*New Zealand Journal of Industrial Relations*, 1992, **17** 109-117

# LEGAL FORUM

The editors are pleased to introduce this new category for submissions to the *Journal*, and hope there will be regular submissions to the Forum. They welcome analyses, comment and discussion on relevant industrial law cases and industrial legislation. As with all submissions to the *Journal*, although preference is given to New Zealand and South Pacific material, submissions from elsewhere deemed of general interest are also welcome.

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## Dismissal Cases 1990-1991

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### Abstract

*The paper considers a number of recent Court decisions related to dismissals, and in particular their impact on industrial relations practice.*

### Introduction

Court decisions in the last few years regarding dismissal cases have been of considerable significance. One possibly influenced a major change in statutory protection against unjustifiable dismissal, others have had considerable impact with regards clarifying the meaning of relevant sections of past and current legislation, the quantum of compensation, managerial behaviour in general and with regards redundancies in particular. Indeed, it is suggested that antagonism engendered by certain decisions of the Labour Court very nearly saw the end of a specialised Court dealing with industrial relations issues. This paper looks at a number of areas influenced by recent case decisions.

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## General right to compensation

A notable aspect of the Employment Contracts Act 1991 was that it extended the right to compensation to all employees whose dismissal was deemed "unjustifiable" - even if it was not "lawfully wrongful". Previously *statutory* protection was accorded only to union members and originally only those covered by a registered award or agreement, although this latter requirement was later relaxed. Other employees had the protection only of common law with the significant case being that of *Addis* (1909). This House of Lords decision basically ruled that a dismissal was not lawfully wrongful if due notice was given. Thus common law protection was restricted to the right to notice or wages in lieu of due notice.

> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment ... (p.491)

However, a significant case in the High Court in 1990 could be deemed either to have made the statutory changes less meaningful or more probably to have gained support for a general statutory change and encouraged the Law Commission in 1991 to recommend the reversal of the Rule in *Addis*. This case was *Whelan v. Waitaki Meats* [1990] 3 NZELC 98,317. This case was not the first in New Zealand to have indicated disquiet with Addis (see: *Gee v. Timaru Milling Co*. Unrep Auck. High Court A387/85 February 1986, and *Horsburgh v. NZ Meat I.U.W*. [1988] 2 NZELC 96,397) but almost certainly has had the most impact.

This case involved the North Island Manager for Waitaki Meats, whose employment had been terminated in early 1988. The Court accepted that he was a highly competent, long serving manager with a high profile in the community. His enforced early retirement was part of an over-all cost saving exercise brought about by losses suffered by the parent company Waitaki International Ltd and there was no suggestion that there were grounds for dismissal.

The Court decided that Whelan was entitled to a year's notice. Although he had in fact been given only 16 day's actual notice and a month's pay in lieu, the Court found that he had received a number of additional payments, which in total, exceeded a year's notice or payment in lieu. Thus he had not been "wrongfully" dismissed.

However Galen J. found that:

> the action of the defendant in terminating the employment of the plaintiff in the manner in which it did was such as to cause the plaintiff undue mental distress, anxiety, humiliation, loss of dignity and injury to his feelings. (p.98,331)

In addition he considered the nature of the dismissal would have caused speculation which would affect Whelan's future employment prospects. Galen J decided that he was not bound by the *Addis* ruling and consequently awarded Whelan $50,000 compensation.

## Clarification of statute

The categories under which compensation may be awarded are the same under the current Employment Contracts Act 1991 (EC Act) as under the previous Labour Relations Act 1987 (LR Act). Thus interpretations under the previous legislation still hold. The categories (giving relevant sections from both Acts) are:

(a) for humiliation, loss of dignity, injury to feelings (s.40 c(i) (EC Act)/*s.227 c(i)* (LR Act))

(b) loss of any benefit, whether or not of a monetary kind (s.40 c(ii)/*s.227 c(ii)*)
(c) lost remuneration (s.41/*s.229*). (If the employee is found to have a grievance, it is mandatory to award the actual lost remuneration up to three months - unless the worker was also at fault.)

Compensation may be ordered whether or not reinstatement is also ordered. In practice, as expected, compensation tends to be greater if reinstatement is either not wanted, or is deemed that it is not practicable. (This could be either because the dismissed employee has already been replaced, or because it is deemed that a reasonable employer-employee relationship would be unlikely.)

In the Telecom case, discussed in more detail below, the Court of Appeal (1991) provided a clarification. Richardson J observed that:

> The conventional approach in the Labour Court has been to treat "lost remuneration" as applying up to the date of hearing and "loss of benefit" as applying to future losses. (p.95,360)

However, Richardson J criticised this interpretation. He pointed out that:

> ... the language of ("loss of benefit" section) is consistent with the view that compensation for past and future remuneration is to be determined under ("lost remuneration") the subparagraph is not related at all to the loss of ordinary remuneration from employment which it might reasonably be expected would be dealt with specifically elsewhere in the statute.
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> Certainly there is much to be said for a single remuneration loss calculation. However, in the end it is not material ... so long as there is no double counting and at some stage the overall position is assessed ... However I consider it beyond argument that the expectation of continued remuneration under an existing employment contract is not within ("loss of benefit") ... It is a prospective benefit, one to be obtained in the future, not the continuation of an existing benefit ... (it) include(s) long service leave, superannuation, redundancy and golden handshakes in various forms. (pp.95,360-1)

It does not appear as yet that this interpretation is fully accepted. Thus in *Singh v. Deka* (1991) an award was made of $5,000 to cover humiliation and loss of benefit. "Loss of benefit" was defined by the Tribunal as "loss of her expected ongoing employment relationship with the company".

## Quantum of Compensation

The two most prominent cases in recent times both had multiple hearings and went to the Court of Appeal. They are *Johnston v. Air New Zealand* (1988, 1989, 1989, 1989, 1991) and *Post Office Union v. Telecom South* (1990, 1991, 1991). In both cases the Labour Court initially awarded compensation at a level deemed outrageous by many employers and manifestly excessive by the Court of Appeal, and in both cases, the Court of Appeal's rulings or advice resulted in a final outcome considerably lower than the initial Labour Court decision. Even so, however, the final awards are sufficiently great to have significantly increased expectations and probable future awards.

The *Johnston v. Air New Zealand* case involved an employee who, after 14 years' service as a worker was appointed to a managerial role in June 1987. Within a month he had been dismissed for falsifying his time sheets. The case took an inordinate length of time and a number of hearings to be finally dealt with. This was occasioned in part by disagreement as to the employee's right to bring the action.

Although it was accepted that the falsification had occurred, the Labour Court deemed the dismissal unjustifiable on the basis of:

> the failure on the company's part to confront Mr Johnstone there and then. Had this been done it seems to us at least likely that Mr Johnstone would have paid much more attention to recording his times and ensuring that he was carrying out his duties in accordance with company directions ... In the last analysis we hold that Mr Johnstone's dismissal was unjustified as being unduly harsh in all the circumstances, particularly in view of his long record of service. (p.96,808)

The Court did not order reinstatement as this was strongly opposed by Air New Zealand, but made a very large award for compensation: $135,000 to cover humiliation and loss of benefit, and $59,700 for lost remuneration. This was equivalent to 28 months' salary. Air New Zealand appealed, on the basis the award was excessive and in effect it was being punished for opposing reinstatement.

The Court of Appeal upheld the appeal and, because the case had been dragging on for so many years, ruled on what it deemed to be a reasonable amount. The $135,000 was reduced to $25,000: $10,000 for humiliation and $15,000 for loss of benefit. This was in addition to the $59,700 lost remuneration.

In the *Post Office Union v. Telecom South* case, the employee was a senior manager on a salary of $86,000 plus benefits. Overall gross salary was deemed to be $110,000. The initial Labour Court award was: $20,000 for humiliation; $220,000 ($200,000 plus a Daimler deemed equivalent to $20,000) for loss of benefit; $55,000 (six months' salary) for lost remuneration. It is not surprising that this enormous sum generated a lot of attention. While the dismissal was clearly unjustifiable, both substantively and procedurally, it is difficult to see why the compensation should have been so much greater in *this* case, than in other equally unjustifiable dismissals. The Labour Court (1990) claimed it:

> exercised analogous recourse to the approach provided for in the Local Authorities (Employment Protection) Act 1963 (p.97,870)

However, assuming it was appropriate to use that Act as an analogy, the employee would be entitled only to a total of 15 months salary. As indicated, the Labour Court awarded a sum well in excess of that.

The Court of Appeal considered a number of questions, including whether the $220,000 was manifestly excessive. It was agreed that indeed it was. In indicating acceptable levels of compensation, Richardson J stated:

> the period of reasonable notice implied in such a contract at common law may be useful as a check. What is reasonable notice at common law depends on the particular circumstances, but it would be rare for the period to exceed twelve months. On that basis it would ordinarily be difficult to justify an award of compensation under (s.40) and (s.41) for a senior management employee substantially in excess of a year's salary overall. (p.95,362)

Casey J concurred:

> An award that goes too far beyond established patterns of compensation may not be seen as a fair and just solution, especially in the light of current economic conditions. (p.95,364)

On return to the Labour Court (1991) the matter of compensation was reconsidered. The $220,000 was reduced to $75,000 ($55,000 plus the Daimler).

The final (reduced) total compensation package in the Air New Zealand case was equivalent to 3.3 years' salary. In the Telecom case it was equivalent to 1.4 years' gross salary or 1.7 years' actual salary. Admittedly the Air New Zealand case involved a particularly long time period, and consequently the award for lost remuneration (2.3 years' salary) was exceptional. It should be noted however that the employee was in a very junior managerial position, and it was admitted he was at fault. The Court of Appeal's suggestion that it would be exceptional if a *total* package would exceed a year's salary for a *senior*

management employee seems to have been somewhat overlooked. It would appear that expectations and awards will definitely have been increased. (In a more recent case, *Harris v. Nurse Maude* CLC 9/91 the employee received three months' salary (before the hearing) and $30,000 for injury to feelings. In total this is around 1.3 years' salary.)

## Redundancy

The most noteworthy case under this category was *Wellington Caretakers IUW v. G N Hale & Son Ltd* (1990, 1990, 1991). Again, the Court of Appeal significantly modified an initial Labour Court stance, but once again the final outcome even if less extreme, has still created a significant change in industrial relations practice.

The case involved a cleaner who was deemed redundant by his employer and replaced by an independent contractor.

There has been a discernible change in Court attitude with regard to the justification of a dismissal on the grounds of redundancy. In the 1980's the attitude was that so long as the employer genuinely believed that a redundancy situation occurred, the dismissal would be justifiable. (see *Canterbury Hotel, etc, IUOW v. Fabiola Fashions Limited* [1981] ACJ 439, and the Court of Appeal in *City Taxis Society Ltd v. Otago Clerical Workers' IUOW* (unrep, CA 82/89, 8/12/89)).

However, in 1990 a change occurred. In *NZ Cleaners IUW v. Ferrymead* [1990] 3 NZELC 97551 the Court considered that a cleaner had been unjustifiably dismissed because:

> the contended commercial justification for it, in a redundancy setting, (had) simply not been established. (p.97,564)

In the Hale case, the Chief Judge went a lot further and stated the dismissal:

> was not, at the time, commercially necessary to ensure the ongoing viability of the respondent. It was therefore unjustifiable. (p.97,719)

The Chief Judge also specified that procedurally the dismissal was unjustifiable in that alternatives were not explored and the employee's union was not involved at an earlier stage.

The case went to Court of Appeal who rejected the notion that a dismissal for redundancy was justifiable only if it was necessary for survival. The employer's "right to manage" was heavily re-emphasised. The President of the Court of Appeal stated:

> In my opinion this Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him ... A reasonable employer cannot be expected to surrender the right to organise his own business. Fairness, however, may well require the employer to consult with the union and any workers whose dismissal is contemplated before taking a final decision on how a planned cost-saving is to be implemented ... Failure to follow a fair procedure does not mean that reinstatement will necessarily be practicable, but it is likely to have a bearing on other remedies. (pp.97, 989-91)

However, although Bisson J. also stressed the employer's right to manage, he went on:

> Where there is no current registered redundancy agreement or the award does not deal with compensation for redundancy, it follows that whether a dismissal for redundancy amounts to an unjustifiable dismissal or not turns on the question whether the circumstances call for compensation and, if so, what would be an appropriate amount in the prevailing circumstances. (p.97,993)

When the case went back to the Labour Court, the Chief Judge highlighted Bisson's statement observing:

> that judgement expresses for the first time the proposition that, on the issue whether the dismissal took place unjustifiably, the Court may consider whether the circumstances are such as to have required the employer to pay compensation for redundancy despite the absence of any express requirement to do so contained in a redundancy agreement or award provision to that effect. (p.95,315)

The Chief Judge ruled that the dismissal was unjustifiable:

> because the circumstances called for payment of compensation. None was paid and the amount that was offered and refused was fixed by the unilateral decision of the employer and was inadequate. (p.95,321)

He awarded the employee $5,000 in total : $3,000 for redundancy and $2,000 for injury to feelings.

This does not give a *universal* right to redundancy pay, in the absence of a redundancy agreement. However it does suggest that anyone made redundant in order to make an organisation more profitable (as opposed to a desperate attempt to avoid bankruptcy) will very probably be awarded redundancy pay by the Court on the grounds that the "circumstances called for payment of compensation".

## Discussion

The cases discussed above clearly have significance to industrial relations practitioners. It is submitted that some of the above decisions very nearly had even greater impact - namely the abolition of a specialised Court dealing with industrial relations issues. Those decisions raised considerable disquiet within two powerful lobby groups: the New Zealand Business Roundtable (henceforth: "Roundtable" - a body comprising the Chief Executives of many of New Zealand's largest organisations) and the New Zealand Employers' Federation (henceforth NZEF). Thus, a senior executive in the NZEF (Clark, 1990) claimed that in his view:

> ... Court interpretations mean that employers' rights to terminate employment are now so severely limited that the system is grossly unfair. (p.7)

The Roundtable (1991) were more direct calling for:

> The abolition of the Mediation Service and the Labour Court, and the transfer of legal disputes arising from employment contracts to the civil courts, is therefore recommended. (p.17)

This could be dismissed as mere rhetoric and posturing or the normal negotiating stance of a group asking for more than they want or expect. However it must be emphasised that the National Government has demonstrated a considerable degree of empathy with NZEF and Roundtable views on legislative reform. This has been noted both by academics (Anderson, 1991) and the media. Thus Macfie (1990) stated in the *National Business Review*:

> Rarely has a lobby group wishlist been transformed so accurately into legislation. The Employment Contracts Bill is the Employers' Federation's agenda for change ... The bill shows its anti-union face ... (pp.1-2).

Thus it is submitted that it is not too fanciful to suggest that the Labour Court came close to being totally abolished, and not simply having a name change.

The possible costs of an unjustifiable dismissal decision are now markedly increased for employers. Hopefully this will lead to better management practice - which presumably is the major motive behind the Labour Court's decisions. Unfortunately this may not be the only result. As discussed, those decisions could have resulted in the abolition of a separate industrial court. In addition, the way the decisions read also suggests that efforts to provide

adequate compensation can backfire. In the Telecom case the Judge appeared disdainful that Telecom had offered the employee "almost $50,000 to go quietly" (1990, p.97,866). This was at a time when there had only ever been one award above $20,000 *(Johnston v. Air New Zealand*, [1991] p.95,366). This reaction could encourage employers to offer less on the grounds that any initial offer seems to be taken as the starting point.

The concept that there is an implied term in every contract of employment that employers will behave in such a way as to maintain trust and a good employer-employee relationship has been further highlighted. Although this concept has been quite frequently expressed in judgements over the past few years and was reflected in the *State Sector Act 1988* with its requirement that State Sector employers be "good" employers, there is clearly a need for it to be further and increasingly emphasised. The employment relationship is not simply an exchange of wage for work with no obligation to behave with human consideration.

The Court of Appeal has emphasised in the "Hale case" not only the employer's right to manage but has taken as the *meaning* of redundancy the definition used in the Labour Relations Act 1987 with approval, saying it "corresponds to ordinary usage". This definition is that redundancy is defined as a termination "attributable wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer". It should be noted that there are no safeguards for employees' job security in this definition. The dismissal in the "Hale case" was because the employer could give the work to an independent contractor, and save money. Once the independent contractor was doing the work, the employee was clearly superfluous to the needs of the employer. However the *amount* of cleaning work had not diminished. Granted, the Court of Appeal in the same case did state that:

> a suggestion that alleged redundancy was being used as a camouflage for getting rid of an unsatisfactory employee might warrant examination. (p.97,989)

While it is not suggested that the Court at this point will accept as genuine redundancy the fact that *another employee* is available more cheaply, it is clearly only a very thin line between it being acceptable to make an employee redundant because an independent contractor can do it more cheaply and it being acceptable to make an employee redundant because another employee can do it more cheaply. There may be a *legal* distinction - but it is not obvious if there is a *logical* or *ethical* distinction.

The clarification provided by the Court of Appeal as to ss.40 and 41 and the concepts of 'loss of benefit' as opposed to 'lost remuneration' was of value. However it is submitted that there is a need for amendment to the legislation. The cases discussed illustrate there is little agreement as to what is a "fair" range for compensation awards, and what is a "fair" period of notice.

Given that in the current economic climate many persons found to have been unjustifiably dismissed could well face long term unemployment, it seems arbitrary and hardly fair either to the employees, or their former employers, that the period of time from dismissal to court hearing can result in enormous variations in payout for lost remuneration (three months in the Nurse Maude case, to 28 months in the Air New Zealand case). Obviously if the decision included reinstatement or the economy was such that re-employment was probable, this problem would not be so severe.

A further potential for unfairness occurs when a dismissal may be substantively justified, but there were procedural deficiencies which rendered the dismissal unjustified. Under the current legislation compensation may be reduced if the employee was also at fault - but it is a total zero-sum game - what comes from the employer goes to the employee. There can obviously be cases where both the employer and employee were grossly at fault. The

employer "deserves" to have a high compensatory award made against him/her - but the employee does not "deserve" to gain. In this case a penalty is called for.

It is submitted therefore that the legislation would be improved if it allowed for:

(a) reinstatement and/or
(b) compensation and/or
(c) penalty.

the compensation would allow for consideration of all factors currently described, but would be a global consideration, not three separate considerations. While it will ever be that "cases are determined on their merits" - there seems no reason to the observer why the statute cannot establish a "usual range" in terms of weeks or months of wage/salary. The legislature could then explain why high status employees, who will also enjoy high salaries, should as of right expect *more* months' salary compensation than low status persons on low salaries.

## References

*Addis v. Gramophone Co. Ltd* [1909] AC 488.

Anderson, G. (1991), The Employment Contracts Act 1991: an employers' charter?, *New Zealand Journal of Industrial Relations*, V.16(2), pp.127-142.

*Canterbury Hotel, etc. IUOW v. Fabiola Fashions Limited* [1981] ACJ 439.

*City Taxis Society Ltd v. Otago Clerical Workers' IUOW* (unrep, Ca 82/89, 8/12/89.

Clark, M., (Manager Labour Market, New Zealand Employers' Federation), (1990), Address to IIR Conference.

*Gee, v. Timaru Milling Co*. Unrep Auckland High Court A387/85 February 1986.

*Harris v. Nurse Maude* CLC 25 February 1991, 9/91.

*Horsburgh v. NZ Meat IUW* [1988] 2 NZELC 96,397.

*Johnston v. Air New Zealand Ltd*
Unrep ALC 82/88 8 August 1988 (Labour Court)
[1989] 2 NZELC 96,798 (Labour Court)
[1989] 2 NZELC 97,089 (Court of Appeal)
Unrep WLC 24 November 1989 (Labour Court)
[1991] 4 NZELC 95,365 (Court of Appeal).

Macfie, R., (1990), "Labour Act Thrown Out Window", *National Business Review*, 21 December.

New Zealand Business Roundtable (1991), *Submission to Labour Select Committee on Employment Contracts Bill*, Wellington, New Zealand Business Roundtable.

*Post Office Union v. Telecom South Ltd*
[1990] 3 NZELC 97,824 (Labour Court)
[1991] 4 NZELC 95,352 (Court of Appeal)
Unrep. CEC 11/91 25 September 1991 (Employment Court).

*Singh v. Deka* [1991] Unrep AT 6/91, AET.

*Wellington Caretakers IUW v. G N Hale & Son Ltd*
[1990] 3 NZELC 97,696 (Labour Court)
[1990] 3 NZELC 97,985 (Court of Appeal)
[1991] 4 NZELC 95,310 (Labour Court).

*Whelan v. Waitaki Meats Ltd* [1990] 3 NZELC 98,317 (High Court).