

RECENT INDUSTRIAL LAW IN NEW ZEALAND

(a) LEGISLATIVE NOTES

THE FISHING INDUSTRY (UNION COVERAGE) ACT 1979

The introduction of this legislation (on 8 June 1979) was noted in the Industrial Relations Chronicle for August at (1979) 4 NZJIR 6, and briefly discussed there. It was signed into law on 30 November 1979 and, as of March 1980, the Minister of Labour had not consented to the registration of any union in the fishing industry. The Act would be more accurately known as the Fishing Industry Union Exclusion Act.

"Fishing industry" is defined in the Act to include operating the boat, catching the fish (including shellfish and crustaceans), processing the catch on board, transferring any fish from one vessel to another (whether processed or not) and unloading the catch, any processed fish and any by-products. No existing union can extend its coverage to such work or such workers; membership rules which do so extend are deemed to be amended, and awards and agreements are to be read as similarly amended. The Waterfront Industry Act 1976 and orders made thereunder are also excluded from the fishing industry. Only one union at one time can be registered in the industry, and the consent of the Minister is required before a society can apply to register as an industrial union of workers.

Industrial relations legislation has not, by historical practice in New Zealand, covered fishermen; waterside unions have, traditionally, tolerated the local fishermen unloading their own catch, although, technically, it may have been watersiders' work.

The peaceful status quo was upset by the arrival of large overseas vessels, joint-venturing under the Territorial Sea and Exclusive Economic Zone Act 1977. See, for example, the **Wesermunde** dispute discussed at (1979) 4 NZJIR 7 (May). It may be that the innovation of foreign crews discharging cargo from large (200 ft and over in length) fishing boats will disturb the waterfront. On the other hand, there are good reasons why routine union coverage should not extend to the fishing industry. First, fishing boats have traditionally operated on a profit-sharing structure as opposed to the standard wage packet. Secondly, there are frequently occasions in the industry when speed and long hours are absolutely essential for a successful voyage. To the extent that similar conditions apply in larger ships, union exclusion may well be appropriate. See Mazengarb, "Union Coverage Legislation Trawls Up Unrest", **National Business Review**, 17 March 1980, p 23.

REMUNERATION ACT 1979

The Remuneration Bill was introduced on 27 July 1979, and passed through its three readings quickly and signed by the Governor General on 10 August 1979: See *Industrial Relations Chronicle* (1979) 4 NZJIR 2 (November). The first regulations made thereunder were the Remuneration (General Increase) Regulations SR 1979/170, which provided for a general wage increase of 4.5% from 3 September. These regulations, gazetted only three days after the Act became law, were proxy for the "minimum living wage" application made by the FOL under the General Wage Orders Act 1977, an application rendered nugatory by the repeal of the General Wage Orders Act (section 9, Remuneration Act).

The Remuneration Act is further evidence of the failure of successive governments and a series of independent agencies to control inflation. The Economic Stabilization Regulations SR 1953/50 (in force until 1969), the General Wage Orders Act 1969, the Stabilization of Remuneration Act 1971, the Remuneration Authority, the Stabilization Remuneration Regulations SR 1972/59, the Economic Stabilization Regulations SR 1973/198, the Wages Tribunal, the Wage Adjustment Regulations (with sixteen amendments), the Wage Hearing Tribunal, the Industrial Commission, the rebirth of the Arbitration Court, and the General Wage Orders Act 1977 are a partial list of the seriatim failures of National and Labour Governments — and five Prime Ministers — over a ten-year period.

The Remuneration Act provides for ad hoc wage controls by the Cabinet, although there is clear and specific authority for that power to be subdelegated to any "authority, tribunal, person or class of persons". The Act extends to the Public Service and Crown employment generally, excepting only judges, ombudsmen and the Controller and Auditor General (see below for judicial salaries). A new definition of "remuneration" extends to "expenses, refunds and allowances to meet expenditure already incurred", thus reversing Regulation 2 of the Wage Adjustment Regulations 1974 (reprinted at SR 1978/226). The act allows for the regulation of conditions of employment separately from levels of remuneration and, in general, reveals a draftsman's determination to close all loopholes. For a detailed examination of that statutory intent see the careful review by Professor Szakats on "Downgrading the Arbitration Court; Wage Fixing by Regulations" (1979) NZLJ 390.

For examples of the Act in operation see the Remuneration Regulations, noted above, at SR 1979/170, the remuneration (New Zealand Engine Drivers, Boiler Attendants, Firemen and Greasers Award) Regulations, SR 1980/24, and the Remuneration (New Zealand Forest Products) Regulations, SR 1980/29. The Engine Drivers et al were prohibited from seeking new heads or items of remuneration (such as registration allowances), while the N.Z. Forest Products Regulations restricted rates of pay increase for twenty-two separate-named collective agreements to 18.06% until 4 March 1981. These regulations which applied to the combined union negotiations at the NZFP plant at Kinleith (and adjunct operations) have since been revoked: SR 1980/45. Both of the latter regulations established a \$1,000 fine for attempted evasion of the

regulations, the maximum fine allowed under s 4 (f) of the Remuneration Act 1979.

For a general comment on the Remuneration Act and the subsisting Economic Stabilisation Act 1948, see "Who Will Arbitrate Now?" (editorial) (1979) NZLJ 313. The learned editor refers to the latter Act as an "avian corpse hanging about the neck of open government", and regulations thereunder as "the ideal instrument of a despot".

(b) CASE NOTES:

DISPUTES PROCEDURE: PARTY IN DEFAULT MAY REFER DISPUTE TO COURT

Arbitration Court, Wellington. 25 January 1980 (AC 2/80)
Horn C J, McDonnell, Oldham.

This application originated as a substantive dispute between the Union and the employer emanating from the new service (Flight TE6) on the Auckland-Honolulu-Los Angeles-Honolulu-Auckland route. The Union claimed that the work was not "normal work" and that the distance travelled, the time in the air, the changing time zones and the inadequate rest during the Thursday-Tuesday return flight caused undue fatigue and a direct threat to the health and safety of the crew and, indirectly, a threat to the safety of the passengers. Industrial action was taken and the particular flight was temporarily discontinued.

That substantive dispute — which has since been resolved by an order of the Director of Civil Aviation — was not before the Arbitration Court in this case. The only matter before the Court was a technical procedural dispute concerning the operation of the disputes mechanism set out in sections 115 and 116 of the Industrial Relations Act 1973 and recorded in clause 24 of the Air New Zealand Stewards and Hostesses Award, 79 BA 4131. In particular, the dispute relates to s 115(4) which provides that "where any party of a dispute of rights fails to observe the procedure . . . set out in s 116 . . . any party to the dispute may refer it to the Arbitration Court for settlement."

In this case the company purported to invoke the procedure and convene a disputes committee under the chairmanship of a former industrial relations officer with Air New Zealand, Mr John Bufton, now a conciliator. This chairmanship was "arranged" by the company rather than having been mutually agreed upon by the parties per subclause (3) of the disputes provision. The arrangement was not the procedure set out in the Act and the union protested the application to the Court on the grounds that the defaulting party was taking advantage of its own default in circumventing the disputes procedure. The Court found that s 115(4) allowed "any party to the dispute" (including the defaulting party) to refer a case to the Arbitration Court where "any party" fails to observe the disputes procedure.

The Court also noted that deliberate abuse of the disputes procedure could lead the Court to decline jurisdiction under s 48(4) of the Act. The Court noted further that disputes of right should be settled as quickly as possible and a "rough and ready" approach to procedure may not be inappropriate. Finally, the Court found the Union itself to have violated the disputes clause, since subclause (7), which provides for continuation of normal work, was not being observed by the Union. (The Union, of course, submitted that the new flight plan was not "normal work".)

Comment

Air transport in New Zealand must be considered a troubled industry. Air New Zealand, in particular, is attempting to rally from the effects of the DC10 disaster in Antarctica, escalating fuel costs, and the shotgun marriage of Air New Zealand and N.A.C., retrospectively made legal, post-consummation, by the *ex post facto* New Zealand National Airways Corporation Dissolution Act 1978 (the merger took place on 1 April 1978 — the authorising statute became law on 11 October 1978. See Vennell, "Unanswered Questions in the Air New Zealand — NAC Merger" (1979) NZLJ 228; see also (1979) NZLJ 406 and (1980) NZLJ 13).

Safety must be of the greatest concern to the Union, having lost fifteen of its members in the Mt Erebus air crash, the greatest disaster in a workplace in New Zealand since the explosion at the Strongman mine in 1967. Flying as cabin crew for Air New Zealand has displaced farming as the most dangerous profession in New Zealand, and the Union would be in dereliction of duty were it not to question and resist unsafe practices by the company. (See statistics, *New Zealand Official Yearbook* 1977, pp 818 and 821; NZOY 1976, pp 893 and 897. Farmers die an accidental death at a rate of nearly 1 per thousand, by far the highest occupational rate. Air New Zealand cabin crews, in the statistical year ending 31 March 1980, suffered accidental death at a rate of nearly 22 per thousand (15 out of 770).)

Sequelae

A special general meeting of the Union was held on 19 January 1980, and by a 95% majority the Union resolved not to operate TE 006 "as currently planned because it is unduly fatiguing and compromises the health and safety of crew members and the safety of the travelling public in the event of an in-flight emergency on the HNL—AKL (sic) all-night flight" (the last leg of the return trip). Twelve members of the Union did operate Flight TE 006 on 31 January 1980, that is, the first Thursday after the Arbitration Court decision on 25 January. Those members were then informed that disciplinary proceedings were to be brought against them, under the Union Rulebook, for "irresponsible conduct", "bringing the Union into disrepute", and/or prejudicing the conditions of employment of the members of the Union".

On 14 February 1980 those twelve Union members sought and obtained an injunction against the Union to restrain the Union and its agents directly or indirectly from proceeding to hear and determine disciplinary charges against them, and from interfering with the applicants' Union membership or contract

of employment: **Marinovic and others v Airline Stewards and Hostesses of N.Z. I.U.W.**, Supreme Court, Auckland; 14 February 1980 (A123/80) Mahon J.

In the meantime, the Director of Civil Aviation rendered the substantive dispute moot by ordering "in the interest of safety" that fresh crew be taken on at Honolulu for the last leg of the return flight and the cabin staff of the previous legs be flown home as passengers.

The Director of Civil Aviation is empowered to ensure the safety of aircraft, under the Civil Aviation Act 1964, s 29(4) as amended by the Civil Aviation Amendment Acts of 1970 (s 2(1)) and 1975 (s 7(2)) and the Civil Aviation regulations 1953 reprinted as SR 1974/275, as amended by SR 1979/18, Regulation 8A(4).

APPRENTICES ACT 1948: PENALTY FOR DISCHARGE

District Commissioner of Apprenticeship v G. J. Francis Ltd.

Arbitration Court, Auckland. 21 December 1979 (A.C. 123/79).

Horn CJ, Jacobs and Oldham.

The Apprentices Act 1948 provides a mechanism in s 38 for the discharge of an unsatisfactory apprentice. The defendant employer used that mechanism, was refused leave to discharge the apprentice, but discharged him nevertheless. In an action for breach of the Act, the Court found that the maximum penalty, under s 38(8) and 42(6) of the Act, was a \$100 fine. A further penalty of \$20 per day for a "continuing breach" was not relevant, as a discharge is a historical event which happens only once and which does not persist. Although there is a reference to "relief from the discharge" in s 38(12), there is no apparent provision for reinstatement in the Apprentices Act 1948. Violation of an order to continue to employ an apprentice, however, may incur a daily penalty for a continuing breach.

See also **Inspector of Awards (Andrews) v Darryll Chohan Motors Ltd.** Arbitration Court, Auckland, 24 May 1979 (AC 47/79), where section 26(3) of the Apprentices Act, which allowed a probationary apprentice to be dismissed "at any time by the employer", was interpreted by Williamson J to mean upon giving appropriate notice or paying the appropriate wages in lieu of notice.

It should also be noted that the court held that the Apprentices Act tends to "protect apprentices and give them conditions more favourable than those enjoyed by most other workers." Apprenticeship continues to be a significant portal of entry into the workforce. Including those in Government Departments, there were 31,538 apprenticeship contracts in force at the end of the last statistical year: 1979 N.Z. Official Yearbook p. 764.

REINSTATEMENT: A POSITION NOT LESS ADVANTAGEOUS

Auckland Clerical and Office Staff Employees I.U.W. v Vacation Hotels Ltd.

Arbitration Court, Auckland. 20 November 1979 (109/79). Horn CJ, Jacobs and Oldham.

In a previous decision of the Court, Williamson J found that P, a night telephonist at the Intercontinental Hotel, had been unjustifiably dismissed, and

ordered reinstatement: AC23/79, 16 March 1979, see (1979) 4 NZJR 41. Williamson J had ordered that P "be reinstated in his former position or in a position not less advantageous to him" (emphasis added).

As P had been found asleep at his post at the switchboard room in a large hotel, in sole charge of communications, in a situation where serious harm could have resulted, the employer resolved to "reinstated" P as a waiter. P was offered terms and conditions of employment, defined objectively, under the Licensed Hotel Workers Award at least as favourable as those under his previous (Clerical Workers) Award.

P and his Union submitted that a telephonist was more skilled than a waiter, which P regarded as "a lower occupation". The Union claimed, therefore, that the employer was in breach of the court order and in breach of the award, in terms of s 124A (6) (c) of the Industrial Relations Act 1973, as amended.

The Court looked at the matter "broadly" and found no disadvantages to P. His wages, hours, and other terms of employment as a waiter, measured objectively, were at least as favourable as those of a telephonist.

The decision establishes that, as a matter of law, in cases of reinstatement, objective criteria and not subjective attitudes will determine whether a new position is less advantageous. The Court may also have implied that the worker's second application could be characterised by the Yiddish word **chutzpa** (perhaps best rendered into colloquial New Zealand speech as "cheek") in that P was lucky to have been reinstated in the first case.

UNJUSTIFIABLE DISMISSAL: ALLEGATION OF THEFT UNPROVEN

Wellington etc Clerical Workers IUW v JN Anderson and Son Ltd.

Arbitration Court, Napier. 28 November 1979 (AC115/79).

Horn CJ, Jacobs and Walton.

Ms H was observed by a fellow-worker probing a third worker's purse in the ladies' restroom, an area subject to petty theft. This information was passed on to management and, in rapid sequence, the police were informed, Ms H was dismissed, she was taken to the police station and her home was searched. Apparently the initial search of her personal effects and her home was without warrant and prior to arrest. Those searches were either with the consent of Ms H or illegal. In due course charges of theft were dismissed and the Clerical Workers Union brought an action for unjustifiable dismissal per the remedy set out in s 117 of the Industrial Relations Act 1973, contained in the N.Z. Clerical Workers Award at 77 BA 8687. The union sought \$3,000 compensation and \$1,436-47 lost wages, apparently seeking to have the employer compensate Ms H for alleged "undue harassment by the police". The union did not seek reinstatement.

The approach of the company was to turn the matter over to the police, and dismiss Ms H when informed that there was enough evidence for a prosecutor. The company made no inquiries of its own.

The court found that the company had not justified the dismissal. Ms H was not given a chance to put forward an explanation; she was summarily dismissed instead of being suspended, and, most importantly, the worker who had witnessed the alleged theft was not called to testify at the Arbitration Court.

Loss of wages and compensation were fixed at \$1,000 and \$750 respectively.

The case might well be compared with **Wellington Amalgamated Shop Assistants I.U.W. v Wardell Bros Ltd** (1977) Ind. Ct 13, where the court strongly recommended suspension in cases where workers were suspected of on-the-job dishonesty. By implication the court also suggested that employers in such situations conduct their own inquiry, perhaps allowing the employee in question an opportunity to explain.

Mr Walton dissented, quite stoutly, from the judgment, arguing that the employer was placed in an invidious position, choosing not to inflict a "Kangaroo court" or double jeopardy on its worker. In addition, any testimony (such as a confession) elicited during such an internal inquiry might well have been inadmissible at a subsequent trial because it was obtained involuntarily.

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THE JUDICIAL SALARIES ORDER (NO 2) 1979

Current judicial salaries (as from 8 October 1979) include the 4.5% general wage increase of 3 September, and are set out below.

Chief Justice	\$53,490
President of the Court of Appeal	51,183
Chief Judge of the Arbitration Court	49,452
Judge of the Supreme Court (now High Court)	49,452
Judge of the Arbitration Court	44,261
Judge of the Compensation Court	38,493
Chief Judge of the Maori Land Court	37,339
Judge of the Maori Land Court	33,878
Magistrate (now District Court Judge)	37,339

See SR 1979/208. Presumably provision will be made for an increased salary for the Chief Judge of the District Court.

For previous salary levels, see SR 1979/7, SR 1978/265, SR 1978/109, SR 1978/103, SR 1977/170, SR 1976/322, SR 1976/216, SR 1976/55, SR 1975/275, SR 1975/176, SR 1975/76, and SR 1974/189.

With eleven salary increases in less than five years, judicial salaries have more than doubled. From the beginning of 1975 to the end of 1979, Magistrates have enjoyed an increase from \$17,608 to \$37,339, while the Chief Justice has gone from \$26,449 to \$53,490.