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COMMENTARY

Recent developments in New Zealand's industrial relations system

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The major problem I have been faced with when preparing this paper is how to analyse and communicate in a short space the numerous changes that have been taking place in our industrial relations system. The answer of course is that I cannot. What I have therefore decided to do is concentrate my paper upon the major developments that in my view are fundamentally changing the practice of industrial relations in New Zealand. For, I do believe that some fundamental changes have been taking place and that such a process of change can be charted from 1968, and that we are still in the midst of this period of change.

Before we begin to explore these developments in our industrial relations system, it is necessary to make two comments. The first is that this paper is concerned only with the formal system of industrial relations, the important elements of which are contained in legislation such as the *Industrial Relations Act 1973*, the *State Services Conditions of Employment Act 1977*, and the *Remuneration Act 1979*. The formal system is mainly concerned with procedural matters. It is concerned with how disputes are to be lawfully settled, who is to represent the interests of capital and labour, what institutions are to be recognised as having jurisdiction in the field, what are to be the legal rules of the game. In some instances the formal system also includes substantive matters, such as how many hours should be worked, what safety standards are to be applied, and in more recent times how much workers should be paid for their labour.

The informal system is more concerned with what actually happens within the formal procedural framework, and at times what happens outside of it. This is a system of few written rules, that relies more upon custom, practice, commonsense, and as a last resort a demonstration of industrial action as a means to determine who has the most power in a particular situation. In some ways this informal system is not only more interesting but more important. It is also a system that is little understood, mainly because inadequate resources have been assigned to the study and analysis of it. Another victim of inadequate research funding in this country.

The formal and informal system are inter-dependent. An obvious example being the fact that in most instances strikes are unlawful; this therefore affects the balance of power in any dispute. It does not stop strikes, but it affects the way they are used and their effectiveness. A study of the recent developments to the formal system of industrial relations will therefore tell us something of what is happening in the day to day practice of industrial relations, even if it is not the total picture.

The second comment I feel it is necessary to make is that the significance of the recent developments to the industrial relations system can be understood only if the basic concepts upon which the system is founded are understood. Since the formation of the formal industrial relations system in 1894, there has been a preoccupation with

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the regulation of disputes through legal procedures. Initially the purpose of the procedures were to prevent strikes, subsequently they were developed not only to prevent strikes, but also to regulate the amount paid in wages or other remuneration. The procedures used for these tasks are still contained in our *Industrial Relations Act 1973,* and are based upon the concepts of conciliation and arbitration.

Procedures based upon the concept of conciliation and arbitration have meant that from the formation of our system we have elected to operate a tri-partite system. Trade unions and management have agreed to settle their disputes within the procedures laid down by government, and before the government regulated institutions of the conciliation service and the Arbitration Court in the private sector, and in the public sector, the Public Service Tribunal and numerous other state tribunals.

Due to the development of a system of industrial relations based upon the concept of conciliation and arbitration New Zealand has never fully developed a system of collective bargaining, that is, trade unions and management settling their disputes without the intervention of a third party. It is true that collective bargaining is to be found in the informal system, but it has never been legitimised by the formal legal system. Our system of conciliation and arbitration has however legitimised the formal intervention of the government into the process of industrial dispute settlement. This intervention is often passive and indirect. For example, it may respond to requests from the parties to amend some part of the formal system, approve the appointment of conciliators, mediators, and arbitrators, and improve the services provided by the Department of Labour. On other occasions it may take a more active, direct role in industrial relations. Such a role is most obvious in times of crisis, such as the Waihi Strike of 1912-13, the Waterfront Strike of 1951, during the 1930s' depression, when it suspended access to arbitration and ordered a general decrease of wages, or when it moves to deregister a trade union.

For much of our industrial history the government has been prepared to play an indirect passive role in our industrial relations, except, as I have said, in times of crisis. It has controlled the formal system but only intruded into the informal system when it appeared to seriously challenge the formal system. An example of this strategy is whenever the trade union movement has tried to operate completely outside the formal system, as in the period 1908 to 1913 when trade unions voluntarily deregistered themselves and bargained with management outside the procedures of concilition and arbitration, the government has through an adjustment to the formal rules prevented the trade unions operating independently of the formal system.

One of the most important recent developments in industrial relations in New Zealand has been the much more active role of the government, which has shown itself willing to directly interfere with both the formal and the informal system. As a consequence of the government's striving for greater control over the industrial relationship the traditional balance of interests has been seriously disturbed. Whereas once the trade unions and employers were left to settle their disputes within the framework controlled by government through the procedures of conciliation and arbitration, since 1968 the government has shown increasing willingness to directly participate in the game, through a system of wage controls, which have by-passed the traditional system of conciliation and arbitration.

The fact that there has been an increase in government intervention in industrial relations since 1968 is not of itself of significance. As already mentioned, governments have historically interfered with industrial relations. What is of importance is the form of the intervention and the consequences of the intervention upon the traditional system of industrial dispute settlement. What I now intend to do is explore some of the recent developments in order to illustrate what, if any, changes have taken place to the traditional formal system of industrial dispute settlement.

I have chosen the year 1968 as the beginning of the period under review because it was that year that the Arbitration Court, and thus the whole system of conciliation and arbitration, had its control of the system successfully challenged by the trade union movement. In 1968 the Arbitration Court declined to grant an application for a general wage order. The reaction of the trade union movement to this decision was to undertake negotiations with employers directly to achieve a general wage increase. These negotiations were successful in so far as the employers eventually consented to support the trade union movement in a new application to the Arbitration Court for a 5 percent wage order. This application was successful because the representatives of labour and capital on the Court combined to outvote the government representative, the Judge of the Court.

In some ways the 1968 general wage order case can be seen as the climax of a process that began after the second world war. During the 1950s and 1960s New Zealand developed a pattern of industrial dispute settlement that involved use of the formal system conciliation and arbitration for obtaining basic wages and conditions, and the use of the informal system of collective bargaining to obtain actual wage rates and conditions. This two-tier system operated most successfully for those trade unions which were well organised and therefore capable of negotiating directly with management. In other industries which were not so well organised, reliance was placed upon the third tier of the system, namely the general wage order, to ensure wages kept pace with the cost of living.

The fact that the trade union movement could bargain directly with management with some success showed it was increasing in strength and organisation. It also showed the government that it could no longer fully rely upon the Arbitration Court to exercise control of wage increases. These developments were of concern to a government that was faced with increasing inflation. How was it to regain some control of this section of the economy? The answer to that question lay in the *Stabilisation of Remuneration Act 1971,* which was the first of many statutory attempts to control increases in remuneration. It was followed by the *Stabilisation of Remuneration Regulations 1972* and then by the *Wage Adjustment Regulations 1974,* which still remain in force today, though the provisions relating to direct control of increases in remuneration have been repealed.

Although governments made numerous attempts in the period 1971 - 1977 to statutory control of increases in remuneration, all these measures followed a similar pattern. A special tribunal would be established - Remuneration Authority, Wages Tribunal, Industrial Commission, Wage Hearing Tribunal - with the responsibility of approving all increases in remuneration contained in an instrument. This meant in effect all monetary payment for work performed by anyone, was subject to the provisions of the legislation. The special tribunal also had jurisdiction in most instances to make general wage orders, which became known as cost of living orders. The criteria for approval of increases in remuneration and for cost of living orders was laid down in the legislation. In some instances it took the form of stating the maximum amount that was to be allowed. In one instance, in 1976, an amendment to the *Wage Adjustment Regulations* provided that there was to be no increase in remuneration permitted, unless there were exceptional circumstances, such circumstances being agreed upon by both the trade union and management. That particular regulation was responsible for the worst strike record since 1951.

Whether the government's measures to control inflation through the statutory controls on remuneration were successful is a question for an economist. What was apparent however during the seven years of wage controls was the gradual breakdown of the traditional method of industrial dispute settlement. Although the conciliation service was still operating, the Arbitration Court was by-passed by the Remuneration Authority during 1971 and 1972, then in 1973 it was abolished altogether to be

replaced by the Industrial Commission and an Industrial Court. This unhappy experiment lasted until 1978 when a new Arbitration Court was established to perform the arbitration functions of the system.

It is true that during that decade of instability the concept of arbitration was retained, though the tribunal to administer it changed with remarkable rapidity. It is also true however that the essential characteristic of arbitration, namely that of hearing a dispute and deciding it upon its merits, was missing. Each dispute during this period had to be heard and decided in accordance with a statutory criteria that had been determined by the government. Very little discretion or flexibility was left within the system. This situation inevitably lead to industrial conflict. There was little purpose going to the arbitration tribunal if you knew the result. In such a situation there are several courses open to you - you can either ignore the system completely and quietly negotiate informally outside it; (how many people did just that is very difficult to assess, it was true however that you were unlikely to be prosecuted for evading the legislation); try to find some way around the legislation (this was done by employing various statutory interpretation principles or finding some loophole); or trying to get the statutory controls removed, which was the only long term solution.

Each of these methods of evading the statutory controls was tried. This resulted in many people being guilty of breaking the law, it provided a new field of work for lawyers, who were called upon to try to make some sense of the ever increasingly complex statutory controls, and it brought the trade union movement into direct conflict with the government. It was this latter consequence of the government's attempts to control inflation by statutory controls which led to much of the industrial unrest during that period. It was obvious to the trade union movement that there was little that the employers could do in such a situation. Government had instituted price control regulations and made it unlawful for employers to grant wage increases. It is the government then that now directly controlled how much was to be awarded in the wage packet, so it must be the government with whom the trade union movement negotiated.

There were of course no formal rules governing such negotiations. There was even a question of whether the trade union movement had a right to pursue its claims directly with government. This argument often came through in the catch-cry of who ran the country the government or the Federation of Labour? Whether it has a right or not, the fact was that after a year of considerable industrial unrest mainly directed at government regulation of the trade union movement, the wage control legislation was substantially repealed in 1977. While undoubtedly the industrial unrest was not the only reason for the repeal, the government may have realised that it could pass as much legislation as it wanted but it may not be so easy to enforce it. In fact if it wanted to enforce it then it may have to be prepared for a direct confrontation with the trade union movement.

The main consequence then of the government's interference with the traditional system of conciliation and arbitration was that it became an active party in the industrial relationship and therefore had to deal directly with the trade union movement. No longer could it discreetly control the system through the "neutral" institutions of the Arbitration Court. It was exposed in open combat with the trade union movement. This situation did not last for long however, because in 1978 the government established a new Arbitration Court. This was an attempt to try to restore the old order. A return to the "good old days" of industrial relations under an Arbitration Court, meant a return to indirect control of industrial relations through the institutions of conciliation and arbitration.

This may have succeeded if it had not been for the government's unease at allowing the parties to control their own negotiation even with the aid of the Arbitration Court. During the period August 1977 to August 1978, there were no direct controls of

negotiations between trade unions and management, but there were indirect controls in the form of government statements as to what may be considered an accepted increase in remuneration. The government had entered what may be termed an indirect active phase. In some respects this position was even worse than the period when there were direct wage controls. It was worse because there was little certainty as to what was to be acceptable to the government and what was not. It is very unsettling and potentially industrially disruptive to permit negotiations to take place, then when agreement is reached to state that the government will veto the agreement because the amount negotiated is outside the informal, unwritten guidelines.

The situation became worse when the *Remuneration Act* was passed in August 1979.[1] Although the Act was passed initially to prevent the Federation of Labour from pursuing a claim in the Arbitration Court for a minimum wage order, its powers were much broader than merely regulation for general wage orders. It gave the government the legal authority to control both wages and conditions of employment. To in effect regulate for all conditions of employment. The effect of such an Act was seen in the Bulk Freight Forwarders Agreement which became a Regulation and could not be altered except by amendment or repeal of that regulation by the government. All control has been removed from both trade unions and employers. It was also seen in the Government's intervention in the Kinleith settlement.

So far I have concentrated upon recent developments in the area of wage fixing. This has been because as I mentioned earlier, the formal system of industrial relations is based upon the notion that industrial disputes must be settled through the legal procedures of conciliation and arbitration. And since most disputes between trade unions and management involve the determination of wages and conditions of employment, the formal system is often preoccupied with wage fixing. This preoccupation is seen more clearly when it is realised that it was only in 1970 that a distinction was made between disputes of interests, those relating to negotiation of wages and conditions, and disputes of rights, those relating to matters arising during the currency of the award or agreement.

There are some who saw this distinction as being unhelpful when it came to the practice of industrial relations. Such a distinction is understandable however in a system that places its faith in legal procedures to resolve its disputes. There are some obvious differences in the nature of a dispute that has as its cause the dismissal of a worker, and one that involves negotiating an increase in wages; obvious differences that is, in terms of how they should be resolved. Each is amenable to a different type of procedure. This procedure however is still based upon the concept of conciliation and arbitration. Settlement of rights disputes involves both a disputes committee, representing the conciliation phase, and the Arbitration Court, which may be used to arbitrate upon the particular dispute.

The development of different procedures to handle disputes of interest and disputes of rights was mainly introduced to prevent industrial disputes resulting in strikes. It has not prevented all strikes, and whether it has decreased the number is difficult to assess. The formalisation of disputes procedures however has led to other consequences. For instance it has increased the work of the Arbitration Court. This is not a problem in itself, but it has led to the necessity of all parties acquiring some legal expertise. This in turn has meant the area is becoming more and more technical. It is sometimes easier to win a case on a technical ground than on its merits. There is nothing wrong with this except it rarely resolves the cause of the dispute, which is likely to fester and to reappear at some later date. The demands on the Arbitration Court to strike a balance between the legal and the industrial are considerable. The

1. The lecture on which this paper was based was prepared before the Act was repealed.

major fear for the system is that as more lawyers invade the industrial arena, the more legal the Court may become, and the less likely the parties may be to use it as a forum for its dispute settlement.

Another factor that may inhibit the development of the system of legal dispute procedures is whether the Arbitration Court is willing to recognise the changing nature of employment and of industrial relations. The attitude of the Court in refusing to accept argument that access to favourable loan terms is not a condition of employment of bank officers, must make some unions wonder if their time may not have been better spent elsewhere than in a Court that shows such a conservative approach. It has also been apparent in several recent dismissal cases that the Court has little to offer to those who have been made redundant. At a time when redundancy is an increasingly important issue and cause of industrial stoppages, it is obvious that a trade union's time is better spent on political and not legal action.

Although the system of rights disputes procedures is only ten years old, I would argue that it is already showing an inability to accurately reflect what is happening within the informal system. Events have overtaken the legal system and unless it soon reflects what is happening in the market place it may find itself, if not redundant, at least not as well utilised as it may well have been. In many respects there is little the Court can do about such a fate unless the government is prepared to alter its jurisdiction.

In many respects similar problems have developed in the formal system of disputes procedures; both interest and rights dispute procedures. Both are inadequate to fulfil their primary function, namely, that of prevention of strikes. This is simply because procedures alone do not prevent strikes, at best they may prevent the number of strikes. They are also inadequate to fulfil their function of control of the actions of both the trade unions and management. They are inadequate because any form of legal control is only as effective as its enforcement or its acceptance. Recent developments would indicate, as has much of our industrial history, that enforcement of the legal provisions relating to industrial relations, particularly enforcement of strike legislation is difficult unless a major confrontation is sought with the trade union movement. Such a confrontation is always a possibility, and I would argue has become more of a possibility in recent times, because legal provisions have been enacted without first obtaining the consent of the majority of those they are to bind.

Acceptance or consent to the legal provisions that provide the framework for the industrial relations system has become more than ever necessary because of the recent developments that have taken place within the trade union movement. Although it is true that New Zealand's trade union movement has been dependent upon many of the legal provisions for its own organisational strength and for it to effectively bargain with management, recent developments would indicate that this dependence is not as strong as it once might have been. These developments include greater willingness of the movement to hire and use professional resources, extensive trade union education programmes for union members, gradual amalgamation of unions. They also include some assistance from the government in the form of issues around which the union movement can strengthen and unite. Apart from the whole question of wage controls, the government's attempt to introduce voluntary unionism forced many unions to justify their position to their membership and one can only assume they succeeded in this task because very few unions in fact voted to have voluntary union membership. Issues such as the dispute over allowing shops to open on Saturdays have done much to assist the retail unions to reorganise. In a sense it has been a combination of actors that have coincided to make the trade union movement look more organised and internally united than at any time in its history.

In conclusion, I wish to briefly summarise what I have seen as the major recent developments in New Zealand's industrial relations system and assess their

significance for the future development of the system. I have argued that the formal system of industrial relations was intended to prevent disputes resulting in strikes and lockouts by providing for disputes to be settled through statutory procedures. These procedures have been developed as a method by which industrial relations are controlled. The principal institutions through which this control has been exercised are the conciliation service and the Arbitration Court. Since 1968 these institutions have not been able to effect sufficient control, particularly in the area of wage fixing, and this has lead to an increasing involvement of government in the process of industrial relations. This involvement has resulted in transferring areas of jurisdiction from the Arbitration Court to the government, or more accurately the executive. The most obvious example of this was the recently repealed *Remuneration Act 1979*. This has meant that at the moment we have an industrial relations system based not only upon the concepts of conciliation and arbitration, which involves a commitment to tri-partite decision-making, but also state control, which involves the decision making authority resting solely with the government.

Whether or not this hybrid system can continue without serious industrial unrest will be decided by future developments in industrial relations. If the development of increasing direct government control is combined with continuing inflation, improving trade union organisation, and a withdrawal of support for aspects of the formal statutory system, then we can at least predict that New Zealand is unlikely to reach that much talked about plateau of industrial harmony in the near future.