THE INDUSTRIAL LAW SEMINAR

Auckland University

3 October, 1979

Legal Research Foundation Inc.

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I N T R O D U C T I O N

These papers were presented at a seminar on Industrial Law held at Auckland University on 3 October 1979.

Out thanks are recorded to the Speakers for making their papers available for publication.

A.H. BROWN
Seminar Convener

LEGAL RESEARCH FOUNDATION INC.

INDUSTRIAL LAW SEMINAR

University of Auckland, 3 October 1979

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INTRODUCTION

The purpose of this paper is to consider the recent developments in the law relating to security of employment. The subject of security of employment is one of considerable interest not only to workers but also to employers. Traditionally the respective rights and obligations of workers and employers have been laid down in the contract of employment. The assumption has been that the individual worker and employer would negotiate between them satisfactory terms for employment. While this is the legal position, in practice this situation is rarely to be found except amongst some highly skilled technical or executive staff.

The unequal economic position of the parties meant that a contract was imposed by an employer upon an individual worker. This was and is the position for those sectors of the workforce where there is no trade union coverage. In order to rectify their unequal bargaining position, workers formed trade unions on the very sensible principle that it is easier to bargain collectively than individually. The rise of trade unions and the development of the award and collective agreement has meant that for most workers in New Zealand the contract of employment is of minor importance.

What is interesting is that the common law continues to assume the supremacy of the contract of employment. It has proved incapable of providing an adequate remedy for what may be considered one of the greatest loss most people could experience, that is, the loss of their employment. This paper is not concerned with the reasons for the common law failure to accommodate what was happening in society in the 19th century. This question has been very well discussed by Otto Kahn-Freund in his article "Blackstone's Neglected Child: The Contract of Employment".[1] It is important for an understanding of the law today however to realise that through the inability of the common law to cope with the changes in employment that accompanied the industrial revolution, the workers themselves were forced to find a remedy for themselves. That remedy being not only the formation and development of trade unions and the consequent development of the collective agreement, but also a reliance upon legislation to regulate the employment relationship.

It is important to note however that legislation in New Zealand has been directed towards the collective relationship. The Industrial Conciliation and Arbitration Act of 1894 was concerned with the development of trade unions and the settlement of disputes through legal procedures and agreements. The same is true of the present Industrial Relations Act 1973. The individual contract of employment has almost been ignored by the legislation. For example under s.231 of the Industrial Relations Act 1973 states that if there is any inconsistency between an existing contract of employment and an award or collective agreement, then the award or agreement is to prevail. The terms of the award or agreement are incorporated into the contract.[2] While then not totally overriding the contract of employment, for those workers within the jurisdiction of the Industrial Relations Act 1973 the contract of employment is almost irrelevant. The award or agreement effectively determine such matters as security of employment.

For those workers not covered by the Industrial Relations Act 1973 the contract of employment is still the only means by which they can provide for their security of employment in New Zealand. [It has been decided that this paper will be confined to New Zealand because the special nature of industrial legislation makes law in other countries of academic interest only.] It is not proposed in this paper to concentrate upon the security of employment terms of the contract of employment. The reason for this is that this aspect of the law has been fully covered elsewhere.[3] Also it is proposed in this paper to approach the whole question of security of employment from the point of view of whether the law provides an effective remedy for those who lose their employment.

This may be a pragmatic approach but it is submitted it is a realistic one. This is what the client normally wants to know. Will he or she get their job back, or are damages available to compensate for the loss of that job? If this is the question to be answered then the common law provides little comfort for the person who loses a job. There is no question of regaining previous employment regardless of the grounds for loss of employment. Damages as a remedy is also normally inadequate as it relates to the period of notice that should have been legally given.[5] A recent New Zealand example of the court's approach to such a question is to be found in Clark v Independent Broadcasting Co.[6] In this case a chief announcer was given one months notice instead of the three months that would have been expected for such a position.

The failure to give the required notice resulted in $260.00 damages, being the difference in salary between what he was receiving in his new job and the amount he should have received for two months extra notice.

For those persons who are not covered by the Industrial Relations Act 1973 there is as much security of employment as there is bargaining strength. When and how employment can be terminated will depend upon the terms of the contract negotiated with the employer. There are not statutory provisions that are incorporated into the contract, or statutory obligation which the employer is bound to observe. The law provides those in a weak bargaining position with little protection. It seems to be almost assumed that one's employment interests will now be protected by a collective organisation whether it be trade union, society, or association. This is a fact which more higher paid workers are coming to recognise. Just as lower paid lower workers in the 19th century were forced by the common law to seek safety in collective action, so today the common law is assisting with the organisation of professional and managerial workers.

Because it seems just a question of time before many persons at present not covered by the provisions of the Industrial Relations Act 1973 become so covered, it is proposed to concentrate upon two situations in which a worker covered by the Act may find his or her employment terminated unilaterally. The first is when the worker has been dismissed; and the second is when the worker has been made redundant.

STATUTORY PROTECTION OF EMPLOYMENT

As has been noted New Zealand's industrial legislation has been largely directed towards the regulation of collective relations. It is assumed that the individual's interests will be taken care of by the collective. To some extent this was true, with wages and conditions of employment generally improving because of trade union involvement. There was one area however which remained contentious and beyond the influence of trade unions. That was the dismissal of workers. Unions failed to negotiate any improvement upon the common law position. If a worker was dismissed, there was no established procedure for handling the matter. In these circumstances often the workers took direct action as a means of trying to prevent the dismissal coming into effect. The strike statistics prior to 1970 illustrate that dismissals made

a major contribution to a number of strikes.[7] In an effort to overcome the necessity to resort to strike action it was decided to introduce a statutory dispute procedure for the settlement of such disputes in the 1970 Amendment to the Industrial Conciliation and Arbitration Act 1954.

THE INDUSTRIAL CONCILIATION AND ARBITRATION AMENDMENT ACT 1970

The primary reason for the Amendment was the prevention of strikes and not the improvement of the worker's security of employment. This is clear from the Parliamentary debates on the Amendment. For example, the then Minister of Labour, Rt.Hon. J.R. Marshall stated when introducing the Bill:

> "These matters [i.e. personal grievances], particularly alleged wrongful dismissals are a constant source of industrial disputes leading to work stoppages . . . . One reason is the absence of a simple procedure for the handling of personal grievances".[8]

It is not surprising then the emphasis in the Amendment was upon the procedure and not the protection of the workers' employment.

For our purposes the main points to note about the Amendment were first, it provided for the settlement of "personal grievances" which were defined as:

> "any grievance that a worker may have against his employer because of a claim that he has been wrongfully dismissed, or that other action by the employer [not being an action of a kind applicable generally to workers of the same class employed by the employer] affects his employment to his disadvantage."[9]

The section applied then to wrongful dismissal and it was clear from the Parliamentary debates that the common law definition of "wrongful" was to remain. The second point to note was the provision for a standard procedure to be followed in the case of a personal grievance. Such procedure was not mandatory in all awards or agreements, but in the event of a discontinuance of employment, the Minister of Labour could invoke the procedure. The third point was that the procedure could be invoked by the union or employer only. The individual worker had no direct access to the procedure and the remedies contained in the Amendment. Which brings attention to the fourth point, namely, the power of the arbitration body that decides the dispute to give

one all three of the following remedies - reimbursement of lost wages; reinstatement to the former position or one not less advantageous; and compensation.[10] Obviously this provision was a major departure from the common law in so far as it provided the dismissed worker with some hope of regaining his or her employment. Much of the effectiveness of these remedies were curtailed however by the fact that a worker had to be wrongfully dismissed before they were available. Therefore if a worker was given the correct notice by the employer, there was little that could be done.

INDUSTRIAL RELATIONS ACT 1973 - s.117

In 1973 there was a redrafting of our Industrial legislation which resulted in the Industrial Relations Act 1973. It is arguable that this new Act did not depart greatly from the traditional method of regulating industrial relations in New Zealand. It's most notable feature was the continuation of the trend towards mandatory dispute procedures. This was seen as a means by which to prevent disputes resulting in industrial stoppages. As with other procedures, the personal grievance procedure was amended in an effort to make it more effective.

Before discussing s.117 in detail, a few general comments will be made. First, the definition of a personal grievance was amended to replace the words "wrongful dismissal" with "unjustifiable dismissal" [s.117(1)]. This was seen as a major departure from the common law because it now extended to type of dismissals for which the statutory remedies of reimbursement, reinstatement and compensation were available. What is meant by the term "unjustifiable" was not stated in the Act. This has meant that each case has to be decided on its facts and while it is difficult to predict what may be considered "unjustifiable", there is now sufficient case law to give some guidance, which will be considered in a moment.

Secondly, the standard procedure for settlement of a personal grievance dispute was now mandatory and had to be included in all awards or collective agreement. If the parties were not satisfied with the standard procedure they could devise their own procedure, but it had to be approved by the Arbitration Court. It is interesting to note that a survey of awards and agreements conducted by the Department of Labour showed that only 49 documents contained a variation on the standard procedure.[11] There are approximately 1000 documents registered at any one time.

While it is not necessary for our purposes to examine the standard procedure in detail [see Appendix A], a third point to note is that if the parties are unable to settle the dispute at the disputes committee stage, there is a right of appeal to the Arbitration Court [s.117(4)(9)]. The reference may be made by the employer or the union and there is no statutory time limit within which the appeal must be referred to the Court [s.117(4)(h)]. Although there is no such time period, delay is not looked upon with favour by the Court, nor be in the interests of the client. This was illustrated clearly in the case of General Motors Ltd. v Lilomaiva[12] where the dispute committee hearing took place within two days of dismissal but the Court Hearing took six months. In such circumstances the remedy of reinstatement becomes almost impractical. This point was noted in McHardy v St.John Ambulance Association,[13] where although the grievance committee chairmen had recommended reinstatement and the Court agreed with this, it felt that because of the delay between dismissal and the hearing, the remedy was not in the best interests of the parties. One further point to note is that if there is undue delay there may be difficulties in calculating damages because of the worker's duty to try and mitigate any loss by finding other employment.

The fourth general point to note about s.117 is that although the 1973 Act provided for personal grievance procedure being invoked by a trade union or employer only, in 1976 there was an amendment to the principal Act which inserted subsection 3A into s.117. This subs.3A provides that any worker who considers he or she has grounds for a personal grievance, but is unable to have the matter dealt with promptly because of the actions of the union or employer or any other person, then that worker may with the leave of the Arbitration Court refer the matter directly to that Court for settlement.

The reason for the introduction of this subsection was to protect the individual worker's remedy if a union refused to act on behalf of the worker, or was slow in so acting. This would appear to be a very sensible amendment from a practical point of view. From a conceptual perspective it does present some difficulties. The Industrial Relations Act and its predessors have always been concerned with collective relationships only. The individual has had no rights under this industrial legislation. The inclusion of subsection 3A is therefore a major departure of principle. The only comment that will be made at this stage is that if the legislature intends to further extend the rights of individuals to appear before the Arbitration Court in their own right, then it may be advisable to consider separate legislation

dealing with all aspects of the individual contract of employment so that all workers, and not only those covered by the Industrial Relations Act may acquire equal protection. The English Contract of Employment Act 1972 may provide a useful model for such an exercise in law reform in New Zealand.

SECTION 117(3A)

Section 117(3)(A) is of particular interest to practitioners because it is only if a worker is unable to obtain relief from the union that a lawyer is normally likely to be consulted. When the Court is considering whether leave should be granted to proceed with the case, it requires to be established the fact that the union or employer were first consulted - Hori v N.Z. Forest Service.[14] This may seem a sensible requirement but there is the difficulty that arose in the Hori Case, namely there was an internal split within the union and in this case the breakaway group had good reason for believing the union would not support it's action. Regardless of this type of situation however, it is essential that the aggrieved worker can show that the union's assistance was sought in the matter.

Not only must the plaintiff show that the union's assistance was sought or that the employer refused to cooperate by participating in the disputes procedure, as was the situation in Dee v Kensington, Haynes and White,[15] but it must also be established that the union or employer failed to act promptly. In Oakman v Bay of Plenty Harbour Board[16] the union had taken up the aggrieved worker's complaint but there was considerable delay in communicating the decision of the union to the worker, so the Court held that leave should be granted. In the words of the Court, "We consider that the union, having taken the matter up, must still act promptly to complete the procedures laid down so far as they are applicable".[17]

It would appear from reading the cases that the Court will normally treat an application for leave sympathetically, but it is also true that in most cases where the union refused to proceed with the matter the Court has found the dismissal was justifiable. The Court seems anxious to ensure that every person has their day in Court, but a day in Court does not normally result in success for the applicant.

Before the law on s.117(3A) is left, attention must be drawn to the recent case of Muir v Southland Farmers Co-operative Association Ltd.[18] Mr. Muir sought leave to proceed under s.117(3A) because the union covering his industry declined to act for him when he was dismissed. The award contained the usual standard procedure clause and an unqualified preference clause. Despite his obligations under the unqualified preference clause, he failed to join the union, so as the Court noted, it was not surprising the union refused to pursue his grievance. The question before the Court was whether lack of union membership was sufficient to deprive a worker from relief for unjustified dismissal under s.117(3A). After considering the matter carefully and fully the Court decided:

> ". . . we are of the opinion that actual membership of the appropriate union is a prerequisite before a worker can, as an individual, invoke the provisions of subs.3A."[19]

The Court was fully aware of the implications of this decision and agreed to state a case to the Court of Appeal if the parties so desired. If the decision of the Arbitration Court is upheld then the collective nature of the legislation will be preserved. If however the decision was overturned, it may mean that the path is open for more individual actions before the Arbitration Court. It is submitted, such a situation is undesirable unless legislation specifically direct to this situation is enacted so all terms of the contract may be considered by the Arbitration Court.

JURISDICTION OF THE ARBITRATION COURT

The question of whether or not the Arbitration Court has jurisdiction to determine a personal grievance had arisen in cases prior to the Muir Case. The principal authority on this question is the Court of Appeal decision in Auckland Freezing Works and Abattoir Employees V.U.W. v Te Kuiti.[20] The question before the Court of Appeal was whether the standard procedure set down in s.117(4) was available to workers who were not covered by an award or agreement, but were voluntary members of the union. The cause of action arose from the defendant Council dismissing two employees who were voluntary members of the union and not covered by the provisions of any award or collective agreement. The Court of Appeal held that the standard procedure did not apply to workers who were not covered by an award or agreement. The standard procedure in s.117(4) was not a general remedy for all workers, but was in fact a clause in an award or collective agreement so therefore could only apply to those covered by such documents.

Although this decision may seem restrictive it is consistent with the concept that the Industrial Relations Act 1973 is concerned with collective rights and obligations. If these rights and obligations are to be applied to individuals, then the law should state this specifically. It is submitted that if the law is found wanting in its ability to provide for the needs of individuals in the employment relationship, and the writer believes it is so wanting, then do not graph new individual rights and obligations onto the collective tree. If this is allowed to happen then the fruit of the tree may make painful eating for everyone. The Court of Appeal is endeavouring to maintain a separation of individual and collective rights, it is now up to the legislature to undertake positive law reform and provide individuals with legal protection in their employment relationship.[21]

PERSONAL GRIEVANCE - DEFINITION

To return to s.117 of the Industrial Relations Act 1973, if the Arbitration Court does have jurisdiction to determine an appeal from a disputes committee on a personal grievance, the question arises whether the grievance falls within the definition of s.117(1). Although personal grievances are not confined to unjustifiable dismissals the majority of cases relate to dismissals. Very few cases of matters other than dismissals have come before the attention of the Arbitration Court. The first case came to Court shortly after the section came into force and the reluctant attitude of the Arbitration Court to consider the matter may have unfortunately deterred other cases. The case in question was Auckland Regional Authority Officers Industrial Agreement - Application for Interpretation.[22] The question before the Court here was whether a non-promotion was a grievance within s.117. The Court did not consider such a matter fell within the definition of personal grievance and expressed their opinion in very negative terms as follows:

> "It appears to us that if the legislature had intended to embrace the non-promotion complaint it would have said so in specific language. As we have endeavoured to show, the non-promotion complaint is essentially different from the ordinary sort of employer/employee dispute and we have said also that the non-promotion complaint requires special procedures. We are of the opinion that s.117 is not aimed at grievances relating to promotion appointments."[23]

The somewhat unwise way in which the Arbitration Court handled the matter has been commented upon elsewhere.[24] The above statement appears to be that of

a Court not well versed in the determination of matters relating to white-collar employment. It is submitted that in view of the increasing unionisation of this sector of the workforce, plus the fact that this sector is more inclined to use the Court than other sectors, it may be time for the Court to broaden its horizen on what type of matters fall within the definition of a personal grievance.

UNJUSTIFIABLE DISMISSAL

The majority of cases before the Arbitration Court involved the determination of the question whether a dismissal was unjustifiable. The lack of a statutory definition of unjustifiable has the advantage of allowing each case to be decided on its own facts and merits, and the disadvantage of being unable to predict what form of conduct is likely to result in a claim for unjustifiable dismissal being upheld. The only certainty in these cases is uncertainty. Any analysis of the cases is also further hampered by the lack of detail in the judgment as to fact and law. This may be understandable because of the personal nature of much of the evidence and the fact that most appeals from the disputes committees do not involve questions of law, but merely a rehearing of the facts.

Some matters have become clear and limited guidance may be obtained from a review of the cases. The Arbitration Court established early in its jurisdiction over these matters that the onus was on the employer to prove on the balance of probability that there were adequate grounds for terminating the employment - see Scholes v AA Mutual Insurance Co.[25] The worker then must establish that he or she has been dismissed and then it is up to the employer to show the dismissal was justified. It should be noted here that the Court has held that sometimes a resignation may in effect be a dismissal - Wellington etc. Clerical Workers I.U.W. v Barraud & Abraham; Auckland etc. Shop Employees Union v Smith & Smith Ltd.[27]

When determining whether or not particular conduct justified dismissal the Court appears to consider both the actual conduct and the way in which the dismissal took place. Misconduct is considered a justified ground for dismissal, but only if it is substantial - Cook v North Shore Ferries Ltd.[28] Bell v Air New Zealand.[29] In Bates v Dunlop (N.Z.) Ltd.[30] and Wellington etc. Drivers I.U.W.v Fletcher Construction Ltd.[31] however one act of misconduct was held

to be sufficient to justify dismissal. In both cases there may have been some element of an example being made to deter other workers. In the former case the worker was caught smoking in a non-smoking area, while in the latter wire mesh was removed from a construction site. In another case - Wellington etc Hotel I.U.W. v Barretts Hotel[32] - a worker dismissed for fighting was found to be unjustifiably dismissed after the full facts of the case were considered. The court's willingness to look at all the surrounding circumstances of a case is illustrated in Auckland Clerical etc. I.U.W. v Vacation Hotels Ltd,[33] where a night telephone operator was found asleep at his job and dismissed. After a consideration of the facts, and in particular the working conditions, the Court held the dismissal was unjustified. It can be seen that much can depend on the facts.

The same situation applies where a worker is dismissed for incompetence. This must be established clearly by the employer. In the recent case of Vial v St. George Private Hospital[34] the Court heard extensive evidence on the allegation of incompetence. It was obvious from the case, as with many personal grievance cases, a clash of personalities was a contributing factor in the situation that led to the dismissal. After considering all evidence and not only the actual incident that led to dismissal the Court found the dismissal was unjustified. It is interesting to note however that if the respondent had clearly warned the applicant that instances of incompetence would lead to dismissal, the matter may have resulted differently. In Auckland Clerical I.U.W. v Universal Business Directories Ltd,[35] the Court also commented upon the fact that if the plaintiff's conduct had been as bad as alleged then a warning to this affect may have been expected. In this case the court held the dismissal was unjustified and that the worker had been dismissed principally because her employer's pride had been hurt over an incident in the office.

There is one ground for dismissal that the Arbitration Court had seemed to accept justified dismissal and that was redundancy - Templeman v Farmers Aerial Topdressing Co. Ltd;[36] Auckland etc Shop Assistants I.U.W.v Curtain Styles Ltd.[37] The Arbitration Court has been reluctant to interfere with the running and organisation of a business. Yet it seems if the circumstances are obviously unjust, the Court may be prepared to find a dismissal on such grounds unjustified. In Auckland etc Shop Assistants I.U.W. v Shrimpi's Fashions Ltd,[38] the respondent wanted to reorganise his

business and to effect this he dismissed the applicant. It was the manner in which he did this that led the court to hold that the dismissal was unjustifiable and award $400 for loss of wages. Also in New Zealand Insurance Guild I.U.W. v Guardian Royal Exchange Assurance Co. Ltd,[39] when the company dismissed a worker shortly after he had joined the staff, because it found itself over-staffed, the Court held the lack of planning by the company did not justify the dismissal of the worker. Compensation of $3000 was awarded for loss of wages and $1000 for loss of employment and expenses.

Although it may be difficult to assert definite principles upon which the Arbitration Court will determine what constitutes an unjustifiable dismissal, certain guidelines for practice may be tentatively suggested. If your client is an employer the obvious advice is to institute clear procedures for dismissal. If a worker's performance is unsatisfactory be sure to notify that worker, preferably in writing. When a worker is dismissed be sure it is for a substantial reason and give the grounds for dismissal. An employer is not required in New Zealand to give grounds for dismissal, but if they are not given the Court may not be impressed with what sounds like an after-thought. If you act for a worker the best advice is to ensure that evidence of good work performance is available and that efforts are made immediately to initiate the standard procedure if dismissal takes place. If the union is reluctant to act then s.117(3A) should be implemented as soon as possible. This is important because as indicated previously the remedy available may depend upon the delay involved between the dismissal and the Court hearing.

REMEDIES

On the question of remedies, the cases are of little guidance. As noted under s.117(7) the worker, if found to have been unjustifiably dismissed is entitled to reinbursement of wages, reinstatement or compensation or all three remedies. Although reinstatement was considered impossible under common law, the Arbitration Court has considered in certain cases it is an appropriate remedy. Industry today does not necessarily involve close working relationships. Quite the contrary in fact. The most notable case where the court ordered reinstatement was The New Zealand Guild Union of Workers v The Insurance Council of New Zealand.[40] This case involved the dismissal of a technical officer with the defendant Council. Although the nature of the employment involved a reasonably close working relationship with others, the

Court upon deciding that the dismissal had been unjustifiable under s.150 of the Industrial Relations Act 1973, ordered his reinstatement. It was considered here that there had not been undue delay in bringing the proceedings, and that the parties were mature enough to accept reinstatement. These are the two factors that seem of importance in any decision as to reinstatement.

In cases where close working relationships do not exist, reinstatement may seem more appropriate. An example of the Court exercising it's discretion of reinstatement is Doyle v Dunlop (N.Z.) Ltd,[41] where dismissal had arisen out of collective action and reinstatement had already taken place because of agreement with the union. Reinstatement is sometimes not appropriate or desired by the worker - see Dee v Kensington Haynes & White.[42] The employment situation seems to have deteriorated to the point where neither party felt reinstatement was desirable. When taking an appeal to the Arbitration Court on an unjustifiable dismissal, it should not be forgotten that the Court may order reinstatement even if one of the parties does not want the remedy. For example, in Harpur v N.Z. Aluminium Smelters Ltd.[43] reinstatement was ordered even though the company argued its trust in the worker was so affected his employment as a security officer could not be successful.

Apart from reinstatement the Court may award damages for lost wages. Often after hearing a case and deciding the worker has been unjustifiably dismissed, the Court will merely award that the wages should be reimbursed for the period during which the correct notice was not given. This is similar to the common law position. In some cases however the Court will award more than what would be considered the equivalent to the appropriate period notice to given. Although the rationale of the Court is difficult to follow, two factors seem important - the nature of the employment and the cause of the dismissal. For example, in Smith v Crown Crystal Glass[44] the type of employment was manual and cause of dismissal an altercation. It appears therefore that while the dismissal was found to be unjustifiable, the Court had little sympathy for the worker who was in part the author of his own misfortune. In the Dee Case[45] however the employment was clerical, and the behaviour of the employer in the whole matter left something to be desired in the view of the Court, so $500 was awarded. This sum seems to have included some element of compensation. In the Vial Case[46] the dismissed worker was a midwife of some experience to whom the Court awarded payment of

lost wages from the time of dismissal until the date of judgment - a period of seven months. Often a sum is awarded which takes into account wages earned in other employment as in the McHardy Case.[47] There is of course a duty upon the dismissed worker to mitigate any loss. This was clear from General Motors Ltd. v Lilomaiava[48] where the worker did not find new employment but reported to his old job each morning and the court reduced the claim for lost wages from $2242 to $1500.

The remedy under s.117(4) which causes most difficulty is that relating to the right of the Court to award compensation. It is very difficult to discern what criteria if any the Court applies when making such awards. There is authority to suggest that distress caused by the dismissal may justify compensation - McDonald v Hubber.[49] Often however the Court gives no indication for the amount of damages awarded. In the Vial Case,[50] the Court merely stated: "We also award the sum of $1000 compensation". In the New Zealand Insurance Guild I.U.W. v Guardian Royal Exchange Assurance Co. Ltd,[51] where the company's lack of planning caused the worker's redundancy, the Court awarded ". . . $1000 for loss of employment and expenses".

Although the more highly skilled the employment the more likely a worker appears to be to receive compensation, an exception to what may be a rule is Auckland Clerical etc I.U.W. v Universal Business Directories,[52] where a receptionist was awarded $2000 to compensate for loss of wages and $1000 for loss of employment. The totally unreasonable attitude of the employer seems to have contributed to the amount of compensation awarded. Perhaps the closest one can get to discerning the principles that guide the Court in this matter is contained in the McHardy Case[53] where the Court after being referred to English authority on the subject commented:

> "Section 117(7) contains no such express provision, but it does entrust a wide discretion to the Grievance Committee and the Court to decide whether, even if unjustifiable dismissal be found, any order should be made in respect of lost wages and compensation, and as to the quantum of both if an order is made. We conclude that the Court when exercising that discretion should take into account along with the other facts, the conduct of the worker."[54]

The Court refused however to accord priority to any one factor.

Section 150 of the Industrial Relations Act 1973

No discussion of remedies for personal grievances under the Industrial Relations Act 1973 is complete without reference to s.150. This section is designed to protect workers from victimisation for involvement in trade union activities, or activities associated with the pursuance of matters specified in the section. [See Appendix B]. An offence is committed against this section if a worker engages in one of the activities specified and is dismissed by the employer within the 12 months of the involvement. If a worker has been wrongfully dismissed under this section then the same remedies as provided under s.117(7) are available to the Court (s.150(4)). These remedies are in addition to the imposition of a fine up to $100 (s.150(1)).

Before the cases decided under this section are considered, a few general points will be noted. First, the onus of proof is upon the employer to prove the employee was dismissed or his or her position altered for a reason other than engagement in one of the specified activities - see Inspector of Awards v Tractor Supplies Ltd.[55] Secondly, if an action may be brought under either s.117 or s.150, an election must be made as to which section upon which to base the action. Thirdly the action can be brought at the suit of an Inspector of Awards or trade union only. An individual has no standing under this section and there is no equivalent to s.117(3A). The fourth point to note is that a worker may not have to be covered by an award or agreement to be eligible for a remedy.

This last point was considered in detail in the leading case on s.150 - The New Zealand Insurance Guild Union of Workers v The Insurance Council of New Zealand.[56] A detailed consideration of this case has already been made[57] so it need only be stated here that the Court was prepared to give a liberal interpretation to the section to enable a worker who was not covered by an award but honestly believed that he was so covered, to be reinstated after being dismissed for claiming a benefit under an award (s.150(1)(d)) and pursuing a personal grievance (s.150(1)(F)). Since the above case, there have been several cases brought under s.150. In two cases - Northern etc Butcher I.U.W. v Cooks Trading Co. Ltd;[58] and Auckland etc Shop Assistants I.U.W. v Smith & Smith[59] the employers discharged the onus of proof and the application dismissed. In Otago Driver I.U.W. v Willetts[60] the Court found that a worker had been dismissed for pursuing a claim for meal money while a job delegate. The employer's member on the Court

dissented from the decision on the facts. This is a good case to illustrate the type of matter for which the section was designed to protect.

Although s.150 may appear an attractive remedy, it is submitted that if there is a choice of remedy between s.117 and s.150 the former is preferable. It not only enables the dispute to be settled in the disputes committee, the union member on the Court in the Smith & Smith case noted that s.117 should be used in the majority of cases.[61] Presumably this advice also seeks to preserve s.150 for clear cases of victimisation.

REDUNDANCY

Although security of employment is often thought of in terms of security from dismissal, a greater threat in the future to security of employment will be redundancies. Not only the economy, but the introduction of the new technology or the "chip" revolution as it is now called, will radically alter the nature of employment. It is probably already too late to warn the decision-makers that new policies and strategies are needed to cope with this new challenge. If the energy crisis is any indicator of the ability to plan, there is much trouble ahead for us in New Zealand.

It would be tempting to devote a great deal of time to the general question of the future of employment.[62] This paper is concerned with the law however so it shall concentrate upon what legal response if any has been made to prevent, or regulate redundancies. Answer to this question is short - very little. Mathieson[62] has argued that the inclusion of a term in a contract providing for redundancy payments, may not be valid because the obligation to perform arises after the contract has been terminated. While this may be legally correct, the market place has not been concerned with such niceties and has embarked upon the process of negotiating redundancy agreements.

These redundancy agreements have resulted in many industrial stoppages including the longest stoppage in New Zealand - Mangere Bridge. Some agreements have been negotiated separate from the award or collective agreement, while many documents now include a clause relating to redundancies. The legality of these agreements and clauses has yet to be challenged. There would seem to be little doubt the redundancy clauses in registered documents would not be enforceable. The unregistered agreements however, rely more upon industrial might than legal right for their enforceability.

As has been already noted, there is little likelihood of a remedy under s.117 of the Industrial Relations Act 1973 if employment is lost due to redundancy. The only statutory provisions relating to redundancy are contained in the Wages Adjustment Regulations 1974, Part IIIA,[63] and these relate to control the amount that can be paid by way of redundancy payments. An economic measure only.

It may be argued that what is needed in New Zealand is comprehensive legislation dealing not only with redundancies, but also retraining and employment. In 1975 a Severance and Re-Employment Bill was introduced into Parliament, but was not pursued with the change of government. In 1976 the then Minister of Labour, promised that the matter would be considered with a view to action.[64] Nothing has resulted. It appears as though a familiar pattern is emerging. As the common law and legislature appear unable to devise rules to regulate redundancies, the people directly involved seem forced to find their own solutions. These solutions will involve more industrial unrest as this is the only tactic available in many circumstances. This does not seem to be a very constructive approach to a national problem, but redundancy is another of those issues upon which the decision makers have displayed inertia.

CONCLUSION

This paper was intended to pass a few observations upon the role of the law in security of employment. It is easy to become lost in the minutia of cases so perhaps I can conclude with this general observation. If it is considered a desirable value in our society that people should have security of employment, then it is time we turned our attention to enacting basic rights and obligations to be observed by all when they enter the employment relationship. At the moment the only effective protection is left to those who belong to trade unions. While the role of trade unions is crucial in any democratic society, must those who are unable to belong to trade unions be deprived of the same protection as those who do? The answer to this question would appear to be yes. If this is to be the case then, I predict the expansion of white collar unionism in the very near future and urge all who have any sense of insecurity in their employment to join a union quickly.

FOOTNOTES

1. (1977) 93 L.Q.R.508. See also "A Note on Status and Contract in British Labour Law", Otto Kahn-Freund, (1967) 30 M.L.R.635.

2. See D.L. Mathieson, Industrial Law in New Zealand 24 for a discussion of s.231.

3. See Alexander Szakats Introduction to the Law of Employment, D.L. Mathieson, Industrial Law in New Zealand, "Termination of Employment", Rowland J. Harrison, (1962) Vol. X Alberta Law Review, 250.

4. Southern Foundries (1926) Ltd. v Shirlaw [1940] A.C.701. For a discussion of recent developments of the law on this question see D.L. Mathieson, Industrial Law in New Zealand, Supplement.

5. Addis v Gramophone Co. Ltd. [1909] A.C.488, Cowles v Prudential Assurance Co. Ltd.(1957) N.Z.L.R. 124.

6. [1974] 2 N.Z.L.R. 587.

7. The following table illustrates the percentage of stoppages due to dismissals:

1967	1968	1969	1970	1971	1972	1973	1974
22.5%	18.9%	15.4%	11.8%	6.7%	13.4%	10.7%	6.3%

1975	1976	1977
10.8%	5.3%	8.0%

Source: Department of Labour Reports.

8. N.Z.P.D. (1970) Vol.368 P.3127.

9. Industrial Conciliation and Arbitration Act 1954, s.179(1).

10. Ibid, s.179.

11. Department of Labour, Personal Grievance Procedures (1978)

12. (1977) I.C. 34/77.

13. (1976) I.C. 66/76.

14. (1978) I.C. 2/78.

15. (1977) I.C. 21/77. See also Szakats, "Trade Unions and the Legal Profession - Or Rule of Law and Unjustifiable Dismissal," (1977) N.Z.L.J.319.

16. (1979) A.C.2/79.

17. Ibid, p.3.

18. (1979) A.C. 27/79.

19. Ibid, p.3.

20. [1977] 1 N.Z.L.R. 211.

21. Other cases involving questions of jurisdiction are:

(a) Hori v N.Z. Forest Service (supra) - Court felt it may not have jurisdiction in this case because under s.218 the Industrial Relations Act 1973 does not bind the Crown so the Forest Service may not be bound by the Agreement.

(b) Palmerston North Newspapers Ltd. v Pywell (1976) I.C. 53/76 - illustrates the case where the parties excluded from their award the Arbitration from hearing appeals on personal grievances.

(c) Parisian Coat Manufacturing Co. v Auckland Clerical I.U.W. (1976) I.C. 23/76 - unless the correct procedure is chosen under the Industrial Relations Act 1973, the Court will not hear the case.

22. (1974) 74 B.A. 531.

23. Ibid.

24. G.J. Anderson, "An Examination of Section 117 of the Industrial Relations Act 1973" Industrial Relations Centre Monograph No.4(1978).

25. (1975) 75 B.A. 5515.

26. (1970) 70 B.A. 347.

27. (1979) A.C. 62/79.

28. (1974) 74 B.A. 2473.

29. (1976) I.C. 63/76.

30. (1975) 75 B.A. 11155.

31. (1979) A.C. 71179.

32. (1978) A.C. 30/78.

33. (1979) A.C. 23179.

34. (1979) A.C. 35/79.

35. (1978) A.C. 21/78.

36. (1975) 75 B.A.

37. (1978) A.C. 3/78.

38. (1978) A.C. 35/78.

39. (1978) A.C. 28/78.

40. (1976) B.A. 173.

41. (1975) 75 B.A. 2883.

42. Supra.

43. (1977) I.C. 56/77.

44. (1974) 74 B.A. 3781.

45. Supra.

46. Supra.

47. Supra.

48. Supra.

49. (1976) I.C. 52/76.

50. Supra.

51. Supra.

52. Supra.

53. Supra.

54. Supra, p.6.

55. (1966) N.Z.L.R. 792; See also The New Zealand Insurance I.U.W. v Cornhill Insurance Co. Ltd. (1979) A.C. 6/79.

56. Supra .

57. Szakats, "Unjustified Dismissal: Grievance and Victimisation," (1977) N.Z.L.J. 348.

58. (1979) A.C. 56/79.

59. (1979) A.C. 62/79.

60. (1979) A.C. 72/79.

61. The Workers member on the Court, Mr. Jacobs did not dissent from the judgment but made a separate comment which have become quite quite common amongst members of the Court, which seemed intended to deter actions being commenced under s.150, as opposed to s.117.

62. For a detailed analysis of redundancy in New Zealand see R.L. Towner, Redundancy in New Zealand: An Evaluation of Industrial Practice and Public Policy, (1979), LL.B.(HONS) Dissertation.

63. S.R. 1978/226.

64. J.A. Farmer, "Legislation on Redundancy," (1976) 1 N.Z.J. of Industrial Relations, 41.

Introduction

The Industrial Mediation Service in New Zealand is a relatively recent invention. The service was established by the 1970 amendment to the Industrial Conciliation and Arbitration Act. The Industrial Mediation Service exists alongside the separate, and distinct Industrial Conciliation Service which is also provided under the same Act, more recently reconstituted as the Industrial Relations Act 1973. A friendly rivalry exists between the two services, largely promoted by the Conciliation Service which has on more than one occasion publicly pointed out that after all they are the Senior service. The Mediators, of course maintain that they are merely our sister service, they employ all the girls.

To the laymen the distinction between a Mediator and Concilator is obscure. This is understandable in so far as the objectives and responsibilities of the two services are set out in the legislative language of the Act, but very little public explanation of the two services has been made. The major objective of this paper is to set out clearly how the Act envisages the separate functions of the services, to examine whether or not the Mediation Service is fulfilling its intended role, and to make recommendations to improve the co-ordination and overall effectiveness of both the Mediation and Conciliation Services.

Disputes of Interest : The Role of the Conciliation Service

The Industrial Relations Act provides for a system of arbitration and conciliation which has operated with varying degrees of success for almost 100 years. The major objective of the system is to resolve disputes between trade unions and employers without the necessity of work stoppage. The most basic type of dispute is when a trade union seeks to improve its wages or conditions of employment. This type of dispute is known as a dispute of interest. The second type of dispute is known as a dispute of right, and I will turn to its explanation subsequently.

Wages and conditions of employment are provided for in the industrial awards which result when a dispute of interest is settled. The function of the award is not unlike the function of the common law contract in so far as it represents an agreement between two parties. In the case of the award, the employer agrees to provide certain wages and conditions in return for the trade union agreeing on behalf of the workers to supply labour to perform

work under the direction of the employer but in accordance with the conditions specified under the award. This agreement is not for an indefinite period of time. The award sets a specific date on which the agreement shall expire.

At a time before the expiration of the award, both the employer and the union who are parties to the award, are entitled to create a fresh dispute of interest. This does not mean that they are entitled to go on strike or to enforce a lock-out. To create a dispute of interest means that the other party is notified of intention to change the award, and that the changes sought are filed with the Registrar of the Arbitration Court whose responsibilities include the appointment of a conciliator to act as chairman of a conciliation council. At the conciliation council, the claims for changes in the award are tabled and negotiations for a new award take place.

The duties of the conciliation council are to endeavour to bring about a fair and reasonable settlement to the dispute of interest. What is fair and reasonable is a perception which is seldom shared by union and management. The statutory duties of the conciliator are to simply preside over the meeting, but their skills extend beyond simple chairmanship. Often the very settlement of a dispute in conciliation depends on the conciliator's insight. He might propose an intricate formula counter balancing concessions and advances which makes such an attractive package to both union and employers that neither can resist reaching settlement.

Importantly, the conciliator does not have the power to impose this formula on the parties. He must tactfully rely on the powers of persuasion so that, at one and the same time, he can influence the course of negotiations without appearing to impose his will on the parties.

This constraint is important because of the relationship of the conciliation council to the Arbitration Court. The role of the judges and members of the Arbitration Court is that of the highest industrial authority. The Court has the power to impose final and binding decisions resolving issues outstanding from conciliation councils and to make, of its own accord an award to apply to the parties. In the conduct of the conciliation council, the conciliator cannot appear to usurp these functions by coming down with opinions clearly favouring one side or the other. However, the matter is not one simply of the higher authority of the Court.

In Industrial Relations, as in marital relations, arbitration before a Court is the avenue of last resort, the result of a breakdown in the parties' relationship.

Management and the trade union will be on-going partners throughout the period of an award and reliance on arbitration to settle the award, does not auger well for the joint decision making required in the day-to-day operation of industry. The point is not that the conciliator is at a lower step than the Court in the hierarchy of legal authority, but that the conciliator's task is different but no less important than that of the Court.

The ultimate objective of conciliation is not to supply the answers for the parties, but to influence the parties in a manner that ensures that they are capable of finding their own answers. While the function of the Court is to fix the issues in dispute, the function of the conciliator is to fix the attitudes which are creating the issues. Therefore, their task is more subjective, dealing with broader social and psychological aspects of a dispute.

Herein lies the most fundamental reason for distinguishing the role of the conciliator in a conciliation council from that of an arbitrator. The expectation of the parties entering into a conciliation council is that the ultimate responsibilities for resolving the dispute lies with the parties themselves, and not the conciliator. The trade union and management representatives must bear the responsibility for concession and compromise, a burden which is not light when the results of the conciliation are to be reported back to individual union members and companies. If the role of the conciliator in conciliation council was to include that of arbitration, many representatives would be all too eager to shift responsibility to the conciliator, explaining the results of a settlement in terms of a biased conciliator's decision.

The act specifically provides that the representatives, or assessors at a conciliation council must have full authority to negotiate, and the conciliator must insist on the exercise of that authority, carefully ensuring that his own attitudes and opinions as chairman do not usurp that authority. The importance of the parties' expectations as to a chairman's role is a point also emphasised in my later discussion of industrial mediation.

A settlement of a dispute of interest will ultimately be reached, a point often made by a conciliator in reminding the parties that coming to terms with the issues at todays date, makes more sense that prolonging the inevitable by taking some form of industrial action. Settlement of a

dispute of interest means that negotiations cease and the parties return to the full time business of keeping industry running. A most important feature of awards, as mentioned above, is that they contain a clause pertaining to the term of agreement. The importance of the term of agreement is that the parties forego the right to make further changes to the award for a set period of time, usually one year. The act provides that a fresh dispute of interest may be created before the expiry of the award, but any matters agreed upon cannot take affect before the old award expires. Without these provisions, either the union or management could continue to seek changes in the award at any time, negotiations over the award would be without beginning or ending.

Disputes of Right : The Role of the Conciliation Service

However, the possibilities for disagreement are not limited to changes each party desires to be incorporated in a new award. The award itself, is read through different eyes, and the drafting of the provisions within the award are not always perfect. That a worker be paid $3.00 for each hour worked is quite clear but what does a provision requiring the employer to provide "protective clothing" mean. The union may understand that this provision requires the employer to provide safety footwear, the employer's interpretation of the term "clothing" may differ distinguishing clothing to mean apparel, but not footwear. A dispute pertaining to the interpretation of an existing provision in an award is known under the act as a dispute of interest. This type of dispute raises the question of the meaning of the award, as opposed to a dispute of interest which seeks a change in the meaning of the award, or the inclusion of a new provision within the award.

Disputes of right, are not fundamentally resolved through negotiation, but through ascertaining the intention of the wording of a provision in an award. The role played by the conciliator in a dispute of right, therefore differs from his role in a conciliation council. The act provides that within each award, there will be a disputes clause. The disputes clause contains procedures for settling disputes of right. The disputes procedures are that a disputes committee be set up with equal numbers of union and management representatives. The disputes committee is chaired by the conciliator or a person appointed by the conciliator. Ideally, the conciliator will have acted as the chairman of the conciliation council where the award was settled. This gives the chairman the decided advantage of knowing the industry and often directly observing the drafting of the provision in question. Therefore, the conciliator should have a working

relationship with the personalities in the industry, practical knowledge of its physical operations, and insight into the parties original intentions in agreeing to the clause in question.

In the case of the disputes committee, unlike conciliation, the conciliator has the right to decide the issues in the dispute if the parties cannot agree on interpretation. However, in the case of the disputes committee, the chairman is not passing a value judgment on what should be agreed or should be the end result of a negotiation. This has already taken place in conciliation. He is arbitrating on what is already an established right of law and his decision is appealable to the Court of Arbitration.

Setting aside the good natured rivalry between mediators and conciliators, I will commit heresy to the extent of arguing that the Conciliation Service provides a function which is more fundamental within the overall structure of our industrial system. To summarise my discussion this far, the industrial relations system most simply described, provides for awards to be settled before a conciliator who either persuades the parties to agree, or refers the dispute for arbitration before the Court. Any dispute on the interpretation of the award arising during its currency is either voluntarily settled in a disputes committee, or arbitrated on by the conciliator whose decision may be appealed to the Court.

The system is theoretically perfect. Industrial stoppages should not occur since the act provides procedures for voluntary settlements of both disputes of interest and of right, and for arbitration in both types of dispute where the parties are unable to reach agreement on their own volition. If this system were strictly accepted there would be no reason for an Industrial Mediation Service, all contingencies are covered by the Conciliation Service and the Arbitration Court. However, before turning to the areas where the system does break down I would like to emphasise that in the vast majority of the cases the system does work. In most industries the complete job is done by the conciliator who is successful in assisting the parties to reach settlement in conciliation, and who may occasionally be required to arbitrate in a disputes committee.

Organisational Problems of the Conciliation Service

However, the statistical facts that most conciliations are settled without industrial stoppages and without reference to the Court exaggerates the effectiveness of the conciliation process. Wage negotiations in

New Zealand are characterised by rigid historical relationships in wage rates between various awards. Certain key negotiations set in motion a chain of wage relativity reactions. Follow on awards are constrained to precedent. Their negotiation is not characterised by the conflict inherent in the first of conciliation councils. The very large number of more easily settled follow on awards should not divert attention from the major difficulties experienced in the settlement of the small numbers of precedent setting awards.

The major organisational problem of the conciliation service is that there are too many award negotiations and too few conciliators. A conciliator is often overly committed to too many conciliation dates in too many industries. These time demands can interfere in more critical negotiations where conciliator involvement should be unencumbered by disputes whose settlement is of lesser sigificance to the overall wage pattern which is to develop during the wage round. In many cases I am confident that were a conciliator's skills more fully utilised and his endeavours allowed to be more single minded, the trend setting award negotiations would not be so prolonged and disruptive.

It is not generally appreciated that a large proportion of the work of the conciliator takes place outside of the conciliation council. The work load and performance of a conciliator should not be measured by the number of days he is booked into conciliation council. Where a conciliator is handling a dispute of national significance, he should not be committed to further disputes, just because the parties to the national dispute have adjourned formal conciliation. Much of the critical work of the conciliator is directly involved in the politics of the dispute which never surface across the formal negotiating table. It is fairly clear at the beginning of a wage round which councils will be significant and specific allowance should be made for the time and freedom necessary for the conciliator to handle that dispute.

Equally, at the conclusion of each set of negotiations, it also is clear whether or not an industry is likely to continue to experience trouble in the future. Latitude should also be given to conciliators for their continued involvement with a troublesome industry after an award is settled. Many issues are in fact impossible to resolve in the tense, formal atmosphere of the conciliation council. For example, where changes in technology require the restructuring of wage classifications, the exercise is more effectively completed outside of conciliation where

attitudes can be more objectively focussed on the skill requirements of jobs rather than on negotiating positions. The Drivers Award is an example of an industry which has been unable to reach agreement on restructuring either inside the conciliation council, or through formal talks during the duration of the award. Given that time was so allocated, allowing for an indepth involvement of the conciliator, I am sure that some agreement could be reached outside of conciliation over this long outstanding issue.

What I am pointing out is that the events in award negotiations give forewarning of industrial problems that are likely to take place during the currency of the award, as well as in future negotiations.

One particular objective which is assigned to the Mediation Service, that of preventing industrial disputes is, in fact, better fulfilled by an industrial conciliator. Conciliators by virtue of their involvement in award negotiations are more intimately and permanently involved with specific industries than are mediators. Their knowledge of the personalities and industrial politics of particular industries places them in a position to anticipate trouble. Mediators generally do not have this type of connection with an industry. Our knowledge of trouble usually comes after the fact, and the history of the Mediation Service is that our job is usually one of industrial repair, not prevention.

In fact, we are often brought into industries to carry out special assignments such as compulsory conferences and Committees of Inquiry. Not only do we have the problem of acquiring special knowledge of the industry and establishing relationships which the conciliator already has, but the involvement of a second chairman is often incorrectly interpretated as a usurping of the conciliators authority. The actual position is that the conciliator by virtue of his understanding of the industry is usually better qualified than the mediator to carry out the exercise, and is only prevented from so doing because of demands on their time.

Closer identification of the conciliator in all industries is neither possible nor necessary, but it makes sense for industries which are trouble proned. Closer involvement in the day-to-day operations of these industries can only be achieved through the rational assignment of disputes and the assignment of the broader responsibilities for promoting deeper understanding between employers and unions in these troubled areas. This raises the question of how this type of re-organisation should take place.

There has been some suggestion that control of the activities of conciliators should be exercised by the Labour Department. The suggestion is without merit, not only because it would be unacceptable to the conciliators, but it appears that the bureaucrats have sufficient trouble keeping their own bureaucracies in order. More importantly, the conciliation service has been designed specifically to be independent of Government, employers and trade unions. The appointment of conciliators is actually made by the Governor General, although this is made after the recommendation of the Minister of Labour.

The policy of the Labour Department in recent years has been not to become involved in Labour disputes. While superintendents of local Labour Departments used to become directly involved in disputes and stoppages, this function has been taken over by mediators and conciliators with far more specialist knowledge. The involvement of the Labour Department in the affairs of conciliators is a direct contradiction of this policy and would be a retrograde step.

Most importantly, however, has been the emphasis of both Governments that industrial disputes should be resolved within the legal system. The Labour Department may play a role of enforcement within that system, but the Department is not an integral part of the system itself. It can not be both the policeman and the judge. The conciliation service is in fact an integral part of the system. It works directly under the umbrella of the Arbitration Court, and in the case of dispute committees actually performs a judical function.

If some form of co-ordination of the activities of conciliators is required, then the overall administration of the service, belongs with the Registrar of the Industrial Court, a position in the future which I believe should be given greater status and filled by the most able of conciliators. The act already provides that the parties file claims for conciliation with the Registrar and that it is his responsibility to appoint a conciliator. The work of the conciliator requires independence and certainly freedom from the traditional supervisor/employee relationship. However, the Registrar in addition to his present duties, could determine the assignment of disputes on a more rational basis, as well as, supplying leadership in setting objectives and priorties for the service. He could also play a role when differences

arise between the conciliators themselves, or between the conciliators and their industries. A Registrar with a deep knowledge of the law would be welcomed by the members of the Court and could supply a needed co-ordination between the activities of the Court and Conciliation Services. Such matters as ensuring that judicial standards applied by the Courts, are also applied by conciliators in dispute committees have been long neglected. It would be clearly helpful if the standards of proof and the cannons of constructions applied in dispute committee decisions concide with those of the Court in so far as these decisions are ultimately appealable to the Court.

These suggestions are in no way critical of the conciliators themselves. To the contrary, they recognise the value of the considerable body of knowledge and expertise within the Conciliation Service and simply recommend the more efficient use of these skills within the system. One final suggestion which could relieve pressure on conciliators is that where the parties so desire, conciliation councils should be allowed to operate without a chairman. Particularly, in the case of follow on awards, the parties are quite capable of negotiating a settlement on their own. The rights and obligations of the parties in conciliation need not be altered because of the absence of a chairman and the chairman could be called in, only if a critical stage in negotiations develops. Many hours are needlessly spent in conciliation where the skills and abilities of conciliators are not utilised. Their time could be better deployed on other more urgent matters. This type of situation is referred to as "hand holding" by the United States Mediation Services, and certainly not encouraged.

The Industrial Mediation Service : Its Role and Objectives

In the United States the term "mediation" is synonymous with "conciliation". The Mediation Service is involved in the settlement of disputes of interest, that is, negotiations for new labour contracts. Mediation means the involvement of a chairman with the view of affecting a settlement of the dispute by means other than arbitration. The American Mediator's role is similar to that of a conciliator in conciliation council. However, unlike the New Zealand conciliator, the American Mediator does not arbitrate on disputes of right, or questions of interpretation. The Americans make use of the American Arbitration Association which provides panels of arbitrators from which the parties make a choice of chairman.

Under our Industrial Relations Act, the Industrial Mediation Service is a separate entity from the Conciliation Service. Therefore, mediation in New Zealand is different from mediation in the United States to the extent that it is not a part of the conciliation of disputes of interest. However, mediation is used in the similar sense that it is a process through which a chairman, without the powers of arbitration, works to affect the settlement of a dispute. Our Act specifically provides that "a mediator shall not have any function under this section (the section specifying the mediators functions and powers) in relation to a dispute of interest during the progress of any conciliation or arbitration proceedings in respect of the dispute".

Essentially, this means that mediators do not chair conciliation councils nor can they intervene when the council is proceeding. It also means that mediators should not be involved in arbitrating. This is a first principle of the American Mediation Service which insists that its mediators do not artitrate, but leaves this role entirely to the American Arbitration Association. The principle is fundamental, and again relates to the expectation of the parties when they come before a chairman. When the parties approach a mediator, their understanding must be that the ultimate responsibility for resolving the dispute is their own. The psychological importance to the proceedings cannot be over-stressed. By virtue of choosing to go before a mediator, the parties will have recognised that concessions must be made, that they must move from their positions if settlement is to be reached. They know that the mediator will not come down on their side because he has no power to do so, and it would be of no avail because the other side would not accept the mediator's conclusion.

On the surface, the mediators position seems less powerful than that of an arbitrator and leads to the mistaken impression that his role will be less active than an arbitrator. To the contrary, the mediator must attack the inflexible positions of the parties in order to invoke compromise. By virtue of having to appear unbiased and objective, the arbitrator's position is often more passive in the sense of simply collecting facts and information in order to make a decision over who is right and who is wrong. The mediator begins from a position that is biased towards both parties in so far as he cannot accept the status quo from either party. In mediation both parties are wrong until a settlement is reached. The result of mediation is a negotiated settlement. That result is also likely

to be different than arbitration.

Where a union claims a 10 cent an hour increase, and the employer resists any increase whatsoever, a fair and reasonable arbitrator might rule for a 5 cent an hour increase. Under mediation, the result is determined by a number of factors other than the simple fairness of a claim. If, for example, the union proposes to strike at a time when business is booming, the employer might settle at 8 cents per hour because he cannot afford to miss out on the orders that a buoyant market will be providing. If on the other hand, the market is in a slump and the employer has excess production capacity, he may well benefit from the results of a short strike. The result of mediation may well be 3 cents an hour.

This is not to say that arbitration always results in splitting the difference. What a fair and reasonable may be 10 cents an hour, or for that matter no increase whatsoever. The point is fair and reasonable attitudes are only one of a large number of factors that a mediator must take into account in effecting a settlement. A few additional factors are industrial power, more skillful negotiation by one party than the other, and a cost benefit analysis which says that this is not a fair and reasonable settlement, but it is less costly than the continuance of the dispute and a final and total capitulation. At the conclusion of a successful mediation, the mediator may return home with the sense that it is an unjust world. Had the mediator been an arbitrator, the final answer would have been different.

In New Zealand very little true mediation occurs. Often discussions take place under the chairmanship of a mediator which lead to the final conclusion that the parties have exhausted all avenues and therefore, the decision is left to the mediator. The mediator then switches hats and becomes an arbitrator. There is nothing wrong with this as a procedure for settlement, but it is not true mediation and one does not need a separate Industrial Mediation Service to provide this facility. Conciliators must often provide exactly the same service in a disputes committee where prior discussions are held with a view of finding common ground, but when agreement fails the issue is left to the conciliator to decide.

Each party has come to find it more comfortable to reach an arbitrated settlement, in so far as it is easier to explain or blame the results of the settlement on the third party, the scapegoat theory of third party arbitration. More importantly, attitudes are psychological set at the beginning of the hearing with the expectation being that major concessions

will not have to be made since the final responsibility lies with the chairman. It is also important to negotiating strategy that these concessions are not given away before the chairman makes his decisions. Such concessions give the chairman an idea of what the parties are "prepared to wear", but the parties are actually interested in what they can get away with. The cards are played close to the chest and the idea of settling on your own volition is not genuine.

The psychology of this situation also restricts the behaviour of the mediator. At the onset of the proceedings the mediator begins to form an opinion of what his answer as an arbitrator would be. As pointed out above, that answer seldom relates to what a negotiated settlement will represent. In true mediation, the mediator attacks the negotiating positions of the parties with the objective of effecting a settlement which is possible under the complex circumstances of the dispute, but which is unlikely to be related to the answer he would give as an arbitrator.

This approach to mediation is possible only if the understanding is that he under no circumstance will arbitrate. If the implict understanding is that he will in the end arbitrate, then the mediator cannot take positions in the lead-up to the arbitration which will be in gross contradiction to his final answer. His position becomes that he must convince the parties before he gives the decision that his final answer is right, or near enough to right, without explicity stating that answer. The thrust of his endeavours, therefore, is not really directed at insisting on agreement being reached by the parties themselves.

The importance of psychology to mediation is so fundamental that the role of the mediator can never be ambivalent, hence the attitude of the Americans that a mediator should never arbitrate. An effective mediator cannot acquiesce and arbitrate at the end of a dispute today, and in all credibility, tell the parties in tomorrow's dispute that settlement is fully their responsibility, and that his function as a mediator under no circumstance will extend to arbitration. The parties in New Zealand have come to expect, virtually, in every mediation that the mediator at the end of the proceedings will acquiesce to a request to arbitrate. Likewise, most mediators in New Zealand also expect at the end of proceedings that they will be asked to arbitrate, even to the extent that some mediators would be offended if they weren't asked to do so. This form of dispute resolution has become almost institutionalised under the name of mediation, but in actual fact it is simply a style of arbitration. The psychology of the situation actually prevents or retards the parties from

reaching their own settlement.

In fact, a true Mediation Service has not developed in New Zealand but this is not a fault of the staff of the Mediation Service. One major structural change which has taken place during the 1970's is that the length of awards has been shortened so that awards are now negotiated once every twelve months. The major result has been an increase in the work load of the Conciliation Service, so that conciliators, as mentioned above, have been heavily committed to chairing conciliation councils. Conciliators have simply not had the time to do dispute committees. In addition, new provisions in the Industrial Relations Act require personal grievance procedures to be written into each award. These procedures require committees, similar to disputes committees, to be set up to consider matters affecting individual employees such as unjustified dismissals. Conciliators have not been able to fully cover personal grievances either. The primary role of the Industrial Mediation Service has been to assist the Conciliation Service in chairing disputes committees and personal grievance committees.

The irony of the situation is that almost all the work of mediators has been arbitrating in disputes committees and personal grievance committees. Conciliators, in so far as the process of conciliation and mediation are nearly identical, actually do more mediating than do mediators. Mediators have had little choice but to fill in for conciliators, and this is because disputes committee and personal griveance arbitration is more fundamental to the country's overall arbitration and conciliation system. This system is based on the premise of automatic arbitration where parties cannot agree, and not on the basic premise of the American system, that third party intervention is undesirable in a free enterprise system, except in so far as it forces the parties to face up to their own responsibilities and decisions. If I were a conciliator, I would be quick to describe New Zealand's mediators as assistant conciliators. Since I am not, I think the two services might be more aptly be described as the Industrial Conciliation Service and the Industrial Arbitration Service.

One basic proposal is that the two services be amalgamated. Here I must set my personal preferences aside. I don't believe I would enjoy acting as a chairman of a conciliation council. However, the suggestion has some considerable merit. The position of a conciliator has far greater utility, than that of a mediator. Conciliators can chair conciliations, disputes committees, personal grievances, as well as, carry out mediation

in the limited definition here in New Zealand. To chair a meeting seeking to bring about agreement without the necessity of arbitration, but arbitrating if necessary, does not present a conflict in the role of the conciliator. The mediator, on the other hand, is limited. He can do part of the conciliator's work in disputes committees and personal grievances, but he is prevented from chairing conciliation councils. The amalgamation of the two services into one Industrial Conciliation and Arbitration Service means that there would be a major increase in staff capable of fully interchanging roles. There would be more chairmen for conciliation councils, thereby giving some scope for specific industry association, which I believe, would improve the possibilities of the new service carrying out a preventative function in regards to industrial disputes, a service which the present mediation service has failed to provide. Certainly, a more indepth involvement in certain industries would lead to greater sense of job satisfaction for most staff in the combined service.

But what of the future of pure mediation as an additional facility for dispute resolution. I have personally pursued the objective of establishing my role as one of a mediator, and not an arbitrator. I have failed in this objective for principally two reasons. The first reason is geographical. Trade Unions and employers in Otago and Southland require firstly that the bread and butter functions of the arbitration and conciliation system be carried out. Mediation is most often a longer and more difficult task. In most disputes the parties simply want a quick and efficient answer to the problem, that follows from the basic premise of our arbitration/conciliation system under which trade unions and employers have been conditioned. They want a chairman on the spot in their locality to provide that service. It is simply impractical to bring conciliators from other parts of the country to supply that service when an experienced man is available.

I would also add that it is equally impractical, although the present provisions of the Act enforce this impracticality, to bring conciliators from out of town to chair local conciliation councils when a chairman is available in the immediate district. An amalgamation of the services with the resulting flexibility for each member of a new service, would allow for the full range of local industrial relations problems to be handled by a single resident member of the Conciliation and Arbitration Service. While the problem of a single mediator or conciliator is peculiar to Dunedin, the resulting flexibility for each individual within a combined Conciliation and Arbitration Service is of no less advantage in meeting the contingencies of industrial problems in the other three metropolitan

districts where staffing levels of the two services are three or more members.

The second reason has been my involvement as chairman of Compulsory Conferences and Committees of Enquiry. The Act provides that where the Minister of Labour has reasonable grounds for believing that a strike or lock-out exists, or is threatened, he may call a compulsory conference in an endeavour to reach a settlement of the dispute. In a compulsory conference, the Minister usually confers on the chairman the right to make a decision. In the case of the Committee of Enquiry, the task of the chairman is to enquire into the dispute generally and to report back to the Minister, rather than to make a decision on specific issues. However, in most Committees of Enquiry, the chairman will state a series of recommendations which will in effect bind the parties to that course of action. In both cases the effect of the Minister's decision to call a conference or enquiry is to give arbitral powers to the chairman. Once again when that chairman is a mediator, we have a contradiction of terms and objectives.

Compulsory conferences and enquiries represent the only provisions under the Act which allow for direct Government intervention into strikes, although there are provisions for fining strikers after a strike has taken place which may be enforced by the Labour Department. The term "compulsory" is a curious misnomer in so far as the conferences are usually compulsory only after the parties have agreed to attend. Ministerial advisors are altogether sensitive to the embarrassment that an unattended Compulsory Conference would cause the Minister. The Act does not provide fines or incarceration for guests that would so rudely turn down an invitation to a compulsory conference, but their enforcement would prove equally difficult to the Labour Department's enforcement of penal provisions for strikers.

Compulsory conferences and Committee of Enquiries, however, do settle disputes. The real trick is how do you persuade the parties to accept the invitation. This is a matter of pure mediation, but not surprisingly under the contradictions of our present system, the mediation is generally not performed by the Industrial Mediation Service. The mediation is usually performed by the Minster's closest advisers or by the Minister himself. The result of their mediation effort is the agreement to have issues arbitrated upon outside the formal arbitration/conciliation system by persons generally masquerading as mediators from the Industrial Mediation Service, but who act as arbitrators. The situation was most

clearly illustrated by the Government's recent agreement with the Public Service Association to bring in a "mediator" to "arbitrate" on the electricity workers housing dispute.

Again the response is "who cares about terminology, thank God the dispute has been resolved". Relief is pleasurable, but not without overall implications for the operation of the basic conciliation and arbitration system. While a limited use of Compulsory Conferences, Committees of Enquiries and other forms of ad hoc arbitration may be inevitable, these procedures are being used indiscriminately. They are being used to resolve disputes that should actually be resolved either before the Arbitration Court, within conciliation, or before disputes committees. The Government by too hastily using these procedures has undermined the function of the central institutions upon which the whole arbitration and conciliation system is built.

The other major implication of using these procedures is that they are forms of Government intervention into industrial relations. The critical feature of our industrial relations system is that it works according to the law, and not according to the politicians. Both Governments have in principle accepted this proposition but in practice have unconsciously undermined the system. Ministers of Labour should be quick to remind parties, all too eager to rush to his office for answers, that the business of running the private enterprise system is that of the employers and trade unions and not the Minister of Labour. The reminder should be made with less sensitivity than is now felt for the inconveniences of industrial stoppages, through suffering comes wisdom.

However, the public is often impatient and does not see what is considerable wisdom of Government inaction in certain circumstances. What are the alternatives in the case of a stoppage of national significance which do not involve direct Government intervention and do not undermine the traditional institutions of the conciliation and arbitration system? Here there is a role of mediation in the strict sense that I have described. The Chief Mediator should be retained in his present position in Wellington, but under reconstituted provisions for the Industrial Mediation Service which explicitly exclude an arbitral function. Stoppages of national significance should stop at the desk of the Chief Mediator and not the Minister of Labour. The objectives of the service would be two-fold. The first and dominant objective should be to insist that the parties resolve the dispute themselves, that compromise be achieved. The second objective would be where agreement is not reached, that the

parties use the traditional institutions to have the matter arbitrated on. Voluntary agreement before the mediator does not conflict with the arbitration and conciliation system, and the mediator's insistence on the use of traditional procedures reinforces that system.

The Minister of Labour should ensure that arguments are not presented in his office, but in the office of the Industrial Mediation Service. One helpful addition to the Industrial Relations Act, I believe, would be for compulsory mediation. The Government could then act by requiring the parties in dispute to participate in mediation. This form of compulsion would be less offensive in so far as the Government would not be imposing answers through arbitration as is the case of Compulsory Conferences. The requirement for compulsory mediation could be made as a decision, by itself, or it could be coupled with a "cooling off" provision similar to that used in the United States. This provision would require the continuance of normal work, or the return to normal work for the period while the parties are under mediation.

In summary, I believe that the Industrial Mediation Service needs a redirection. This redirection would establish the objectives of either encouraging the parties to reach a settlement or to use existing procedures for arbitration. The demand for pure mediation is in fact limited in so far as our system is based on the premise of automatic arbitration to resolved differences, but where the parties refuse to use the system, mediation has a critical role. The demands could be met by centralising the service in Wellington and retaining the Chief Mediator who would take over a large part of the mediation which is presently carried out by the Government and its advisers. If under closer analysis the need exists for a further mediator, then the additional mediator should be retained.

The remainder of those employed by the Industrial Mediation and Conciliation Services should be employed under a reconstituted Industrial Conciliation and Arbitration Service. The functions of the members of the service should include the full range of industrial activities including conciliation councils, disputes committee, and personal grievances to ensure the greatest possible flexibility in the service. The activities of the service should be organised through the Registrar of the Industrial Court. These should include the assignment of conciliators to industrially troubled industries so that a more permanent and indepth solution to their problems might be sought and so that more effective prevention of industrial disputes should be practiced. The re-organisation should also provide for sufficient

time for conciliators to work towards the resolution of disputes of more obvious national significance.

My proposals are tentative. However, a closer look at the direction of the Conciliation and Mediation Services is about to become over due. Hopefully, this paper may initiate the required debate.

The system of wages and conditions of employment bargaining, which bear heavily on the state of industrial relations and affect the standard of employer/employee relationships, are continuing to be untidy, undisciplined and in some cases even unprincipled. These systems have to date remained unmotivated by efforts made and still being made, to reshape and redirect the pressures they cause so that a degree of stability and order may be found.

Wages bargaining takes place within the framework of our industrial laws, within the political, economic and social structure of the country and within the climate or mood so established. We have in New Zealand an unsatisfactory stage setting for wages bargaining. Our economy, export markets, overseas reserves, the energy crisis, inflation, domestic and internal politics, and the stresses and strains in our society, have each and collectively developed a mood of uncertainty, and a deep concern for our future.

As a nation we have developed and are continuing that conflict of interest situation, instead of the necessary commonality of interest approach which is vital to a free enterprise democratic society, if it is to survive.

The present chaos in our wages and conditions of employment bargaining has therefore been predictable. Some of this chaos just happens as an inevitable part of direct bargaining, but a substantial portion is orchestrated.

In looking at the trends in wages and conditions of employment bargaining in New Zealand, the evaluation of where we are today can be traced over the last four decades, each of which has a clearly definable trend.

1940's:

The predominant feature in wages bargaining in the 1940's was the making of Standard Wage Pronouncements by the Court of Arbitration - 1945, 1947, 1949 (and 1952). These pronouncements set down the Court's finding on levels of skill, semi-skilled and unskilled wage levels to be incorporated into awards. This decade covered the war years and postwar period of getting the country back on to a peace-time footing. With a stable economy and low inflation, there were no ripples to speak of.

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1950's:

This is the decade of general wage orders - 1950, 1951, 1952, (standard wage pronouncement in lieu of general wage order application), 1953, 1954, 1956, 1959.

New Zealand was in a period of increased economic activity with the maintenance of a low inflation rate. This was the period of the Korean War, the wool boom, and the country seemed to have everything going for it. We had the development of our secondary industry and although immigration was being stepped up, an acute shortage of labour developed. The phenomena of wages drift began to occur. That is, the drift of paid wages away from the legal minimum award rates.

Workers unions wages pressure developed in the area of whether or not employers were going to "pass on" the award or general wage order movements in wage rates. The union officials activity was to seek a movement in the paid wages of companies, and did not develop any argument on the precise level of the above award wages, that had developed as wages drift in the law of supply and demand for labour. It is true that some unions developed a policy of shop rates as against individual workers holding individual wage rates in a company. Because of the "pass on" argument of unions, employers moved to a review of paid wages concurrent with the various awards to avoid making reviews immediately prior to an award renewal, and then also coming under pressure to "pass on" the award increase. The award renewals were fairly leisurely affairs at two year periods and it was not uncommon for awards to move well past their expiry dates before the union would seek its renewal. Relativity of wage rates at the award level did play a major feature in award negotiations. As often as not it was the Court of Arbitration that established a trend in minimum award wage levels through an arbitration decision.

New Zealand seemed to have the answer to stable industrial relations and bargaining systems, such that other countries with less had practitioners and theorists visit New Zealand to see how our system operated. No one was "rocking the boat", nor did they seek to.

1960's:

Again a decade of general wage orders - 1962, 1964, 1966, 1968, 1970. With the acute shortage of workers especially skilled tradesmen continuing to plague an expanding secondary industry sector, wages drift was accelerating.

Workers' Unions began to opt out of the sanctity of the averaging Award system into paid wage rate bargaining over and above the minimum Award rate. That is, a move away from conciliation and arbitration, into confrontation. No longer were Awards to be negotiated prescribing their lawfully enforceable provisions, with the paid wage rate and actual conditions of employment to be left to the law of supply and demand. Key Unions such as the Engineering, Boilermaking, Electrical, Carpenters, Labourers and Drivers, changed the system and placed strain upon the continued viability of national industry Awards. These Awards and the legal framework under which they were made (the Industrial Conciliation and Arbitration Act) were propped up by the negotiation of ruling rate agreements, house agreements and other forms of paid wage agreements for industries or individual companies.

The first such agreements were negotiated in the Building and Contracting Industries for Auckland and did stabilise the wages pressures which the various Workers' Unions had brought to bear. The purport of the agreements being to achieve "stability of wage rates and general harmony" in the various industries.

This was also the decade for "margins for skill" cases which were argued before the Court in 1965/66. In 1967 New Zealand moved into a recession, devaluation, and a period of uncertainty that left wages bargaining in limbo for upwards of nine months (August 1967 to June 1968). It was the Court of Arbitration itself that started a 2¢ per hour movement in award wage rates in a decision in early 1968 that helped to get wages bargaining under way again. 1968 was of course the year of the nil General Wage Order with its aftermath of a return to the Court with the Judge of the Court being outvoted by the workers and employers nominees as a majority. Actually the employers of New Zealand were in no mood to sustain the nil General Wage Order decision, such that although the then Minister of Finances allegation of unholy alliance may have had a ring of truth, it was an alliance required in practical terms.

1969 was the year of a severe strike action in the electrical contracting industry in Auckland over the renewal of a ruling rate agreement. This dispute highlighted union involvement in paid wages setting. The decision of the

Committee of Inquiry established a rate for registered electricians of $1.28 per hour as against the award rate of $1 per hour. With the statement by the then Minister of Labour that New Zealand did indeed have three tiers of wages setting - minimum award rates, general wage orders and paid wages, an assault on paid wages in their industries was mounted by workers unions, generally seeking 28% above award.

1970's:

This is the decade of change and instability in New Zealand systems of wages and conditions of employment bargaining.

With the pressures on paid wages bargaining, major companies in Auckland established house agreements which were introduced to bring about some logic and stability to a constant parade of union(s) claims. Wages drift continued to accelerate until a drift of 20%-40% above award became common. By mid-1970 the New Zealand Employers' Federation had completed sufficient research ranging over the previous six years to enable an effort to be made to restore the authority of awards of the Court of Arbitration which had been effectively destroyed by wages drift.

"Wage-drift" is a well-known phenomenon in all times of inflation and was during the thirties a nuisance to the planning authorities in the suppressed-inflation, full-employment economies of Germany and the U.S.S.R. It might be maintained, too, that the wage-drift is the normal form of wage development in economic systems characterised by absence or small importance of collective bargaining.

It is, however, only when wage-drift crops up as a disturbance in a system where wages in general are regulated through agreements, each agreement having a vast coverage, that the phenomenon can be conceived of and studied specifically as a statistically and logically definable part of the total wage development. It becomes meaningful to speak about wage-drift as a specific part of the total wage development only when the authority of the agreements is shaken but not completely broken down. This has been the case in Sweden during the full employment period since World War II. Needless to say, even in Swedish post-war experience cases are to be found where earnings are effectively regulated through the agreements, the forces tending to break the authority of the agreements being too weak. On the other hand even earlier cases have existed where the market forces have been strong enough for destroying the authority of the agreements. Once this has happened, in a severe depression or an inflationary

boom, the wage development may begin to take its own course, and the eventual recurrence of more 'normal' market conditions will not in itself be sufficient for the re-establishment of the total dominance of the agreements. The process may be non-reversible; the experience of a period of dominance of other forces may have lasting consequences and - at least for some time - create supplementary determinants of the developments of earnings." *

* Bent Hansen and Gosta Rehn: "On Wage Drift". A Problem of Money-Wage Dynamics in 25 Economic Essays in Honour of Erik Lindahl (Stockholm 1956) Page 90.

The updating of the many and various awards to a "more realistic and meaningful level" in 1970 was a chancy and costly exercise and did not fail in the manner of the 1967 attempt in the engineering industry in Australia where the above-award wages element written into their Metal Trades Award was not held as an offset against existing levels of paid wages but quickly swept over the industry, and the country, like a general wage increase.
Updating did generally succeed in reshaping the attitudes of the unions and the employers toward the authority and sanctity of the awards and industrial agreements made in the terms of the Act, and it is true to say that the union movement did honour the essential features of the exercise which are recorded in the Memorandums to each of the updated 1970 documents. Wages drift was reduced to 0-7%. Where the exercise did flounder, and finally required the intervention of Government by way of the wages and salary restraint measures of March 1971, was in the leapfrogging relativity carousel that developed, fed by an unfortunately timed wages arbitration in the freezing industry and by the emergence of State Rates as leaders in the wages field.

In the years of wage restraint between 1971 and 1977, New Zealand tried most known forms of wage and salary control. We tried guideline, freezing, cost of living indexation, jawboning, social contract, self-discipline, serious anomaly, exceptional circumstances, and so on, and so on. None of these approaches of course achieved stability. In 1977 the Government decided to allow "free bargaining" again, the sole restraint being the "12 month rule" that the F.O.L. was prepared to accept, that is that once having achieved the wage rates and code of employment to apply in any award or collective agreement, there would be sanctity of that award or collective agreement for 12 months.

Since 1977 we have of course seen the evolution of Government involvement in collective bargaining. The electrical supply authorities electrical workers

negotiations in 1977, the freezing industry intervention in 1978, the Cook Strait ferries, freight forwarders and general drivers interventions in 1979 are each illustrative of the different forms of Government intervention.

In looking back over the last ten years, having tried most known forms of wage and salary restraint; having tried to restore the authority awards and collective agreements; having experienced an emergence of political strikes; having noted the regular orchestrated pattern of pre-F.O.L. Conference activity by the S.U.P. led unions and having experienced the results of the take-over of the Auckland Trades Council by that group; having had guerilla strike 'activities' become the norm; having automatic deductions of union fees now common place in awards - pouring an estimated $15-$16 million per annum into union fees; having the resurgence of wages drift again beginning to destroy the authority of the awards and collective agreements upon which it occurs; having a country caught in a rampant inflation situation; having an unemployment situation and yet an extreme shortage of skilled labour continuing; and having the economic, energy and social problems vitally affecting our free enterprise democracy, is it little wonder that we have become a society questioning our future.

1980's:

In this decade New Zealand must overcome all these ills that have been identified in this paper. An acceptable system of wages bargaining will not alone achieve a recovery but will obviously make a substantial contribution to recovery.

In the last few years there has been developed by the Organisation for Economic Cooperation and Development (comprising 24 western industrialised countries), the concept of "social responsibility in collective bargaining". Emphasis has also been given in papers the New Zealand Employers Federation has presented on the need for a 'balance in bargaining' and on 'a need for commonality of interest' and not conflict of interest. It is true that the balance of power in industrial relations in New Zealand today appears to be held by the union movement. Certainly strike actions have become more sophisticated whereby union members no longer act with their feet before adopting strategies from the head, and that in their wages bargaining employers are still motivated by expediency and relativity when the pressure is on.

It has been said that employers have no preparedness for pain, that their bargaining is not based on ability to pay but on preparedness to pay.

Put in another way, it is alleged that employers are not showing social responsibility so long as they are prepared for 'soft' settlements or too easily sucumb to demand on the grounds they expect to be able to recover by passing on the cost of their concessions to their product and ultimately the consumer. The finger is certainly pointed to contractors in this regard.

Many ideas to improve industrial relations have been put forward by interested or affected parties. A short list of aspects that require investigation would be

- Attitudes.
- Sanctity and authority of agreement when made
- Improved balance of power
- Social responsibility in collective bargaining
- Communications
- Commonality of interest and not conflict of interest
- Amalgamation of Unions, particularly into industry Unionism
- Indexation of wages; especially as part of an economic package
- Incomes policy
- Tri-partite or even bi-partite / Centralized Bargaining (Employers' Federation, F.O.L., with or without Government), or the direct opposite: decentralized bargaining (that is breaking up of the national award system into industry or company bargaining).

Each of these aspects of industrial relations is under review because in no way can New Zealand continue with its current system of wages bargaining where a dozen or so key award negotiations trigger off the relativity flow-on into all industry awards, into second-tier paid wage bargaining, and ultimately through survey/pay research into the wages and salaries of State servants - with each of these procedures for creation of Union and workers expectations leading to final settlement of wages, involving no criteria whatever for the state of the economy, the ability of the country or the industry or the individual employer to pay with resultant feeding of domestic inflation, or causation of retrenchment, redundancies, loss of overtime.

The New Zealand employers' Federation Inc. through its 1979 discussion paper "Balance in Bargaining" and through the exhaustive research undertaken prior to the commencement of 1979 collective bargaining round of just what the export sector of New Zealand could absorb by way of labour cost increases for the year without losing markets, is illustrative of the motivation that is required of and by employers if New Zealand is to survive as a free enterprise democratic society.

We will carry into the 1980's various proposals by the F.O.L. for changes in our systems and wages bargaining such as:

- consumer price indexation for wages movement
- minimum living wage
- restoration of general wage orders
- right to direct bargaining without interference.

Through each of these claims a common thread appears and that is that the union movement wants to preserve the "right" to take the employer through as many bargaining stages in the one bargaining round as it sees fit. In other words, a company's or industry's code of employment is never in fact finally settled. There is bargaining at the award level, bargaining at the paid rate level, recourse to a general wage order application, claims for productivity agreement, travel allowances, redundancy agreements, reopening of various codes by disputes committee, indeed a constant parade of wage cost claims which continually add to an employer's inability to get on with the job so that he can perhaps afford to meet even the cost of the now annual bargaining round.

C.P.I. Index:

In defending it as a panacea for inflation in so far as wage rates are concerned, the union movement expects full compensation for consumer price index movement plus as has already been noted the "right" to continue with whatever other forms of bargaining it wishes to demand. Indexation in this form is not the indexation now occuring in Australia wherein the Australian trade union movement has given undertakings to not proceed with paid wage demands upon the employers but to handle any anxiety over wage levels through work value cases submitted to the Conciliation and Arbitration Commission. This centralized system of wage compensation is coming under strain and paid wage claims are beginning to arise and some unions report $5 - $7 per week above award wage increases are being "won".

In a recent news release from the Minister for Industrial Relations - 41/79 Government's Initiatives on Wage Indexation 17 August 1979 - the Australian Government has "developed a package of proposals as a basis for re-establishing consensus between the parties involved in wage fixation. Such consensus is necessary if an orderly, centralised system of wage fixation is to be preserved. All parties have already stated their commitment to such a system."

The main features of the Commonwealth's initiative are:

- "A firm and continuing commitment by all parties to refrain from pursuing wage and other labour cost increases outside the wage fixation principles, and a rejection of industrial action in support of such increases. This commitment would be a pre-condition to the other elements of the Commonwealth package.

- Automatic wage indexation every six months for movements in the Consumer Price Index discounted for price increases resulting from Commonwealth Government policies, e.g. import parity petroleum pricing, indirect taxes.

- Claims for wage increases based on work value to be subject to rigorous examination and testing by the Conciliation and Arbitration Commission.

- The Conciliation and Arbitration Commission, when determining a wage increase based on work value, to pay particular regard to skill and responsibility.

- No productivity hearing until at least October 1980; in any such hearing only the movement in productivity which had occurred over the preceeding 12 months could be considered.

- The proposed wage fixation system to operate for a fixed period, of say 2 years, after which it may be reviewed.

- The Conciliation and Arbitration Commission's current principles of wage determination to continue to operate with the necessary amendments to reflect the Commonwealth's proposals.

The Ministers stated, "The proposal is an integrated package; the individual elements do not stand alone and part of it, of course, is an end to the current rash of disputes over wage demands."

It should also be noted that in the New Zealand context it can be shown that the national trend setting awards already settled in the 1979/80 bargaining round have been better off under the different wages systems that have applied during 1970 than if consumer price index had been followed over the same period. In other words, even at the award level let alone the paid level with its accelerating wages drift there is no case to answer on indexation.

Minimum Living Wage:

The concept advanced by the Federation of Labour in its application to the Court of Arbitration for a minimum living wage of $147 a week had as many pitfalls in it for the trade union movement as it did for the employers and the economy of New Zealand as a whole. The one major deficiency was the impact of such a minimum living wage upon margins for skill and the undoubted interest of those unions with skilled tradesmen as members having to seek a restoration of margin both at the award and paid level. If the Government and the Employers' Federation is still prepared to discuss the concept of a minimum living wage within the context of wage rates - income tax rates - child benefits and other income elements, it is surely beneficial to union members for the F.O.L. to pull back from a concept that had obvious fish hooks for its own constituent unions and look again at the wider proposal.

Restoration of General Wage Orders:

There is obviously a need in New Zealand for a more orderly system of wage setting. It is a "three bites of the cherry" attitude that has obviously brought about necessity to reduce the number of bites and the general wage order system has accordingly fallen. We are now left with the minimum award negotiations and in many cases but not all, the demand and achievement by unions of paid wage and conditions of employment bargaining. Wages drift is again accelerating. In 1970 wages drift of up to 40% was destroying the authority of New Zealand awards. The action taken was to remove wages drift by absorbing it. This action was at substantial cost to New Zealand but at a time that the economy of the country was better suited to absorb such cost.

In 1980 with wages drift again beginning to destroy the authority of awards and collective agreements it would be foolhardy to remove wages drift by absorbing it. Firstly, on the ground that the economy of the country cannot afford it, and secondly, on the ground that absorption would be inevitably followed by rebirth.

It would appear that the action necessary in 1980 is to remove wages drift by recognising it, and not endeavouring to restore the authority of those awards and collective agreements upon which it has again risen. I refer again to the extract of the paper by Bent Hansen and Gosta Rehn (1956), and quote again the analysed affect of wages drift. The stated affect of wages drift and its consequential destruction of the authority of agreements:

"Once this has happened, in a severe depression or an inflationary boom, the wage development may begin to take its own course, and the eventual recurrence of more 'normal' market conditions will not in itself be sufficient for the re-establishment of the total dominance of the agreements. The process may be non-reversible; the experience of a period of dominance of other forces may have lasting consequences and - at least for some time - create supplementary determinants of the developments of earnings."

Right to Direct Bargaining without Interference:

Unless the trade union movement and the employers party to wages bargaining can develop and sustain "social responsibility in collective bargaining"then obviously in the interests of the economy, the New Zealand Government (whether National or Labour) will have to continue to play its role as custodian of the economy of New Zealand and our free enterprise democratic society. If this is not done there is indeed no future for New Zealand but a downhill slide into social revolution such as was being predicted for the United Kingdom in 1976.

This of course is what the Socialist Unity Party is about; and this is what the recent displays of employer solidarity are all about. Individual and industry groups of employers have had enough of being kicked around and are prepared to stand up and be counted and take the pain that they have been accused in the past of not being prepared or able to sustain. It is about time New Zealand as a whole decided which way it wants to go if indeed we want to continue the downhill slide so be it. If we do not wish the slide to continue and have not got North Sea oil to prop us up, then it is an urgent requirement upon us all that a consensus be reached.

It is my view and that of my organisation that in the 1980's, out of the pain the private sector is now experiencing in wages and conditions of employment bargaining and in industrial relations generally, in which the public and legal body sectors have and are likely to become similarly more involved, well come a winning consent.

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TOWARDS AN EFFECTIVE INDUSTRIAL RELATIONS SYSTEM

Industrial relations - at least at a public level - has occupied a fair deal of news media attention over the past months. Some commentators would have us believe the country is on the point of anarchy or as was recently said, (1) 'to hear some people tell it, the poor state of industrial relations in New Zealand is the principal cause, indeed perhaps the only cause of our current economic problems'. As the commentator correctly concluded 'such a view is clearly nonsense'. Nevertheless the confusing series of events over the past few months make it an appropriate time to look at the system that we have. (I am not certain whether 'system' is the appropriate word for it implies at least some order and definable rules but rather than use the term 'industrial relations chaos' I will be charitable and use 'system'.)

For amongst all the clamour, the charge and counter-charge over the past months there has been little attempt to examine the system of industrial relations in New Zealand and the extent to which it helps or hinders the settlements of industrial disputes. This paper is an attempt to do that: it attempts to examine the role of the key actor in the system (Government); the ingredients of an effective industrial relations system; and the direction that we might move to try and effect change. In the time permitted it does not endeavour to do more than raise a number of the issues and suggest a line of thought for future consideration.

THE ROLE OF GOVERNMENT

I make no apology for starting with an examination of the role of Government. Government after all sets the rules within which the two sides of industry must operate. The apparently 'nonsensical' view quoted above i.e. that unions are the principal cause of our economic problems is one which for various reasons is pushed by Government. These reasons include: the need to direct attention away in a time of severe dislocation in the economy from failed or non-existant policies in other areas, the desire to fulfil policies on which it considered it was elected in 1975, the belief that 'the public' want a 'hard' line adopted towards 'militant' unions, the general immaturity and authoritarian nature of our political and economic system. These factors and others - combined with a traditionally central and interventionist role by successive Governments in industrial relations - are all the ingredients necessary for an unworkable system: Until Government is genuinely prepared to work towards an effective system I see little possibility of change - simply because (unlike some countries)

the State has always been the key actor in our industrial relations system.

THE OPTIONS

It is impossible to look at an effective industrial relations system without considering the nature of the broader economic system of which the relationship between employers and workers is a part. In other words the role of the State, employers and unions in the industrial relations system are influenced to a large degree by their overall role in the economy and the nature of that economy. There are, I would suggest, three broad options open to society - (a) a controlled economy (b) a 'free' enterprise system (c) a combination of both. Clearly New Zealand has always fitted somewhat uneasily into the third category.

What do these different models imply for an industrial relations system? Firstly in a wholly controlled economy limits on the incomes of workers are more or less accepted because they are one aspect of that controlled economy. There is therefore little or no scope for collective bargaining. A large degree of Government intervention is applied to control the incomes of all wage and salary earners, prices, profits, self employed and so on. In other words, the controls are perceived to apply to all groups. This is why the present clumsy attempts to introduce a wage control mechanism cannot work through the Remuneration Act. It is I think, necessary to point out that the NZ Federation of Labour represents about one third of the work force through its affiliated unions. These workers are to a large degree, those at the bottom of the earnings heap - to expect the FOL or its affiliates to sit back while the Government applies controls to their earnings and not to other interest groups in the economy is to fly in the face of reality. The evidence of the last seven years is that direct Government intervention on one aspect of the inflationary spiral - wages - has been ineffective.

The second choice confronting society is the notion of a 'free' enterprise system of which free collective bargaining is an essential part. With a Government supposedly committed to an unfettered free enterprise system, one would have thought they would be fully committed to such a notion. Unfortunately such a committment ends if the parties are not bargaining 'responsibly' and the arbitrator, on what constitutes 'responsibility' appears to be the Prime Minister. From the evidence of the recent proposed intervention in the Drivers' Award settlement by use of the Remueration Act, the criteria for assessing this responsibility appears to be not economic i.e. the level of settlement) but industrial relations (i.e. the fact that strikes and lockouts were resorted to or the politics of a few of the union officials or both).

The reality of course is that this 'free enterprise' model does not exist in New Zealand nor is it likely to. A large degree of State intervention in all aspects of the economy has always been the norm and will continue to be so in the forseeable future. Free collective bargaining entails that the parties are able to resort to strikes and lockouts with presumably a power reserved to Government to intervene if the public order is threatened or if the safety, health or welfare of the public is threatened. Clearly this was not the case with the drivers, with the employers actually claiming on one occasion that the stoppages has not been effectual. Such a free collective bargaining system also has no place for general wage orders as wages are purely determined by the bargaining strength of the parties. It presumably also has no place for the compulsory arbitration; a blanket coverage clause, fees and allowances for conciliation or enforceability of awards through the Inspectors of Awards. (2)

The system implies trial by strength with the devil taking the hindmost. Government's role is confined to watching anxiously on and using other devices open to it to control the economy. This type of system has not existed in New Zealand for the past ninety years - it is questionable to what degree there is support for it amongst trade unionists - particularly as the strength of capital is increasing as it continues to aggregate. If, as I consider, there is less than overwhelming support for the second option, then the same probably also applies to the first option, in other sections of society. A planned and controlled economy with all sectors participating in the decision-making and sharing the wealth created in an equitable manner does not seem to be attracting great political support from either of the two main parties so we can probably assume that it is unlikely to eventuate in the immediate future. It is probable in my view, that this may be the only viable long term option.

The third model is the New Zealand version of 'State capitalism' where a large degree of state intervention in all aspects of the economy is accepted. This particularly applies in the industrial relations system and this seems likely to continue. Can our traditional industrial conciliation and arbitration system (3) be adapted so that it has some chance of functioning effectively or should we look for more radical change. An adaption of the existing system is an approach favoured by the Employers' Federation (4) which believes we should build on the existing institutions in our system. Given the inherent conservatism in our society and the apparent lack of enthusiasm for the first two options this is the most realistic option for change. Therefore in the interests of considering change that is possible I now turn to this option, examine its essential characteristics and what is needed to give it a chance of functioning. Whether an 1894 model can still be relevant remains to be seen.

Nearly 90 years ago the State recognised that workers have legitimate interests in 'industrial matters' that is 'the rights, duties and privileges of employers and workers'. [5] Predictably this has been interpreted in at least two ways. Employers usually supported by Government (and therefore usually the central institution in the system - the Court of Arbitration) [6] considered that this restricted unions to those matters that were their 'legitimate interests' (that is wages and conditions with the latter narrowly defined). To trade unions the words of this section permit unions to raise any matter which may affect workers.

Perhaps this difference is the reflexion of the difference between the capitalist and the socialist. Industrial matters are, always have been, and as far as I can see, always will be the cutting edge between capitalism and socialism. It is impossible to avoid this conflict and it is foolish to try because the results are always disastrous. This is what is being attempted at the moment and it is the road to totalitarianism.

What our system has traditionally tried to do is to channel that conflict into an arena where there is a referee who will endeavour to prevent each contest becoming a trial by battle or ordeal. The I.C. and A. Act was an attempt to do just that but it has now largely failed because neither the lawyers who staffed the Arbitration Court nor Government, who makes the rules, have ever been prepared to accept that significant social change should be initiated in the workplace. In a time of significant and rapidly changing social attitudes in the sixties and seventies, the Court has by and large adopted a narrow and static view of relationships in the workplace.

If union claims are good within the narrow parameters of a legally static system, then generally unions will find the Arbitration Court sympathetic. Outside those parameters, the Court is of little use and unions believe they can get nothing from the Court - the only alternative is industrial action. The most obvious example of this would be the ANZ Bank case [7] in 1977 where the Court held the matter of interest rates that the Bank charged to its employees was a matter between the employer and the employee and the union had no legitimate interest.

Other examples could be cited but the narrow view the Court has adopted in its role coupled with a traditional reluctance of unions to resort to the Court means that a vacuum has been created. The development of this vacuum is normally traced back to the nil order of the Court in 1968.

The net result of this has been that rather than trying to reform the existing institutions in our industrial relations system Government has intervened much more directly in the system. This had reached the ludicrous stage where Government is now seen to be going through tortuous steps in trying to decide whether to regulate the drivers' wages or 'permit them' to go to arbitration. Nothing could be more calculated to destroy any confidence left in the system.

If it was possible to 'solve' industrial relations issues, then perhaps the increasing Government forays into the arena may have succeeded. It is necessary for all to realise that there are no 'solutions' but only the possibility of reducing the conflict to less than nuclear proportions. To do this trade unions must be induced to repose confidence in the system. What would be the framework of that system?

THE LEGAL FRAMEWORK OF AN EFFECTIVE SYSTEM

Effective industrial laws in the industrial relations arena (as in any other relationship) must be based on certainty, fairness and enforceability. None of these elements will be fulfilled absolutely but they must be a constant aim for policy makers. How then does our system measure up:

Certainty: Probably the key element in our system is uncertainty. It is becoming almost an annual ritual to witness politicians thrashing around in Parliament trying to come up with 'the answer' to our industrial relations 'problems'. In 1976 the answers were to be found in penalties (amendments to the Industrial Relations and Commerce Acts) and in state run ballots. Predictably both failed. In 1977 the answer was to go back to basics and re-establish the powers of the old Arbitration Court to hear dispute of interest, thereby doing away with the Industrial Commission. In 1978 new legislation was introduced to replace the unworkable state run ballot provisions which were introduced in 1976. In 1979 we have so far had the Remuneration Act which revoked the General Wage Orders Act which had been reintroduced by Government in 1977 - to the surprise of many - and also gives extremely wide powers to intervene in the wage fixing process on a completely ad hoc basis should it be deemed 'expedient' so to do by Executive. As if all this wasn't enough there are still the remnants of the Wage Adjustment Regulations 1974 hanging around just to totally confuse anybody who isn't confused enough.

The end result of course is a total and complete shambles where nobody

knows where they are from one day to the next. You file for a General Wage Orders Act and four days before the hearing is due to commence, TV and Radio are commandeered to announce the Act is being revoked. You make a wage settlement with your employer after industrial action on both sides and it is announced that it is 'excessive'. Such a cynical approach to the rule of law by policy makers must and does breed the same cynicism in the participants in the system. Policy makers have clearly demonstrated that the rules are to be changed when they don't like the way the game is going. If an institution starts pursuing policies not to Government's liking then it is abolished - as was the case with the Industrial Commission which was in existence from 1973 to 1977.

Invariably such legislative changes are made totally without consultation. Ironically the present Minister of Labour is on record as saying that one of the key elements of good industrial relations is 'talking'. This Government has quite clearly shown that it will talk only when they want to talk. One example will suffice to illustrate this - I have mentioned the revocation of the General Wage Orders Act whilst the Federation of Labour's application for a minimum living wage was before the Arbitration Court. The Government claimed that the application was an inappropriate way to deal with the lower paid groups. If they had expressed their concern to the FOL it may have been possible to accommodate their objections by changes to the legislation - but no, instant revocation is the answer.

FAIRNESS

I will not dwell on this element. Suffice it to say that in view of the comments above on wage control the system in the seventies has been perceived by trade unions to impose restraint on one side of the inflationary equation only (wages). The employers on the other hand see the system as having 'shifted the balance of negotiating power into the hands of unions'. Be that as it may, it also follows from what is said above that the uncertainty of the system is such as to really be unable to judge the effectiveness of the changes in the system that were effected in 1973 by the Industrial Relations Act. Had that legislation been allowed to operate and the parties had had the opportunity to sit down and rationally discuss its defects and look at ways of improving the system, we might well now have a workable system. It is my view that the Employers' Federation discussion paper 'Balance in Bargaining' does provide a useful starting point for this - regrettably other events have intervened which has pushed dialogue well into the background.

ENFORCEABILITY

Most people would agree with the notion that if you're going to have laws they should be capable of enforcement. If they are not they are at best unnecessary. At worst they tend to bring the whole system into question. In my view the whole system has been brought into question by the continuing passage of obviously unworkable legislation. The Government's legislative provisions on penalties and their state-run ballots provisions for example, seem destined to remain of merely academic interest - objects of interest to labour historians. Perhaps the extreme example was the recently reported reply by the Secretary of Labour when he was asked whether he was going to prosecute workers for taking part in what was clearly an illegal FOL national day of stoppage against the Remuneration Act - "Do you expect me to prosecute 500,000 workers?" If law is not capable of enforcement it has no place on the Statute Books and it matters not that politicians and employers wish that it was enforceable - the days of coercing the workforce by whatever means are over and unless that is accepted, industry will be a battleground in the 1980s. I would suggest that the main function of the changes in our industrial law over the past three years has been to drive the parties in industry into extreme positions where dialogue is impossible.

FIRST STEPS TOWARDS CHANGE

How do we break this apparent deadlock? How do we begin to create a system which allows the real industrial issues to be focussed upon by the parties in industry?

Firstly Government needs to sort out where it stands. Does it want a workable system or a political football. Using the football analogy it can, like a referee, adjudicate in the game so that all the participants benefit through the institutions that it has established or it can carry on changing the rules during the game, whilst trying to join in from time to time. The end result of the second approach is to have the three participants at each other's throats most of the time - with the objects of the game forgotten.

Secondly and obviously dependant on the first condition - how do we move towards a system that embodies certainty, fairness and enforceability?

Basically like the approach adopted in the NZ Employers' Federation discussion paper - 'Balance in Bargaining' and for the reasons already outlined I consider we should build on existing institutions and in particular the framework of the 1973 legislation. This legislation should

however be brought into line with the provisions of ILO Conventions 87 (relating to freedom of association) and 98 (the right to Organise and Bargain Collectively). I am aware that the trade union movement has been less than wholehearted in calling for ratification of these two conventions but I think it is high time that the principles embodied in these conventions were embodied in our legislation. This would go some way towards promoting fairness in that there would be an external international convention against which our industrial legislation could be measured. It would also, hopefully, promote certainty in that Governments would be less reluctant to intervene directly in the industrial process - legislation such as the Remuneration Act and Fishing Industry (Union Coverage) Bill would clearly contravene the principles in the Convention.

I have earlier made the point that if legislation is to be effective in this area it must be enforceable. In the two key areas wage fixing and industrial action, the last eight years should provide sufficient evidence for anyone that the use of the law has not been effective and therefore there must be a change of direction, if wages are to be held, this can only be part of a package of measures fitted into a comprehensive and broadly consensual economic plan of which an incomes policy is one factor. The role of the law in the area of industrial action, as I have indicated, is restricted to maintaining public order unless the parties to an agreement accept the use of penalties. The injunctive remedy would be removed to the Arbitration Court and restricted to non-industrial matters.

Thirdly the established institutions in the system - the conciliation and mediation service, the Court itself - must be seen to be free from direct Government interference and should be prepared to adopt a more progressive role in industrial matters. Whether Governments have the political will to allow the system to function in this way is doubtful.

EMPLOYERS' FEDERATION PROPOSALS - COMMENT

Reference has been made to the Employers' Federation proposals contained in their discussion booklet 'Balance in Bargaining'. When they were first released they were welcomed by the Federation of Labour as forming a useful basis of discussion. In particular the proposals relating to the amalgamation of Awards and Employers into industry groups, and the idea of custom built procedures for handling disputes would receive general support.

Central to their proposals is the concept of a dual system of wage fixing whereby the negotiating parties choose whether they engage in two party

collective bargaining or resort to a modified conciliation and arbitration procedure. Providing employers are prepared to accept genuine collective bargaining and not dash off to the Minister of Labour at the first hint of industrial action and providing also that the Arbitration Court is prepared to adopt a more progressive attitude towards its role, then this proposal may offer a basis for discussion.

The proposal for a tripartite consultation process between Government, the FOL and Employers' Federation prior to Award negotiations has drawn some publicity. I think two comments need to be made:

Firstly if these discussions did occur they could only be meaningful if all aspects of the economy were dealt with. That is taxation levels, benefits, subsidies, price control and so on.

Secondly the concept of agreement on a wage path in such discussions has a number of problems. It may well be that the Employers' Federation are being unrealistic in this proposal in the short term.

Eventually I think regular tripartite consultations will occur. Unions and employers are regularly engaged in such a process and it is unrealistic not to expect the central organisations and Government not to bargain over issues that can only be dealt with at a national level.

THE FUTURE - THE ISSUE

At a time when the New Zealand economy is undergoing change I consider it essential that there be open debate about the sort of system we want. Do we want

- a controlled economy of which wage control is a part?
- an unregulated economy of which genuine free collective bargaining is a part?
- a continuation of the existing system with some elements of both?

I have suggested that the prevailing view is largely for a continuation of the status quo.

To conclude let me indulge myself by giving an outline of the sort of industrial relations system that I would like to see develop in the next twenty years (as opposed to what is likely to happen!).

Unions are amalgamated and organised along industry lines: This amalgamation will be hastened by a positive role from Government and also by the bringing of our system into line with ILO Convention 87 which would allow a degree of freedom of association. The key issue will be effective use by unions of their resources in pursuing their objectives.

Bargaining at an industry level predominates: Bargaining over jobs not wages will become the critical issue that unions will have to face. The scope of bargaining will have to widen dramatically to include all aspects of the organisation and operation of the industry. To do this disclosure of information on industry plans, technological change, and future manpower needs will be vital.

Bargaining at an enterprise level will not only be about wages and conditions but will also be about ownership and control. There will be a variety of ways in which workers seek to increase the control they have in the workplace.

At a National level the Government, Employers and the central organisation of workers are responsible for ensuring that the system and rules of that system meet the criteria mentioned earlier. Since the main focus of union activity is in their industry and at enterprise level there will not be a large role for central national bargaining - it will probably be restricted to (1) the establishment of a minimum standard of living and (2) the establishment and operation of effective manpower planning although even this might be better focussed at an industry level.

Role of Government: Clearly this is vital for it is inconceivable that unions will be able to perform this enlarged role without radical change to the rules of the game:

Firstly the politicians must remove themselves from involvement in industrial relations. This is often said and I believe with the will it could be done.

Secondly institutions with a revamped role are needed: The Arbitration Court is the ultimate arbitor of the rules of the game and it is given the powers necessary to perform such a role. The Industrial Commission is revived as the Industrial Democracy Commission. This body (and the mediator who would operate under it) had the statutory function of promotion change in industry and in assisting the parties in engineering that change. Legislation on employment protection, disclosure of information and industrial democracy will be promoted and administered by the Commission. There will be lay

representation/with the Arbitration Court determining on the Commission points of law.

The exact role of employers is uncertain - one thing is clear they will have to be prepared to accept change. Undoubtedly this will apply to us all; without this acceptance the future is bleak.

NOTES:

1. Dr D.T. Brash, General Manager, Broadbank Corporation in a recent address to the Canterbury Chamber of Commerce.
2. All features of our industrial relations system embodied in the main industrial legislation - the Industrial Relations Act 1973.
3. First enacted in the Industrial Conciliation and Arbitration Act 1894. Continued with some modification in the Industrial Relations Act 1973.
4. See 'Balance in Bargaining' N.Z. Employers' Federation Discussion Paper.
5. Section 2, Industrial Relations Act 1973 essentially unchanged since 1894.
6. From 1973 - 1977 known as the Industrial Court.
7. NZ Bank Officers' Industrial Union of Workers v ANZ Bank (1977) NZICJ 219