REGISTRATION OF UNREGISTERED SOCIETY: APPEAL AGAINST REGISTRAR'S DECISION

Wellington Union of Advertising Workers Society v New Zealand Sales Advertising Representatives Guild I.U.W.

Industrial Court, Wellington. 17 October, 1977. (I.C. 48/77). Jamieson J.

Regional rivalry between Auckland and Wellington is at the heart of this dispute, although it came to the Court in the guise of an appeal from the refusal of the Registrar of Industrial Unions to register the appellant society. The Registrar found that the members of the applicant Wellington society might conveniently belong to the existing national union, the Respondent in this action. The Society appealed to Court under s 168 (6) of the Industrial Relations Act 1973, and the Court noted that the Society had the burden of proving, per s 168 (7), that "having regard to distance, diversity of interest, or other substantial ground, it will be more convenient for the members of the Society to register separately as a union than to belong to the existing union."

Sellers of newspaper advertising seem organized only in Auckland and Wellington, as there was no evidence before the Court of membership from outside those two centres. The origins of the national union lie in the registration of a northern district regional union in 1975, which was called the Wilson and Horton Limited Sales Advertising Representatives Guild I.U.W. As is obvious from the name, this was a local union dominated by the employees of one large employer. Both the Wellington society and the Auckland district local union wanted a national union — but apparently only if it was based and controlled in their district. In spite of a clear geographical advantage, the Wellingtonians lost the race to the courthouse (that is, to the Registrar's office), and the Auckland district union was converted into a national union in August 1976.

The appellant Wellington Society claimed that the rules of the Auckland-based national union unfairly discriminated in favour of Aucklanders, and cited **Shipmasters Association of N.Z. v Registrar of Industrial Unions** 4 B.A. 259, for the principle that if an existing union has drawn up its rules so as to exclude a particular group from the management of the union, then that group is entitled to form their own union. In this case the "national" union is really a small homogeneous group located in Auckland and a similar group based in Wellington, and the benefits of national coverage are largely illusory. There can be neither full-time staff nor adequate expenditure on travel, and virtually no service extended to Wellington.

Jamieson J seemed sympathetic toward the Wellington dissidents, and expressed the hope that suitable amendments might be made to allow for executive participation outside Auckland. He noted, however, that a national union had to be based somewhere (resisting the Solomonic suggestion that the national headquarters ought to be in, say, Ohakune, midway between the two North Island centres). The Court concluded that the Wellington Society had not discharged its burden of proof under s 168 (7) and declined to reverse the decision of the Registrar.

Other appeals against the Registrar's decision are noted at (1976) 1 NZJIR 45, (1977) 2 NZJIR 103, and (1978) 3 NZJIR 36. ⊙

CONTRACT OF EMPLOYMENT OR INDEPENDENT CONTRACTOR

MacKenzie (Inspector of Awards) v Rotorua District Veterinary Club Inc.
Industrial Court, Rotorua. 29 March 1978 (I.C. 11/78). Jamieson J.

The facts in this case are remarkably similar to those in the **Bay of Islands Veterinary Service** case, 75 B.A. 5151, noted at (1975) 1 N.Z. Recent Law (N.S.) 312. Both cases concern a group of veterinarians who needed an answering service, after-hours and weekends. In each case the veterinarians contracted with a married woman to work from her home, and supplied her with radio-telephone communications equipment, so that an on-duty, rostered veterinarian could be reached, even in the field, when a farmer needed urgent assistance. The employer maintained the equipment, paid the telephone bills, and paid the worker a fixed sum at regular intervals (weekly in the Bay of Islands case, monthly in the Rotorua case). In neither case did the employer make any deductions for PAYE or otherwise from those regular payments. In both cases the plaintiff sought to prove that the woman was a clerical worker, due arrears of wages under a series of Awards, while the defendant attempted to show that the woman was an independent contractor not covered by any Award. In both cases Jamieson J. referred to the judgment of Blair J. in **Perry** v **Satterthwaite** (1967) NZLR 719, and accepted that he should "look broadly at the whole transaction." In the Bay of Islands case the worker entered into the contract by responding to a newspaper advertisement, while in the instant case the worker shifted from full-time office clerical work for the same employer to the at-home answering service function.

In the former case the Court found a master-servant relationship, covered by the relevant award, while in the instant case the majority of the Court came to the opposite conclusion. The ratio of the instant decision, to distinguish it from the former case (which was not referred to in the judgment), was that the defendant's secretary, a chartered accountant, had clearly attempted to convert an admitted contract of employment into an independent contract. As the employee herself had been in some measure responsible for this change in status, she should have understood the new relationship, if for no other reason than that her pay cheque was now made up with no deductions.

In the Bay of Islands case, the Court noted that it would be "vigilant" to guard against "devices" constructed to defeat the provisions of an award. To the extent that the Court was alert in 1975, it may have nodded here. Mr McDonnell was moved to say, in dissent, that the Court's decision was based primarily on the mode of bookkeeping adopted by the defendant's chartered accountant secretary. The only other feature distinguishing these two cases is that arrears of several hundred dollars only were at issue in the former case, while the Inspector of Awards in the instant case sought recovery of $70,621.35 arrears for some three years of weekend work. This incredible and excessive claim may have turned the Court against the claimant. ⊙

"MAFIA TYPE MOB RULE" AT OCEAN BEACH FREEZING WORKS

O'Donnell v Ocean Beach Freezing Co. Ltd

Industrial Court, Dunedin. 29 March 1978 (I.C. 12/78). Jamieson J.

O'Donnell was dismissed by the employer on 25 November 1977. From the limited facts which appear in this personal grievance application under section 117 (3A) of the Industrial Relations Act 1973, Mr O'Donnell's union, the N.Z. Engineering, Coachbuilding, Aircraft, Motor and Related Trades I.U.W., and Mr O'Donnell himself considered the termination to be a section 150 dismissal, commonly referred to as victimisation. From the beginning of the dispute, the company urged the union to use section 117 personal grievance machinery, but the union believed the matter to be a "union grievance," not a "personal grievance." Unaccountably, the union pursued neither the section 117 mechanism nor the section 150 remedy.

Instead, a conciliator was prevailed upon to call a conciliator's conference under section 122 of the Act. Immediately thereafter the Minister of Labour called a compulsory conference under section 120, appointing the same conciliator as Chairman of that conference. The two conferences were held on successive days in January 1978, at Bluff, where the Ocean Beach works are located. The conciliator reported that he was subjected to "abuse, threats, and intimidation" which he considered to be "an endeavour to sway any decision" which he might make. He also reported that there was a "Mafia type mob rule" at the works.

Because of these attacks, that conciliator appointed a second conciliator to inquire into the dismissal of O'Donnell. The second conciliator reported back that the dismissal was justified, and that finding, being adopted by the first conciliator, became the decision of the Chairman of the compulsory conference.

There was some discussion before the Court regarding the delegation of a Chairman's powers, and the maxim **delegatus non potest delegare** (the person to whom a power is delegated may not sub-delegate that power) as analysed at 1 **Halsbury,** 4th ed., p. 34. The Court found, however, that it was not strictly necessary to examine the administrative law concerned, as the instant application was not, and could not be, an appeal from the decision of a compulsory conference. Under section 120 (4) of the Act that decision was "final and binding on the parties."

The Court noted that the union sought to use the personal grievance machinery set out in section 117 only after receiving the adverse decision of the compulsory conference. The Court also noted that both the company and the conciliator had expressly and repeatedly urged that the matter be dealt with as a personal grievance. The Court concluded that this union reversal was an opportunistic attempt "to have a second bite at the cherry." O'Donnell's application was therefore refused because the Court found that the preconditions of subsection 3A were not satisfied. But even if the application was technically well founded, the discretionary extension of leave to the appilcant would not be granted, considering the circumstances of this case.

Other individual applications under section 117 (3A) include the **Dee** case and the **Franich** case, noted at (1977) 2 NZJIR 54 and (1977) 2 NZJIR 102, respectively. It should be noted that the union "failed" to pursue a section 117 remedy at the outset for tactical reasons, not because the union had no sympathy for O'Donnell's case. The alteration to section 117, as set out in section 19 of the 1976 Amendment Act, does not refer to the motive of the recalcitrant union, but only to the result of the "failure": "the worker is unable to have his grievance dealt with or dealt with promptly . . . " Unless the compulsory conference can be said to have "dealt with his grievance," instead of a threatened strike or lockout, the decision in this case would better rest on the subsection 3A judicial discretion. ⊙

AIR NEW ZEALAND - SINGAPORE AIRLINES CHARTER AGREEMENT:

EXCLUSION OF STEWARDS AND HOSTESSES I.U.W.

Airline Stewards and Hostesses of N.Z.I.U.W. v Air New Zealand Ltd.

Industrial Court, Wellington. 15 May 1978 (A.C. 5/78). Jamieson C.J.

Air New Zealand, the employer in this dispute, signed a DC 10 charter agreement with Singapore Airlines Ltd (S.A.L. — the Charterer) for a once-weekly, non-stop, return flight between Auckland and Singapore. The owner (Air New Zealand) was to provide the Charterer with any one of its eight DC 10 Series 30 aircraft, operating "in the livery of the Owner," with Air New Zealand pilots and engineers flying the aircraft under their respective agreements with the employer. The charter agreement was signed on 31 December 1977, and was to be effective for the 31 weeks between 3 April 1978 and 31 October 1978 (unless extended by mutual consent) at $54,000 a week. The Charterer, S.A.L., was to provide the cabin crew (stewards and hostesses), who were to "come under the direct command of the Owner's pilot in command on the Aircraft . . ." The S.A.L. cabin crew also to "be responsible at all times to (the pilot) for the safe and efficient operation of the Aircraft."

The Airline Stewards and Hostesses of N.Z.I.U.W. considered their exclusion from an Air New Zealand aircraft operating out of Auckland to be, in effect, a lockout from their traditional workplace and a breach of their Collective Agreement. A Disputes Committee was convened under the standard disputes clause set out in s 116 of the Industrial Relations Act, and reprinted as Clause 27 of the relevant Award, recorded at 76 B.A. 7033. The Chairman of that Committee referred the matter to the Arbitration Court, where it got a prompt hearing.

The employer suggested that the chartered flights were not an Air New Zealand operation at all, and that the Collective Agreement between Air New Zealand and the union was not relevant to flight services operated by Singapore Airlines, services operated pursuant to a bilateral Air Traffic Agreement between New Zealand and the Republic of Singapore.

From the beginning, the union objected to the employer invoking the section 116 "dispute of rights" mechanism, arguing that the question of charter agreements was held back by the employer at the last dispute of interest conciliation, and that such charter agreements would be more properly dealt with in the next dispute of interest. The union agreed that the dispute was technically a dispute of right, because it was not "created with intent to procure a Collective Agreement," but submitted that the dispute did not fall within the rubric of the section 116 model clause, as the contract of charter was not related to any matter dealt with in the Collective Agreement. The union here relied on the judgment of the Court of Appeal in **A.H.I. N.Z. Glass Manufacturing Co. Ltd v North Island Electrical and Related Trades I.U.W.**, and the judgment of the Industrial Court of the same name, noted at (1977) 3 NZJIR 38.

The Court rejected this threshold procedural argument, holding that the dispute was related to matters dealt with in Clause 4 (a) of the "instrument" in question (76 B.A. 7033), but not specifically and clearly disposed of by that clause. Clause 4 (a) reads as follows (in part):

> "The Company shall employ its flight stewards and flight hostesses and they shall serve the Company in that capacity of flight steward or flight hostess whether in New Zealand or in any other part of the world where the Company may from time to time be operating or to or from which the Company's aircraft may require to be flown . . ."

Alternatively, the union suggested that

If the Court found the disputes clause to be applicable, then the Court might exercise its discretion not to hear the dispute, per the comment of Richmond P. in the **A.H.I. Glass Manufacturing** case, on the ground that the question of charter agreements was "held back" by the employer at dispute of interest conciliation. As the employer had raised the issue in conciliation with both pilots and flight engineers unions, and as the charter was announced to the union as a **fait accompli,** the union argued that only the Company could have raised it at conciliation. The union also noted that other charter agreements operating out of Auckland, such as Polynesian Airlines, had employed New Zealand cabin crews. Mr Justice Jamieson gave short shrift to this argument by simply saying it could not "infer from this that the topic was deliberately held back by the company."

Having decided that the Disputes Committee was properly convened under the model disputes clause, and that there was no reason for the Court not to hear the dispute, the Court then rejected the substantive claim of the union, in the terms of Clause 4 (a), set out above, the Court found that the charter arrangement involved neither a situation where "the Company may . . . be operating" nor the status whereby "the Company's aircraft may require to be flown . . . " The Court did not fully explain the non-relevance of the second phrase.

The Court reached its conclusion with the aid of the "Aviation section of Halsbury's Laws of England, Vol. 2 (4th Ed.) at page 546, wherein "wet" charters (those operated by the owner) are distinguished from "dry" charters (those operated by the charterer). The presence of Air New Zealand pilots and engineers, and Air New Zealand decor, point towards a "wet" charter, but commercial risk taken by S.A.L., on a flight advertised as a Singapore flight, with "temporary and superficial ornamentation about the passenger entrance to give (the plane) the character of a Singapore Airlines aircraft" point toward a "dry" charter. Jamieson J. found that the "proposed charter agreement does not readily fall into either of the categories discussed" but that Clause 4 (a) could not be interpreted to give the union exclusive coverage of such S.A.L. flight services.

Other extra-legal matters which may have figured in the judicial calculus include the 1.7 million dollars in overseas currency which New Zealand stood to lose if the agreement were threatened, the fact that the agreement was temporary, and finally the fact that conciliation council proceedings for a New Collective Agreement for the union were "in train," with the union still able to amend its claims, to discuss charters in the forthcoming negotiation.

The Court did not put the charter to the test by asking who would be the decision maker — a senior Singapore executive or an Air New Zealand employee — in case of critical weather conditions, mechanical problems, medical emergency, or criminal behaviour by a passenger during flight. The Court also did not consider the employment contract of Air New Zealand cabin crew working on similar flights, Auckland-Tonga-Apia and return, on a Boeing 737 chartered to Polynesian Airlines. By its interpretation of Clause 4 (a), those stewards and hostesses must be outside award coverage.

There was no apparent reference by either party to ancillary N.Z. legislation, such as responsibility for damage under section 23 (3-5) of the Civil Aviation Act 1964, the concept of "actual carrier" set out in section 18 of the Carriage by Air Act 1967, and responsibilities for licensing by the actual carrier set out in section 22 of the Air Services Licensing Act 1951. ⊙

ASPECTS OF THE NEW ARBITRATION COURT

The Industrial Relations Amendment Act of 1977 received the gubernatorial assent on 21 December last and came into force on 17 April 1978, by Order in Council: SR 1978/99. The Industrial Court, which had come into existence on 8 March 1974 (SR 1974/50) was thus extinguished — after some 49 months of operation — and replaced by the revived Arbitration Court. By section 32 of the Industrial Relations Act 1973 that short-lived Industrial Court had been "declared to be the same Court as that established by the Industrial Conciliation and Arbitration Act 1954 and heretofore called the Court of Arbitration." The amending legislation of 1977 substitutes a new section 32, to provide that the new Arbitration Court "is hereby declared to be the same Court as that established by (the 1973 Act) and called, before the commencement of the Industrial Relations Act 1977, the Industrial Court." Parliament has thus provided minimal comfort of continuity, amidst the present and future shock of constant flux.

By the transitional provisions contained in section 8 of the 1977 Act, all applications, actions, appeals, proceedings, referrals, and other matters pending before the Industrial Court, but not determined or completed before 17 April 1978, may be determined and completed by the Arbitration Court. The first decision of the Arbitration Court, then, had actually been argued before the Industrial Court (in Taumarunui, on 7 and 8 February 1978) but judgment was rendered by the Chief Judge of the Arbitration Court. The judgment, which received the historical enumeration of "A.C. 1/78," is probably of no great importance to anyone but the parties, but is a salutory reminder that a union may not negotiate an Award for workers outside its membership rules: **MacKenzie (Inspector of Awards) v Ali-Craft Boats Taumarunui Ltd;** Arbitration Court, Taumarunui. 24 April 1978 (A.C. 1/78). Jamieson C.J.

The plaintiff had sought a penalty from the defendant and arrears of wages for the benefit of two workers, under Clause 3 of the clearly relevant Northern Industrial District Shipwrights and Boatbuilders Collective Agreement (conciliated), recorded at 75 B.A. 2987. The workers, who were unskilled assemblers of aluminium boats, had been paid under the Metal Workers Award. The defendant successfully claimed, however, that the purported extension of the Shipwrights Collective Agreement to unskilled workers was ultra vires the Northern Industrial District Ship, Yacht, and Boatbuilders I.U.W. because the membership rule of that union at the relevant time made no provision for assemblers and processors. Citing **I/A v Mayor of Wellington,** 43 B.A. 329, Jamieson C.J. held that there was ample authority for the general proposition that a union cannot negotiate on behalf of workers who are not covered by an appropriate rule of the union.

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Several aspects of the "new" Arbitration Court deserve consideration. Firstly, the whole package of industrial legislation has the air of permanence about it. The "Industrial Law Reform Bill" was introduced and read a first time on 8 November 1977 after extensive discussion in the Industrial Relations Council. The name was changed to "Industrial Relations Amendment Bill" after clauses amending the aircrew Industrial Tribunal Act, the Waterfront Industry Act and the Agricultural Workers Act were severed from the package and passed as separate amendments. Upon introducing the Bill, Mr Gordon, the Minister of Labour, had "no compunction in saying that we are trying to get back to the same understanding, rapport, and confidence enjoyed by the Arbitration Court — the same name — in the early 1960's, with the same personnel held in high esteem — a court that was really valued" 1977 N.Z.P.D. 4250. Following a bewildering period when the wage fixing power has rapidly rotated through the old Court of Arbitration to a Remuneration Authority to a Wages Authority to the Industrial Commission to Cabinet to the Wage Hearing Tribunal, the Government hopes, along with everyone else in the industrial relations field, that the new "wage settlement procedure . . . will enjoy the confidence of the parties . . . " 1977 N.Z. P.D. 4247.

Symbolic of this determination to create a Court with mana and prestige are the

judicial designation and salaries. Judge Jamieson of the Industrial Court becomes Chief Judge Jamieson of the Arbitration Court and the third highest paid judge in the land. After the Chief Justice of New Zealand ($34,777) and the President of the Court of Appeal (33,212), Jamieson C. J. at $32,253, receives a salary somewhat in excess of the $31,648 received by judges of the Court of Appeal and the Supreme Court. The two associates of Jamieson C. J., J. R. P. Horn J. and N. Williamson J., are to be paid at the rate of judges of the Supreme Court. This is an astounding arrangement, when one considers that judges of special tribunals, such as the Chief Judge of the Maori Land Court, are usually paid on a level with Magistrates ($23,075). It will be interesting to watch the seating chart at the next formal state function.

It should also be noted that the three judges will not ordinarily sit together on the bench, but will in fact only come together triennially, under the State Services Conditions of Employment Act 1977, s. 32 (17), to measure the drift between the public sector and the private sector. It is to be hoped, in the name of consistency and to avoid parties' forum shopping, "that the three judges will compare notes." Mr Gordon, 1977 N.Z.P.D. 4251.

The clear legislative intent is that all the sticks of judicial and arbitrational wage fixing power are now bound into one **fasces** (used in its original latin sense), and given to these three judges. Wage fixing arbitration and interpretation for public servants, agricultural workers, the quasi-public waterfront workers and aircrews, and the private sector, plus the general wage order function, are all given to these three judges.

The posture of the new Arbitration Court, in questions of interpretation of awards and agreements, may be substantially different from that of the Industrial Court. Mr Justice Jamieson, in the Industrial Court, applied strict rules of statutory interpretation, citing **Halsburys Laws of England** on "Interpretation of Non-Testamentary Documents," and other tools of the lawyer's trade, such as **Maxwell on the Interpretation of Statutes** and the Acts Interpretation Act 1924. See (1976) 1 NZJIR 20, 34 and 75, and (1977) 2 NZJIR 23. The old Court of Arbitration, on the other hand, could, as law-interpreter, always understand the intent of the law-giver, since the arbitral and judicial functions were combined in that one Court. Where necessary, the court could redraft poorly drafted clauses and fill in a **casus omissus,** since, in theory, it had approved the original agreement. The Industrial Court did not have this latitude and stood vis a vis awards as did the Supreme Court: **Anderson** v **Couchman** 40 B.A. 114, 117. Once awards issued under its aegis and imprimatur come back for interpretation, the new Arbitration Court can return to the relaxed posture of the old Court of Arbitration, and avoid legalism when determining problems of interpretation.

Finally, it should be noted that the quest for certainty and permanence, so ardently sought by the Minister of Labour, may have already been undermined by his own Prime Minister. No sooner had the Court issued its first general wage order of 7%, with a ceiling of $7, than the Prime Minister was attacking the Court for ignoring the budget of next October. Not only did he criticize the order itself, but, more ominously, he threatened to amend the criteria which the Court must take into account in fixing an order. No one can have much confidence in an institution if the Government changes the ground rules after every decision.

⊙ BILL HODGE