themselves have the resources to help train a chaplain, thus adding competence to their chaplain's independence.

The preceding comments make clear some of the emphasis the local Industrial Mission will now give to its work:

- Establishing the concept of a chaplain more as an "industrial" than as a "domestic" counsellor.
- Clarifying between companies and chaplain their mutual expectations.
- Training chaplains more thoroughly to help them meet their extended role.

Bill Wright's visit also highlighted the need for churches to release more money and person-power for work in the industrial sector, as well as for the establishment of a lay education programme to enable participants to see that "faith at work" extends beyond personal behaviour. Of greater significance in this regard is an intelligent concern for the reform of those structures that deny individuals the freedom to develop their own skills for the good of the organisation and their own satisfaction.

CONCLUSION

There are two types of management. "Type A" assumes that senior management alone define a company's needs, think up ideas, make plans and institute them. Decisions are communicated downwards for implementation; reactions and suggestions occasionally filter back up.

"Type B" assumes that when anyone in management or on the shop-floor senses a need appropriate representatives from each level get together to hammer out a solution. There are, of course, various intermediate steps between the two types.

The advantages of "Type B" are obvious:

- Ideas are generated by a much wider group of people, many of whom have direct knowledge of the issue at hand.
- Overall commitment to any plan is assured by involving those affected from the outset.
- The level of staff morale and fulfilment is greatly enhanced.

Although few examples of "Type B" are to be found in New Zealand, Bill Wright's visit evoked real enthusiasm for this style of management wherever he went — from workers, from managers,, and from government. It is on this enthusiasm that the hope for the future of our industries can be based. ⊙

INDUSTRIAL LAW CASES

HOLIDAY PAY ACCRUES DURING ILLEGAL STRIKE: SUPREME COURT UPHELD BY COURT OF APPEAL

Hellaby Shortland Ltd v **Weir,** Court of Appeal, Wellington, 30 April 1976 (C.A. 89/75), McCarthy P., Richmond and Cooke J. J.

Lord Upjohn recently observed in the English House of Lords that " . . . Factory Acts are Acts passed for the benefit of the workers and ought to be broadly construed." These remarks were, of course, made in the context of English legislation, but they have been adopted and repeated in the New Zealand Court of Appeal, by Mr Justice Richmond, with respect to the Factories Act 1946 of New Zealand. Richmond J, joined in his opinion by McCarthy P, and joined in a separate concurring opinion by Cooke J, thus upheld the decision of Mahon J in the Supreme Court that striking workers are entitled to statutory holiday pay which accrues during that strike. (**Weir** v **Hellaby Shortland Ltd** (1975) 2 NZLR 204, noted at (1976) NZJIR 19).

Appellant Hellaby, Defendant in the court below, argued that statutory holiday pay, which accrues under ss 26 and 28 of the Factories Act 1946, is payable only to workers who actually worked during the fortnight of the holiday in question, i.e. workers who were in the factory doing physical labour during that fortnight. The Appellant argued that the phrase "Any person . . . employed in any factory" in s 28 (1) can only refer to persons actually performing work in the factory. The unanimous Court of Appeal did not accept that submission, but agreed with Mahon J that "Any person . . . employed" in s 28 (1) refers to the status of the contract of employment, and not actual labour. If a contract of employment subsists, then, when a worker is sick or on strike (remembering that the employer may elect to treat the breach as funda-

mental and announce the termination of the contract of employment), the statutory holiday pay is due and payable.

The Court acknowledged that the verb "employ" had been used in two senses in the Factories Act, and gave the example of s 26 (2) where the unmodified verb could only refer to actual physical presence and labour. The Court was more influenced, however, by the use of the adverb "actually," used in s 28 (5) to distinguish the physical sense of employment from the contractual sense, and Richmond J said "I attach great importance to this change of language, as it occurs within s 28 itself."

In addition to the $48,000 judgment, Appellant was ordered to pay $350 towards Respondent's costs. ◉

"INDIVISIBILITY OF WEEKLY WAGE" DOCTRINE NOT APPLICABLE

Wilson (Inspector of Awards) v Heylen Centre of Marketing, Social and Opinion Research Ltd. Industrial Court, Auckland. 30 June, 1976 (I.C. 28/76). Jamieson J.

Disputes over applicability of wage provisions in awards can fall into one of only four categories:

(1) Conflicts between two clauses of the same award;

(2) Conflicts between clauses in two different awards;

(3) A conflict between a clause in an award and coverage by no award at all; and

(4) A conflict between coverage of an award on one hand and the status of independent contractor on the other.

This case fell into the third category, as the Inspector claimed that the worker was subject to successive New Zealand Clerical Workers Awards for the relevant period and due arrears of wages from July 1971 to May 1974. Defendant employer (hereafter Heylen) claimed that the worker was subject to no award. Ironically, Heylen did not suggest that the worker was really an independent contractor, and therefore exempt from awards and collective agreements, even though a similar employer recently won a similar case. See **Market Investigations Ltd v Minister of Social Security** (1969) 2 Q.B. 173.

Traditionally, the questions posed by disputes in this third category, as well as disputes in the first two categories, are resolved by applying one of two conflicting tests: the "indivisibility of the weekly wage" test or the "substantial employment" test. In choosing between the two tests, Jamieson J noted, reference is usually made "by common consent" to the opinion of Cornish J in **International Paints of New Zealand Ltd v Hopper** (1948) NZLR 240, 256 to ascertain which of the two doctrines might be applicable.

Jamieson J then recorded that Heylen submitted that the worker concerned allocated 20 per cent of her time to tasks described in the award, while the employee herself estimated that her clerical duties, as defined in the award, might take up 37 per cent of her time.

By both estimates, the clerical work was regular, continuous, not incidental or of an emergency nature, and quantitatively far in excess of the principle "de minimis non curat lex." Therefore, in the ordinary case, as Cornish J would have ruled, the "indivisibility" rule should apply, and the worker should be covered by and be paid by the relevant award.

However, in the instant case, the coverage clause of the award itself excludes application of the "indivisibility" principle; Clause 2 (a) of the Clerical Workers Award reads as follows:

"For the purpose of this award the term 'clerical worker' shall comprise all workers employed **wholly or substantially** (at various types of clerical work)" (emphasis added) 73 B.A. 1106.

The Court found as a matter of fact that the plaintiff had not established that the worker was so "wholly or substantially" employed. The "indivisibility" test does not apply, the worker concerned is not covered by the award, and the plaintiff's action under s 158 of the Industrial Relations Act 1973 must fail.

The Court did not specifically say whether they accepted or rejected the worker's estimate of 37 per cent of her time being given to clerical work. If they did accept

that submission, they found that 37 per cent was not employment "wholly or substantially" devoted to clerical work. If, as is likely, they found the employee's 37 per cent estimate not proven, then the ratio of the decision must be that 20 per cent (Heylen's submission) does not amount to "substantial." In making that finding, Jamieson J must have relied on the decision of D. J. Dalglish, Deputy Judge of the Court of Arbitration in **Schierning (Inspector of Awards)** v **Westerman and Co,** 49 B.A. 1542, where the Court found that the worker concerned, who devoted, at most, 25 per cent of her time to the work in question, was not "wholly or substantially" so employed.

In any event, this action would have been time-barred under the Industrial Conciliation and Arbitration Act 1954, s 211, except for any work done under an award current on 8 March 1974 (the date when the Industrial Relations Act 1973 came into force). See s 236 (8) of the 1973 Act, and the recent decision of the Court of Appeal in **Anderson (Inspector of Awards,** v **Malcolm Furlong Ltd**, noted infra in these pages. ⊙

ARREARS OF WAGES — I.R. ACT STATUTORY LIMIT APPLICABLE ONLY TO AWARDS MADE THEREUNDER

Anderson (Inspector of Awards) v **Malcolm Furlong Ltd.** Court of Appeal, Wellington. 26 August, 1976. Richmond P., Woodhouse and Cooke J. J.

This matter came to the Court of Appeal by way of a case stated by the Industrial Court pursuant to s 51 of the Industrial Relations Act 1973. (See the notation of that decision at 1 NZ Recent Law (N.S.) 311).

In the original hearing before the Industrial Court, the Inspector of Awards had argued that two car salesmen in Taumarunui were covered by an award, and were due arrers of wages for the period from 8 June 1970 to 7 March 1972. Under s 211 of the now obsolete Industrial Conciliation and Arbitration Act 1957, such an action would be time-barred, by the two-year limitation in that section. Under the new Industrial Relations Act, s 158 (2), a claim is only time-barred after a six-year time span. The legal question put to the Court of Appeal is whether the time-barred claims of 1970 and 1971 are revived by the new Act, which came into force on 8 March 1974. Does s 158 (2) revive a claim which was stale when the Act came into force?

The Court of Appeal answered this legal conundrum by resort to the "Interpretation" or "definitions" section of the Industrial Relations Act 1973. Section 158 of that Act refers to the " . . . recovery of wages . . . payable . . . (under) an award or collective agreement . . . " But as those terms are defined in section 2 of the Industrial Relations Act, they apply only to awards made by or collective agreements registered with the Industrial Commission "under this Act." Since the awards in question in this case were made by the Court of Arbitration, under another statute, the recovery provisions of s 158 cannot apply to them.

This conclusion is supported, the Court said, by the special provision in s 236 (8) of the Industrial Relations Act 1973, which deems every award of the Court of Arbitration in force when the new Act came into effect to be an award of the Industrial Commission. Since the so-called "grey area," or transitional period, is specifically dealt with by a statutory deeming clause, Arbitration Court awards which expired before the new Act came into force, 8 March 1974, cannot be covered by s 158 of the new Act. The Court of Appeal also noted in answer to further submissions by counsel for the Inspector of Awards, that awards not made by the Industrial Commission, and not deemed to be so made, could still be pursued for up to two years after 8 March 1974, even though the old Act had been repealed, by reference to section 29 (3) (iii) of the Acts Interpretation Act 1924. (That provision preserves rights and interests accrued under repealed legislation). ⊙

DISABILITIES, DIRT MONEY, AND ELECTRICAL WORKERS

J. Wattie Canneries Ltd v **North Island Electrical and Related Trades I.U.W.**
Industrial Court, Wellington. 20 September, 1976. (I.C. 45/76) Jamieson J.

Clause 6 of the Northern, et al Electrical Workers Collective Agreement, recorded at 75 B.A. 9653, is entitled "Dirt Money" and provides for payment of same in certain situations. Sub-clause 6 (g), in particular declares that if "Any electrical worker . . . is required to work . . . under the same conditions as another tradesman (who receives special pay) for the disabilities of that job, then the electrical worker shall be paid correspondingly . . . "

The "disabilities" in this case concerned only height and the lack of a working platform. Are such disabilities, for which Engineers working on the same job receive special pay, covered by the "Dirt Money" clause 6, particularly sub-clause 6 (g), or does sub-clause 6 (g) only apply to slush, mud, filth, dust, lampblack and the like?

The employer sought to introduce evidence relating to the formulation, in conciliation, of the clauses in question; in particular, the employer wished to show that the union had sought to shift sub-clause 6 (g) out of the "Dirt Money" clause, and into another clause of more general application. The Court refused to hear such evidence, saying that " . . . if the Court were to allow evidence to be given as to what one party had in mind in conciliation it would have to hear from both sides and perhaps from several people. Nothing could result except confusion and uncertainty."

The Court then consulted standard canons of construction including **Maxwell on the Interpretation of Statutes,** a chapter from **Halsbury's Laws of England** on "Interpretation of Non-Testamentary Documents," and the New Zealand Acts Interpretation Act 1924.

The Court concluded that the plain meaning of sub-clause 6 (g) must be applied, regardless of the possible real intent of the parties, and notwithstanding the title of clause 6. Height and the lack of a working platform are, then, "disabilities" for the purposes of sub-clause 6 (g) and attract the appropriate special pay. ⊙

COMMENT ON APPROACH OF THE COURTS TO RESOLVING INDUSTRIAL DISPUTES

The cases noted above share a legalistic common denominator; each decision, whether by the Supreme Court, the Court of Appeal, or the Industrial Court, is based on strict and narrow rules of interpretation. Each decision, if put before the parties at the time when they were negotiating the agreement, might be met with the joint cry "No, that's not what we meant at all!"

In still another recent decision of the Industrial Court, **Richards (Inspector of Awards)** v **the Mayor of Wanganui,** 20 August 1976 (I.C. 42/76), Mr Hewitt, a nominated member of the Court, felt sufficiently moved to say, in dissent, that a legalistic approach led the Court to turn a blind eye to the "**known** but erringly or indifferently expressed intention" of the parties. The majority decision in the **Wanganui** case requires the City of Wanganui to pay tradesmen twice while they are travelling to various maintenance jobs in the city. Mr Hewitt repeated the comments which he made (also in dissent) in **Pickford (Inspector of Awards,** v **Canadian Construction Co,** 17 July 1975 (noted earlier in these pages at (1976) NZJIR 20).

But there is nothing sinister or insidious about a **court** applying strict rules of statutory interpretation to the contract of employment — every craftsman takes the tools of his trade to his chosen task, and **Maxwell on the Interpretation of Statutes, Halsbury's,** and the Acts Interpretation Act 1924 are for a judge like unto the hammer and nails of a carpenter.

Employers, and trade union officials alike, however, would do well to heed these words of Jamieson J:

> "The function of the Court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the express

meaning being, for the purposes of interpretation, equivalent to the intention. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention. The ordinary rules of construction must be applied, **although by so doing the real intention of the parties may in some circumstances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law."**

(Emphasis added. Jamieson J was quoting from **Halsbury's Laws of England**, 4th Ed, Vol 12 at 593).

Although the Court is aware that collective agreements are drawn up by laymen with the best of intentions but very little skill in the art of draftsmanship, that fact will not cause the Court to depart from "rules of construction which have grown up over many years and are largely designed to avoid confusion and uncertainty."

The lesson then, in these cases, is that parties to a collective agreement might do well to consult a legal practitioner experienced in industrial matters before and during conciliation. Ironically, such legal practitioners are rare in New Zealand, since the Industrial Relations Act 1973, s 78 (3), and its statutory predecessor, bars them from appearing in Conciliation Councils. New Zealand lawyers have no tradition of involvement in industrial disputes, have little expertise in industrial relations generally, and are not likely to acquire it. ⊙

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Notes on Industrial Legislation

EQUAL PAY AMENDMENT BILL

The Equal Pay Amendment Bill, which amends the Equal Pay Act 1972, is primarily designed to improve the procedures relating to the enforcement of equal pay. Clause 3, which amends section 4 of the Equal Pay Act, provides that where an instrument provides for the implementation of equal pay, the employer, on request of the employee or member of a group that is covered by the instrument, for example, an award or agreement, must supply all relevant information to enable the employee to enforce her rights under the instrument.

Clause 4, which amends section 6 of the principal Act, provides that where the rate of remuneration for females is fixed as a percentage of the rate for males, and between increment dates the rate for males is increased, the rate for females is to be increased by the percentage by which the male rate was increased. Clause 5 (3) which amends section 13 (1) of the principal Act, increases from 2 years to 6 years the period within which proceedings for the recovery of equal pay entitlements may be taken. This provision now brings the Equal Pay Act into line with the Industrial Relations Act which enables the recovery of wages to be made within a period of 6 years.

Clause 6 (2), which amends section 17 of the principal Act, provides that all employers must now keep records of particulars of all equal pay determinations made by the employer. Clause 7, which inserts a new section 17A in the principal Act, requires employers to give female employees written advice of increments in pay made for the purpose of implementing equal pay, and of all other increases in pay granted before the time when equal pay has been fully implemented.

While these amendments will go some way to ensuring an improvement in the enforcement of equal pay, the problem of ensuring an efficient inspectorate to check the records remains. The onus of seeing that the legislation is being implemented still primarily remains with the individual female employee.

INDUSTRIAL RELATIONS AMENDMENT ACT 1976

This short amendment to the Industrial Relations Act passed in August alters the existing legislation in three ways. First, section 123 is amended to include within the definition of a strike a reduction in the normal output or normal rate of work; secondly, the intent requirement of section 123 has been deleted, which has the effect of including stoppages over non-industrial matters not directed at the employer, within the definition of a strike; thirdly, section 128 relating to suspension of non-striking workers has been amended to enable an