TRANSPARENT DEVICE

Lineham v. Newlandia Industries Ltd. Industrial Court, Wellington, 19 August, 1975. Jamieson J.

The Industrial Court has often said that the contract of service-contract for services distinction is a "troublesome question," but Jamieson J. did "not find it a particularly difficult question in the present case."

Three clothing trade employees were hired by defendant company under a purported independent contract, by the terms of which the company would pay a sum of money based on the amount of work done, with no deductions for PAYE or Superannuation. The workers would be rented factory space, tools, and machinery for the sum of 10 cents per week.

Against these facts, which point to an independent contract for services, the Court found that the three women worked ordinary award hours, supplied no tools of their own, could not subcontract, and submitted to such close and continuous control that it was referred to as tuition. Although they were on "piecework," they were paid for idle time, and at no stage did they own either the raw materials or the finished product. Jamieson J. also noted that the 10 cents per week leasing arrangement was a transparent device.

The Court ruled that the three women were, in fact, employees and covered by the collective agreement. Defendant employer was fined $100 for breaching the agreement, under the Industrial Relations Act ss 147-148.

This case demonstrates that employers may be increasingly interested in creating independent contracts, instead of employer-employee relationships, and thus evade awards and collective agreements, PAYE obligations, Equal Pay Act requirements, accident compensation levies, superannuation payments, and possible redundancy consequences. The Industrial Court, however, has given notice that it is alert to such evasions and is prepared to order not only arrears of wages, but also penalties. One can only ask whether $100 was an appropriate penalty in this case. ⊙

CONTRACT OF EMPLOYMENT CONTINUES DURING ILLEGAL STRIKE

Weir v. Hellaby Shortland Ltd (1975) 2 NZLR 204.

Although the statutory scheme of conciliation and arbitration with terms of employment being defined by award, has been dominant in New Zealand since 1894, the common law contract of service between employer and worker remains important.

Because of a dispute relating to a police search of certain private homes during which search management allegedly aided the police, members of the Auckland Freezing Workers Union employed at Hellaby's Southdown freezing works stopped work from 9 April 1973 until 30 April 1973, although an ancillary dispute was responsible for the stoppage after 17 April. Four statutory holidays happened to fall during the period of stoppages: Good Friday, Easter Monday, Easter Tuesday, and Anzac Day, being April 20, 23 24 and 25 respectively. (Easter Tuesday being the day selected by the union in place of the 2nd day of January).

Plaintiff Weir argued, on behalf of himself and 1200 fellow workers, that under the Factories Act 1946 and per the relevant award, holiday pay was due for each of the four holidays. Defendant company submitted that holiday pay was due only to those actually working during the fortnight prior to the holiday concerned, and in any case, the company further submitted, the contracts of service were "terminated" by the walk-out on 9 April, and the workers were not employed during the three week stoppage.

The Court found that the verb 'to employ' had two meanings in the Act: (1) to employ contractually, that is, to be in the status of employer-employee; and (2) to cause or to allow a worker to engage in actual work. Mahon J. found that the words "employed in any factory" in s 28 (1) of the Factories

Act 1946 meant the contractual relationship, or the status, and not physical activity on the chain. The Court also found that the employees were not dismissed on April 9, and then re-engaged on April 30 under new contracts of service. Rather, the contract of service remained in effect. Although it was certainly open to the employer to give notices of dismissal, especially since the stoppage was in violation of an agreement of 29 February 1973, the employer must explicitly give such notice.

Defendant employer was ordered to pay out the amount due for such holiday pay, approximately $48,000.

The decision demonstrates the continuing fundamental importance of the common law agreement: a strike, albeit illegal, does not automatically destroy the contract of service. Management must expressly announce that the breach is fundamental, thus terminating the underlying contract. ⊙

ASPECTS OF THE NEW INDUSTRIAL COURT

Pickford v. Canadian Construction Co. Ltd. Industrial Court, Tauranga. 17 July, 1975. Jamieson J.

The new Industrial Court, as defined in ss 32-62 of Industrial Relations Act 1973, is declared "to be the same Court as that established by the Industrial Conciliation and Arbitration Act 1954 and heretofore called the Court of Arbitration." s 32 (2). This declaration of identity, however, is belied not only by the new name, but also by the new function, and the new approach of the Industrial Court as contrasted with the old Court of Arbitration. This note will attempt to demonstrate that the new court, as a legal institution, is so markedly different from its predecessor that significant adjustments must be made in the practice of industrial relations in New Zealand.

Pickford v Canadian Construction Co. Ltd is a seemingly inconsequential case involving only the interpretation of a "meal money" clause, and a few dollars for the few workers concerned. The dispute related to Clause 6 (a) of the Northern Industrial District Labourers Award, 72 B.A. 3874, which required that meal money be paid to workers "required to work after 6 p.m. . . . provided that work continues after the meal break."

The Inspector of Awards asked that the meal money be paid to shiftworkers on ordinary time, working the 4 p.m. to midnight shift. The Company contended that Clause 6 (a) was only intended to apply to overtime work, and not ordinary time, albeit shift work. There was evidence that such was the known intent of the parties. Had the case arisen in the Court of Arbitration, that court could have filled in any omissions or made new provisions to overcome deficiences in the drafting of the clause in question. In other words, the law-interpreter, the Court of Arbitration, always understood the intent of the law-giver, the Court of Arbitration. Now that judicial and arbitral functions have been split asunder, however, the new court can only interpret awards made by the Industrial Commission, and **cannot** re-phrase poorly drafted clauses and, in fact, has the same position in respect of awards and collective agreements as the Supreme Court. **Anderson v Couchman,** 40 B.A. 114, 117.

The result in this case was, as the court applied strict rules of statutory interpretation, that meal money must be paid to shiftworkers, although that was probably not the intent of the parties. The court quoted at length from **Maxwell on the Interpretation of Statutes,** even though the document in question was the fruit of lay conciliation, and not the product of a skilled Parliamentary draftsman.

In a dissenting remark, one of the nominated members of the Court commented that the known intent of the parties to an agreement would now be ignored by the Court.

The impact of this legalistic decision is that parties in conciliation should have legal assistance in drafting their agreements. The Industrial Relations Act 1973, however, excludes barristers and solicitors from conciliation councils by s 78 (3), and legal advisers must either stay in the background, or give up their practising certificates. ⊙

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