COMMENT ON RECENT DEVELOPMENTS IN THE LAW

PROTECTING THE JOB DELEGATE

Section 150 of the Industrial Relations Act 1973 protects workers from victimisation by reason, inter alia, of their involvement in union activities. If an employer dismisses any worker or alters any worker's position in the employment to his prejudice a maximum penalty of $100 may be imposed (and the worker may be reimbursed wages, reinstated and/or compensated financially) if, within the previous twelve months, that worker was engaged in one of a number of specified activities. Broadly speaking these activities (set out in subsection (1), paragraphs (a) to (g)) can be summarised as concerning union membership, union representation or exercising a right under the relevant award or agreement. Once the fact of dismissal or prejudicial treatment combined with one or more of these activities is proved beyond reasonable doubt, the burden of proving that the employer's action was for a reason other than the prohibited one rests on the employer.[1] There is a growing body of case law under the section which has been examined in detail elsewhere.[2] The purpose of this note is to examine one issue of present concern.

Section 150 (1) (a) proscribes dismissal or prejudicial alteration of the employee's position by reason of the worker's being "an officer of any union or branch of a union or . . . a member of the committee of management of any union or branch, or . . . otherwise an official or a representative of a union or branch." The problem to be examined arises under this paragraph with regard to the job delegate or "shop steward". Where such delegates perform union duties their functions vary considerably from union to union, the most accurate external guide being an examination of union rule books (although it should be noted that many unions utilise job delegates, yet do not provide for them in their rule book).

A recent survey by the Industrial Relations Division of the Department of Labour[3] reveals that, according to the rule books of unions registered under the Act which make some provision for job delegates, these functions vary from simple collection of union fees at one extreme to acting as a "real front line representative" of the union at the other.

As an example of the latter category, some rule books fix the job delegate with the functions of, for example, calling meetings, reporting breaches of award to the employer, making claims to the employer affecting wages and conditions on behalf of the union (sometimes on the delegate's own judgement as to the best interest of the members), repre-

1 The "civil standard" being applicable. The burden of proof under the section is discussed in *Inspector of Awards v Hastings Glazing Co Ltd* (1974) 74 BA 691.

2 See Szakats, *Introduction to the Law of Employment* and *Supplement* para 130; Mazengarb & Smith, *Industrial Relations and Industrial Law* 164-167; Mathieson, *Industrial Law in New Zealand and Supplement* 53-56.

3 "Trade Union Rules and Job Delegates", Industrial Relations Division, Department of Labour, September 1978.

senting the union on any job committee and deciding what is urgent work for the purposes of any award or agreement. All of the unions surveyed by the Department of Labour which provide for duties of this nature allow for the delegates to be elected by the appropriate membership; many of them also provide for removal from the position by a decision of the members. And it is here that the problem arises because, as the law stands at present, it appears that a delegate may not always be "an official or representative of any union or branch" for the purpose of s 150 and thus will be outside the scope of the section's protection.

The difficulty turns on the meaning of "representative" in the section. The word is not defined in the Act and owes its appearance to s 2 of the Industrial Conciliation and Arbitration Amendment Act 1943. The only difference between the relevant paragraph of that section and the present s 150 (1) (a) is that the former was phrased in terms of "an official or a representative of any union or branch" whereas the latter omits the word "a". It is likely that nothing of significance turns on this omission. The debate on the Industrial Conciliation and Arbitration Amendment Bill in 1943 did not canvass the meaning of "representative".[4] However, the term appears in contemporaneous industrial relations literature in New Zealand as being synonymous with "shop steward" or "job delegate", these being treated as synonyms themselves.[5] According to a leading commentator writing in 1943,[6]

> The shop steward is the *representative of the union in a particular works or shop*. He is generally elected by the workers in the establishment and acts for them in taking up local grievances with the management, reporting more serious disputes to the district union and generally maintaining the union organisation and seeing that the workmen are enrolled. [Emphasis added.]

Indeed, looking at union structure in New Zealand, both in the war years and since, it is difficult to see whom the word "representative" is intended to encompass if not job delegates—those who "represent" the union in negotiations, conferences or conciliation councils are specifically dealt with in other parts of the section. Given that this is so it might be argued that, in construing s 150, the court could have applied the long-established principle of statutory interpretation *contemporanea exposito est optima et fortissima in lege*: that the best way to construe a document is to read it as it would have read when made. In addition courts have frequently been prepared to take into account the particular usage words have acquired, especially in the context of industrial legislation.[7] However, this appears not to have been the case with s 150 (1) (a) to date.

In *Inspector of Awards* v *W Williamson Construction Co Ltd*[8] the defendants dismissed a job delegate employed by them as a carpenter on a construction site. One of the heads of claim against the employer was that, within twelve months before his dismissal, the worker was a repre-

4 See (1943) 263 NZPD 1068-1110.
5 See, eg, Hare, *Industrial Relations in New Zealand* (Wellington 1946) 191-192.
6 Hare, *Works Councils in New Zealand* (Wellington 1943) 11. For more recent observations to the same effect in industrial relations texts see Harley et al, *Personnel Management in New Zealand* (Wellington 1966) 173-175; Ellis et al, *Personnel Practice* (Wellington 1974) 132-133.
7 See Pearce, *Statutory Interpretation in Australia* (Melbourne 1974) 31.
8 (1958) 58 BA 1020, a case brought under s 167 of the Industrial Conciliation and Arbitration Act 1954.

sentative of the Carpenters Union in his capacity as job delegate. The union rule book provided for the appointment of delegates on jobs in the following terms:[9]

> (a) Where members of the union are employed on any job such members must appoint one of their number to be the job delegate who shall deal with a union official upon all matters affecting the welfare of those workers on that particular job.
>
> (b) Job delegates appointed under this rule shall meet monthly at a date, time and place fixed by the Secretary. They may formulate and forward through the Secretary remits to the Executive on matters concerning the objects of the Union.
>
> (c) Eight delegates shall form a quorum for each such monthly meeting.

It was clear from the rules that the executive of the union had no say in the appointment of any job delegate. The Court of Arbitration held that, having regard solely and specifically to the rules of the union, the job delegate was not a representative of the union but was merely a representative of a minor group of members of the union employed on a particular job. In doing so, the Court suggested that the position would be different where the union rules provided for appointment of such delegates by the executive of the union, who would have power to define the delegate's duties and suspend or replace the delegate.[10] It is also of interest that the job delegate in this case acted as a "collector"; the Court's view was that such an activity did not transpose "the job delegate who is a representative of the workers on the job into a representative of the union. . . ."[11] (Although could it not be said that here the delegate was "representing the union" to union members in the workplace?)

Given that the purpose of s 150 is to protect workers who have taken part in union or industrial activities by deterring employers from dismissing or otherwise prejudicing them, it has been recognised that a technical or narrow construction of the section should be avoided if the spirit of the Act is to be observed.[12] An equally valid rationale for the section might be to ensure that workers are not discouraged from accepting union responsibilities by the possibility of their being dismissed or prejudiced by reason of such acceptance.[13] The section in this sense can be said to be aimed at protecting both the individual and the union.

Clearly, the major protection for such workers as job delegates lies in

9 Ibid at 1021.

10 Ibid at 1023, citing the then rule 16 of the branch rules of the North Island Electrical Trades IUW.

11 No mention was made of the earlier case of *New Zealand Timber Workers IUW* v *A B Seales* (1954) 54 BA 686 where an elected delegate was held to be "representative" of the union within s 2 (1) (a) of the Industrial Relations Amendment Act 1943 without consideration of the union rule book. See also *Re Shop Employees (State) Award and Shop Employees Confectioners etc (State) Award* (1977) ALMD 978 where Macken J described the view that union delegates are elected merely to reflect the wishes of the rank and file members of the union in the places where they work as a "complete misconception of their proper role as delegates" and stressed the proper function of delegates as a part of the conciliation and arbitration process.

12 *Inspector of Awards* v *Tractor Supplies Ltd* [1966] NZLR 792, 794 per Blair J.

13 See, eg, *Hyde* v *Chrysler (Australia) Ltd* (1977) 30 FLR 318, 329 per Northrop J, a case based on the similar s 5 of the Australian Conciliation and Arbitration Act 1904.

the potential application of s 150. Whilst the *Williamson Construction* case remains good law on its particular facts, it has since been distinguished in *Inspector of Awards* v *Tractor Supplies Ltd.*[14] Here a worker was dismissed allegedly by reason of unsatisfactory work and behaviour and/or redundancy; the union brought the claim under s 150 on the basis that the worker concerned was an elected shop steward. Under the union rules, the shop steward's election was subject to approval by the union and he was subject to suspension or replacement by a committee of the union. The shop steward had power under the rules to view members' subscription books, although, apparently, not to exercise any further authority on behalf of the union. The Court of Arbitration held that[15]

> These factors all point to a dependence on and a connection with the union by the shop steward and indicate that [he] was a medium and indeed a representative for the union in the factory.

The language of the rules in this case differed considerably from that in the *Williamson Construction* case, in other respects than the union endorsement; in particular the rules in *Williamson Construction* obliged delegates to deal with a "union official" on matters affecting workers' welfare. The Court in the present case attached some significance to this when distinguishing *Williamson.* However in a recent decision of the Arbitration Court, the *Tractor Supplies* case appears to have been overlooked. In *Auckland and Gisborne etc Shop Employees IUW* v *Smith & Smith Ltd*[16] Horn J, citing the *Williamson Construction* case, stated that

> it is possible that a shop delegate is not an officer of a union or a member of a committee of management or otherwise an official or representative of any union or branch within the meaning of the section.

In the circumstances of this case it proved unnecessary to consider the point further.

Thus the established approach is to concentrate on the union's rule book in deciding, as a question of mixed law and fact, whether the word "representative" in s 150 covers the job delegate in question. Such an approach will have pitfalls for those unions whose rules simply reflect the legislative requirements under s 175 of the Act,[17] since the question of job delegates is not covered by the specific mandatory provisions under that section. Just slightly more than 31% of registered unions make provision in their rules for some form of delegate, according to the Labour Department survey[18] (though these unions represent more than a 69% coverage of total union membership). From a table appended to the Department's survey, analysing 92 unions by major groupings and specifying whether their delegates are elected or appointed, it is apparent that many union rules would not satisfy the *Williamson Construction* test.

Assuming that the rule book either makes "insufficient" provision for job delegates or does not provide for them at all, what significance can be attached to award clauses making such provision so far as s 150 is

14 [1966] NZLR 792.
15 Ibid at 795.
16 Unreported, Arbitration Court, Auckland, 11 June 1979 (62/79).
17 There are few studies of the rule books of New Zealand unions but those that have been undertaken (see, eg, Seidman (1975) Jo of Ind Rel 156 and (1975) 38 NZ Jo of Public Administration 1) suggest that, perhaps understandably, imagination is not the hallmark of union rule books (for an explanation see Mathieson, supra n 2 at 141).
18 Supra n 3 at 1.

concerned? According to a further survey by the Department of Labour[19] slightly more than 23% of awards and agreements make such provision, the majority of these providing for recognition only on notice of appointment being given in writing by the union to the employer. The effect of award provisions on the present question is not settled. In *Otago Drivers IUW* v *F A Willetts Ltd,*[20] whilst again the Court did not find it necessary to consider whether the job delegate concerned was a "representative" within the meaning of the section, it was "noted" that a clause in the relevant award(Clutha Valley Power Development Scheme Drivers Award) provided for the elected delegate's "endorsement" by the union. This represents some indication of a move away from a strict approach based on the union rule book but in view of the present uncertainties it would be going too far to say that the award clause—where it exists—will suffice. Many such clauses however do reveal that, whilst the job delegate ostensibly represents a limited group of members of the union (the *Williamson* analysis), the delegate's functions transcend this "group" representation in practice. Consider, for example, clause 23 of the Huntly Coal Project Construction Composite Agreement:[21]

> One delegate may be appointed to represent members of each Union employed by each contractor. On receipt of written confirmation from the Union, such delegate shall receive recognition by the Employer. A delegate wishing to leave his place of employment to carry out bona fide Union business affecting the Union and the Employer shall first seek the consent of the foreman and on this being granted shall be allowed reasonable paid time to follow up such business. Absence from work on Union business not related to that Employer shall not be paid for. The Employer shall afford the delegate adequate facilities for meetings with the Employers Industrial Relations representative for the purpose of maintaining good industrial relations on site.

It would seem out of step with industrial reality, to say the least, if the plain intention of such a clause should be negated by concentration on the union rule book.

This leads to the general question as to whether the past emphasis on the rule book should be conclusive. In one sense the arguably strict approach adopted by the Court towards the wording of the section is understandable, since the section is penal in nature.[22] Nevertheless the Court has stated in the *Tractor Supplies* case that "in view of the manifest intention of the legislature as expressed in [the] section, the Court should avoid, if possible, a technical or narrow construction of the section."[23] Given this, criticisms might be levelled at the present approach which stems from the *Williamson Construction* case. It is arguably a narrow interpretation of the job delegate's role in the industrial relations system, whether the delegate is "merely" a collector or fulfils more detailed functions, to hold that the delegate merely represents a minor group of members employed on a particular job rather than the union itself. Given that there is nothing in s 150 to require the

19 "Awards and Agreements and Job Delegates", Industrial Relations Division, Department of Labour, January 1978.
20 Unreported, Arbitration Court, Wellington, 13 June 1979 (72/79).
21 (1978) 78 BA 3051, 3068. For construction of a similar award clause see *Cuevas* v *Freeman Motors Ltd* (1975) 25 FLR 67, 73.
22 See supra n 14 at 794.
23 Idem.

Court as a matter of construction to consider the rule book, the Court might properly have regard to the general scheme of the Industrial Relations Act 1973.

When called upon recently to describe the general scheme in *Muir* v *Southland Farmers Co-operative Association Limited*,[24] Horn J stated that "[i]t deals with unions of workers and unions of employers. Its operation is, for the most part, dependent upon and based upon the existence of unions", adding that "[t]his is particularly so . . . in its arbitral operations." Of the Australian counterpart of s 150 Isaacs J has remarked that the section "is designed, among other things, to preserve organisations, so that the method selected by Parliament for settling disputes shall not be thwarted."[25] Delegates are an integral part of this "method" in New Zealand. Even where one of the delegate's main functions is to take members' complaints to the union, that delegate may still be regarded as "the eye of the union in the shop" and, in referring matters to the union for action, may be described as "the medium through which the union can further its objects."[26] Should then the delegate's status under s 150 depend upon a technical construction of the union's rule book?

Legally, the rule book constitutes a contract of association among the members of the union.[27] Understandably, then, the emphasis in drafting the rules will be upon the relationship between the members and the union; but under s 150 it is the relationship between the union and *third parties* which is at issue.[28] To use a procedural union rule relating to the election of a job delegate to decide whether that delegate is a "representative" of the union within s 150 (1) (a) is arguably to place strain upon its original purpose. In addition, as Mathieson notes,[29]

> a brief inspection of a number of rule books will show that some are much more complex than others and some better drafted than others. . . . Some individual rules seem drafted on the assumption that all possible contingencies must be provided against. Others leave a good deal to the discretion of union officers.

This being so, it might be argued that the current emphasis on the rule book is an emphasis based upon form rather than substance. Union A might have a rule to the effect that job delegates are to be elected by the members in each shop or in default appointed by the executive, and that such delegates may be suspended or replaced by resolution of the executive. Seemingly such a delegate will be a "representative" within s 150 (1) (a), even where that delegate's only duties are to collect subscriptions and forward moneys collected; (this is not to disparage what is, after all, a vital organisational function). Union B, on the other hand, might expect its job delegates to engage in an extensive range of activities but may provide in its rules simply for election by the shop con-

24 Unreported, Arbitration Court, Invercargill, 1 March 1979 (27/79).
25 Dissenting in *Pearce* v *W D Peacock & Co Ltd* (1917) 23 CLR 199, 205.
26 In the *Tractor Supplies* case, supra n 14 at 795 per Blair J.
27 There are a large number of dicta to this effect. See, eg, *Gould* v *Wellington Waterside Workers IUW* [1924] NZLR 1025, 1042; *Prior* v *Wellington United Warehouse IUW* [1958] NZLR 97, 99.
28 This is not to say, of course, that the rules can never be relevant where such a relationship is involved; in cases based on vicarious liability, for example, they may be crucial although in such cases liability will depend upon the relationship between the union and its member by definition.
29 Supra n 2 at 141. See also Szakats, *Trade Unions and the Law* 123.

cerned, or the rules may be quite silent as to job delegates. Union B's delegates will not be covered by s 150 under the *Williamson* approach (though an approach based on any existing award provisions might be taken, as intimated in *Otago Drivers IUW* v *F A Willetts Ltd*).

It is difficult to disagree with the dissenting member of the Court in the *Tractor Supplies* case when he pointed out that the shop steward in that case (held by the majority of the Court to be a "representative" within the meaning of s 150 (1) (a)) had a more restricted function under the rules than his counterpart in the *Williamson Construction* case (who was held *not* to be such a representative).[30] However, where both the employer and the delegate's fellow workers understand the delegate to represent the union in the shop (rather than, on the present approach, as representing the shop to the union and employer), should not effect be given to this understanding regardless of both the extent of the delegate's functions and the provisions of the rule book?

In summary it is arguable that, in deciding that the union "representative" was to be protected under the predecessor to s 150, Parliament intended to protect the job delegate or shop steward. In construing s 150 consideration might be given to this likelihood as well as to the fact that industrial usage, both at the inception of the relevant paragraph and today, treats the words as synonymous. The past emphasis on the union rule book, reiterated in passing in recent cases, is—with respect—misplaced. First, it places an unnecessary strain on the original purpose of the rules in issue. Secondly, it is submitted that the tenor of s 150 (1) (a) is directed broadly towards protecting from victimisation workers who take part in union activities and that this broad purpose should be construed within the general scheme of the Act. It is surely the act of victimisation which is aimed at (Did the the defendant intend to victimise a worker elected by union members to pursue union objectives?) and not its consequences (Has the defendant, albeit unwittingly, victimised a worker endorsed or appointed by the union executive?), because to all intents and purposes the latter will be accidental from the defendant's point of view so far as job delegates are concerned. To argue that the defendant is fixed with constructive knowledge of the union's rules under *Progress Advertising (NZ) Ltd* v *Auckland Licensed Victuallers IU Employers*[31] is to beg the question; unless the defendant has actual knowledge of the union rule, he will be unaware of whether he is "dealing with the union" in the first instance and the doctrine of constructive knowledge does not arise until the defendant does so deal.

The simplest solution (although, on present form, the least likely to be implemented) would be an amendment to s 150 (1) (a), substituting the word "delegate" for "representative". This would bring the legislation into line with s 5 of the Australian Conciliation and Arbitration Act 1904 which expressly protects delegates from victimisation. It is, of course, possible for unions to amend their rule books by application to the Registrar of Industrial Unions under s 178 of the Act. Thus, for example, a union which wished to could adopt a rule in the form approved by the Court of Arbitration in the *Williamson Construction* case.

30 Supra n 14 at 797.

31 [1957] NZLR 1207. There the rule in *Royal British Bank* v *Turquand* (1856) 6 El & Bl 327; 119 ER 886, under which those who deal with a company are fixed with constructive knowledge of the memorandum and articles of association, was applied to industrial unions by Shorland J.

Finally, any union dealing with dismissal of a delegate or prejudicial alteration of that delegate's position within the employment has the alternative of raising the matter as a personal grievance under s 117. Indeed, under s 150 (3) a choice has to be made between the sections. In *Auckland and Gisborne etc Shop Employees IUW* v *Smith and Smith Ltd*[32] a union delegate objected to the replacement of a senior grade employee with a younger, inexperienced person. He was dismissed after an acrimonious discussion with the branch manager. The union claimed, inter alia, that the employer was in breach of s 150 (1) (a). Horn J, as previously noted, doubted whether a shop delegate was protected under that paragraph. Mr Jacobs added the comment that:[33]

> The union should not be blamed for its decision as it is obvious that the facts concerning dismissal pointed towards utilising section 150. However, although this section sets out the criteria which must first exist to allow the cause of action, it should also be recognised that at the same time it narrows the grounds considerably which can be considered and decided by the Court in either finding for the employer or the worker. On the other hand section 117 with its code setting out the steps to be actioned in attempting to resolve the matter such as, among other things, a referral to a grievance committee, clearly envisages all relevant matters being discussed and considered in a less formal manner.

Drawing attention to s 150 (3), he concluded that:

> Although at first glance one could assume that there is a clear choice of options where the dismissal of the worker meets one of the criteria in section 150 (1) (a) I would suggest that section 117 may be more suitable to use in the majority of cases.

On tactical grounds this comment makes admirable sense; although it should be noted that s 150 does have some advantages over s 117 in addition to those listed above. For example, reimbursement of lost wages is mandatory under s 150 but discretionary under s 117. It might be thought that this makes compensation and/or reinstatement a more likely proposition under s 150 than under s 117.[34] There is also the penalty under s 150 though this is of such a small amount that it is unlikely to deter employers in itself nor to be of any "value" to the union.

In conclusion it is worth remembering that job delegates may be the management's only point of contact with the union and that, unlike full-time officials, the delegate must have regard not only to the union's requirements but to his or her own position within the employment. Because of this extra threat to the delegate's security of employment it is submitted that some protection over and above that accorded to other workers is merited and that protection is most aptly to be realised under s 150. After all, as the Department of Labour survey concluded, "We . . . are dealing with a large volunteer force and the question arises as to how much can readily be asked of these people."[35]

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32 Supra n 16.
33 Ibid.
34 But see *Wellington etc Clerical Workers Union* v *Francis* (1975) 75 BA 7207.
35 Supra n 3 at 19.

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