EMPLOYER MAKES COUNTER-APPLICATION TO CONCILIATION COUNCIL

New Zealand Meat Processors, Packers, Preservers, Freezing Works and Related Trades I.U.W. v. New Zealand Freezing Companies I.U.E.

Industrial Court, Wellington, 14 May 1976 (IC 18/76). Jamieson J.

In the previous issue of the Journal, the "News and Views" correspondent from Canterbury advised that the Conciliator based in Christchurch was to "state a case" for the Industrial Court regarding the practice of a party respondent, already before a Conciliation Council, making his own application — thus, himself, becoming an applicant ((1976) 1 N.Z.J.I.R. 16). The significance of such a dual application, with both parties being at once applicant and respondent, is, of course, that the original applicant no longer has the power to withdraw from conciliation. The case, as stated for the Industrial Court, has now been decided, but without a definitive resolution of the central issue.

The question as originally put by the Conciliator, Mr Fortune, concerns perhaps the most fundamental question regarding industrial conciliation in New Zealand yet to come before the recently reconstituted and renamed Industrial Court. Both the Federation of Labour and the Employers Federation made appearances, by counsel, at the hearing in Wellington.

Ordinary industrial practice in New Zealand, at least in recent times, has been for the industrial union of workers to create a dispute of interest and make an application for the dispute to be heard by a conciliation council. The workers' union, as opposed to an employer or an employers' union, would ordinarily take the initiative because they, not the employers, would be seeking a change in the status quo. In most cases the employer would, presumably, be happy to be bound by the existing award or agreement for another year.

In this case, the union of workers was, indeed, first off the mark to apply, under s. 68 of the Industrial Relations Act 1973, for a conciliation council to hear a dispute of interest. The Industrial Commission processed this application on 7 January 1976 and appointed a Conciliator for the hearing; he, in turn, under s. 69 of the Act, appointed 16, 17 and 18 March for the actual hearing of the dispute. Before the hearing commenced, however, the Employers filed their own application under s. 68 of the Act, as well as a statement by respondents, per s. 70 of the Act. When the appointed date for conciliation arrived, an impasse was struck immediately; the union refused to acknowledge the employers' application until their own had been conclusively settled or withdrawn, and the employers refused to proceed with the union application until their own application had at least been acknowledged. The employers suggested that a Council be constituted to hear their application, but adjourned sine die.

The significance of the employers' position resides, of course, in s. 81 of the Act: even if the workers withdrew their application under s. 76, the prohibition on strike action in s. 81 would remain operative because of the employers' application.

This important question, so crucial to the legality of strikes in New Zealand, was given no final resolution by the court, as two other objections by the employers proved conclusively fatal to the workers' position. The court noted that the agreement involved is national in scope (except Westland) and expires on 8 July 1976. Under s. 68 (3) (b) of the Act no application may be made earlier than 6 months before the expiry date of the multi-district award. Apparently through inadvertence, the union application was sent to the Registrar, and processed by his office on 7 January 1976. This over-eagerness to apply resulted in two deficiencies:

(1) The Industrial Commission acted on the application on the 7th day of January, but the application stated that a dispute of interest "had" arisen on the 8th day of January. Therefore, on the face of the union claim, no dispute existed when the application was made.

(2) In any case, the application could not have been made until the 8th day of January, because of s. 68 (3) (b).

Therefore, the union application was not properly made, and there was in fact only one application legally before the Conciliation Council — that of the employer. Thus there was no need for the Industrial Court to consider the legality of counter-applications. The court proceeded to discuss that issue, however, Jamieson J. commenting that, although a discourse on counter-applications could "only be regarded as dicta . . . it may be useful to both employers and unions."

He began by noting that the relevant provisions of the 1973 Act were similar to provisions of the 1954 and 1925 Industrial Conciliation and Arbitration Acts; all three statutes are, or were, silent as to counter-applications. The Court of Arbitration, however, had ruled in 1933 that counter-applications as well as statements by respondents could be filed after the original application had been made. 33 B.A. 607. That decision was based upon the belief that the original applicant could withdraw his application at any time, ex parte. In 1943, however, Myers C. J. ruled that an applicant had no power to withdraw his application before settlement without the consent of the respondent: **Wellington Foremen, Stevedores, and Timekeepers I.U.W.** v **Tyndall** (1943) G.L.R. 486; 43 B.A. 877; the 1933 decision was in part, therefore, overruled.

In 1946 that decision of Myers C. J. was expressly reversed by s. 36 of the Statutes Amendment Act of that year, which enabled the original applicant to withdraw as of right. (That section was consolidated in the 1954 Act at s. 114). To the extent that the **Wellington Foremen and Stevedores** case (supra) was overturned by statute, the 1933 decision of Frazier J. once again became the most relevant precedent. Jamieson J. quoted favourably the figures of speech used by Frazier J.: a counter-proposal (respondent's statement) is like a shield, but a counter-application is like a sword. 33 B.A. 607. (Myers C. J. also quoted a remark allegedly made by Frazier J. in an unreported decision: "You cannot start a war with a shield," (1943) G.L.R. at 487; 43 B.A. at 881).

The conclusion of Jamieson J. was that if Parliament in 1973 had wanted to reverse the long established practice of making counter-applications, they would have used express language.

In a final note, Jamieson J. reminded counsel that s. 68 applications must be "meticulously correct;" the letter of the law must be complied with. The workers' application was premature, and "it is no answer to say that it was only slightly premature." The fault was so fundamental that it could not be cured by waiver by respondent employers. ⊙

EMPLOYER OF "OUTWORKERS" DECIDED TO "CHANCE IT"

Mills (Inspector of Awards) v. Teeny Babywear Ltd. Industrial Court, Auckland, 13 April 1976 (I.C. 13/76). Jamieson J.

Defendant employer, a clothing manufacturer, operated a small factory in Auckland. Two company directors and two employees were actually employed on the factory premises, but finishing work on the garments was ordinarily done at home by outworkers. The Inspector of Awards claimed backpay, holiday pay, and other remuneration for the use of four such outworkers, pursuant to section 158 of the Industrial Relations Act 1973. The claim was based upon the New Zealand Shirt, White, and Silk Workers Award, 73 B.A. 2096, and the collective agreement of the same title, recorded at 74 B.A. 1271. Mr Justice Jamieson had no difficulty in holding that the workers concerned were indeed outworkers and not independent contractors. (Cf. **Lineham** v **Newlandia Industries Ltd,** noted at (1976) N.Z.J.I.R. 19). The Court then found, as a matter of fact, that rates paid to the workers fell short of compliance with the Award and Collective Agreement, and gave judgment for plaintiff, ordering defendant to pay witness fees.

The case is remarkable, not for the legal precepts traversed by the judgment, but for the facts presented at the hearing, and also for the industrial reality which must lay behind the facts. The evidence revealed defendant's callous and unrepentant disregard for sections 39 and 40 of the Factories Act 1946 ("Work Done Elsewhere Than in Factories") and hinted that breaches of the "outwork" provisions of the Act were widespread and symptomatic in the industry. When asked why she had "chanced it," Defendant replied "Well, I had to, you have to get your production out, otherwise you are not in business."

No penalties were sought in this case, either under the Industrial Relations Act 1973, per section 148, or under the Factories Act 1946, before a Magistrate. Considering that discovery of violations is difficult, and considering that the maximum fine available under section 40 of the Factories Act is $20, it is not surprising that defendant decided to "chance it." Considering further that defendant is probably correct in asserting that "masses of people in Auckland" were similarly illegally employed, it might be submitted that (a) either the Factories Act should be amended to permit more legal outwork, or (b) there should be more Inspectors of Factories given greater authority to seek more meaningful penalties. ⊙

REGISTRATION OF UNREGISTERED SOCIETY: APPEAL AGAINST REGISTRAR'S DECISION

New Zealand Universities Technicians Association v. New Zealand Printing and Related Trades I.U.W.

Industrial Court, Wellington, 4 May 1976 (I.C. 16/76). Jamieson J.

Northern Totalisator and Allied Employees Association Inc. v. New Zealand Federated Clerical and Office Staff Employees I.A.W.

Industrial Court, Wellington. 11 September 1975 (I.C. 58/75). Jamieson J.

The facts in these two cases are remarkably similar. Each association applied to the Registrar under ss. 163-164 of the Industrial Relations Act 1973 for registration as an industrial union of workers. In each case, the Registrar declined to register the applicant association because "in his opinion the members might conveniently belong to a then existing union." s. 168 (2). In each case, the unsuccessful association appealed to the Industrial Court, under s. 168 (4) of the Act. Three existing unions opposed the appeal to the Court in each case: Printers, Engineers and Electrical Workers opposed the University Technicians and Clerical Workers, Engineers and Caretakers-Cleaners appeared to oppose the Totalisator workers.

The University Technicians were formed in 1972, are not incorporated, and have never negotiated an industrial agreement. The Totalisator Association, on the other hand, has represented its members as an incorporated society since 1938. Between that year and 1974, the Association negotiated industrial agreements under the Labour Disputes Investigation Act 1913; following the repeal of that Act, its agreements have been filed under s. 141 of the Industrial Relations Act 1973. The Totalisator Workers decided to seek registration only after fending off, in 1974, attempted coverage of their members by the Theatrical and Places of Amusement Employees I.U.W. (see 74 B.A. 929).

In spite of the facts which would seem to count more in favour of the Totalisator Workers, the Industrial Court upheld the Registrar's decision with respect to them, and reversed his decision with respect to the University Technicians. The technicians won, where the Totalisator Workers failed, because:

(1) Less than half of the membership of the Technicians Association are eligible to join any existing union; and

(2) University Technicians have special interests and develop special skills which set them apart from any existing union constituency.

The Totalisator Workers then applied to the Supreme Court for review on the grounds that the Industrial Court (and the Registrar) had made a jurisdictional error of law, in that s. 168 had been misconstrued. (Only such a jurisdictional error can be appealed from the Industrial Court to the Supreme Court under s. 47 (6) of the Act). Counsel for the applicant society argued that the Registrar could not base

his refusal to register on s. 168 (2), that the members could conveniently join "a then existing union," since, in fact, there were **nine** existing unions which could cover the membership. Counsel submitted that "a then existing union" must be read literally, strictly confined to the singular number.

Wild C.J. disposed of this proposition by reference to s. 7 of the Acts Interpretation Act 1924, which ordinarily requires that words which import the singular number include the plural. ⊙

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BOOKS

Mazengarb and Smith, **Industrial Laws of New Zealand** (4th Edition 1975).

For many years the standard reference book on Industrial Law in New Zealand was Mazengarb's **Industrial Laws of New Zealand.** The work took the form of an annotated version of the Industrial Conciliation and Arbitration Act and other major industrial statutes. The annotations, in the form of footnotes to the sections of the Statute, contained useful references to relevant decided cases of the Arbitration Court and Supreme and Magistrate's Courts as well as general commentary and some indication of the history of the particular provision where that was of interest.

The last edition of Mazengarb was published in 1956, not long after the last major consolidation of the Industrial Conciliation and Arbitration Act. Not unnaturally, the intervening years have seen a decline in the usefulness of the book as an up-to-date source of information. The passing of the Industrial Relations Act in 1973, and the repeal of the Industrial Conciliation and Arbitration Act by that enactment, finally saw Mazengarb relegated to the basements of most working libraries.

Mr Ian Smith, formerly a lecturer in law at the University of Canterbury, has however performed a valuable service by updating and re-writing Mazengarb to take account of the changes effected by the Industrial Relations Act and of the case law that has been promulgated in the last twenty years. This reviewer has, over the past few months, used the new book extensively in legal practice and has consistently found it to be of considerable assistance. In particular, the work as a whole contains a very good mixture of a descriptive analysis of the precedents and an academic critique of the more obscure and difficult problems contained in the Act.

One interesting departure from the previous format that has been adopted with Mazengarb and Smith is to publish the work in loose leaf folder form. Presumably the intention is that new case law of the Industrial Court should be incorporated as and when it is promulgated so that practitioners and students are not left to await the years that often pass before a new edition is published. Bearing in mind the time gap of 19 years between the present edition and the previous one, this can only be regarded as a very positive advance and it is to be hoped that the publishers and the authors will indeed seek to update the work on a regular and periodic basis.

One final note of caution. Mazengarb and Smith **is** a reference book for people who already have a good working knowledge of the industrial legal system. It is **not** an introductory description of that system and therefore will be of little or no assistance to students coming to the subject for the first time. For the practitioner, however, whether he be lawyer or industrial relations officer or trade union official, the book is warmly recommended.

⊙ **J. A. FARMER**

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Seminar with the theme Worker Participation: and **Worker Participation — Examples from New Zealand Practice.** Wellington, N.Z. Institute of Economic Research (Inc.) 1975.

The subject of worker participation in management is one that is of recurring interest to all persons interested in industrial relations. Although a great deal has been written upon the subject, most of it relates to overseas experience with worker participation schemes. It was therefore interesting to see at least two publications that relate to attempts that have been made