INDUSTRIAL LAW CASES

PERSONAL GRIEVANCE — DISMISSAL

In February and March 1979 the Arbitration Court delivered some six decisions (which are briefly noted) concerning the personal grievance procedure, the exercise of the discretion to allow an individual leave to proceed to the Court where the Union has decided not to proceed and the grounds for dismissal of a worker. Taken together the cases re-emphasize that misconduct signifies behaviour inconsistent with the due and faithful discharge of the servants' duties under the contract of employment. The degree of inconsistency is the decisive factor and there is no fixed rule of law defining the degree of misconduct justifying summary dismissal or dismissal on notice. The sufficiency of justification varies with the proven misconduct, the nature of the business and the position held by the employee.

Oakman v Bay of Plenty Harbour Board AC 2/79 Arbitration Court, Wellington. Judgment 8 February 1979, Horn J.

On 15 July 1977 O, (the applicant, and gatekeeper of 6½ years standing) was summarily dismissed. Gatekeepers on night shift employed by the respondent had for at least 5 years taken portable TV sets to watch when not otherwise occupied. This practice was apparently abused and in July 1977 the foreman gave oral instruction to O not to use a TV set in the gate house. O failed to comply on three occasions and was summarily dismissed on the fourth. O contacted his local union and some officials met the Board officials (without O being present); the Board refused to reinstate O and the union executive decided to proceed no further. An application to the Court was made under s.117 of the Act. The Court found that (i) the union had not informed O of its decision not to proceed and (ii) the matter was not disposed of and (iii) O had not been able to have the matter dealt with promptly; leave was given O to proceed. The Court then held that dismissal was justified although not summary dismissal and consequently O ought to receive payment in lieu of notice.

Campbell v. Vacation Hotels Ltd AC 10/79 Arbitration Court, Auckland. Judgment 19 February 1979. Horn J.

C. sought leave to proceed after the Union had taken the matter "to a certain stage." Leave was granted and the Court indicated "quite firmly that its sympathies lie with Mrs Campbell." From 6 March 1972 C was employed as an accounts clerk. On 1 June 1976 her employment was transferred to the respondent company which agreed to carry over leave and service entitlements. C entered hospital early in 1977 and required an immediate operation. The company was kept informed of her condition. On 10 February 1977 she received a letter from the company dated 9 February 1977 dispensing with her services by giving one weeks notice of termination. C had used all her sick leave. The Court observed that "if a worker is not entitled to sick leave and is absent for some significant period then there are circumstances in which an employer could be entitled to a replacement. She did receive the notice required for dismissal in

terms of the award . . . it would have been more fair on the part of the respondent if it had paid one weeks wages to Mrs Campbell. It must have been known to the company that, by giving one weeks notice in the circumstances in which Mrs Campbell was, she could not have worked out her notice physically. Had she been able to do so she would have received a weeks pay.'' The Court approached the question of leave to proceed as being closely intertwined with the merits of the case. Leave to proceed was granted but the dismissal was not unjustified.

Muir v. Southland Farmers Co-operative Association Ltd. AC27/79 Arbitration Court, Invercargill. Judgment 6 March 1979. Horn J.

M. sought leave to proceed with a personal grievance arising out of his dismissal; he had never joined the appropriate union contrary to an unqualified preference clause and the union declined to act on his behalf. The Court held that M could not proceed, because actual membership of a union is a prerequisite before a worker can invoke s.117 (3A) (which provides for leave to proceed personally.) The Court observed that the Act operates on employer and employee unions and that persons not required to be members of unions, are not debarred from joining the appropriate union. The decision has major implications for non-unionists which were underlined by the Court's offer to state a case for the Court of Appeal.

McIntosh v. Brambles J.B. O'Loghlen Ltd AC 22/79 Arbitration Court, Auckland. Judgment 13 March 1979. Williamson J.

M. a wharf foreman of 5½ years standing was summarily dismissed on 6 July 1978. He obtained the support of his union following his dismissal but after ''difficulties of communication'' between himself and union officials, he informed the union he would proceed on his own. He obtained leave to proceed with his personal grievance claim but only with ''considerable hesitation.'' The Court observed that s.117 (3A) was a default procedure, not an alternative procedure to be used at an aggrieved person's option. The claim also failed on the merits. Although there was a conflict of evidence the dismissal, following an attempted assault on a superior, was held to be not unjustifiable.

Upton v. Oneroa-Surfdale Transport Limited AC 21/79 Arbitration Court, Auckland. Judgment 13 March 1979. Williamson J.

U. was dismissed on 25 September 1978. He had previously been dismissed on 31 August 1978 but his union had then secured his reinstatement. His union did not support his case on this second occasion. The Court gave him leave to proceed because there was some doubt whether the union's decision not to support him was based solely on the merits (apparently U had become unpopular with fellow workers). The Court observed that a union's decision not to support a member's case is not ''a failure . . . to act or to act promptly'' if the reasons are adequate. His claim failed. The dismissal following ''the culmination of a series of incidents of unsatisfactory work and casual attitudes towards the care of moneys belonging to the employer'' was not unjustifiable.

Auckland Clerical and Office Staff Employees' IUW v. Vacation Hotels Limited
AC 23/79 Arbitration Court, Auckland. Judgment 16 March 1979. Williamson J.

P, the telephone operator at the Intercontinental Hotel was found asleep on a coat and pillow on the floor of the switchboard room at 3.00 am. An alarm buzzer was going. He was woken by the night manager and resumed his duties. Later in the day he was dismissed and given his pay. The Court considered evidence of a previous incident; the lack of opportunity given for explanation; the lack of meal breaks; P's back ailment; the reasonableness of the belief that the alarm buzzer would wake P; 8 years past service and other matters. It ordered reinstatement in a position not less advantageous but did not order reimbursement in wages. A dissenting judgment was also delivered by Mr Walton.

PUBLICATION OF CIRCULAR CALCULATED TO INTERFERE WITH OR PREJUDICIALLY AFFECT CONCILIATION COUNCIL.

N.Z. Printing and Related Trades I.U.W. v Printing Industry Federation of New Zealand Inc.
Arbitration Court Wellington 16 March 1979 (A.C. 20/79.) Horn, J.

Conciliation proceedings with a view to obtaining a new commercial award had broken down but were not completely abandoned and were adjourned sine die. Immediately after the adjournment the Printing Industry's Federation, over the signatures of its Chairman and Executive Director sent the circular to its employer members advising that the Union had rejected the Employers' offer and that the Conciliation proceedings had been adjourned sine die. Comment was added on the circular that in the view of the Federation it was "difficult to understand the reasoning behind the Union's moves because the offers made were in keeping with those already accepted by the Unions from the Packaging Institute and the Photo Engravers Employers within the last few weeks". The circular was headed "for your Notice Board" and it was common ground at the hearing which subsequently took place at the Arbitration Court that the Federation had intended its member employers should place copies of the circular on their Notice Board for the attention of employees in the industry.

The Union took exception to the fact that the employers chose to communicate with its members in this way and brought a prosecution against the Federation and its executive members under section 146 of the Industrial Relations Act 1973. That section makes it an offence to print or publish anything "calculated to obstruct or in any way interfere with or prejudicially affect any matter before a Conciliation Council or the Arbitration Court".

At the hearing the Union witnesses gave evidence that the Notice had in fact been placed on numerous Notice Boards in printing establishments around the country and that this had had the effect of causing many Union members to wonder whether their assessors at the Conciliation Council proceeding were properly promoting their interests in rejecting the offer made by the employers.

On cross examination, on the other hand, it transpired that the Union itself had forwarded circulars to printers presenting their own side of the story so far as the Conciliation proceeding was concerned. It was also conceded by Union witnesses on cross examination that on previous occasions during the conduct

of conciliation proceedings the Union had published comment on the employers actions in those proceedings.

The Arbitration Court held that the effect of the Notice that had been published by the Federation when read by Union members could only be to cause dissatisfaction with the Union and lack of faith in the Union's assessors. The court ruled that many Union members would be expected to bring pressure on the Union and their assessors to accept the offer of the employers as indicated in the Notice. Accordingly the court found that the circular was calculated to interfer with or prejudicially affect the matters in conciliation.

The court however also confirmed that an employer is entitled to communicate his views on industrial matters to his employees. ''There may be instances'', the court said ''where there is insufficient communication on such matters but any communication which denigrates employers or Union assessors goes far beyond that entitlement''.

A conviction was entered against the Federation and a fine of $50 imposed with $25 costs to the Union. The employer member of the court however dissented from that decision. Having regard to the earlier occasions on which the Union's publications had in his view ''blatantly and intemperately attacked the employers assessors'' he thought that the instant case was one of the ''pot calling the kettle black''.

Clearly therefore employers (or for that matter Unions) who choose to comment either publicly or to their members or employees on the state of progress (or lack of it) in conciliation proceedings will do so at their own risk. Anything short of a full accurate and purely factual account is likely to run foul of section 146 and may lead to a conviction if an information is laid by the opposing party. Having regard to the considerable amount of published comment that is made by both sides to industry in respect of industrial disputes that are before either a conciliation council or the Arbitration Court the decision in the Printing Federation case is likely to have widespread importance.

REFUSUAL BY ARBITRATION COURT TO MAKE AN AWARD.

N.Z. Harbour Boards Employees I.U.W. v N.Z. Harbour Boards I.U.E.

Arbitration Court, Wellington. 15 March 1979 (AC19/79). Jamieson, C. J.

Section 88 of the Industrial Relations Act 1973 provides that when a dispute of interest has been referred to the Arbitration Court, the court may, if it considers that for any reason an Award should not be made, refuse to make an Award.

In the present case the Arbitration Court in the exercise of its discretion refused to make an award in respect of the claim by the Harbour Boards Employees Union that an award should be made in respect of clerical workers and/or administrative workers, supervisory and/or technical workers who are members of the Union but who are not currently covered by the N.Z. Harbour Board Employees award. At the hearing before the Court the Union's Advocate advised that the proposed award was intended to apply to ''middle range'' people but not to ''top'' people. In particular the union wished to obtain coverage in the award for senior clerical and administrative workers whose salary was determined by a grading system operated by the Auckland Harbour Board.

The potential for award coverage of such workers arises because the Rule Book of the New Zealand Harbour Board's Union allows memberships to all employees permanently employed by Harbour Boards. Strictly speaking this could include senior administrative officers including the general manager and the chief engineer of Harbour Boards, an anomaly which has been referred to on previous occasions by the Waterfront Industry Tribunal. The existing National Harbour Board's award however covered only those workers who were specified in schedules to that award. Those schedules included lower paid clerical workers but did not clearly include clerical workers of the kind now sought to be covered.

The Arbitration Court pointed out that it has previously been ruled that when a Union seeks to obtain an award in an area where there has not previously been one a heavy onus rests upon it to justify the making of the award (see re **Canterbury Shop Employees** 44BA 751, **New Zealand Electrical Employees** case 49BA 478, **Canterbury Freezing Works** case 59BA 414 and **Taranaki Hydatids Inspectors** case 65BA 2559).

Evidence was laid at the hearing that a substantial proportion of persons who might be covered by the new award preferred to remain without such coverage and preferred not to join the Union. The Court found that the Union had not made it clear exactly which employees it wished to cover by the new award. Nor was it entirely clear as to which Harbour Board employees were covered by the existing national award. Accordingly, the Court ruled that the claims as filed lacked sufficient detail as to which employees it was designed to cover and for that reason the present proceedings should not be continued and an award should not be made. The Court however urged the parties to confer with the purpose of dispelling the confusion that exists in respect of the coverage of the existing award.

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REVIEWS

Alan J. Geare, Joyce J. Herd and John M. Howells *Women in Trade Unions: A Case Study of Participation in New Zealand.* Victoria University of Wellington, Industrial Relations Centre, Industrial Relations Research Monograph No. 6, January 1979, pp. 73.

This book comprises a sortie into hitherto unexplored research territory in New Zealand. As such it has been eagerly awaited by unionists, womens studies specialists and students of industrial relations. It does not claim to be a theoretical study or a rigorous piece of experimental research, but a "Case Study" (title) whose "main purpose is to provide basic background data" (preface).

It is not proper to make severe technical demands of a study with such modest claims. On the other hand even basic data is only as good as the questions asked and the methods used. There are some definite shortcomings in these areas which require mention to put the data in perspective. There are also some missed opportunities which should be drawn to the attention of future