Despite the cautious use of 'generally', that whole statement and the concept it carries has been rendered simply historical by the events of early 1980. That is, of course, an inevitable problem.

Unfortunately, the editors are not content to let the various contributions stand by themselves. They feel the need to sew a thread throughout the work, but fail in their attempts to do this. The introduction claims that the book is 'intended as a contribution to a discussion of topics that have thus far not received adequate attention'. That statement is really too brazen: all these topics have been covered elsewhere, often by the same authors.

To illustrate this point further, and without intending any criticsm of Don Turkington's work, the editors introduce his paper with the comment that observers ordinarily expect a low incidence of conflict in countries with compulsory conciliation and arbitration frameworks, but the experience of Australia and New Zealand tends not to bear this out. What is the evidence used by Martin and Kassalow in their claim that observers expect low conflict levels in conciliation and arbitration systems? It is certainly not cited in their introduction.

This is an overview which covers less ground than its title implies and is introduced in a way which promises a theme which does not materialise. Most of the contributions are individually interesting and useful introductions to their topics. The collection falls down because of an unfulfilled promise of more.

RICHARD RUDMAN
Wellington

# BOOKS RECEIVED

*The Labour Relations Process,* W.H. Tolley, Jr and K.M. Jennings, The Dryden Press, 1980, pp 656.

*Economic Change and Employment Policy,* R.M. Lindley (ed), MacMillan, 1980, pp 395.

# CASE NOTES

## *(a) VICTIMISATION*

The following six cases mark a thorough review of the law of victimisation. John Hughes points out the differences, now, between a personal grievance claim (S.117) and a victimisation action (S.150). The lesson for the employer seems to be that he can win, under S.150, if he can convince the Court on a preponderance of the evidence, that his mind was directed to a real or imagined fault in the worker. Conversely, the lesson for the Union may be that a victimisation claim can be made out, even when the worker could have been dismissed with justification (under S.117), if the employer's conscious decision-making dwelt (for example) upon the worker's Union activity.

WCH

*(1) VICTIMISATION AND JUSTIFICATION*

*Cornhill Insurance Company Ltd v NZ Insurance Workers IUW.* Court of Appeal. 18 March 1980 (CA100/79). Richmond P., Richardson and McMullin J.J.

In claims under S.150 of the Industrial Relations Act 1973 alleging that a worker was dismissed or had his employment disadvantageously altered because he had been involved in one of the forms of industrial activity set out in S.150(1), it is a defence for the employer to show that the dismissal etc was for a reason other than the activity in question (S.150(2)). In one recent case the Arbitration Court effectively held that the employer had the additional duty of proving that the worker was not wrongfully dismissed or, in other words, of proving facts justifying the action taken *(NZ Insurance Workers IUW* v *Cornhill Insurance Company Ltd, unreported, Arbitration Court, Auckland, 19 February 1979, A.C. 6/79).* The Court of Appeal has now held this approach to the section to be incorrect *(Cornhill Insurance Company Limited* v *NZ Insurance Workers IUW, unreported, Court of Appeal, 18 March 1980, C.A. 100/79).*

The worker concerned claimed entitlement to certain benefits under the Insurance Workers' Award: five days after this claim was settled he was dismissed summarily — allegedly for poor punctuality — the company's General Manager believing his explanations for lack of punctuality to be incorrect. The Union brought a claim under S.150 on the basis that the employer had dismissed the worker within 12 months after he had claimed a benefit under an award (one of the forms of industrial activity set out in S.150(1). In finding that the worker's explanations could not be said to be "probably incorrect", the Arbitration Court held that the employer had not discharged the burden of proof under S.150(2) and gave judgement for the Union. However, the Court of Appeal held unanimously that, under S.150(2), "as a matter of law all that the employer need prove is that he dismissed the worker *whether lawfully or not* for a reason independent of the worker's industrial action" (per Richmond P, emphasis added); thus, once the employers establish a reason for dismissal independent of those set out in S.150, they are not required to establish that the action taken against the worker was legally justified. The independent reason need not be proved as a fact; the test is whether the employer "honestly entertained a belief in the existence of that reason", though the reasonableness or otherwise of the grounds advanced will be relevant as a matter of evidence in determining whether the professed reason for dismissal was the true motivation (per Richardson and McMullin J.J.).

The decision exemplifies the difficulties faced by unions making the necessary choice under S.150(3) between claiming under S.150 or S.117. See note at (1977) 2 NZJIR 26. There are perhaps five clear advantages to S.150 where the facts point towards utilising it:

1. Reimbursement of lost wages is mandatory once the union succeeds under S.150 but only discretionary under S.117.

2. Unlike S.117, S.150 entails a $100 penalty and may be said to have a deterrent effect (though this is obviously questionable).

3. Proceedings under S.150 may be brought by an Inspector of Awards where the individual worker concerned is not a union member *(NZ Workers' IUW* v *Waitakere Hatchery Ltd,* discussed elsewhere in these pages; Arbitration Court, Wellington; 4 May 1979, A.C. 37/79); under S.117, union membership

is a prerequisite before an individual worker can invoke S.117(3A) *(Muir* v *Southland Farmers Co-operative Association Limited* unreported, Arbitration Court, Invercargill. 26 March 1979, A.C. 27/79). Further, the worker must be covered by an award before the union can institute grievance proceedings, but possibly need not be for some S.150 claims. *(NZ Insurance Guild of Workers* v *The Insurance Council of NZ* (1976) Ind. Ct. 173). But see the contrary remarks of Horn, C.J. in the *South Canterbury Public Relations case,* also noted in these pages.

4. Where the claim is based upon alteration of the worker's position to his disadvantage. it seems that the most the Court can do under S.117 is to make a persuasive finding; there is no power to award any of the remedies which attach to unjustifiable dismissal (under S.117) or victimisation (under S.150) : **NZ Insurance Guild of Workers Case.**

5. Under S.150, once the union establishes industrial activity falling within S.150(1), the onus of proving some other reason for dismissal falls on the employer under S.150(2) (It might be thought likely that, in practical terms, the same position will arise under S.117, however an ill-defined burden of proof under S.117 rests on the employer when the evidence has reached a certain stage **(McAuley v R. Hannah and Co Ltd** (1979) A.C. 103/79) and it seems unlikely that the Court would hold dismissal for any activity within S.150(1) to be "justifiable"). Against these advantages, the union must weigh the facts that:

(i) The categories of industrial activity set out in S.150 considerably narrow the grounds for the Court's consideration, compared to those that may be taken into account under S.117 (see the Comment by Mr D. Jacobs in **Auckland etc Shop Employees IUW v Smith and Smith Limited,** unreported, Arbitration Court Auckland, 12 July 1979, A.C. 62/79). Most facts potentially giving rise to an action based on S.150 may comfortably be dealt with as personal grievances under S.117; the converse is not true.

(ii) After the **Cornhill** case, the emphasis under S.150 is on the employer's "state of mind"; the trend under S.117 seems to be towards requiring proof that the alleged misconduct etc actually occurred.

J.H.

## (2) VICTIMISATION: EMPLOYER'S ADMISSION

**Canterbury Clerks, Cashier, and Office Employees IUW v Direct Imports (NZ) Ltd.** Arbitration Court, Christchurch. 7 November 1979 (A.C. 108/79). Horn. C.J.

The defendant employer dismissed Mrs H a few days after she had claimed a higher rate of pay under a higher job classification. The applicant union sought a penalty for the alleged victimisation, and arrears of wages for the correct wage rate. The employer rendered futile any attempt to show a motive for the dismissal other than the claim made by Mrs H by referring to that rejected claim in its letter of dismissal. The Court held that the letter of dismissal, signed by the Managing Director, foreclosed proof of any other motivating reason. The Court imposed a $100 fine, ordered $300 in compensation to be paid to the worker, and left the parties to quantify the amount of arrears of wages.

W.C.H.

## (3) VICTIMISATION: AN OFFICE RESTRUCTURED

**Canterbury Clerks, Cashiers' and Office Employers' IUW v South Canterbury Public Relations Association Limited.** Arbitration Court. Timaru. 28 May 1980 (A.C. 46/80). Horn, C.J.

The position of the worker in this victimisation claim, Miss G, is analogous to that of Mr Estall in the **NZ Insurance Guild** case [1976] Ind. Ct. 173, noted at (1977) NZ Recent Law 52 and (1977) 2 NZJIR 25. Both workers were dismissed after they made complaints to their employer. Both workers were union members but were unable to use the standard grievance procedure set out in S.117 of the Industrial Relations Act 1973 because they were above a salary bar and no longer covered by the award; "like most modern appliances the machinery [of S.117] does not operate unless plugged in [to the award]". The relevant union, in both cases, then sought relief under the victimisation clause S.150 of the Act. The "broad cloak of protection" of S.150 was thrown round Mr Estall in the 1976 case, but the instant application failed on legal and factual grounds.

Miss G had been the Assistant Public Relations Officer in the Timaru headquarters of the South Canterbury Public Relations Association. She was invited to apply for the more senior post of Public Relations Officer, but lost out on 7 August 1979 in the final selection to the less qualified son of the Chairman of the Board of the employer. This disappointment to Miss G was more than a miscarried advancement; it meant prospective redundancy since the Assistant PRO's job was being phased out. Miss G consulted her solicitors, who wrote to the employer on 9 August. This letter could be construed as a claim or the expression of a personal grievance. Miss G then unwisely aired her grievances in an interview with the press, published in the **Timaru Herald** on 14 August 1979. On 16 August, the employer summarily dismissed Miss G, referring to the interview as "a serious misdemeanour" which "tended to bring the employer into disrepute".

Without referring to the decision of Jamieson J. in the Estall case, Horn C.J. virtually overturned the ratio of that case, saying that S.150 "may not be applicable in respect of a worker who is outside the scope of the award". Without deciding that question, Horn C.J. also suggested that the "personal grievance" referred to in S.150(1)(f) pertained to a S.117 personal grievance, not a common law contractual claim. This suggestion is directly contrary to the careful consideration and express finding of Jamieson J. in Estall's case. Ignoring the fact that Miss G was motivated not only by her unsuccessful application but also by her impending dismissal, Horn C.J. concluded that S.150 could not cover the letter of 9 August. In any event, rejecting the application on alternative grounds, and following the ratio of the recent **Cornhill Insurance** case (Court of Appeal: 18 March 1980, C.A. 100/79) Horn C.J. found, on a balance of probabilities, that the newspaper interview of 17 August 1979 was the motivation for, and the real cause of the dismissal in the mind of the employer.

**COMMENT:**

The facts of this case demonstrate how an employer can recast a job description, call for applications, appoint a stranger, and dismiss the existing employee as redundant, in a superannuated post.

W.C.H.

**(4) VICTIMISATION: MOTIVATION**

**Otago Road and Transport and Motor and Horse Drivers IUW v F.A. Willetts Ltd.** Arbitration Court, Wellington, 6 August 1979 (A.C. 72/79). Williamson, J.

The respondent employer dismissed an earth-moving machine operator in early January 1979, only two weeks after the employee (H) was elected job delegate and during an on-going dispute over a meal money claim, in which H played a prominent role for the union. The applicant union then claimed that H, a representative of the union as described in S.150(1)(c) of the Industrial Relations Act 1973, and a worker who had made an award claim as described in S.150(1)(d) of the Act, had been "victimised" within 12 months of those activities.

The employer set out several reasons for the dismissal, independent of the protected union activity. These included redundancy caused by a change of Ministry of Works contract requirements, a suspected theft by H, two violent threats by H, and general disharmony on the site, presumably caused by H. While accepting the validity of some of these charges, Williamson J. noted that the Court "must decide in a commonsense way what really moved the employer to take the action he did". (This approach comports with the Court of Appeal decision in the **Cornhill Insurance** case, also noted in these pages.) The motivating reason, Williamson J. determined, was the annoyance and resentment which the meal money claim fomented in the mind of the Managing Director of the employer. Having found a violation of S.150, the Court ordered $550 in lost wages and compensation be paid to the worker, but imposed no penalty and did not order reinstatement.

**COMMENT:**

This case might be compared with the **Cornhill Insurance** case, noted above; in that case there might have been no justification for the dismissal, but because the employer thought there was justification, there was no victimisation. In the instant case, there may well have been justification for a dismissal (threats of violence and redundancy), but because the employer was preoccupied with an irritating claim, there was victimisation. Compare also the proof made in this case, in cross-examination, of that annoyance, with the failure of the proof in the **Waitakere Hatchery** case (also noted in this issue), where the applicant was unable to demonstrate that the employer was even aware of the protected activity. Finally, compare the evidence of the **Direct Imports** case (also noted in this issue) where the letter of dismissal irretrievably focussed attention on the employer's attitude toward the worker's claim.

W.C.H.

## (5) VICTIMISATION: REASONABLE BUT UNSUCCESSFUL CLAIM

**Canterbury Clerks, Cashiers', and Office Employees' IUW v Printset Processes (1973) Ltd.** Arbitration Court, Christchurch. 13 May 1980 (A.C. 39/80). Horn C.J.

Mrs O was the only clerical worker in the defendant's office. She made a claim for wage arrears, under the mistaken belief that she was entitled to a "worker-in-sole-charge" rate. The Court agreed with the employer that a solitary clerical worker is not necessarily in charge of an office. Motivated by this claim, the employer dismissed the worker, in acknowledged violation of S.150(1)(d) of the Industrial Relations Act 1973. The court cited the well-known opinion of Blair J. in **I/A v Armoured Transport-Mayne Nickless Ltd,** 67 B.A. 763, that

> "A man should be entitled to negotiate about his working conditions under his award with no fear of dismissal because his law might not be right. . ."

The Court fixed a penalty of $100, awarded compensation of $500, but limited the measure of lost wages to the three-week period before the defendant employer offered reinstatement. Applying the mitigation of damages principle, the Court held that Mrs O should have accepted the offer of re-employment at her old job.

W.C.H.

## (6) VICTIMISATION AND REDUNDANCY

**Inspector of Awards (Kelly) v Waitakere Hatchery Limited.** Artbitration court, Auckland. 19 February 1980 (A.C. 6/80). Horn C.J.

On 6 April 1979, an employee of Waitakere Hatchery Ltd, Mrs G, gave evidence in the Arbitration Court on behalf of the NZ Workers' IUW in proceedings seeking an award for the poultry production field. Five days later Mrs G was dismissed, in circumstances which "almost stretch credulity to a limit before one can be satisfied . . . that [Mrs G] was dismissed for reasons other than her appearance in the Arbitration Court". A few weeks later the New Zealand Workers' Union brought proceedings pursuant to S.150 of the Industrial Relations Act 1973, claiming a penalty and the other relief available under that section. Those proceedings were dismissed on 4 May 1979 because Mrs G was not a member of the registered union at the time: **NZ Workers' IUW v Waitakere Hatchery Ltd,** A.C. 39/79. The appropriate plaintiff in such cases, and in cases involving a society seeking registration, is an Inspector of Awards, under S.150(1).

The employer, under S.150(2), has the burden of showing on a preponderance of the evidence, that the worker was dismissed for a reason other than the union activity. In the instant case, the employer was able to show a reduction in the available work. Mrs G was effectively the "last-on" worker, and Mrs G was not willing to accept alternate work elsewhere in the hatchery. As the plaintiff was unable to show that the employer was even aware of the union activities of Mrs G, the Court concluded that the worker had not been "victimised", and she had been dismissed for a reason other than her testimony in the Court seeking award coverage.

**COMMENT:**

To the extent that the Court required the employer to justify the dismissal, the Court placed an excessive burden on the employer. For example, Horn, C.J. referred to the statutory presumption in S.150 as "factually a high presumption". The Court of Appeal decision in the **Cornhill Insurance Company** case, discussed elsewhere in this issue, establishes that objective facts are only relevant in showing the state of mind of the employer, and his motive for the dismissal. If he was unaware of the worker's union activity, no violation of S.150 would be possible, although there could still be an unjustifiable dismissal under S.117 of the Act.

W.C.H.

## (b) PERSONAL GRIEVANCES

These personal grievance cases represent considerable clarification of Section 117. The **Waitemata City Council** case establishes useful first principles, while the **Ward** case goes further in outlining categories of justification. It can now be said with some confidence that if an employer follows procedural propriety, he can dismiss a worker on two general grounds:

(1) misconduct on the part of the worker, and

(2) business operational reasons.

Misconduct will be defined here as including disobedience, non-performance, misbehaviour, and incompetence. As the Privy Council said in **Clouston and Company Limited v Corry** [1906] A.C. 122, 129 "there is no fixed rule of law defining the degree of misconduct which will justify dismissal". Business operational reasons, after **Ward,** can be considered similarly open-ended. Hitherto, it was thought that redundancy, caused by economic downturn, geographical shift, or technological change in the employer's business was the sole operational justification. According to Horn C.J. in **Ward,** however, "There may be many reasons for an employer to dismiss well-behaved competent staff". The worker in that case was constructively redundant because she outgrew the position. It may be that labour shedding will be justified on the grounds that the worker in question is over-trained or over-skilled or over-paid, and that this over qualified worker is being dismissed in favour of a 17 year old school leaver who will do the job for half the pay.

W.C.H.

### (1) GRIEVANCE PROCEDURE: BURDEN OF PROOF ON WORKER

**Scurrah v Auckland Hospital Board.** Arbitration Court, Auckland. 12 February 1980 (A.C. 8/80). Williamson, J.

Section 117(3A) of the Industrial Relations Act 1973, as inserted by S.19 of the Industrial Relations Amendment Act (No 2) 1976, allows a worker to refer a personal grievance directly to the Arbitration Court when either the worker's union or his employer refuses promptly to comply with the established grievance procedures. Williamson J. in this brief judgement emphasises that such an individual reference to the Court is with the leave of the Court only and that the onus of proof lies on the applicant. The only evidence which the applicant adduced in this case was that he was not invited to accompany a union representative when the work place was inspected, and he was unable to see the union

secretary on demand. These facts did not establish a "reluctance" or "lack of enthusiasm" on the part of the union. The union, in fact, did act on the complaint the day it was lodged. The application for leave was rejected.

W.C.H.

**(2) GRIEVANCE PROCEDURE: FAILURE BY UNION**

**Tangira v Tolley Industries Ltd.** Arbitration Court, New Plymouth. 29 April 1980 (A.C. 30/80). Horn, C.J.

The applicant worker, Mrs T, sought the leave of the Court to bring a personal grievance claim, on her own behalf, under S.117(3A) of the Industrial Relations Act 1973. The Court found that the union representative (of the Taranaki Hotel Workers' Union) had been a recent employee of the respondent company, was evasive in his evidence, had failed to investigate the complaint of Mrs T, and "probably did not act at all in respect of Mrs T's grievance". There was, therefore, "a failure on the part of the workers' union" and leave was granted.

Mrs T had been employed by the company for six years. Upon her return to employment after two months' sick leave, she found that she had a new supervisor, she had been demoted, she was probably deprived of a measure of sick leave to which she was entitled, and she was accused, wrongly, of "fiddling the till". The deterioration in the work place and certain personal animosities which sprang up were therefore not the fault, primarily, of Mrs T. The Court found that Mrs T had been unjustifiably dismissed and ordered the copmpany pay Mrs T six months' wages and $1,500 compensation. Reinstatement may have been granted had it been sought.

W.C.H.

**(3) GRIEVANCE PROCEDURE: MATTER DISPOSED OF BY UNION**

**Jones v Home Bay Cottage.** Arbitration Court, Auckland. 16 May 1980 (A.C. 40/80). Horn, C.J.

The worker in this case, Mrs J, sought leave of the Court under S.117(3A) of the Industrial Relations Act 1973 to refer her own personal grievance to the Court, on the grounds that the relevant union (the Auckland Hotel, Hospital, and Restaurant Employees IUW) had "failed to act or to act promptly in accordance with the standard grievance procedure". As is usual in such cases, the hearing of the application to grant leave, a procedural threshhold, became, in practice, a hearing of the substantive grievance. As is also common in such cases, the union appeared to protect its interests, creating an awkward tri-cornered dispute, further complicated in those cases where the union advocate wishes both to give sworn testimony and to make legal submissions.

Mrs J was a nursing sister employed in a small rest-home, under the NZ (except Canterbury) Rest Homes Employees Award. Mrs J became redundant and a week's notice was negotiated and accepted on 4 September 1979. Later that same day relations became acrimonious, and heated disputes, involving the husband of Mrs J, took place in the hearing of patients. Mrs J was then given two days' notice "for insubordination" and she left that very evening. The Hotel Workers' Union received the complaint of Mrs J, and acted promptly under the standard grievance procedure, "taking the matter up with the

employer forthwith''. The union decided that the grievance lacked merit, since (1) a redundancy notice had been accepted by Mrs J, (2) there had been insubordination, and (3) Mrs J had walked out.

Mrs J claimed that S.117(3A) was applicable because the union had ''failed to act''. The Court rejected this submission and concluded that the union had acted, and had taken the dispute through SS.(4)(c) of the model clause set out in S.117. The matter had been ''disposed of'' in the discussion between the union and the employer, and no rights under SS.117(3A) arose. The phrase ''disposed of'' cannot mean ''disposed of to the worker's satisfaction''; subsection (3A) does not give the worker an automatic right to seek leave whenever he or she is unhappy with the union's action. The union discretion to dispose of a complaint by not constituting a grievance committee, however, would not be a final disposition when ''on the facts known to the union, it would be unreasonable to cease to act''.

A dissent by Mr McDonnell suggests that the minimum union response should be the institution of a grievance committee, so that both parties would have a chance to rebutt the other's arguments.

W.C.H.

**(4) PERSONAL GRIEVANCE: REDUNDANCY**

**Taranaki Amalgamated Society of Shop Assistants and Related Trades IUW v C.C. Ward Ltd.** Arbitration Court, New Plymouth. 30 April 1980 (A.C. 32/80). Horn, C.J.

The applicant union brought this personal grievance action on behalf of a salesperson, Miss A, dismissed before Christmas 1979. Miss A, in the words of the employer, was ''. . . a good sales person with a pleasant obliging manner towards customers and a willing worker. We regret losing her and would re-engage her should a suitable senior position become vacant''. The employee was dismissed because (1) she turned 21, (2) she achieved senior status, and either (3) she was thereby entitled to a higher rate of pay which the employer did not wish to pay, or (4) there was no room for another person with such a senior status.

The Court rejected the third reason, saying ''we do not hold that merely because a higher rate of pay is attracted to a particular post that an employer may be justified in every case of exercising the perogative to dismiss''. The Court did conclude, however, ''that if an employer engages a person for a junior position and finds in due course that when seniority is achieved either by length of service or by age that there is no work for a person in a senior position then there can be justification for dismissal''. In this case there was no such work available, and the dismissal was justified as a constructive redundancy.

**COMMENT:**

Redundancy can obviously arise because business decreases; this decision finds redundancy arising because a worker attained adulthood. There was no finding of fact that the inevitable maturation of a ''junior'' to a ''senior'' denoted increased productivity and responsibility as well as a higher wage rate.

W.C.H.

## (5) PERSONAL GRIEVANCE – NO "RIGHT TO WORK"

**Northern (except Gisborne) Butchers, Smallgoods and Bacon Factory Employees' IUW v Wilson Meats Ltd.** Arbitration Court, Auckland. 30 May 1980 (A.C. 48/80). Castle, J.

This personal grievance action, brought to the Court under the model clause set out in S.117 of the Industrial Relations Act, demonstrates that the so-called "right to work" is a "political slogan and a sociological desideratum" but is not subsumed by New Zealand's industrial law.

Having worked casually, part-time, on an hourly basis for the employer intermittently through 1979, the worker sought a permanent full-time position. The company declined to accept this job application. Following a reference to a grievance committee, the union complained, under S.117, that this "action by the employer . . . affected [her] employment to [her] disadvantage". The Court expressly found that there was no right in the award to full-time employment, and by implication no such common law or contractural right existed. The Court declined to give literal effect to the words of S.117(1).

**COMMENT:**

The court has held that non-promotion does not constitute a personal grievance within the meaning of S.117 : 74 B.A. 531. A non-hiring must also be outside the scope of the Act, albeit the worker's employment was certainly affected to her disadvantage if the job never came to existence.

W.C.H.

## (6) THE MEANING OF UNJUSTIFIABLE IN SECTION 117

**Auckland Local Authorities Officers' Union v Waitemata City Council.** Arbitration Court, Auckland. 1 May 1980 (A.C. 36/80). Horn, C.J.

This decision represents the most definitive judgement yet rendered by the Arbitration Court on the meaning of the term "unjustifiable dismissal" as used in S.117 of the Industrial Relations Act 1973. The employer dismissed M, an assistant engineer with the Waitemata City Council, in November 1979, after some four and a half years of service to the Council. He was given his holiday pay and three months' wages in lieu of notice, as required by the contract of employment. The union brought a personal grievance claim on behalf of M seeking reinstatement and compensation. Counsel for the Council claimed that the dismissal was not "unjustified" since the relevant contractural terms had been fulfilled, and the dismissal was not "wrongful". The court rejected this submission, saying that the legislative insertion of the word "unjustifiable" must have been deliberate, and that "common law authorities on 'wrongful' dismissal would have little or no application to the concept of 'unjustified' dismissal". The Court declined to give an exhaustive or rigid denotation to the word "unjustifiable", but since the legislature had not defined it, it was for the Court, in a pragmatic, case-by-case approach, to find the parameters of the protection extended.

The Court indicated that S.117 does not create absolute job security. "The right to a job is not perpetual. Redundancies are obviously justifiable. There may be many reasons why an employer can dismiss staff for reasons associated with his business operation." On the other hand, S.117 does create "an ill-defined measure of job security . . .", and where an employer gives reasons

for a dismissal those reasons can be examined.

Although the legal submissions for the employer were thus rejected, the employer did prevail on the facts. The Court concluded that the engineer, "highly capable and energetic", had "broken too many rules, cut too many corners, created or contributed to disharmony" and that in fact his dismissal was justifiable.

**COMMENT:**

Justification may thus take two forms: misconduct and business operational reasons. Redundancy, as justification, can be seen as a sub-category of business operational reasons. For an example of the latter category, see the **Ward** case also noted in these pages, where a worker was constructively redundant although the business had not decreased.

W.C.H.

## (c) UNION AFFAIRS

### (1) UNION ELECTIONS: A LESSON IN POWER

**Watson v National Union of Railwaymen of NZ IUW.** High Court, Wellington. 11 August 1980 (A. 234/80). Hardie Boys, J.

This application for an interim injunction manifests a dispute between elected officials of a branch of the Railwaymen's Union and the national officials of that same Union. The plaintiff, Branch Chairman Watson, sought relief against the National Council of the Union to preserve himself and his lawfully elected fellows in office, and to interdict by-elections.

The East Town Branch of the National Union of Railwaymen of NZ IUW ("the Union") elected and appointed the following officers for a two-year term on 1 August 1979: chairman, vice-chairman, secretary-treasurer, and five committeemen. Dissension swiftly arose, and on 8 October 1979, the vice-chairman, the secretary-treasurer and three committeemen resigned. One of the resigning committeemen, Gibbs, was the national vice-president of the same Union. The branch rules provide that casual vacancies are to be filled by appointment by the committee except for the secretary-treasurer, which is to be filled by by-election. As five of the eight executives had resigned, the rump of the executive was inquorate, and Watson, the Chairman, called for elections for all vacancies. These were filled, without opposition and without objection on 23 October 1979. Had the resignors not been replaced, the executive committee would have been unable to act for the remainder of its term.

The National Council of the Union, for reasons not before the Court, declined to accept these results, ordered (on 2 November 1979) still another election, wrote to the employer to disregard the newly elected officers, suspended Watson (on 21 February 1980) as Branch Chairman because he refused to hold a third election, and placed Gibbs (the resigned committeeman) in charge of the Branch. The Union applied to the Registrar of Industrial Unions for a fresh election to be held under the Industrial Relations Act 1973. Watson applied for relief under S.68 of the Human Rights Commission Act, and the Registrar (the second defendant in the instant proceedings) declined to hold elections pending a determination of the Human Rights Commission. When that Commission reported on 16 July 1980 ("a rather unsatisfactory state of affairs", but no breach of S.68), the Registrar prepared to hold new elections.

## (2) UNION DISCIPLINE: A LESSON IN PLEADING

**Richardson v Canterbury General Drivers and their Assistants IUW.** High Court, Christchurch. 25 June 1980 (M. 672/79). Cook, J.

This application presents a cautionary tale in pleading for labour lawyers. The applicant, an oil tanker driver, worked on the day of the General Strike in September 1979 at which time he was a member of the Drivers' Union whose policy was to take part in the stoppage. Some weeks later at the union's annual general meeting it was resolved to impose a levy upon any member who had worked on that day to be paid into the union welfare and education account by 15 November; if the levy was not paid, another meeting was to be held "to discuss the matter further". No power to make such a levy existed in the union rule-book. Later the applicant authorised his employer to deduct the levy from his wages at the rate of 20c per week (whereby payment would have taken six years). The period for payment expired and a meeting of oil company drivers was called at short notice, precipitated by a critical newspaper article concerning the levy quoting a "concerned" driver: the meeting had no status as a meeting of the union under the rule-book, being held without due notice and inquorate. At the meeting, which was not attended by the applicant, a resolution was passed "That Mr Richardson who was employed by Mobil Oil Timaru no longer has the right to retain his membership with the Canterbury Drivers' Union". The applicant and his employers were informed of the resolution and the company continued to employ the applicant in the capacity of oil storeman, which involved him in financial loss. The Drivers' Union forwarded the applicant's union fees thereafter to the Labourers' Union (which had coverage of storemen) and two months later purged him from the register because he was no longer employed as a driver and had not paid the levy. An application for review was made to the Supreme Court under S.4 of Part 1 of the Judicature

Before considering the balance of convenience. Hardie Boys J. found plaintiff's threshhold requirement to be: "Has he raised a serious question to be tried, a claim that is not merely frivolous or vexatious". This test, established by the House of Lords in the **American Cyanamid** case, [1975] A.C. 396, and adopted by the Privy Council in **Eng Mee Young v Letchumanan** [1979] 3 W.L.R. 373, replaces the somewhat higher standard of "strong **prima facie case**", followed in New Zealand in the **Congoleum** case: [1979] 2 N.Z.L.R.560. This threshhold requirement was met and crossed in the claims based on the national Union's disregard of the elections of 23 October and the national Union's treatment of Watson.

Weighing the balance of convenience, however, the learned Judge found that reinstatement of Watson and the others, and the removal of Gibbs now, pending a full hearing, would cause confusion and further ill feeling. Although Gibbs' de facto chairmanship was a stop-gap arrangement, it had operated successfully without complaint since February 1980 and it would be inconvenient to turn Branch management topsy-turvy yet again pending final resolution of the dispute. With respect to new elections, the Court accepted the undertaking of the Union that no such elections would be held until determination of the substantive application. That aspect of plaintiff's motion was adjourned but otherwise plaintiff's motion was dismissed.

W.C.H.

Amendment Act 1972. This section provides that the relief which a court may grant is "... in relation to the exercise, refusal to exercise or proposed or purported exercise by any person of a statutory power".

The union rule-book contained no power to discipline by imposing fines or levies. In Rule 3F there appeared as an object "To exercise all other or any of the powers of an industrial union the Act". Whilst accepting that this broad object may well incorporate any powers given under the Industrial Relations Act which are not otherwise covered by the rules, Cook J declined to treat the levy as falling with S.182 of the Act since "what was done ... was not the imposition of a levy which the Act recognises. It was no more than an attempt to impose a fine upon certain members, when there was no power whatsoever to do so." His Honour remarked, obiter, that in any event S.182 does not necessarily empower unions to impose levies (in a proper manner) in the absence of any power in the rules to do so since "it is a section imposing restrictions rather than giving powers". Cook J held that no valid procedure had been followed to terminate the application's membership and that there were no grounds for purging the applicant's name from the register of members. Nevertheless, despite the fact that "at no stage ... did the union act in a proper fashion" Cook J felt unable to make the orders sought in the notice of motion. Under the 1972 Act jurisdiction depended upon this application relating to "the exercise or purported exercise by the Respondent Union of a power or right conferred by or under its rules to do an act that would, but for such power or right, be a breach of the legal right of the applicant". The resolution of the oil company drivers could not "by any stretch of the imagination", be said to be the exercise or purported exercise of a statutory power thereby opening the way for the review sought. There was no power under the rules to impose levies in the nature of a fine, it was not competent under the rules for such a group of members to pass resolutions and the union's own treatment of the resolution as having validity was not correct. The matter was accordingly adjourned in case further submissions were intended. In the meantime the Drivers' Union have applied to the Registrar of Industrial Unions for approval of a new rule providing for fines of up to $100 a day, three months suspension, or expulsion for discipolinary offences.

**Comment**

Watson and Richardson were both unsuccessful in their applications to the High Court although both had lost positions (elected and employment ; respectively) because of the lawless exercise of power by their unions. Compare these decisions with the **Marinovic** case, noted (1980) 5 NZJIR 43—44, where union members, properly notified of disciplinary charges, were able to obtain an injunction against their union **before** those charges had been heard. The message for union executives may be to ignore the rules of natural justice, take action without notice, and inquorate, and worry about legal review later.

WCH

## (d) QUARTERLY WAGE INDEXATION

**NZ ENGINEERING, COACHBUILDING, AIRCRAFT, MOTOR AND RELATED TRADES IUW v NZ ENGINEERING AND RELATED INDUSTRIES IUE.** Arbitration Court, Wellington. 30 May 1980 (A.C. 47/80). Horn, C J.

The engineers, in conciliation with their employers, sought a wage indexation clause, providing for cost of living adjustments every quarter (the first days of January, April, July and October) based on the Consumer Price Index published by the Department of Statistics. (Hereafter, this adjustment mechanism shall be the "COLA Clause".) The employers resisted this novel (for New Zealand) concept, and the engineers referred the partially settled dispute of interest to the Court, per S.84 of the Industrial Relations Act 1973. In addition to the COLA Clause, unconciliated differences between the union and the employers concerned the quantum of wages and the term of the award, excluding wages. The Court denied the claim for quarterly indexation, but declined to arbitrate on the remaining issues because of the linkage between these three issues and because of the need for further conciliation on the quantum of wages, considering the bar on indexation.

The Court noted that indexation as a concept had been totally barred by S.6(4) of the General Wage Orders Act 1977, which reserved examination of movements in the Consumers' Price Index to general wage order applications under that Act. With the passage of the Remuneration Act 1979, and the express repeal of the 1977 Act per S.9 of the 1979 Act, indexation became theoretically possible. This was recognized by the Court in an earlier reference from a Conciliation Council, recorded at A.C. 83/79.

The Court found that still another legislative obstacle to untrammelled conciliation and arbitration remained, and which, in the instant case, foreclosed the possibility of awarding any less than annual COLA Clause. The Wage Adjustment Regulations of 17 June 1974 (S.R. 1974/143), promulgated under the authority of the Economic Stabilisation Act 1948, and amended 17 times, remain partly in force: S.R. 1978/226. Regulation 6(1), "to promote the economic stability of New Zealand by preventing frequent changes in rates of remuneration", requires that any rate of remuneration fixed by any intrument must "continue in force for a period of at least 12 months". An exception is provided in Regulation 6(3), where "particular and special reasons" exist and where **"all the parties to a proposed instrument have agreed"** that a rate of remuneration shall continue in force for less than 12 months. As the respondent employers in this application had not so agreed, the Court had no jurisdiction to make an award for quarterly or six-monthly wage indexation.

Having had the benefit of helpful and comprehensive submissions from both parties, the Court gratuitiously discussed the substantive merits of indexation, as possible guidance to the parties and interested observers. The Court expressed the tentative view (though Mr Oldham dissented) that in general terms "wage indexation could remove uncertainty in wage negotiations and could lead to industrial harmony'. On the other hand, "one hundred percent wage indexation annexed to the CPI **plus** wage bargaining on top would most probably produce a higher and faster rate of inflation". The Court also discussed Australian indexation, where the six-monthly awards, which discounted imported inflation, taxation and the economic effects of industrial disputes, total-

ly displaced free wage bargaining. The Court also considered submissions on export prospects, the current tri-partite talks, COLA Clauses in North America, and the effects of inflation directly. In a dissenting opinion, Mr Oldham feared that indexation would be in addition to — not a substitute for — free wage bargaining. He suggested that submissions be made by the Federation of Labour, the Employers' Federation, and the Government, and that the Australian experience be further examined.

In a supplementary decision (A.C. 47A/80), dated 27 June 1980, the Court referred the application back to the Conciliation Council, noting both the higher wage claims of the applicant and the untimely death of Mr W.C. McDonnell, of the Court.

**COMMENT:**

It is healthy to see such fundamental questions — and revolutionary solutions — coming to the Arbitration Court. In 1968 Mr P.J. Luxford, then Director of the Employers' Federation, wrote that the Arbitration Court has been "for a very long period the accepted battleground ... in major matters relating to the determination of wages ...." **(Wage Fixing in New Zealand,** S.J. Callahan ed, N.Z.I.P.A., Oxford, 1968). Ironically, that very year saw the beginning of the end for the Court in the "nil wage order" controversy: see the 5% general order subsequent to the joint application of the"unholy alliance": 68 B.A. 1334. The next year saw the beginning of a ten year series of temporary, expedient, unsuccessful measures to control wage bargaining: the General Wage Orders Act 1969 (replacing the Economic Stabilization Regulations 1953), the Stabilization of Remuneration Act 1971, the Remuneration Authority, the Stabilization Remuneration Regulations (S.R. 1972/59), the Economic Stabilization Regulations (S.R. 1974/143), 17 amendments to those regulations, the Industrial Commission, the Wage Hearing Tribunal, the rebirth of the Arbitration Court, the General Wage Orders Act 1977, and the Remueration Act 1979. It can be hoped that the Court will regain and retain its pre-eminent position in wage bargaining. For a thorough examination of the Australian wage indexation practice, see "Wage Indexation — The Australian experience", by D. Plowman in (1978) 3 NZJIR 105.

WCH

## (e) ENTITLEMENT TO PAYMENTS

### (1) SICKNESS DURING ANNUAL LEAVE

**Butland (I/A) v Winstone (Northland) Ltd.** Arbitration Court, Whangarei. 9 May 1980 (A.C. 38/80). Castle, J.

The worker in this case, F, took his annual holiday entitlement between 22 December 1978 and 15 January 1979. He was entitled, under S.3(I) of the Annual Holidays Act 1944, and per Clause 28(a) of the NZ General Drivers' Award, 78 B.A. 6315, to full pay for that holiday. A medical certificate attested that F had contracted influenza and was unable to work on the 3rd, 4th and 5th days of January 1979. The Inspector of Awards claimed that Winstones should pay F sick pay for those three days and "restore" to F three days annual leave entitlement, referring to S.3(7) of the Annual Holidays Act 1944:

"No period during which a worker is unable to work because of sickness or injury shall be counted as part of any annual holiday to which he is or may become entitled under SS.(I) of this Section."

The Inspector claimed that these words should be taken literally, and that, as the contract of employment subsisted, the worker in question was "unable to work because of sickness". This submission is comparable to the successful claim made in **Hellaby Shortland Ltd v Weir** (1976) 2 NZLR 355, noted at (1976) I N.Z.J.I.R. 72, where striking workers were held entitled to statutory holiday pay, albeit they were on strike during the relevant holidays.

The Court rejected the claim, finding the language of S.3(7) to be prospective, not retrospective, and referred to the recent decision of **Caddie (I/A) v ARA**, 20 October 1978 (A.C. 56/78), where "the general inherent principle, that workers who fall sick on annual leave are not entitled to additional annual holidays", was followed. The Court also relied on the language of the Award, which was relevant because it was more favourable to the worker than the statutory minima. Clause 29 referred, in sub-clauses (a) and (c) to "absence on account of sickness" and the worker's obligations to notify the employer on the first day of absence due to that illness. The notification in this case was not received by the employer until 15 January 1979. The Court construed the words "unable to work because of sickness' as meaning "prevented from working because of sickness", and found the purpose of the sick pay clause to be income insurance. The Court concluded that neither the Act nor the Award had been violated.

**COMMENT:**

The Court of Appeal found a holiday pay entitlement in **Hellaby Shortland Ltd v Weir** (1976) 2 NZLR 355, noted at (1976) I NZJIR 19 and 72, because such pay, under the Factories Act 1944, bears upon the subsisting contract of employment, not actual labour. The ratio of that case is not in harmony with the instant decision, although, to be sure, the statutory language was not identical in the two cases.

WCH

**(2) CONTINUOUS SERVICE PAY**

**Inspector of Awards (Williams) v Feltex Carpets Ltd.** Arbitration Court, Christchurch. 24 July 1980 (A.C. 19/80). Horn, C J.

The top rate of pay in the carpet industry, expressed most recently in Clause 6(a) of the Carpet Factories' Employees Award at 78 B.A. 4337, is for those workers with "five years (or more) continuous service in the industry". The worker in this case, H, worked for 13 consecutive years with the same carpet industry employer, and then left that employment. After more than a year as a joiner, H returned to his former employer for some three and one half years. The current claim for wage arrears, made by the Inspector of Awards for the use of H, is based on the non-payment of the continuous service premium for that second period of employment. The employer claimed that the allowance was payable for continuing, unbroken service only, and was not a lifetime qualification which adhered to the worker no matter how long he remained outside the industry.

An express exception to the principle of continuity was granted in Clause 20(b), which provided that continuity of service would not be affected by maternity leave not exceeding six months. Presumably that exception related to interruptions in the five year period itself, not maternity leave taken after completion of the five year period. If the latter interpretation was valid, then all other breaks in employment would be fatal to a claim for the continuity allowance. The Court also noted that if the allowance were a qualification payment, like a practising certificate, it might be illogical to pay it automatically to a worker who had been out of the industry for decades, losing all touch with technology and materials.

Somewhat reluctantly, reaching its conclusion "with some diffidence" the Court concluded that the payment was a service allowance designed to retain workers in the industry and to see that no loss is incurred if a worker shifts to another employer in the industry. The claim would therefore succeed. The result would be different if the clause referred to "current continuous service" or to "continuing service". The Court referred to **I/A v Donaghys Rope & Twine Co. Ltd.** 28 B.A. 421 as precedent. Frazer J there referred to the "increased dexterity due to experience" and cited **I/A v Calder** 11 B.A. 377.

WCH

## (f) DEMARCATION

### (1) DEMARCATION DISPUTE : ENGINEERS VS ELECTRICIANS

**New Zealand Engineering Coachbuilding, Aircraft, Motor and Related Trades IUW v New Zealand (except Canterbury and Westland) Electrical Workers IAW and New Zealand Registered Electrical Contractors' IUE and Dunlop NZ Ltd.** Arbitration Court, Wellington. 16 May 1980, (A.C. 35/80). Horn, C J.

The New Zealand (except Canterbury and Westland) Electrical Workers IAW (the "Electrical Workers") have expanded their South Island coverage and the New Zealand Engineers (who historically covered most South Island electrical workers) continue to resist. Presumably the Electrical Workers' goal is a unified New Zealand union, covering all eight industrial districts (Northern, Taranaki, Wellington, Nelson, Marlborough, Westland, Canterbury and Otago-Southland).

Before 22 August 1978, the Engineers covered electrical workers in four districts, being Canterbury, Westland, Nelson and Marlborough. On that date the Arbitration Court overturned the decision of the Registrar and allowed the registration of the Nelson, Marlborough Electrical Workers' Society, over the objections of the Engineers: A.C. 31/78, noted at (1978) New Zealand Recent Law 403 and (1978) 3 NZJIR 135. Evidence of the new status is found in A.C. 40/79, where the Court extended the Northern, Taranaki, Wellington, and Otago-Southland Hospital Boards Electrical Workers Award to include the Marlborough and Nelson districts.

Two further conciliated settlements involving the Electrical Workers, covering Marlborough and Nelson, were registered by the Court in late 1979 under section 82(2) of the Industrial Relations Act 1973. These two awards replace, as far as Marlborough and Nelson are concerned, awards negotiated by the

Engineers. That union sought to have the court strike out Marlborough and Nelson from coverage of the New Zealand (except Canterbury and Westland) Electrical Workers' Awards, under S.82(5) of the Act. Having previously decided that there should be a Marlborough and Nelson Electrical Workers' Union, the Court was unwilling to return coverage of the relevant electrical workers to the Engineers' Union and the Engineers' aplications were rejected.

The Court foreshadowed further litigation by noting that collective agreements negotiated by the Engineers covered the same workers, and suggested that S.118A provided an appropriate mechanism for clarification of the dual coverage. Horn C J suggested that the Engineers might be stopped from registering those agreements, because of SS.91 and 92 of the Act, while Mr Jacobs, in dissent, suggested that the court could not refuse to register them, citing SS.65 and 82.

WCH

**(2) DEMARCATION DISPUTE : MERCHANT SERVICE GUILD VS COOKS AND STEWARDS**

**Shipping Corporation of NZ Ltd. v Federated Cooks and Stewards of NZ IUW and NZ Merchant Service Guild IUW.** Arbitration Court, Wellington. 27 May 1980 (A.C. 43/80). Castle, J.

The Shipping Corporation of NZ applied to the Court for resolution of the demarcation dispute between the NZ Merchant Service Guild IUW (''the Guild'') and the Federated Cooks and Stewards of NZ IUW (''the FCSU'') regarding coverage of the provedoring and stewards' work on its two new container vessels, the **New Zealand Pacific** (commissioned in September 1978) and the **New Zealand Caribbean** (commissioned in January 1980). The employer may have catalyzed the dispute by converting its Chief Stewards into ''Catering Officers'', a term common on UK ships. A previous application was found by Mr Justice Jamieson to be premature, as the **New Zealand Pacific** was at that time an incomplete hull known as ''1008''. Jamieson J refused to disturb the status quo and left the existing Chief Stewards as appropriately covered by the FCSU or the now non-existent Marine Chief Stewards Guild IUW (the ''MCSG'') : (1977) Ind. Ct. 23. the MCSG has since been deregistered and the rules of the Guild have been expanded to include the members of the MCSG. See also similar demarcation disputes (between the same parties) evidenced at 48 B.A. 531 and 74 B.A. 1000.

The employer has now abandoned plans to use the term ''Catering Officer'', and there was no evidence that the SCNZ intended to have the person in that position complete a Catering Officer's certificate course operated by the Merchant Navy Training Board at Liverpool. In the absence of any other compelling evidence, the Court was bound to follow S.119(2)(f) of the Industrial Relations Act 1973, to give effect to 70 years' New Zealand practice on cargo vessels, and to direct that chief stewards on the **New Zealand Pacific** and **New Zealand Caribbean** be covered by the FCSU.

See other disputes involving the FCSU and the Hotel Workers Union noted at (1976) NZ Recent Law (N.S.) 15 (February), (1978) NZ Recent Law 370, and (1978) 3 N.Z.J.I.R. 129.

**SEQUEL:**

The successful respondents — the FCSU — then sought costs for the two day hearing against the Guild — the unsuccessful respondent. In an ancillary decision (A.C. 43A/80; 21 August 1980) the Court announced that it was increasingly reluctant to make orders for costs:

"The Court considers that any prospect of incurring a substantial liability for costs must not be allowed to influence those who are responsible for initiating and defending litigation on this Court."

WCH

BILL HODGE
JOHN HUGHES

# CUMULATIVE INDEX TO VOLUMES 1 TO 5 1976-1980

## Author Index