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The Right to Refuse Unsafe Work in New Zealand

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This paper examines the issue of the right to refuse work on the grounds of health and safety. It is structured around three themes. First, the way in which the right to refuse unsafe work[1] is currently established in New Zealand law is examined. The second major component is an examination of the application of the right to refuse unsafe work in Canada, the USA and New Zealand through analysis of relevant cases that have been tried in the respective jurisdictions. The paper concludes with policy recommendations to shift the current adversarial processes of dealing with the rights to refuse to do unsafe to a proactive system of statutory duties and obligations on all the parties involved in the employment relationship. We suggest that an alternative process for the right to refuse unsafe work will improve the enforcement of both the principles and the provisions of the Health and Safety in Employment Act 1992 (HASE).

Introduction

In respect to occupational safety and health, the legal rights of workers can be categorised into two broad categories: individual and collective. These rights primarily arise from the legislated protective standards the government sets. A secondary source of these rights arises from the negotiated agreement between employer and worker, which are embodied in the contract of employment. The third source is the obligations that the employer owes to the worker under the common law (Gunningham, 1984). In current employment law, New Zealand workers have legal rights to refuse to perform unsafe or unhealthy work. In New Zealand, these rights are both collective and individually posited; however, it must be noted that they are seldom successfully exercised. The actual and practical outcomes of attempting to exercise these rights, is that workers have severely limited protection afforded to them by law.

This paper examines the issue of the right to refuse unsafe work. It is structured around three themes. First, the way in which the right to refuse unsafe work is currently established

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[1] The term unsafe work implies work that has a potential and/or actual impact on the health and safety of workers and others in and around the workplace.

in New Zealand law is examined. The second major component is an examination of the application of the right to refuse unsafe work in Canada, the USA and New Zealand through analysis of relevant cases that have been tried in the respective jurisdictions. The paper concludes with policy recommendations to shift the current adversarial processes of dealing with the rights to refuse to do unsafe to a proactive system of statutory duties and obligations on all the parties involved in the employment relationship. We suggest that an alternative process for the right to refuse unsafe work will improve the enforcement of both the principles and the provisions of the Health and Safety in Employment Act 1992 (HASE).

Occupational health and safety in New Zealand

Historically, New Zealand's system of regulating occupational health and safety has taken its form and substance from English law. As a British colony, New Zealand initially adopted English law and the philosophies of the English legal system. The English common law has particular importance in employment relationships (and by extension occupational safety and health) as it has imparted into New Zealand law the legal doctrine that employment is a relationship between a "master" and a "servant". Thus, the legal treatment of the employment relationship in New Zealand is based on the view that it is one of polarity – of superior and subordinate. As time went on legislation was adapted to react to specific contingencies that were experienced. Despite this contingent approach to specific hazards and situations, the underlying philosophy of New Zealand law has continued to be based on the philosophies adopted from English common law at the time of colonisation. These common law provisions relating to health and safety in New Zealand were extensively modified and extended during the period from 1880 to the 1990s by the enactment of a multiplicity of legislation and regulation.

However, none of these pieces of legislation substantially altered the then prevailing position in respect of workers right to refuse unsafe work. In this matter, New Zealand workers continued to have the individual common law right to refuse to work or the collective statutory right to strike on the grounds of health and safety as the only positive rights they could exercise independently of the employer. As is intimated above and discussed below workers exercising these rights place themselves in a state of considerable legal jeopardy. They may also not succeed in protecting themselves from danger because of the high standard of proof currently demanded by the court in its post facto deliberations.

In addition to the legal and practical constraints on successfully exercising the right to refuse, the current provisions of both the common law and the legislative rights to refuse work are by their adversarial nature not conducive to promoting excellence in health and safety management and the prevention of harm to workers (to paraphrase the s.5 of the HASE Act). In combination, these issues place workers at a potentially serious disadvantage in attempting to exercise their rights and are inconsistent with a proactive and cooperative system of health and safety management. The current inadequate system of regulation of health and safety further compounds the disadvantage to workers by not acting sufficiently to compensate for the jeopardy that workers place themselves in by refusing to work. This is best exemplified by the fact during 1998-9, despite there being 20,000 claims made to

the Accident Compensation Commission (ACC) for weekly compensation representing a very high number of harmful events there were only 172 prosecutions by the Occupational Safety and Health (OSH) service during the same period. Similarly, there were only 9,854 investigations by OSH during the period compared 267,000 ACC claims. Total fines imposed for breaches of HASE for the period 1998-9 equalled $916,175 versus ACC premiums of $1.1 billion and $50 million dollars in ACC penalties imposed on employers. Clearly, there are many harmful events occurring to workers that are not being prevented either by the current regulatory regime or by the availability of an effective right for workers to refuse hazardous work. It is argued in this paper that the basis upon which workers can exercise the right to not perform dangerous work needs to be transformed through a realignment of policy. A proactive process of dealing constructively with actual and potentially dangerous work needs to be found. To meet the goal of reducing injury to workers, the burden to ensure workplaces are safe should fall on those who control the work, the employers and their managerial agents.

The right to refuse unsafe work in New Zealand

New Zealand workers do have some legal right to refuse to perform unsafe work. These rights arise from two sources: first, the seldom used common law right of an individual worker to refuse to follow an employer's instructions if those instructions are unreasonable or would give rise to an unsafe situation for the worker (Gunningham, 1984). Second,1a the legislated right of a group of workers to legally strike on the grounds of danger to their health and/or safety under s.71 of the ECA.

The English system of common law imbues employment contracts with reciprocal sets of rights and obligations. These rights and obligations are deemed implied terms of all contracts of employment even where the negotiated agreement between the parties is silent on such issues.[2] Where the common law rights and obligations have not been contractually varied or waived, these implied terms arising from the common law provide an important source for determining the parties' respective rights and duties.

In regards to common law duties with respect to health and safety, two main terms are implied into employment contracts. "First, the employer must take reasonable care for the worker's safety" (Gunningham, 1984: 13). This term obligates parties to take a reasonable level of "duty of care" and it is implied into all contractual agreements (whether in employment or commercial) that are subject to the common law. Thus, this component of the common law places clear requirements on both workers and employers to exercise a duty of care in employment (Mazengarb's, 1995). However, an employer who insists on dangerous work being performed and does not live up to the duty of care is not seriously constrained by common law unless a worker sustains an injury (Lewis, 1991).

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[2] Although where the parties specifically negotiate an agreement on the common law issue may be varied (Gunningham, 1984).

A potentially contradictory common law term is also implied into employment contracts. This involves the obligation of the worker to obey the "lawful and reasonable" orders of the employer (Lewis, 1991). "By law, the master has the right to command and discipline the servant; their relation was not terminable at will, as both were expected to honor their commitments until the end of the term of service; and the legal obligation to render personal services was enforced as a property right" (Gross, 1998: 64). Therefore a worker's refusal to follow a lawful and reasonable order is deemed to be insubordination – a breach of the employment contract which can be justifiably punished and might (for example) result in summary dismissal of the employee for breaching an implicit term of the employment contract (Christie, England, and Cotter, 1993; Brooks, 1993).

The important point in regards to lawful and reasonable orders in health and safety is that if an employer breaches the obligation not to issue unreasonable or unlawful orders, the common law holds that the worker is entitled to disregard the order. This component of the common law has two main implications in regards to health and safety. First, failure on the part of the employer to meet legislated and regulated occupational safety and health obligations could give rise to workers justifiably refusing to follow orders, as they may be deemed unlawful. Second, orders requiring workers to work in unsafe conditions could be deemed unreasonable (Brooks, 1993; Gunningham, 1984).

It must be noted, however, that the right of a worker to refuse to work because he or she views the order as either unlawful or unreasonable is not an action without jeopardy. If the worker is lucky enough to be placed in a position where such a refusal is made and the employer takes no disciplinary action, the issue is settled (Gunningham, 1984). Alternatively, if the employer takes any disciplinary action against the worker the onus is upon the worker to accept the discipline or prove the refusal was justified (Brooks, 1993). Where a refusal to work occurs and discipline follows, workers in New Zealand are entitled to lodge personal grievances. In most cases they would lodge a personal grievance case accusing the employer of "unjustified dismissal" if employment had been terminated or "unjustified action causing disadvantage" if the discipline did not amount to a dismissal[3] (Gunningham, 1984: 240). Should the worker prove their case the Court is likely to make an order allowing damages to be recovered.

Therefore, while a common law right to refuse unsafe work is provided, this right serves solely as a defence for the worker to an accusation of insubordination. As such, this right extends only to provide workers with a financial protection to recover losses arising from punishment of insubordination or breach of contract when the refusal to work was justified for reasons of health and safety (Brown, 1983; Lewis, 1991; Harcourt, 1996). In the situation in which this right is exercised, the worker gains no net compensation for having been put in a situation that was unsafe; the fullest extent of the employers' loss for having an unsafe workplace would be lost wages or time and legal bills from arguing the case.

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[3] Under the Employment Contracts Act, it is still possible for the employee to sue for damages directly under the common law causes of breach of contract and wrongful dismissal (Rossiter, 1996).

Legislated rights to refuse unsafe work

The right to refuse to perform unsafe work has only ever been included in New Zealand legislation as a collectively held right. In each incidence, that the right has been incorporated into New Zealand legislation, it has provided workers with "consent" to lawfully undertake a strike in response to some perceived unsafe circumstance. This right initially appears in section 123(h) of the Industrial Relations Act 1973. This section granted workers in industries defined as being "essential services" with a limited right to strike without the notice usually demanded for strikes to be lawful in such services. The expression of the right was limited in three ways: first, it only applied to safety issues (health issues being ignored), second, it only came into effect when there was no way to perform the work "without exposure to unreasonable danger" (Industrial Law Service, 1984: 136/4), and finally, only workers in "essential services" could access this right.

The right to take lawful strike action on the grounds of safety was extended in the Labour Relations Act 1987. Section 237 of that Act extended the right to strike for safety reasons to cover all industries and to cover threats that were related to health as well as to safety. In addition, in July 1987 the Council of Trade Unions and the New Zealand Employers Federation negotiated a Code of Practice for occupational health and safety. This Code was accepted and promoted by the Department of Labour under the jurisdiction of the Factory and Commercial Premises Act. This code provided amongst other rights,[4] for representatives to be able to stop work and withdraw workers' labour when there was an immediate and serious threat to health and safety.

The enactment of the ECA in 1991 and the HASE in 1992 effectively extinguished those rights leaving the ECA as the only piece of New Zealand legislation which provided a statutory right to refuse to do dangerous work (Mazengarb's, 1995).[5] But such a withdrawal of labour under the ECA has continued the precedent of the Labour Relations Act 1987 in that such action is once again treated as a strike which is deemed to be illegal unless: (s.71)

> (1) . . . the employees who strike have . . . reasonable grounds for believing that the strike or lockout is justified on grounds of safety or health.
>
> -and when such an action is taken:
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> (2) . . . any party to those proceedings who alleges that . . . participation in the strike or lockout was not unlawful, shall have the burden of proving that allegation.

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4 The intent of the Code was to establish a bipartite system for improving health and safety at work. The mechanisms through which this objective was pursued included:
Including workers in decision making areas relevant to their health and safety
Having elected representatives of workers on health and safety committees
Clearly setting out the rights and responsibilities of parties involved in workplace health and safety

5 Note that the NZCTU has claimed s.19 of the Health and Safety in Employment Act implies a duty on employees to refuse unsafe work by requiring them to take all practicable steps to ensure that their work behaviour endangers neither themselves nor others (New Zealand Council of Trade Unions, 1994).

In terms of workers actually operationalising this right the employer's response is often to seek an interim injunction ordering a return to work. It is then the workers who have to prove that their actions are justifiable or they suffer the consequences.

Review of other jurisdictions

A review of the right to refuse in other jurisdictions provides a useful comparison to the experience in New Zealand. A number of western industrialised countries provide workers, to a greater or lesser degree, with rights to refuse to perform unsafe work. In Britain and in a number of other nations who share links back to British jurisprudence there are common law rights that allow work to be refused on the basis that the order to work is unreasonable. However, the legislated right to refuse unsafe work is quite uncommon. In Canada, the USA and Australia, there are both federal and state or provincial laws which, to varying degrees provide workers individually and/or collectively with the right to refuse unsafe work.

Despite the differences in both the legislated entitlement and in the extent of the rights provided for, the different jurisdictions share similarities. Reviews of the decisions of tribunals, arbitration bodies and courts that have heard disputes over these rights; particularly in North American jurisdictions, demonstrate the similarity in two essential areas. The first similarity is the type of, and relative importance given to, the precedential tests applied by the various bodies in making their decisions. The second is the outcomes for workers.

The North American jurisprudence[6] places the onus on workers to demonstrate that just cause existed for the withdrawal of labour. The demonstration of just cause requires the worker to satisfy one or more of five tests:

> That the worker had a genuine/honest or good faith belief that danger existed.
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> That the worker had a reasonable cause or grounds to believe that the situation was dangerous.
>
> That the situation was dangerous when assessed by objective standards of evidence.
>
> That the worker had reported the matter appropriately to the employer.
>
> That the employer had not responded to the worker on the matter.

To illustrate the North American situation, Harcourt and Harcourt (2000) reviewed 272 "right to refuse" unsafe work cases heard before Arbitration and Labour Boards in Canada between 1950 and 1993. The analysis of the results showed there were a number of essential factors that contributed to the likelihood of a penalty either being upheld or being overturned/reduced.

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[6] For a full discussion see Harcourt and Harcourt, 2000.

The first factor of note was that a worker holding a genuine belief that the work was unsafe (Test No.1) made no contribution to changing the odds of winning the case. However if the worker was held not to have had a genuine belief, the odds of not having the penalty overturned/reduced went up from 1:7 to 1:860, virtually guaranteeing that the worker would lose the case. The second factor was the workers being able demonstrate that they had reasonable cause to believe the work was dangerous (Test No.2). In these cases their chances of having the penalty overturned went from 1:7 to 35:1, and the odds of having the penalty reduced rather than upheld changed from 1:71 to 1:8. Contrary to their expectation Harcourt and Harcourt (2000) found that whether or not objective evidence was available (Test No.3) made no significant change to the odds of the penalties being overturned reduced or upheld. They did find that if the worker had reported the matter to the employer (Test No.4) then the odds of having the penalty overturned or reduced went up from 1:7 to 3:1. The last significant factor was whether the employer responded to the situation by properly investigating the worker's concern (Test No.5).[7] When Boards found the employer had responded the odds of a penalty being overturned fell to 1:345. On the contrary, if the employer had not responded then the chance of a win for the worker rose from 1:71 to 1:5.

What is clear from the Harcourt and Harcourt (2000) study is despite the presence in Canada of both common law and statutory rights to refuse unsafe work, the onus for action and the burden of proof still falls most heavily on the workers.

> Refusing to work, whether explicitly regarded as insubordination or not, is still treated as a major offence against the management's right manage, and therefore deserving of punishment in 70 percent of the cases in the study. Moreover, the employer is presumed to provide a safe workplace, and is consequently not obliged to show that measures to prevent accidents have been taken. It follows that employees who challenge the employer's control over health and safety by refusing to work are being unreasonable, unless they can prove otherwise. (p.26)

In another North American study, Gross and Greenfield (1985) examined the right to refuse in the USA by reviewing 154 US cases published by the Commerce Clearing House and by the Labor Arbitration Reports from 1945 to 1984. The study found that in 42 percent of the cases arbitrators specifically ignored the issue of whether the workers' concern for their health and safety were reasonable preferring to rely purely on objective evidence of danger. A further 24 percent indicated intent to consider the reasonableness of the workers concerns but in the final decision relied entirely on the objective evidence test. In only 25 percent of cases did arbitrators seek to determine whether the facts and circumstances known to the employee at the time of refusal to work would have convinced the "average" employee of the dangers of continuing to work and used this in their judgements. Another nine percent of arbitrators took into consideration the sincerity of the workers concerns in deciding to reduce the extent of penalty earlier imposed. Overall the authors found that in the majority of cases arbitrators demonstrated deference and bias towards the prerogative of management to manage. For example, comments such as "no company could produce

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[7] It should be noted that responding by investigating did not necessarily require the employer to actually do anything concrete such as would be required under the HASE Act in New Zealand.

anything without [having] the right to tell a man [sic] what to do and when to do it" illustrated the arbitrators' positions (Gross and Greenfield, 1985: 656). Given this sentiment, it was not surprising that Gross and Greenfield (1985) found that there was some penalty against the worker for exercising the right to refuse in two-thirds of all of the cases analysed.

Practical application of the right to refuse in New Zealand

To establish how both the common law and legislative rights to refuse unsafe work have been applied in the New Zealand context an analysis of the reported cases was undertaken. A multiple "keyword" search of the New Zealand Employment Law Database was performed. The search criterion used in the search was that the cases relate to an individual refusal to work and/or a strike (as defined in the appropriate legislation of the day) on the grounds of health and safety. An analysis of the case headings of the search results revealed just 13 cases[8] that met the criterion.

The first two cases were personal grievance appeals to the Labour/Employment Court relating to individuals who had been dismissed for insubordination/refusal to obey a lawful order in which the issues of health and safety had been raised as a defence. The remaining 11 cases related to actual or threatened strikes, the justification of which had included either wholly or in part, matters of health and safety. The cases were further analysed to establish first, which of the precedential conditions (such as identified in the Canadian jurisdiction) applied in the each particular case. Secondly, what weight was placed on the presence or absence of each of these conditions in the Court's judgement? The precedential conditions are defined as follows:

A. Workers have a genuine and strongly held belief that the work was dangerous,
B. Workers had reasonable grounds to believe that work was dangerous,
C. Workers had objective evidence that work was dangerous,

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[8] The cases were as follows:
New Zealand Labourers etc IUOW v Joint Venture Zublin-Williamson (1988) NZILR 629
Northern Distribution IUOW v Mount Cook Group Ltd (1991) 1 ERNZ 1190
NZ Woollen Mills etc IUOW v Christchurch Carpet Yarns Ltd (CLC54/88)
Coates Brothers [NZ] Ltd v Auckland Chemical etc IUOW & Ors (ALC109A/89)
Smith [In Respect of the Department of Justice] v NZ PSA (WLC42/90)
Manawatu-Wanganui AHB v Wellington District Hotel etc IUOW (WLC91/90)
Fletcher Development and Construction Ltd v NZ Labourers etc IUOW & Or (ALC74/90)
NZ Stevedoring Co Ltd and NZ Forestry Corp Ltd v NZ Waterfront Workers IUOW & Ors (CLC48/90)
Weddel NZ Ltd v NZ Freezing etc Clerical IUOW and Ors (WLC78/90)
New Zealand Rail Ltd v National Union of Railway Workers of New Zealand and Ors (CLC58/91)
Leonard and Dingley Ltd v NZ Waterfront Workers Union (ALC75/91)
Coal Corp NZ Ltd v Mine Workers Union of NZ Inc (CEC17/93)
Griffin and Teki v Attorney-General In Respect of the Secretary for Justice (WEC9/95)

D. The employer had inspected work for dangers and/or had taken practicable steps to prevent dangers,
E. Workers had adequately communicated concerns about dangers to employer.

The condition *A) Workers having a genuine and strongly held belief that the work was dangerous*, was present in 11 cases. In all but one case,[9] the Court accepted that the workers held a genuine belief that the work tasks they were required to perform and/or the conditions of work were dangerous to their health. In none of these cases did the Court find that the subjective test of holding such a belief is of itself justification for a refusal to work or a strike on the grounds of health and safety. In another case[10] the Court commented in its judgement that the subjective test is

> . . . incompatible with the principles normally governing the duty of an worker to accept directions that are legal, reasonable and within his contractual obligations if the Court were now to find that for reasons of his own, undisclosed to the employer and beyond scrutiny by the Court the worker could with impunity refuse to carry out an otherwise proper direction. (p.632)

In one other case[11], the substance of which related to redundancies and contracting out, the Court found that, despite their submissions to the contrary, the workers actions and other statements indicated that they did not hold a genuine belief about the danger. This belief of the Court did not assist the worker's case.

There were ten cases relating to condition *B) that workers had reasonable grounds to believe that the work was dangerous*. The base test applied in each of these cases was whether a "reasonable lay observer would regard the workers" fear for their safety as reasonable, thereby rendering the refusal to work as justifiable. In only one case[12] did the Court hold that the test had been met and the action was justifiable. Unfortunately, the Court did not explain how this decision was reached.[13]

Despite the foundation of the reasonableness test being that of the "reasonable lay observer", in a number of cases the Court builds on this theme. In one case,[14] the Court suggested that the test might include the opinion of a "reasonable co-worker". This approach would appear to set a higher threshold on reasonableness than required in the

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9 Leonard and Dingley Ltd v NZ Waterfront Workers Union (ALC75/91)

10 New Zealand Labourers etc IUOW v Joint Venture Zublin-Williamson (1988) NZILR 629

11 Leonard and Dingley Ltd v NZ Waterfront Workers Union (ALC75/91)

12 Coal Corp NZ Ltd v Mine Workers Union of NZ Inc (CEC17/93)

13 This was a hearing to decide whether or not an ex parte injunction should be made against the defendant workers and their unions over an alleged unlawful strike. The court refused the order because the defendants had demonstrated sufficient substance to their concerns and that the substantial matter should be dealt with as a matter of urgency at a full hearing.

14 New Zealand Labourers etc IUOW v Joint Venture Zublin-Williamson (1988) NZILR 629

"lay observer" test. In another,[15] the Court held that the worker had no reasonable basis for his belief when tested against the "reasonable lay observer". However, in its decision the Court also noted that management had taken the worker's original concerns seriously enough to investigate them, implying that those concerns were, prima facie, reasonable. The Court then further held that despite the application of an "objective test" which proved that the original concerns were unfounded, the worker's refusal to work would only have been unreasonable if he had refused after hearing the results of the "objective test".[16]

Further complicating the reasonableness tests are some subsidiary decisions relating to danger. In two cases,[17] it is suggested that while the reasonable lay observer may consider that the fears about health and safety held by particular workers are reasonable, the fact that a certain amount of danger is generally associated with their work renders the fears unreasonable in the circumstance. In another case,[18] the Court added the notion of the "imminence of the danger" as a defining criterion as to the reasonableness of the workers fears, i.e. the more imminent the threat, the greater the entitlement to refuse to work.

There were nine cases in which the condition *C) Workers had objective evidence that work was dangerous*, was considered by the Court. The basis of the objective test is that either a person who might be reasonably held to be an expert on the health and safety matter at hand has inspected the situation and provided an expert, objective opinion on the matter and/or there is other objective evidence available about the matter. In only one case[19] did the Court accept that there was sufficient objective evidence to support the reasonable fears of the workers that their particular situation was unsafe. Nevertheless, this was over-ridden by the fact that it was generally accepted that a certain amount of danger existed as a normal part of the work being undertaken. In another case,[20] both parties to the dispute relied on evidence from expert witnesses who presented conflicting opinions about the levels of danger. In view of the conflicting positions on the issue, the Court said that it was not willing to conclude that the situation was dangerous until there was greater consensus on the scientific evidence. In one case,[21] the Court held that the lack of significant accidents in the preceding five years was in itself sufficient objective evidence the fears held

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15 Northern Distribution IUOW v Mount Cook Group Ltd (1991) 1 ERNZ 1190

16 The court held that the workers dismissal was unjustified because management had not conveyed the results of the objective test to the worker before dismissing him, thereby denying him the opportunity to reconsider the reasonableness of his refusal to work in the light of those tests.

17 Smith [In Respect of the Department of Justice] v NZ PSA (WLC42/90) & Griffin and Teki v Attorney-General In Respect of the Secretary for Justice (WEC9/95)

18 Leonard and Dingley Ltd v NZ Waterfront Workers Union (ALC75/91)

19 Smith [In Respect of the Department of Justice] v NZ PSA (WLC42/90)

20 Leonard and Dingley Ltd v NZ Waterfront Workers Union (ALC75/91)

21 Fletcher Development and Construction Ltd v NZ Labourers etc IUOW & Or (ALC74/90)

by the workers were unreasonable. In all the other cases in this category, the Court relied on the evidence from experts, who had inspected the work and were of the opinion that the work was not dangerous, in making its decision.

Condition D) the employer had inspected work for dangers and/or had taken practicable steps to prevent dangers was considered by the Court in three cases. In each of these cases, the Court held that the employer had responded appropriately to the concerns expressed by the workers and therefore the workers continued refusal to work was unjustified. However, in one case[22] the omission by the employer to convey the results of the inspection to the worker contributed to the worker's refusal and subsequent dismissal; consequently, the employer's action in dismissing the worker was found unjustifiable.

There were eight cases where condition *E) Workers had adequately communicated concerns about dangers to employer* was considered by the Court. In three of the cases,[23] the Court held that the worker/s had reported the matter of concern but that the report was inadequate or improper. In the first of these the worker refused to state his reasons as to why he believed the tools were unsafe. In the other two cases the workers' reports were deemed insufficient because their reports contained no evidence of the degree of imminence of a threat to health and safety that would justify their actions in refusing to work without giving the fourteen days notice of strike action required for "essential industry". In two cases, the Court held that the workers had not reported their concerns, which in one case[24] raised questions in the Court's mind about the union's claims that the strike was justified on the grounds of health and safety. In another case,[25] the Court held that the worker had been derelict in his duty in not reporting his concerns about possible health and safety matters. In the remaining cases, the Court acknowledged that the workers and their unions had properly raised their concerns and this was considered favourably in making its decision.

Discussion

The relative paucity of cases that have been heard in the New Zealand Courts prevents us from drawing the strong comparisons between the work of Gross and Greenfield (1983) and Harcourt and Harcourt, (2000) who were able to draw firm conclusions from their much larger studies. What can be said is that the Harcourt and Harcourt's (2000) finding that the right to refuse in Canada –

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22 Northern Distribution IUOW v Mount Cook Group Ltd (1991) 1 ERNZ 1190

23 New Zealand Labourers etc IUOW v Joint Venture Zublin-Williamson (1988) NZILR 629, Smith [In Respect of the Department of Justice] v NZ PSA (WLC42/90) & Griffin and Teki v Attorney-General In Respect of the Secretary for Justice (WEC9/95)

24 Manawatu-Wanganui AHB v Wellington District Hotel etc IUOW (WLC91/90)

25 Northern Distribution IUOW v Mount Cook Group Ltd (1991) 1 ERNZ 1190

> . . . is a very restricted right to the extent that workers must satisfy many rigid conditions to qualify for protection from discipline. These conditions are based on the notions that health and safety are properly managements prerogative and the obedience to management authority is essential to efficient production (p.2)

-- appears to be currently replicated in both the common law and statutory application of the rights in New Zealand. For instance in both the Canadian and New Zealand survey, genuine belief or its lack, appears to have a similar effect on outcomes for workers, as does proof that the workers had having reasonable grounds for their belief. Despite there being so few cases an analysis of the New Zealand Court decisions does provide us with some clear indications as to the thinking of the Court on the application of both the common law and legislative rights to refuse unsafe work.

The first of the important themes that runs through all but two of the cases is that of the worker holding a genuine belief that the work was unsafe. The Court is clearly of the opinion that that the worker holding such a belief (however strongly) does not provide justification for the worker to refuse to work. What is implicit in the two cases where the workers did not claim to hold a genuine belief at the time of the initial incident is that the Court is suspicious of any later claims to justification on the grounds of health and safety. In both of these cases, the Court held that the strikes were unlawful in that they related to a personal grievance[26] and a dispute of rights.[27] Therefore, it would appear that the primary component of any action to refuse unsafe work must be that a worker holds a genuine belief about the danger.

The second theme of importance is the requirement for the worker to notify the employer of the perceived danger in a clear and unambiguous manner. The Court on one occasion went as far as to state that workers had a common law duty to report perceived or actual danger to their employer. This duty (while not explicitly stated) could also be said to arise out of s.19 of the HASE Act, which requires employees to act to protect their own health and safety and that of other people in the place of work. What is implicit in the Court's discussion on this matter is that reporting should be both timely and include as accurate a description as possible (in the circumstance) of the danger: its imminence and its level. Failure to report "adequately" was seen to reduce the persuasiveness of any post facto attempt at justification on the grounds of health and safety.

A third theme (related to the above) is that of the employer, having received reports from the workers of an unsafe situation, taking some, though often minimal, action in response. What is important in this respect is that once the employer has taken any action and communicated this to the workers then any ground for justification that the workers might have had based on the "reasonable person" or "objective evidence" tests (discussed below) is lost.

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[26] Coates Brothers [NZ] Ltd v Auckland Chemical etc IUOW & Ors (ALC109A/89)

[27] Fletcher Development and Construction Ltd v NZ Labourers etc IUOW & Or (ALC74/90)

The "reasonable person test" is arguably the most significant theme that runs through the cases. It is through application of this test that the Court begins to determine whether refusal to work is either justifiable or not. In ten of the cases, this test was applied and the results of the test significantly contributed to the findings of the Court. The test is essentially "would a reasonable person consider that the work to be done constitutes a danger to the workers health and safety". Unfortunately, as discussed above, the Court introduced two possibly complicating factors into this test. The first of these was should the test be that of a "reasonable lay person" or should it be that of a "reasonable co-worker" who has knowledge and understanding of the work.[28] In two cases, there is a suggestion that a reasonable layperson may indeed consider the work dangerous. Despite this, because a certain amount of danger is an accepted part of the job, then a reasonable person's belief could not be used as justification by the workers who "normally" accepted the presence of such danger. The reasonable person test may be a substantive ground for justification of the refusal to work but is still open to interpretation by the Court.

In a similar fashion the "objective evidence test", the fifth theme running through the Court's findings, is also open to contestation. This test requires either the opinion on the danger or otherwise of a work situation, from an expert person, and/or objective evidence about the risk. The problem here is that experts can, and do, disagree with each other particularly in a situation in which parties are contesting a matter after the event in a Court where one or other of the parties must lose. In resolving the cases of expert evidence contradicting, the Court errs conservatively on the protection of the economic rights of employers as opposed to the fundamental human right to safety held by workers.

As important as these themes are in illuminating both the individual common law and the collective legislated right to strike on the grounds of health and safety, there is a larger issue which should be considered. In each of the cases, whether they arise out of a personal grievance against dismissal, an application for an injunction against a strike, or an application for a judicial review of managerial decision, they arise firstly out of a situation of conflict between the employer and the workers. A conflict in which the parties end up as adversaries before a Court who is asked to make a post facto ruling on whether or not the parties acted in a justifiable manner. That these matters should have ended up before the Court is an inevitable consequence of the way in which these "rights" are framed.

In the situation when a worker having a genuine fear for their safety attempts to assert their individual common law right to refuse unsafe work they are by definition threatening insubordination and entering into a potential dispute with their employer. They may argue that they are justified in their refusal by being able to demonstrate that their behaviour is consistent with the "tests" discussed above. However, the burden of proof is on the worker to show that s/he held a genuine belief, that s/he had reported the matter, that their belief

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[28] In Case No.1 it is further complicated by the fact that the court appeared to accept the evidence of a least one co-worker who, contrary to other co-workers, suggested that in some circumstances the use of the "dangerous" tool complained of by the plaintiff could fatal and then appears to ignore this evidence, raising the question of which co-worker is to be considered reasonable and which is not.

was reasonable, and preferably that there was also objective evidence to support their decision. If the worker is not able to justify their position then s/he is judged "insubordinate" and liable for discipline or dismissal.

Similarly, when a group of workers collectively exercise their legislative right to strike on the grounds of health and safety under s.71 of the ECA they again (by definition) enter into a dispute with their employer. Again, the workers ". . . who are claiming ". . . that participation in the strike . . . was not unlawful, shall have the burden of proving that allegation." If they cannot prove the allegation through satisfaction of the above tests, they are deemed to be unlawfully on strike and subject to penalties.

Policy implications

Given the nature of employment relations dispute resolution in New Zealand we can confidently say that the 13 cases discussed above represent only the very tip of the iceberg of a mass of unreported "cases" or "events" that fall within the ambit of the right to refuse.[29] It is therefore likely that these cases represent a large but undefined number of disputes around the matters of health and safety and the rights of workers to work in safe workplaces that may or may not be resolved in a satisfactory manner.

In a pluralist democratic society, it is accepted that there are competing interests between groups in society. For most of New Zealand's history (excluding the last ten years), pluralism has been one of the foundations of New Zealand's employment relations system. While we would agree that many of the issues that effect the employment relationship are quite properly addressed through contestation, bargaining and dispute, within a regulatory framework, we believe that matters of health and safety, and in particular on the matter of a worker's right not to have to perform unsafe work, the adversarial model is neither appropriate nor effective. The current provisions of both the common law rights and duties and the legislative rights to refuse work are by their adversarial nature not conducive to promoting excellence in health and safety management and the prevention of harm to workers (to paraphrase the s.5 of the HASE Act 1992). This, combined with the high standard of proof currently demanded by the Court in its post facto deliberations, places workers at a potentially serious disadvantage and as such is inconsistent with a proactive and cooperative system of worker involvement.[30] Accordingly, the whole manner in which issues related to the right to refuse unsafe work are dealt with needs to transformed through a realignment of policy and legislation towards a proactive process of dealing constructively with actual and potentially dangerous work. The policy should shift the burden of proof and onus for action onto those who control the work, the employers and their managerial agents.

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29 See Donald and Cullinane (1998).

30 Although where the parties specifically negotiate an agreement on the common law issue may be varied (Gunningham, 1984).

The authors suggest that the HASE Act be amended to include a system, which includes the processes outlined below. The proposed system would more adequately protect workers and remove the adversarial nature of the current system. The system would be constructed so that the employer and worker would have interlocking rights and obligations.

For workers, the system would create two main obligations. First, the worker/s must report a health and safety issue and their intention to cease work to the employer as soon as possible. Second, having made the report of an unsafe situation, the worker/s would generally be obligated to remain at the place of work and take up any other duties reasonably assigned by the employer.

For the employer, the obligation to comply with the specific (s.6 to s.10) and general duties imposed by the Health and Safety in Employment Act would remain. The nature of the employers' obligations in regards to workers having the right not to undertake unsafe work would be linked to these statutory obligations. In the situation in which the hazard identified by the worker was pre-existing at the time of reporting, the presumption would be that the employer has not previously taken sufficient steps to eliminate or control the hazard. In the situation in which the hazard identified by the worker is new, the employer has an existing legal obligation to take sufficient steps to eliminate or control the hazard.

At the point in time when the worker informs the employer of the hazard, the burden of proving that the situation is safe for the continuation of work will fall on the employer. A primary requirement in proving the situation is safe will be evidence of a full and thorough investigation of the situation and/or hazard. This will usually require the elimination of the hazard or the provision of expert advice about control of the hazard. Once an unsafe situation is reported, the employer would be obligated to find other suitable tasks for the affected workers, or if none were available, to release the worker on pay.

In the event that the worker makes a complaint and the employer disagrees (after investigation) that an unsafe situation exists, the matter would be referred to an appropriate inspector or mediator at the Department of Labour.

An effective right to refuse requires workers to be informed of their legal rights and the conditions that must be satisfied to secure protection for them. Harcourt and Harcourt (2000), reviewing the Canadian experience, suggest that workers are often ignorant of such rights and are consequently reluctant to either refuse unsafe work or invoke the protections and corrective procedures provided by statute. For the right to refuse unsafe work to be effective workers will need appropriate training and education. We propose that the duty to provide workers with information contained in s.11 and 12 of the HASE Act be extended to include a duty to inform workers of the rights under the Act, and the imposition of penalties for not doing so.

The system proposed would replace the specific right to strike on the grounds of health and safety (established in s.71 of the ECA) and would render null the common law provisions to refuse to undertake unsafe work. This "new" statutory right for workers to refuse unsafe work has several potential advantages over the current approaches to health safety described above. As Harcourt (1996) discussed elsewhere the foremost of these advantages

is a broader coverage of hazards to the extent that any danger a worker identifies can be the subject of a refusal. Temporary and permanent dangers associated with staffing levels, maintenance problems, and production speed may thus serve as the basis of a refusal. The right to refuse has the further advantage of not depending upon the frequency or thoroughness of official government inspections to detect hazards. Instead every worker is a potential inspector when he or she observes and responds to unsafe conditions on the job. Work refusals also offer a proactive rather than reactive approach to health and safety that allows workers to escape exposure to hazards, until management has eliminated the dangers or an inspector has investigated and declared the work safe. Moreover, refusals can result in costly work stoppages that managers may try to avoid by instigating preventive measures before the fact or by undertaking rapid corrective action after the fact.

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