STATUTE OF LIMITATIONS: THE "GREY AREA"

Inspector of Awards v Caxton Printing Works Ltd.

Industrial Court, Auckland. 26 May 1977 (I.C. 19/77). Jamieson J.

The Inspector of Awards came to the Industrial Court in September 1975, seeking arrears of wages for the use of several workers under Printing Employees Awards from 1971 through 1974. The action was set aside, pending decision by the Court of Appeal on the proper statutory limitation period. The Industrial Relations Act now in force allows a claim to be made, under Section 158, within six years after the wages become due and payable. By that provision, the Inspector would seem to be able to recover all the wages sought. However, the statutory limitation of the Industrial Conciliation and Arbitration Act 1954, s 211, allowed only a two-year reach backward. In **Inspector of Awards** v **Malcolm Furlong Ltd.** (1977) 1 NZLR 36, noted in these pages at (1976) 1 NZJIR 74, the Court of Appeal decided that the six-year statute of limitations under the new Act could only apply to awards and collective agreements made under the new Industrial Commission and not to awards made by the old Court of Arbitration.

The present action fills the gap, called a "grey area" by the Court, concerning awards made by the Court of Arbitration, but still in effect on 8 March 1974 when the transition from the old I.C. and A. Act and the new Industrial Relations Act took place. By the operation of s 20A (1) of the Acts Interpretation Act 1924 and s 236 (8) of the Industrial Relations Act 1973, those awards of the Arbitration Court in effect on 8 March 1974 are to be treated as awards made by the Industrial Commission. The Inspector, therefore, can recover, under s 158, arrears from 1973 under those awards only, and not awards which had expired before March 1974. ⊙

COUNTRY TRAVELLER: WORKER OR INDEPENDENT CONTRACTOR?

Inspector of Awards v Mineral Additives Ltd.

Industrial Court, Hastings. 15 June 1977 (I.C. 26/77). Jamieson J.

The defendant company, a manufacturer and distributor of agricultural fertilizers, entered into an oral agreement in late 1972 with Mr D. E. Lindsay, whereby the latter was to act as a travelling sales agent for the company. Lindsay was to receive 30% of his sales revenue as commission, plus certain expenses. The plaintiff, a Department of Labour Inspector of Awards, sought arrears of wages for Lindsay for the period October 1972 to November 1974, under Clause 5 of the Warehousemen's Award, recorded at 72 B.A. 589, and under the relevant clauses of subsequent updated awards. In particular, the Inspector claimed that Lindsay was a

> "country traveller . . . , wholly or substantially engaged outside of the town and suburbs thereof in which the warehouse is situated . . . "
>
> (Clause 5 (c)).

Country travellers under that Clause were to receive a minimum weekly wage of $58.61, which had not been paid to Lindsay.

If Lindsay was an employee of the company, then he was covered by the award and would recover. If Lindsay was, on the other hand, an independent contractor, then he was not covered by the award, and he would not recover.

The Court noted that Lindsay was paid monthly, with Inland Revenue deductions

made by the Company. These two factors pointed toward a contract of employment.

On the other hand, the court concluded that Lindsay did not work regularly and did not make many sales. Although he used his own car, his "expenses" were related to sales, not mileage. In addition the court found that Lindsay had taken up a full-time job, with another employer, without telling the Company. In fact, he neither resigned nor notified the Company of his return after leaving the other employer. The Company exercised little or no control over Lindsay, although they did, from time to time, refer potential customers to him. Lindsay never asked for time off and he never received holiday pay.

Following past practice the court refused to be bound by any particular test, such as the "control" test or the "integration" test, but chose to take "a broad view of the whole of the circumstances." In this case, the "broad view" revealed that Lindsay was not an employee, but an independent contractor, and therefore, was unable to recover arrears of wages. (For similar recent decisions, which lead to the opposite conclusion, see notes at (1976) 1 NZJIR 19 and (1975) 1 N.Z. Recent Law (N.S.) 312). ⊙

PERSONAL GRIEVANCE: INDIVIDUAL APPEAL TO THE INDUSTRIAL COURT

Franich v Air New Zealand Ltd.

Industrial Court, Auckland. 8 August 1977 (I.C. 32/77). Jamieson J.

The applicant Franich was dismissed in March 1976 by the respondent employer. In April 1976 the Executive Committee of the Aircraft Workers Union resolved not to pursue a personal grievance on behalf of Franich. The unused grievance machinery, set out in the Air New Zealand, National Airways Corporation, Safe Air Ltd, Aircraft Workers Collective Agreement recorded at 76 B.A. 5253, follows the standard procedure contained in s 117 of the Industrial Relations Act 1973 ("the Act"). That standard procedure, of course, gives standing to the aggrieved worker's union and his employer, not to the aggrieved worker himself. Therefore, the decision of the Union in April 1976 was conclusive under the Act; Franich at that stage could only pursue a common law remedy for wrongful dismissal in the ordinary courts.

However, by s 19 of the Industrial Relations Amendment Act (No. 2) 1976, which came into force in November 1976, the Industrial Court may give leave to a worker to come directly to the Court, without going through the grievance procedure set out in **s 117 (4) of the Act, when either** the worker's union or the employer fails "to act promptly" in accordance with the statutory procedure. That new procedure was first successfully used in **Dee** v **Kensington Haynes and White,** I.C. 21/77, noted at (1977) 2 NZJIR 54.

In the instant case, however, the Court ruled that Franich could not avail himself of the November statute, because his personal grievance with the employer came to an end in April with the Union resolution. The November Amendment created no retrospective or retroactive rights for extinct, historical disputes.

Although not decided by the Court, this decision presumably leaves open a dismissal which occurred before November 1976, but which was still being discussed by the union and employer. As both the principal Act and the Amendment refer to prompt settlement, it seems unlikely that anyone dismissed before November 1976 could now make use of the Amendment. In any event, it should be remembered that the Amendment does not create a **right** to go to the Industrial Court—the Amendment only creates a **privilege** for the worker to ask leave to refer the matter to the Court. ⊙

REGISTRATION OF UNREGISTERED SOCIETY: APPEAL AGAINST REGISTRAR'S DECISION

Northern Industrial District Graphic Designers, Artists and Related Craftsmen's Guild v N.Z. Printing Trades Industrial Union of Workers

Industrial Court, Auckland. 18 August 1977. Jamieson J.

The appellant Guild applied to the Registrar of Industrial Unions for registration as an industrial union of workers. The Registrar declined to register the Guild as a union, on the grounds that the members of the Guild might conveniently belong to certain existing unions (See s 168 (2) of the Industrial Relations Act 1973). The unsuccessful Guild then appealed to the Industrial Court, under s 168 (4) of the Act, seeking to reverse the Registrar's decision. Three unions appeared in the Industrial Court to oppose the appeal, being the Printers, the Shop Assistants and the Photo Engravers, and a fourth respondent, the Clerical Workers, made no official appearance.

The Court held that the appellant Guild failed to show on the grounds of distance or diversity of interest or on any other substantial ground that it would be more convenient for their members to register separately as a union than to belong to existing unions. A case had been made out for separate coverage of the Guild members within the Printing Trades Union, but there was no showing that there should be a separate union.

This decision should be compared with two previous such appeals to the Industrial Court, noted at (1976) 1 N.Z.J.I.R. 45, involving the Universities Technicians Association and the Totalisator Employees Association respectively. The University Technicians successfully showed (1) that their members had special interests and skills setting them apart from existing unions, and (2) that less than half of their membership were eligible to join any existing union. The Totalisator Workers on the other hand failed in the Industrial Court and subsequently lost an appeal to the Supreme Court.

Counsel for the Totalisator Workers argued that their membership could not conveniently join "a then existing union", per s 168 (2), but in fact would be spread over several existing unions. Wild C. J. in the Supreme Court disposed of that argument by reference to s 7 of the Acts Interpretation Act 1924, which requires that singular words (such as "a then existing union") include the plural. Coincidentally, three existing unions appeared in each of these three cases to oppose the application. (See also the appeal by the Tasman-Kaingaroa Staff Association Inc., noted at (1977) N.Z. Recent Law 51. In that case the Court refused to reverse the Registrar's decision, but the Court did make constructive suggestions about the Association's membership rules). ⊙

BILL HODGE