REGISTRATION OF UNREGISTERED SOCIETY: APPEAL AGAINST REGISTRAR'S DECISION

New Zealand Refining Company Salaried Staff Association v. **Auckland Clerical and Office Staff Employees** I.U.W.

Industrial Court, Auckland. 22 November 1977 (I.C. 77/77). Jamieson J.

North Island (Except Northern and Taranaki Industrial Districts) Boilermakers', Metal Workers' Assistants', Iron and Steel Ship and Bridge Builders' and Structural Workers' Society v. **New Zealand Engineering, Coachbuilding, Aircraft and Related Trades I.U.W.**

Industrial Court, Wellington. 19 December 1977 (I.C. 72/77). Jamieson J.

The Refining Company Salaried Staff Association (hereafter, the "Association") and the North Island (except Northern and Taranaki Industrial Districts) Boilermakers' et al Society (hereafter, the "Boilermakers' Society") both applied to the Registrar of Industrial Unions for registration as industrial unions of workers under s 163 and s 164 of the Industrial Relations Act 1973. In each case the Registrar declined to accept the application on the grounds that members of the respective applicants "might conveniently belong to a then existing union:" s 168 (2). In the case of the Association, their membership might conveniently belong to five existing unions. The Supreme Court has held that words such as those in s 168 (2), which import the singular, subsume the plural: see the **Totalisator Workers' case**, noted in this journal at (1976) 1 N.Z.J.I.R. 45. Both the Association and the Boilermakers' Society appealed to the Industrial Court under s 168 (4) of the Act.

The appeal of the Association, which was opposed by, inter alia, Clerical Workers', Engineers', Electrical Workers' and Storemen and Packers' I.U.W., resembles similar appeals noted at (1976) 1 N.Z.J.I.R. 45 and (1977) 2 N.Z.J.I.R. 103. In particular, Jamieson J. agreed that the instant appeal of the Association resembled the successful appeal of the Universities Technicians Association of 4 May 1976. In addition to finding that members of the appellant Association had "certain common interests" between "higher authority" on one hand and "unionised labour" on the other, Jamieson J. also noted that only "a majority" of the Association members could belong to one of the five existing unions. Against the appeal, however, the Court found, as a fatal flaw in the application, that the membership rules of the Association were ambiguous. In addition, certain other workers might gain only a revolving door, in-and-out, sort of membership due to salary bar rules in other unions. Without promising future favourable treatment, Jamieson J. intimated that if problems regarding membership clauses were cured, then future applications by the Association might prove successful.

The appeal of the Boilermakers Society, however, was a completely different matter. Although jurisdiction of the Industrial Court was sought under the registration sections of the Act, vis a vis the decision of the Registrar, the Court found that the application to the Registrar and the appeal to the Court were really part of a transparent subterfuge to avoid and evade the deregistration order of the Minister of Labour, as gazetted on 3 September 1976. Albeit the appellant Society called itself the "North Island (except Northern and Taranaki Districts) Boilermakers", and the deregistered union had been the "Wellington District Boilermakers," the Court noted that there were only three industrial districts in the North Island, and the Society's exclusion of the Northern and Taranaki Districts left precisely the Wellington District. The Court

concluded that the appeal was really an attempt to re-register a deregistered union, and that the controlling section of the Industrial Relations Act was not s 168, but s 130. That latter section prohibits the registration of a union in the locality and in the industry of a deregistered union until the Minister of Labour so consents. Therefore, the Industrial Court had no jurisdiction to advise the Registrar to register the applicant society, or even consider the merits of an appeal under s 168. The consequences of deregistration are also noted in another Industrial Court decision regarding the Boilermakers, noted at (1975) 1 N.Z. Recent Law 312. ⊙

SUSPENSION OF NON-STRIKING WORKERS

Auckland Paint and Varnish Manufacturers I.U.W. v. **Dulux N.Z. Ltd**

Industrial Court, Auckland. 9 December 1977. (I.C. 69/77). Jamieson J.

This decision represents the first reported judicial consideration of section 128 of The Industrial Relations Act 1973, as amended by section 3 of the Industrial Relations Amendment Act 1976. The purpose of this section was to create an employer's power of suspension, respecting "salary, wages, allowances, or other emoluments," for non-striking employees, when that employer is unable to provide such employees with work because of a strike by any other workers. In its original form, the employer was to give 1 week's notice of any such suspension; however, because of the effective tactic of co-ordinated seriatim one-day strikes by several unions, the Government simply deleted the notice requirement by the 1976 Amendment. (If an employer's business involved, say, five unions, by co-ordinating their one-day strikes, the unions could shut down the employer for a full week, while each worker was entitled to four days' pay).

The instant case concerns a lengthy strike by the Storemen and Packers I.U.W., and subsequent suspension of members of the Paint and Varnish I.U.W. By acting promptly, under section 128 (3) the union appealed the suspension to the Industrial Court. That section contains no reference to any burden of proof for the appellant union of the respondent employer, but apparently Jamieson J. found the employer had the final burden of coming forward with evidence, because Jamieson J. concluded that the employer "has justified its actions . . . " This justification was shown by the delay in suspending the workers in question. The first suspension took place some three weeks after the strike began, further suspensions took place four weeks after the strike commenced, and some paint and varnish workers were not suspended at all. These facts apparently demonstrated the bona fide attitude of the employers regarding the provision of work for non-striking employees, and unresolved matters of fact (such as overcrowded storage areas, safety, working room, etc.) were viewed favourably toward the employer, on the ground that " . . . some degree of judgment must be left to the employer who is faced with such a situation." The union appeal was therefore dismissed. ⊙

REINSTATEMENT APPROPRIATE REMEDY

New Zealand Harbour Board's Employees' I.U.W. v. Wellington Harbour Board

Industrial Court, Wellington. 20 December 1977 (I.C. 75/77). Jamieson J.

This personal grievance case, which comes to the Court through the standard procedure set out in section 117 (4) of the Act, makes no new law, but is a useful illustration of the judicial flexibility provided by section 117 (7).

The worker in question had a bad work record both at the Harbour Board, and at the container terminal, where he had been seconded for more highly paid work. After his eleventh unexcused absence from work, he was stricken from the container terminal roster and sent back to his parent employer, the Harbour Board, where he was summarily dismissed for misconduct, although apparently gratuitously given two weeks pay in lieu of notice.

The Court found that he had been an unsatisfactory employee, but nevertheless, he had been unjustifiably dismissed. His removal from the container terminal was a considerable punishment in itself; and in light of his record, the court ordered that he be reinstated (s. 117 (7) (b)) to ordinary Harbour Board employment but without compensation (s. 117 (7) (c)) or reimbursement of lost wages (s. 117 (7) (a)).

Comment: The remedies available to the Court are obviously being applied on a case-by-case basis, depending on the instant facts. On another set of facts, reinstatement might be unthinkable, but a cash payment entirely appropriate. And in **Smith v Crown** Crystal Glass, reported at 74 B.A. 3781, the court found an unjustifiable dismissal but gave no remedy at all.

A DISPUTE OF INTEREST IN THE GUISE OF A DISPUTE OF RIGHT

A.H.I. New Zealand Glass Manufacturing Co. Ltd v. North Island Electrical and Related Trades I.U.W.

Industrial Court, Auckland. 1 February 1978 (I.C. 1/78). Jamieson J.

Certain electrical workers employed by Alex Harvey Incorporated ("A.H.I.") successfully obtained, through the appropriate medium of a conciliated dispute of interest, a premium payment of $8.80 per week for being "on call" to their employer. This premium agreement was recorded as Clause 11 (a) in the Award dated 23 December 1975, and recorded at 75 B.A. 9563. (By operation of s. 10 of the 1976 Industrial Relations Amendment Act (No. 2), registered collective agreements are to be known as awards). No sooner had the agreement come into force than the employer entered into a supplementary agreement, approved by the Industrial Commission, whereby such "on call" personnel were to receive a premium of $18 a week, instead of the agreed-upon $8.80. These two agreements, by operation of s 92 of the Act and by virtue of Regulation 9 of the Wage Adjustments Regulations 1974 (Reprint) 1976/198 (the Regulations are identified by their reprinted enumeration) were to extend until July 1976. This date is confirmed by Clause 35 of the Award.

The union then put forward a claim for extra annual leave for these "on call" workers. Such a claim would have seemed a claim for an increased rate of compensation, as defined by Regulation 4 (2) which provides that a reduction in hours shall be treated as an increase in rate of remuneration. Such a claim would, therefore, prima facie ordinarily be negotiated during a dispute of interest. However, the union raised the claim as a dispute of right, to be heard by a Disputes Committee, set up pursuant to Clause 30 of the Award noted supra. That disputes clause is, of course, identical to the model set out in s 116 of the Act. The Chairman of the Disputes Committee decided that each "on call" electrician was to be awarded an extra day's leave for each seven weeks period of "on call" duty. This decision by the Chairman was promptly appealed by the employer to the industrial Court; the employer there challenged the propriety of using a section 116 Disputes Committee for such a purpose. Each party consulted its central organization, and it was agreed to state a case for the Court of Appeal, pursuant to s 51 of the Act.

The questions which were settled between counsel and accepted by Judge Jamieson to be put to the Court of Appeal were as follows:

(1) Is a dispute which relates to a matter which has been dealt with in the said Collective Agreement and specifically and clearly disposed of by its terms capable of being a 'dispute of rights' to which the procedure set out in Clause 30 of the said Collective Agreement can apply?

(2) In dealing with a dispute under the procedure provided by Clause 30 of the said Collective Agreement has the Committee power to make a decision which involves amending during the currency of the said Agreement, a provision of the Agreement dealing with, and disposing specifically and clearly of the matter in dispute?"

The Court of Appeal answered "No" to each of these questions: 6 September 1977, C.A. 35/77, noted at (1977) 3 N.Z. Recent Law 318. The matter then returned to the Industrial Court for further consideration.

Two basic problems emerged in the second hearing in the Industrial Court. First, the litigants, or rather the respondent union, appeared to shift factual ground upon reappearance by submitting that the extra annual leave had not been discussed and settled unfavourably to the union in the dispute of interest of December 1975; the union consequentially argued that the question of extra annual leave for "on call" workers was not settled "specifically and clearly" by the Award. By shifting the focus of the dispute, the union successfully prevented the Court of Appeal judgment from being dispositive of their claim.

Secondly, the Court found difficulty in statutorily distinguishing the two species of the genus dispute. While the definition of "Dispute of right" in section two of the Act defines Dispute of right, inter alia, as "any dispute that is not a dispute of interest," the provisions in Part VII of the Act, "Procedures for Settlement of Disputes of Rights" do not subsume that definition. In other words, the model disputes clause contained in s 116 of the Act (read together with the personal grievance provisions of s 117) does not dispose of all possible disputes which are other than disputes of interest, and it may be possible to raise a dispute of right which has no settlement procedure.

In this case the union argued that the claim for extra annual leave was covered by subsection (1) (b) of the model disputes clause, being a matter "related to matters dealt with (in the Award)." Mr Justice Jamieson agreed with the Court of Appeal in finding no problem with the clarity of the Award, but he found that the Award did not "specifically" (i.e., expressly) deal with the "on call" workers' annual leave entitlements. In other words, Mr Justice Jamieson chose to interpret the adverbial construction "specifically and clearly" disjunctively, emphasizing the separate meaning of each word, and not conjunctively. The Court then found that as the Award was "quite silent" as to the leave entitlement in question, the matter had not been "specifically" disposed of by the Award. The Disputes Clause was properly invoked, and the Dispute Committee, its Chairman, and the Court, had jurisdiction to deal with the said dispute.

The Court then noted that the Wage Adjustment Regulations cited by the employer were not relevant, as Regulation 10 (Reprinted) of those regulations makes

an exception for increases in remuneration awarded pursuant to a proper invocation of the model disputes clause.

There being no other legal objection, the Court emphasized that it would not "lightly overturn a decision of a Disputes Committee . . . without very good and convincing reasons." Finding no such reasons, the Court dismissed the appeal, thus allowing the Chairman's decision to stand.

Comment: With great respect, this writer suggests that a conjunctive interpretation of "specifically and clearly" would be more in the spirit of the Act; that is, claims for increased rates of compensation should be dealt with only at annual intervals, in dispute of interest conciliation councils. It might also be noted that a common law approach to the underlying contract of employment would have disposed of the union's claim.

This decision may lead to year-round continuous negotiation for higher wages, in the thin disguise of disputes of right. Henceforth, the only exclusive parameters of a dispute of right will be:

1. Claims unsuccessfully raised in conciliation;
2. Claims deliberately held back in conciliation;
3. Claims unrelated to any matter dealt with in the award in question; and
4. The imagination of the union advocate. ⊙

TIMBER WORKERS UNION INTERNAL DISPUTE: PERSONAL GRIEVANCE AND LOCKOUT

Hori v. New Zealand Forest Service

Industrial Court, Wellington. 3 February 1978. (I.C. 2/78). Jamieson J.

These two actions brought by the applicant Hori both arise from a dispute referred to by Mr Justice Jamieson as a "fratricidal conflict" between the Timber Workers' Union (or its South Auckland branch) and an unofficial body generally known as the Combined Council of Delegates. The employer, the N.Z. Forest Service as operator of the lumber mill at Waipa, appears in this case as respondent, but may properly be seen as the innocent third party caught between the fraternal opponents. Between 8 August 1977 and 19 December 1977, or during roughly 100 working days, the intra-union dispute flared so continually that more than 30 stoppages occurred at Waipa during that period, or a stoppage about every three days. The management at the Waipa mill reached the end of its tether by late November and " . . . issued individual notices to all those workers who participated in those stoppages warning them that if they continued to behave in this way their employment would be at risk."

After three stoppages, seriatim, on 13, 14 and 15 December, management dismissed summarily those 135 men involved who had previously received the aforesaid warnings. Men involved for the first time were not dismissed, but were given a similar warning. Pursuant to that set of facts, two pleas were brought to the court.

The first application was in the name of Mr Hori, but it really was a test case for the benefit of all 135 dismissed men, under the model personal grievance clause set out in s 117 of the Industrial Relations Act 1973. And therein lay applicant's first insurmountable obstacle. That model clause has no validity unless set out in an agreement which binds the aggrieved worker's employer. The parent agreement in this case was the New Zealand (except Nelson and Westland) Timber Workers Collective Agreement, dated 17 November 1977, as incorporated in an undated "Regional Agreement" between the State Services Commission (acting for the Crown, or more particularly, for the Forest Service) and the Union. By paragraph 1 of that "Regional Agreement" the parties agreed to observe the above-mentioned collective agreement. Clause 26 of that agreement, in turn, incorporates the model clause of section 117, including section 3A as provided by section 19 of the 1976 Amendment. However, insofar as that clause purports to bind this

employer, as a Government Department, or to give the Industrial Court jurisdiction over the Crown, it is a simple nullity, by the terms of s 218 of the Act, which reads as follows:

> "218. **Act not to apply to Crown or Government Departments** — Except as provided by sections 216, 217 and 233 of this Act or by the special provisions of any other Act, nothing in this Act shall apply to the Crown or to any Department of the Government of New Zealand."

Having noted that complete bar to the jurisdiction of the Industrial Court to hear Hori's application, Jamieson J. then heard it regardless, because "there are human problems concerned in this matter . . . " It might be said, therefore, that Jamieson J. pretended to hear the case, to give the applicant the satisfaction of a day in court, albeit, had the Court ruled in Hori's favour, it would have been unable to provide a remedy.

Jamieson J. then ruled against the personal grievance claim on two grounds: First, Hori had proceeded without his union, under subsection 3A of section 117, as amended in 1976. That provision can be activated only when there is a "failure on the part of the worker's union . . . " to pursue the claim. Jamieson J. found however, that Hori's application was flawed because Hori had never approached the union, and, in fact, "he had not given a thought to this . . . " Therefore it could not be said that the union, however ill-disposed it might be toward Mr Hori, had failed to pursue the claim. Mr Hori had never told them about it.

Secondly, Jamieson J. found that, on substance, the dismissal was neither wrongful nor unjustifiable. In the words of the Court,

> "The dismissal came about because the applicant and his associates were continually, and in an unauthorised and improper manner, disrupting the work of the mill."

Assuming that the Court had jurisdiction (which it did not), and assuming that Hori had standing (which he did not), the Court found that the employer's power to dismiss in this case was "beyond doubt."

The second application was made pursuant to section 119C of the Commerce Act 1975, as inserted by the Commerce Amendment Act of 1976. Hori argued that the mass dismissal of 135 men at the Waipa mill constituted a lockout (as defined by section 124 of Industrial Relations Act 1973), whereby (per s 119C (1) (b)): "The economy of a particular industry . . . is seriously affected, or it is clearly evident that it will be seriously affected in the immediate future, by a strike or lockout . . . " That section provides that the Court can order a "resumption . . . of the operation of any undertaking," which in this case would mean a restoration to their employment of the 135 men. (Although the court did not refer to the jurisdictional issue regarding this second application, sections 119D and 119E of the Commerce Act satisfy the requirements of s 218, supra, being "special provisions" of another statute).

The Court found against this second application on two grounds. First, the dismissal of the 135 men was not, in fact, a lockout, because, in terms of s 124 of the Industrial Relations Act 1973, the motive of the employer was not to compell the workers to accept terms of employment or comply with any demands made by the employer. As the dismissal in this case could not amount to a lockout, s 119C had no application.

Secondly, the court found that, even assuming the dismissal were a lockout, the substantive terms of s 119C were not met. At the time of the hearing the work at the mill was proceeding in a normal manner, and the Court would assume that the law would be abided by in the future. Therefore the timber industry was not seriously affected at the time of the hearing, the court could not find clear evidence that it would be seriously affected in the immediate future, and no resumption order could be issued.

In passing, the Court referred to **Te Miha v Dunlop (N.Z.) Limited,** reported at 75 B.A. 8829, and noted at (1976) 2 N.Z. Recent Law 68, where the Court suggested that the grievance procedure was hardly appropriate for use by a worker who was merely one of a number engaged in what amounted to strike action. In addition, Jamieson J. remarked that " . . . quarrels within the union should be fought out in a proper and seemly manner within the constitution and rules of the union."

Comment: The closing remarks by Mr

Justice Jamieson about fighting out quarrels "in a proper and seemly manner" may well be greeted with some bitterness by the Combined Council of Delegates because their frustration may have arisen in the context of allegedly undemocratic union rules. For example, by Rule 27, "Only members who have had at least four years' experience as an Executive member of a branch . . . " can stand for national office. By Rules 5 and 6, the national officers are elected triennially. Assuming, by way of example, that these triennial elections are held simultaneously with national parliamentary elections, an aspirant to national office might have joined the union in 1970 (or in 1960, or in 1950), taken branch office in 1975, and yet be unable to stand for national office until 1981.

That such a requirement is undemocratic may have been conceded by the union in as much as a proposed amendment to Rule 27 provides that eligibility to national office be reduced to " . . . two years in the industry and one year as an executive member of a branch . . . "

Other rulebook problems concern management of union funds. At present two trustees are appointed by the National Council; a proposed rule change would provide for three trustees to be elected by an annual conference. ⊙

INTERNAL UNION DISPUTE: INJUNCTIVE RELIEF

Kenneth Robert Schultz v. **P. Best, G. Bell, M. Collins, S. Isbey, B. Logan, T. Manning, A. Milne, B. Pugh, K. Thorne, and M. Williams** (First Defendants) **and Airline Stewards and Hostesses of N.Z. I.U.W.** (Second Defendants)

Supreme Court, Auckland. 8 February 1978 (A 82/1978). Barker J.

Mr Justice Barker, in the Supreme Court at Auckland, issued an exparte injunction to the plaintiff against the ten first defendants, officers and executives of the union, to restrain them from executing any contract of employment on behalf of the union (second defendant) without first obtaining a resolution of a special meeting of the union. The judicial order was based on a strict interpretation of the union rule book.

Comment: Although judicial intrusions into union affairs are usually greeted by the Federation of Labour with stentorian cries of outrage about the undemocratic weapon of injunction, when such legal devices are used in intra-union power struggles, a veil of silence usually pervades the dispute. That may be especially so in this case, since the secretary of the union is the head of the F.O.L.

See also **Gould v Herbison (1st Defendant)** and **Auckland Amalgamated Society of Shop Assistants and Related Trades I.U.W.** (unreported), A 142/77, Supreme Court, Auckland. ⊙

BILL HODGE

EDUCATIONAL FORUM

ADVANCE NOTICE

The 1978 Annual General Meeting of the Industrial Relations Society of New Zealand Inc. will be on Monday, 28th August, 1978.

WORKER PARTICIPATION - EMPLOYEE INVOLVEMENT

The Department of Labour has had a continuing interest in research on worker participation during the 1970's and has published several reports on the subject (listed below and available on request).

"Worker participation," "employee involvement" and "industrial democracy" are some of the many terms used to describe arrangements allowing employees an increased share of decision-making within an enterprise. Each of them expresses a slightly different set of expectations held by different groups within New Zealand society. Government policy of encouragement is expressed under all three headings, acknowledging these different approa-