LAWYERS AS EMPLOYERS

Dee v. **Kensington Haynes and White,** Industrial Court, Auckland; 27 May 1977 (I.C. 21/77); Jamieson J.

The British Parliamentary model, as adopted in New Zealand, is characterised by the supremacy of the Rule of Law, as opposed to the arbitrary whim of man or party. The Prime Minister, and "regal authority," are subject to the Rule of Law: see **Fitzgerald** v **Muldoon** (1976) 2 NZLR 615, the case wherein the Chief Justice decided that Mr Muldoon could not suspend an act of Parliament by press release. Trade unions are subject to the Rule of Law, as the other cases noted in these pages illustrate. The instant decision demonstrates that even lawyers and law firms are bound by the Rule of Law; like other employers they must obey the statutory requirements of dispute settlement.

The defendant in this case is a prominent Auckland law firm, whose attitude toward the statutory grievance machinery set out in s 117 of the Industrial Relations Act ('the Act') was found to be "highhanded, astonishing, regrettable and unworthy." The applicant is a member of the Northern Industrial District Legal Employees I.U.W. and, indeed, is a member of the Executive of that Union. Her employment as a receptionist at the defendant law firm was covered by the Northern Industrial District Legal Employees Award ('the Award'), recorded at 76 B.A. 1565.

The applicant sought leave from her employer to attend union business on a workday, being Wednesday, 1 December, 1976. There was some confusion before the event as to whether she had sought leave to attend a 'union meeting,' or a Conciliation Council. As it was a busy time for the employer, her request was rejected, but she attended the Council, as an assessor, without such permission. When she returned from Conciliation, she found that her final pay cheque had been made up, and she was summarily dismissed, albeit with two weeks' wages in lieu of notice.

The Union immediately sought conciliation and arranged for a Conciliator to chair the Grievance Committee set up pursuant to Cl. 30 of the Award, a clause which follows the model set out in s 117 of the Act. The employer refused to take part in this statutorily required procedure, apparently because the partners of the law firm had unilaterally decided that reinstatement was impossible.

The Court noted that the arrogant and highhanded attitude of the law firm ("a disastrous mistake") precluded reasonable discussion at the time of the dismissal, and when the grievance procedures were invoked. The Court also indicated that the Union would have prevailed had they elected to pursue a "victimisation" remedy under the penal provisions of s 150. The Court found the dismissal was not justified. The applicant was awarded $500 compensation and costs.

It should be noted that this decision marks the first application of the 1976 amendment to the personal grievance machinery of the Act, being subsection 3A of s 117 of the Act, as inserted by s 19 of the Industrial Relations Amendment Act (No. 2) 1976. That subsection allows the Industrial Court to give leave to a worker to come directly to the Industrial Court, without going through the grievance procedure of s 117 (4), when either the worker's union or the worker's employer fails to act promptly in accordance with those procedures. Hitherto there was no access to that Court for an individual worker in any case. ⊙

STRIKE ACTION DURING DISPUTE SETTLEMENT

New Zealand Labourers, General Workers and Related Trades Industrial Union of Workers v. **Downer & Co.** Industrial Court, Wellington; 29 April 1977 (I.C. 11/77); Jamieson J.

Section 116 of the Industrial Relations Act sets out a model dispute settlement clause to be included in every award and collective agreement. Subclause 7 of that model provides, in part, that:

> "The essence of this clause being that, pending the settlement of the dispute, the work of the employer shall not on any account be impeded but shall at all times proceed as if no dispute had arisen, it is hereby provided that — No worker employed by an employer who is a party to the dispute shall discontinue or impede normal work, either totally or partially, because of the dispute."

This unanimous decision of the Industrial Court stresses the importance of that non-interruption of work subclause.

A dispute arose about carpentry work in a tunnel project on the Wellington motorway. The tunnellers involved took strike action in pursuit of their claims. The substantive issue was resolved in a disputes committee convened under Cl. 24 of the relevant award, the New Zealand Building, Quarrying, Contracting, Civil Engineering, Constructional, and Allied Industries Labourers and Other Workers Collective Agreement, recorded at 75 B.A. 10625. An ancillary issue, not successfully resolved by the parties, concerned wages lost by the men who took direct action during the dispute. The Chairman of the Dispute Committee rejected the union claim for lost wages, and his decision was vigorously upheld by the Industrial Court.

The ratio of the Chairman's decision, as quoted by Jamieson J, is as follows:

> "The over-riding factor in consideration of this issue must however be that the disputes procedure of the Agreement was ignored. To support the union claim in whole or in part would be tantamount to participating in rejection of the procedure." ⊙

THE LAW STUDENT AND THE BUS DRIVERS

Harder v. **The New Zealand Tramways and Public Passengers Transport Authorities Employees I.U.W.,** Supreme Court, Auckland. 28 April 1977; 11 May 1977 (A441/77). Chilwell J.

This note is an attempt to dispel the confusion, misunderstanding, and misrepresentation which has been so characteristic of the **Harder** case, a case which is actually quite simple in substantive legal principle. Perhaps the easiest way to grasp that legal principle, and to dash such misrepresentation, is to examine several aspects of industrial law which are **not** manifested in this case.

First, Harder's cause of action is **not** grounded in one of the so-called "industrial torts," known to the common law as the tort of intimidation and the tort of inducing breach of contract. These common law actions always involve at least three parties, and a contractual nexus between the injured plaintiff and the third party. See, for example, **Rookes** v **Barnard** (1964) A.C. 1129, **Pete's Towing Services Ltd** v **Northern Drivers IUW** (1970) NZLR 32, **Flett** v **Northern Drivers IUW** (1970) NZLR 1050, and **Northern Drivers IUW** v **Kawau Island Ferries** (1974) 2 NZLR 617. In these four cases the contractual third parties (being neither defendants or plaintiffs) were, in order: B.O.A.C. (employer of Rookes); Ready Mixed Concrete (purchaser of sand from Pete's Towing); Dominion Breweries and New Zealand Breweries (suppliers of beer to Flett); and Mobil Oil (suppliers of fuel to the ferry services). In each case the plaintiff suffered either the breach of that contract or its termination owing to the pressure applied to the innocent third party by the defendant union. In none of the cases would the third party have severed those contractual relations on its own motion; the cases turned on whether the defendant union used unlawful means to

apply pressure on the third party.

There is, to be sure, a third party in the instant case, being the Local Authorities Public Passenger Transport Association, in general, and the Auckland Regional Authority ("the A.R.A.") in particular. Plaintiff Harder, however, had no contractual relation with the ARA; failure on the part of the ARA to provide a bus service to Harder neither breached nor terminated any contract with Harder. Therefore, no common law industrial tort cause of action was possible.

Secondly, Harder's cause of action was not a quasi-criminal prosecution of the union in the Industrial Court, as was made possible by the punitive industrial legislation passed in 1976. The punitive aspects of this legislation, being section 21 of the Industrial Relations Amendment Act (No. 2) 1976 and section 36 of the Commerce Amendment Act 1976, were carefully eschewed by Harder in spite of their clear relevance to the facts of the case. The former amendment provides penalties, available only in the Industrial Court, of up to $1500 for a union party to a strike in an essential industry where 14 days notice was not given and the latter amendment creates a power in the Industrial Court to order "a resumption of full work" where the economy of a particular industry is seriously affected. This power is similarly backed by the availability of a $1500 penalty against the union for non-compliance with a resumption of work order. Given the well-known union hostility to such penal provisions, Harder took the less-inflammatory course of seeking relief in the Supreme Court, where neither of these remedies is available. And the Government itself, although responsible for this very pertinent industrial legislation, went to great pains to avoid any involvement in the controversy, in spite of adverse comment from back-bench Government Members of Parliament.

This case, then, involved neither the judicially created common law industrial torts nor the statutory penalties contrived in 1976 by the National Government.

THE FACTS

Section 125 of the Industrial Relations Act, as enacted in 1973 by the then Labour Government, requires unions and employers engaged in certain essential industries to give 14 days notice of strikes or lockouts respectively. This provision was carried over, intact, from section 196 of the 1954 Industrial Conciliation and Arbitration Act. The 1954 Act had in turn brought forward the 14-day notice requirement from an Act of the same name of 1925. And the 1925 Act, in its turn, had merely re-enacted a similar provision contained in the Act of 1908. So the concept of strike notice in essential industries has been part of New Zealand industrial law for seven full decades. Indeed, when the New Zealand Federation of Labour made submissions on the Industrial Relations Bill in February of 1973, the FOL strongly opposed the penalties contained in that Bill, but made no specific reference to this historical notice requirement. (Paragraphs 49-54, submissions to Labour Bills Select Committee). The penalty provisions contained in that Bill were dropped before it became law, and the unopposed notice requirement remained.

The New Zealand Tramways Union, which operates in the context of an essential industry, had been negotiating with the Local Authorities Public Passenger Transport Association for some 15 to 18 months when they "became dissatisfied with progress."

The Union quite properly gave notice to the employer, as required by law, in a letter received by the ARA on 23 March. According to an affidavit filed with the Court, this notice warned of strike action to be taken on the "6th and 7th April 1977 and on Thursday and Friday of every week thereafter . . . " Either the original strike notice was miscalculated, or the affidavit was in error, for the first Thursday and Friday in April are the 7th and 8th, not the 6th and 7th. In any event, a strike notice delivered on 23 March would statutorily suffice for a stoppage commencing Thursday, 7 April, that day being the 15th day after the 23rd of March. Mr Justice Chilwell, perhaps confused by the mistake in the affidavit, miscounted the 14-day period and, with all due respect, quite wrongly found that the notice would not be effective until Friday 8 April. In the event, however, this strike did not occur; negotiations in fact continued, the strike notice of 23 March was spent, and the error of the learned judge is not relevant.

The Union, apparently, "became dissatisfied a second time" and sent a telegram to the employer on 15 April purporting to give notice for a strike which would commence on 21 April. This telegram quite

obviously did not fulfil the statutory requirements. Counsel for the Union submitted that the letter delivered on 23 March could apply to the strike contemplated on 15 April, but the very words of the National Secretary of the Union defeated that contention. Chilwell J noted the following press report, which referred to the said telegram and which was not disputed by the Union:

> "(Mr Stubbs, the National Secretary), agreed that the strike notice (in the telegram) was less than required but he said it was enough."

Thus ably assisted by the words of the Union Secretary, Mr Justice Chilwell had no difficulty in finding the notice inadequate and the strike illegal. And, having made that interim finding of fact, Chilwell J was then left with the rather simple judicial task, or judicial posture, so ably refined by Lord Denning MR:

> "(The statute in question was) enacted by Parliament. It is, I take it, the will of Parliament that it shall be obeyed. Even by the most powerful. Even by the trade unions. We cannot change the law. We sit here to carry out the will of Parliament. To see that the law is obeyed, and that we will do.
>
> "The order which is sought is nothing more or less than reporting the very words of the Act of Parliament itself — it does not add to it or detract from it by the least. All we are asked to do is to make an order against the (Union) saying it must obey the Act of Parliament."

Gouriet v **Union of Post Office Workers** (1977) 1 All E.R. 696. 719, 704.

THE PLAINTIFF

Plaintiff Harder sought injunctive relief on two grounds: first, as a member of the public he has a general interest in seeing that statutes are obeyed; secondly, as a habitual bus passenger, he has suffered proximate financial loss because of the illegal action of the defendant, action taken in direct violation of a statutory duty.

With respect to the first cause of action, Chilwell J noted that ordinarily the Attorney-General was the nominal plaintiff in such actions, by means of the so-called relator action. However, Chilwell J also noted two recent decisions of the English Court of Appeal which "unshackled the procedural difficulties of the past" and which allow such plaintiff to proceed without the Attorney-General. The two cases are **Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority** (1974) QB 629, which involved an allegedly illegal television broadcast, and **Gouriet** v **Union of Post Office Workers** (1977) 1 ALL E.R. 696, which concerned a strike by postal workers in violation of statute. In the former case, because of the imminent nature of the broadcast, there was no time to seek the relation of the Attorney-General, and in the second case the Attorney-General refused, for no express reason, to give his consent. Chilwell J found that Harder was in the same position as McWhirter, with inadequate time to pursue the relator procedure in Wellington. Therefore Harder could proceed in his own name to protect the rights of the public and ask that a statute be obeyed.

Furthermore, Harder was suffering particular damage, more than was suffered by the plaintiffs in **McWhirter** and **Gouriet, in** that he was faced with a necessary expenditure of $14 a week for taxi fare in the absence of the bus service. Harder's financial injury was also much greater than that suffered by the plaintiff in **Fitzgerald** v **Muldoon** (1976) 2 NZLR 615, where the plaintiff, in a very similar action, could show only the loss of $1 a week.

Secondly, the defendant owed plaintiff a duty, imposed by statute, not to strike without appropriate notice, and the violation of that statutory duty has caused financial loss. Even though there may be other remedies for such illegal behaviour, the supreme Court has a residual equitable power to enforce obedience to the law, and to prevent a continuing statutory tort. The learned judge acknowledged that the nature of the statutory tort was a "serious question to be tried and no one can be certain of the answer." But this hearing was only an application for an interim injunction, and such an application is not the same as the careful consideration of a final hearing. The test at this preliminary stage is whether or not there is a serious question to be tried.

THE DECISION

Having found as a matter of law that Harder was a proper plaintiff, with standing to complain, and having found as a matter of fact that the Union had violated s125 of the Industrial Relations Act, Chilwell J made an interim declaration that the strikes of 21-22 April and 28 April were illegal.

He also declared, prospectively, that the strike scheduled for 29 April would be illegal. Finally, he issued an interim injunction against the union, "restraining it from inciting, instigating, aiding or abetting any future offences by its members against the provisions of section 125." The injunctive relief would not take effect until Monday, 2 May 1977.

SEQUELAE

It is common knowledge that bus services did not operate on 5 and 6 May, being the Thursday and Friday after the injunction took effect. The plaintiff moved to have the defendant union found guilty of a contempt of Court, having violated the order composed in Court on 28 April. A second hearing was held on 11 May, to consider the contempt of the Union, again before Chilwell J.

Counsel for defendant union successfully argued that this second hearing was in no way an interim or interlocutory motion, but was in fact a final hearing on the point of whether there was or was not a contempt, albeit the injunction itself may ultimately be held to have been wrongly issued. Therefore, plaintiff must prove the contempt beyond reasonable doubt, and affidavits by plaintiff must be confined to such facts as he is able of his own knowledge to prove.

Chilwell J also acknowledged that the **Union** must be found in contempt, as it was the party bound by the injunction. It is not enough to show that bus services did not operate, or that bus drivers did not show up for work on Thursday or Friday — the injunction did not, and could not, compel bus drivers to serve their employer. The plaintiff must show, said the judge, that the **Union** had incited, instigated, aided or abetted the said strike. It was enough, however, to show that the officers of the Union, being the "brains and guiding hand of the Union" had so acted.

The affidavit evidence offered by the plaintiff was in two forms: (1) assertions made by certain officers of the union reported in newspaper articles and (2) assertions made by those officers on television interviews and seen by the plaintiff. Chilwell J refused to accept the evidence contained in newspaper articles, as being edited hearsay, and clearly inadmissible. In making this decision, Chilwell J declined to follow the oral, unreported decision of Mr Justice Mahon of 1 July 1974, where Mahon J accepted such evidence to show the contempt of Mr Gordan Andersen in the **Kawau Island Ferries** case (supra).

Chilwell J, however, did accept Harder's affidavit that he had seen officers of the Union on television defiantly promising to defy the Court order. Such an appearance was "tantamount to the person being in the home television viewing room making a statement" and admissible under the rules of evidence as an "admission against interest."

The following remarks of the National Secretary of the Union were found to be conclusive evidence of Union defiance, and proof beyond reasonable doubt that the Union was in contempt of Court: "We will defy the Supreme Court injunction and strike indefinitely."

"Yes we can win against the Courts and the government. It has been proved time and again overseas that the Courts and the government can be influenced if the support is strong enough."

It could be said that both actions, the application for an interim injunction and the motion for a finding of contempt, succeeded against the Union primarily because of the indiscreet language and arrogant attitude of their Union Secretary.

COMMENT

None of this, of course, need have happened.

After negotiating for over fifteen months, there would seem to be little excuse for union leadership unable to count to fourteen accurately. Surely the people as employer and the people as consumer deserve the protection required by statute in New Zealand for seventy years. As for the arrogance of the National Secretary, that may or may not be explained away by recognition of internal union politics. However, it should be emphasised that Mr Stubbs' press statements made out an easy case for plaintiff Harder.

Finally, it should be noted that the closest precedent for Harder's action in New Zealand is the case which Fitzgerald brought against the Prime Minister in the Superannuation affair. Both plaintiffs could be characterised as officious political busybodies interfering in a matter only minimally their concern; conversely, both plaintiffs could be characterised as courageous individuals fighting against powerful institutions to uphold the rule of law. ⊙

W. C. HODGE