

NOTE

Industrial relations legislation in 1985

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This note outlines and discusses the major changes in industrial legislation to take place in New Zealand during 1985.

Introduction

The signal achievement of the 1985 legislative calendar was the passage of the Industrial Relations Amendment Act 1985 (hereafter, the IRAA) and 9 companion pieces of amending legislation, all signed into law on 18 June. Introduced into the House on 20 December 1984 (460 NZPD 2790) as an omnibus Union Membership Bill, that Bill had 7 self-contained components, which provided for amendments to the Industrial Relations Act 1973, The Agricultural Workers Act 1977, the Aircrew Industrial Tribunal Act 1971, the NZ Railways Corporation Act 1981, the Post Office Act 1959, the State Services Conditions of Employment Act 1977, and the Wages Protection Act 1983. Thanks to a Supplementary Order (5 March 1985, 461 NZPD 3405), amendments to the Coal Mines Act 1979, the Fire Service Act 1975, and the Waterfront Industry Act 1976, were added, so that when the planned-for breakup took place (31 May 1985, 462 NZPD 4457) 10 self-contained amendments to 10 statutes were ready for passage.

Nine of the amendments were of a piece, providing for preference for union members, ballots for that preference clause, and conscientious objection rights and procedures, but the tenth amendment was an across-the-board provision protecting the automatic deduction of union dues from wages. The union membership and conscientious objection provisions will be discussed under the heading of the IRAA, the other 8 limited sector amendments being a repetitive statutory chorus, while the Wages Protection Act will be discussed separately.

Before discussing these substantive law changes, it is appropriate to make several introductory comments:

- (1) The parliamentary debates on the union membership legislation reveal the strengths and weaknesses of our parliamentary system, the best and worst in our parliamentarians. Readers with time and fortitude can however, find principled, thoughtful, and insightful debates on individual integrity, collective security, principles of collective bargaining and industrial relations generally (see 460 NZPD 2790-2808, 461 NZPD 3404-3410, 462 NZPD 4181-4210, 4415-4456, 4477-4496).
- (2) The complexity of modern lawmaking is staggering. Whereas the old Industrial Conciliation and Arbitration Act of 1894 took up only 23 pages of the statute book, with 91 sections to define and create the system, the Union Membership Bill, as

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reported back from committee, subsumed 213 pages and as many sections just to reverse the effects of section 5 of the IRAA of 1983. This complexity, and the necessary attention to detail justifies the frequent remark of Mr Stan Rodger, Minister of Labour, that reversal of National's voluntary unionism programme was not simply a matter of turning the clock back to 1983. Had the job been done in haste, in the last days of 1984, as this writer has already suggested (Hodge, 1985), it may well have become the proverbial "dog's breakfast".

- (3) In an ordinary year, the Union Membership Bill would have been the centrepiece of legislative attention and media scrutiny. Even compulsory versus voluntary unionism, however, took second billing in 1985 to interest generated by Fran Wilde and the homosexual law reform legislation. Still, according to Fred Gerbic (462 NZPD 4181), the Union Membership Bill attracted some 389 submissions, with at least 358 against and only 25 in favour. The debates were fiercely contested, and it seems likely, given New Zealand's legislative revolving door, that the law of union membership will appear on the order paper again before too long.

IRAA 1985 – Union preference and balloting

The return of compulsory unionism, after 17 months of voluntary union membership (1 February 1984 – 1 July 1985) is accomplished by a new substantive union membership clause (hereafter, the UMC) and by several procedural provisions.

The new substantive UMC is contained in the new section 98 of the Industrial Relations Act 1973, (hereafter called the principal Act), as substituted and inserted by section 4 of the 1985 IRAA, effectively repealing section 4 of the 1983 IRAA; the model clause requires that persons 18 years and older employed by an employer covered by an award must join the relevant registered industrial union of workers within 14 days after being employed, and must remain such a member while so employed. Statutory teeth are found in a new section 103, also inserted into the principal Act by section 4 of the 1985 IRAA, entitled "Enforcement of union membership clauses". A \$500 breach of award penalty (s148(1) of the principal Act) is imposed on employers who continue to employ a non-unionist after being notified by the union, and a \$50 fine (s148(3) of the principal Act) is imposed on workers who fail to become a member after being requested to do so by the union. The union must notify the employer that the worker has rejected the union request. The pre-1984 (and post-1976) Labour Department abstention is reinstated by section 103(2) which relieves the Department from responsibility of policing and prosecuting breaches of UMCs.

Ancillary protection against abuse is found in section 98A and 146A, which make the section 98 UMC the exclusive measure and compulsion of union membership, and which, by implication, thereby outlaw any pre-entry closed shop potentiality. The employer retains complete freedom to hire the members of any union or no union, so long as the proper union is joined within 14 days of engagement. Further protection is guaranteed by section 12 of the IRAA 1985, inserting a new subsection (1A) into section 182 of the principal Act, and forbidding any retrospective collection of past union subscriptions which might have gone unpaid during the 17 month membership holiday. (Presumably that would not protect a worker who remained in employment and who never formally resigned from the union in question; he or she would remain a member, non-financial to be sure, but a member subject to union subscriptions as a debt.) Section 182 is itself of importance in the conscientious objection debate, and is discussed below.

Machinery provisions

A mere definition in section 98, the UMC is not part of the law of the land; it only

become legally meaningful and operative through being included in awards and agreements. There are 2 mechanisms which make the connection; the first is the so-called transitional clause, in section 17(2) of the 1985 IRAA. That section bluntly stated that the UMC shall be deemed to be part of any award or agreement, from 1 July 1985, if the predecessor of that award or agreement, on 1 February 1984, contained an unqualified preference clause, for a period of 18 months, or until a section 99 ballot is conducted and certified.

The first mechanism thus envisages that the second, a "retention" ballot, will take place before the end of 1986. Ballots, both the standard "retention" and the less common "restoration" or "initial" ballot are described in clauses set out in section 99, as statutory imposed union rules, and transmitted into awards and agreements by the registrar in section 100. The rulebook of every registered industrial union of workers is deemed to include a detailed set of rules for the appointment of returning officers, the issue of special ballots, categories of persons eligible for special ballots, conduct of meetings, written notice of the special meeting, and (in the case of restoration and initial ballots) publicity measures to insure notice being given to non-union members who would be covered by UMC.

In sum, these rules provide for special meetings to be organised convened and conducted by the union, with a secret ballot (supervised by an agent of the Registrar of Industrial Unions) of the financial members present at the meeting (or in the case of restoration and initial ballots, other qualified workers present at the meeting) in the following terms:

I vote *in favour* of the Union Membership Clause because I believe workers *should* be obliged to join the union.

or

I vote *against* the Union Membership Clause because I believe workers *should not* be obliged to join the union.

Further provisions implement the majority decision, allow electoral inquiries, create jurisdiction in the Arbitration Court to hear such an inquiry, impose offences in relation to balloting (personation, intimidation, bribery, multiple voting etc.) and prohibit a fresh election to be legally effective until 3 years have elapsed from the previous ballot (whatever the result).

The details and procedures seem as fair and meticulous as the environment permits. Whatever the guarantees of a secret ballot, however, the meeting will be organised and advertised by the union in premises occupied by the union, the gate and the chair will be kept by the union, the special ballots will be issued by a union-appointed officer, and those conditions may be inherently coercive or at least off-putting to the non-enthusiast and anti-unionist alike. A more evenhanded and democratic measure might be taken on neutral ground (entry to the work place?) of all workers (not just those bold and determined enough to enter union territory to speak and vote against the union). Given the friendliness of the balloting environment, it might be predicted that:

- (1) a low percentage of workers will turn out to vote;
- (2) a high percentage of those voting will be in favour of the UMC; and
- (3) union officials will claim great support for compulsion.

Exemption from union membership

The second major feature of IRAA 1985, the opposite side of the compulsory coin, is a generously-defined conscientious objection escape hatch from the UMC. Sections 105 - 112A create a Union Membership Exemption Tribunal, with the powers of a commission of inquiry (s105) and a flexible procedure (s111) whose 3 members are to have experience in religious beliefs, human rights, or industrial relations (s107). Section 112C defines the grounds for exemption exclusively as "genuine objection, on the grounds of conscience or other deeply held personal conviction, to becoming or remaining a member

of any union whatsoever or of a particular union". (Compare the original "CO" clause, in section 6 of the 1951 Industrial Conciliation and Arbitration Amendment Act: "Any person who objects on religious grounds to being a member of a union may apply . . . for a certificate . . . The Registrar shall refer every such applicant to the Conscientious Objection Committee appointed under the Military Training Act 1949"). The objection need not be religious in character and seems to encourage, unlike its predecessor in the principal Act (s105), selective conscientious objection.

"Selective" objection suggests opposition to a particular union, not compulsory unionism as such: "Although I have happily joined other unions in the past, I object to the Westland Asbestos IUOW because of its politics". Compare, in the sphere of military conscription, a similar selective conscientious objection, that of *R v District Court : exparte Thompson* (1968) and *US v Gillette* (1971) : "I do not object to serving in the defence of my country, but I won't go to Vietnam".

The applicant must complete Form 7, contained in the Schedule to the IRAA 1985, make out a cheque for \$100, which goes into the consolidated account (s112E; SR 1985/162, Regulation 3), and attend a hearing conducted by the Tribunal. The applicant has a right to be assisted by counsel (s112I). The union concerned has a right to appear (s112G) and the Federation of Labour (or other "central organisation of workers") may apply to be heard (s112J) but the FOL's appearance is a matter for the Tribunal's discretion, not a matter of right. No hearing need be held if the union concerned does not object to the application (s112H).

In the past the conscientious objection option has been little-known, and used primarily by certain Christian groups. (To take a random year, in 1982 there were some 213 CO applicants – of those 116 were Exclusive Brethren, 16 were Seventh Day Adventist, 44 were "other religions" and only 37 were "other grounds". (Department of Labour, 1982). Given the rather more prominent profile of the compulsory – voluntary issue, the media attention given to the early cases, and the broader grounds entitling objection, it may be that applicants for the CO exemption may number in the thousands in 1986, instead of hundreds.

It should be pointed out that existing law continues to protect union members, in a political minority, against forced contributions to political levies. Section 182(2)(a) of the principal Act allows a registered union to bind its members to pay "a levy to be applied in furtherance of political objects" (i.e. capitation fees to the Labour Party) but section 3 of the Political Disabilities Removal Act 1960 exempts union members from paying such levies if objection is made to the union secretary within 14 days of receiving written notice that the levy is payable).

Wages protection

An amendment to the Wages Protection Act 1983 is an essential part of the union membership package. When National's voluntary unionism programme came on line in 1984, it did so in 2 stages. The first stage was the substantive law of voluntary membership, commencing on 1 February 1984. At that time, and until 1 July 1984, a union member could resign from the union, but he/she had to take the initiative, had to resign formally from the union, and inform the employer that the automatic salary deduction in favour of the union should be stopped. On the 1st of July 1984, when section 16 of the Wages Protection Act 1983 became operative, automatic salary deductions became illegal and the employer committed an offence if he made such a deduction without express written consent of the worker concerned. After 1 July 1984, financial membership of many unions melted away through inertia and attrition with the apathetic majority who did nothing becoming unfinancial automatically.

The 1985 Amendment to the Wages Protection Act reverses that aspect of section 16, and exempts union subscription from the prohibition against deductions from the wage packet. Unless the employers' assessors fight against it in the annual dispute of interest,

automatic deductions will again be part of the award system.

Finally, an accounting change, chiefly important to conciliators, mediators and Arbitration Court judges, makes the salary of those officers determinable by the Higher Salaries Commission (Industrial Relations Amendment Act (No. 2) 1985).

Conclusions: the future

It seems likely that the debate on the proposed Bill of Rights, focussing on Article 10: Freedom of Association, will keep the union membership clause in the public eye; similarly, more intensive pursuit of exemption status will give that issue more prominence than ever before. The coming year will see employers resisting automatic deduction of union dues, and unions will seek a tighter conscientious objection procedure.

References

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- New Zealand Parliamentary Debates (various issues).

List of cases

- R v District Court: ex parte Thompson* (1968) 118 CLR 448
- US v Gillette* (1971) 401 US 437