HYDROFOIL SERVICES LIMITED SHIPMASTERS – ENFORCEMENT

In the Court of Arbitration of New Zealand, Northern Industrial District – In the matter of the Industrial Conciliation and Arbitration Act 1954; and in the matter of the Hydrofoil Services Limited Shipmasters Industrial Agreement, dated the 30th day of April 1971; and in the matter of an action between Gordon Nelson, Inspector of Awards, Auckland, Plaintiff, and Hydrofoil Services Limited, Ferry Building, Quay Street, Auckland, Defendant.

Hearing: Auckland, 15 November 1972.

Counsel: D. G. Rumpit for plaintiff, J. B. Sinclair for defendant.

Inspector of Awards v. Hydrofoil Services Limited

Industrial Agreement Interpretation – Stabilisation of Remuneration Act 1971 – "Base Rate" Not Altered by Pre-dating of Instrument – Application of Cost of Living Order – Section 2 and 16 (4) Stabilisation of Remuneration Act 1971.

This was a claim by the Inspector of Awards for a penalty for a breach of the wages clause, clause 1 of the schedule to the Hydrofoil Services Limited Shipmasters Industrial Agreement dated 30 April 1971 (71 B.A. 1330). It was claimed that the employer had failed to pay the minimum rate of wages provided by the agreement for the worker, the Master of the hydrofoil "MAN-U-WAI" for the week ending 27 February 1972 namely $86 plus the 9.1 percent Cost of Living Order dated 18 January 1972 and effective from 31 January 1972.

From 30 May 1969 the industrial agreement (69 B.A. 1057) provided a weekly wage rate of $75 for the worker. On 18 of May 1970 by verbal agreement this was increased to $81.50 and in November 1970 it was increased by 3 percent to $83.94. An industrial agreement dated 30 April 1971 (71 B.A. 1330) increased it to $86, clause 12 of the agreement making the increase retrospective to 1 January 1971.

For the plaintiff it was submitted that as the agreement dated 30 April 1971 had retrospective application to 1 January 1971, the rate of $86 provided by that instrument was the base rate as defined by section 2 of the Stabilisation of Remuneration Act 1971 and that $86 was the rate to which the order attached.

The Court found that the base rate was the rate which was in actual operation on 1 January 1971 and was not a rate which had been retrospectively applied by the predating of an instrument, and therefore the base rate was $83.94. The order came into force on 31 January 1972 and at that date the wages being paid had been increased to $86 from $83.94. In the circumstances proviso (b) of section 16 (4) of the Act applied. This provided that where the rate of remuneration had been increased prior to the Cost of Living Order coming into force such increase was offset against the increase provided by the Order. It therefore followed that $83.94 and not $86 was the figure to which the Order attached.

Held: That the correct rate for the worker for the week ending 27 February 1972 was $83.94 plus 9.1 percent.

Decision of the Court of Arbitration per Blair J.

Dated 8 December 1972.

STATEMENT OF CLAIM

The Plaintiff claims to recover from the Defendant the sum of twenty dollars ($20.00) as a penalty for a breach of the Hydrofoil Services Limited Shipmasters Industrial Agreement, dated the 30th April 1971, and recorded in the 1971 Book of Awards page 1330.

The following are particulars of the said breach:

That the Defendant being a party bound by the provisions of the said industrial agreement did during the week ending 27 February 1972 employ Herbert James Hansen as Master of the Hydrofoil "Man-U-Wai" being work covered by the said industrial agreement and did fail to pay the said Herbert James Hansen the minimum rate of wages provided in the said industrial agreement, namely, eighty-six dollars ($86.00) plus the 9.1 percent Cost of Living Order dated the 18th January 1972 and effective from the 31st January 1972. The said Order being made pursuant to section 16 of the Stabilisation of Remuneration Act 1971.

Wherefore the Plaintiff claims to recover from the Defendant the sum of twenty dollars ($20.00) and the costs of and incidental to this action or such other sum as the Court considers just.

JUDGMENT OF THE COURT DELIVERED BY BLAIR, J.

In form this case was one for a penalty for the breach of an industrial agreement. It was common ground, however, that the real issue was one of interpretation, and the Court was asked to deal with the matter on this basis.

The central question is: In terms of the industrial agreement and the revelant legislation what is the rate of wages lawfully payable to Captain H. J. Hansen during the week ended 27 February 1972 Mr Hansen was the Master of the hydrofoil "Manu-U-Wai" at all material times.

We will refer first to the salary agreements between the parties. As from 30 May 1969 the parties were subject to an industrial agreement (69 Book of Awards 1057) which made provision for a pay rate of $75 a week plus a weekly travelling allowance which was agreed at $7 a week, this later being increased from 18 May 1970 to $8 a week. Meal allowances were also paid. This agreement was expressed to expire on 31 March 1970, but by virtue of section 103 (5) of the Industrial Conciliation and Arbitration Act it continued in force after the expiry date. A new industrial agreement was not made until 30 April 1971. However, on 18 May 1970 a verbal agreement on pay rates was made whereby Captain Hansen's salary was increased to $81.50, and in November 1970 his salary was increased by 3 percent to $83.94. Then, on 30 April 1971 a new industrial agreement was made which provided for a pay rate of $86 per week for Captain Hansen. In addition to this, new allowances were negotiated which allowed him a total of $13 which was regarded as between the parties as a tax-free allowance. Five dollars of this was described as travelling allowance and $8 as expenses. Normal meal allowances were paid in addition to this. This agreement provided by clause 12 that: "This agreement shall be deemed to have come into force on the 1st January 1971 and shall continue in force until the 30th April 1972." This industrial agreement was never referred to the Remuneration Authority.

We must now refer to the Stabilisation of Remuneration Act 1971 (hereafter called the "Stabilisation Act") which was enacted on 25 March 1971. The general purpose of this Act was to stabilise remuneration rates. The Act selected 1st January 1971 as the date on which the "base rate" was fixed. The base rate was the amount of remuneration payable to a worker as at 1 January 1971 (s. 2). For the purposes of this case we need not concern ourselves with the provisos to the definition of "base rate" as they do not apply to the circumstances of this case. We turn now to s. 19. If we may paraphrase the effect of s. 19 it is this: Where the agreed rate of remuneration exceeds 7 percent of the base rate (i.e., that payable as at 1 January 1971) then the proposed instrument "shall be forwarded" to the Remuneration Authority with a memorandum giving reasons why the

proposed rate should exceed the specified percentage, and the section says that: "The rate of remuneration to be provided shall not have effect until the expiration of 21 days . . ." from the date of the receipt of the instrument and the information. The Authority is required, if it considers the proposed rate not to be justified, to report that fact to the Minister with reasons for its opinion.

In our opinion it is a mandatory requirement of the Act that instruments providing increases of more than 7 percent in the circumstances set out shall be sent to the Authority under s. 19, and failure to do so is an offence under s. 31 of the Stabilisation Act. However, the making of such an agreement is not in itself an offence. Our understanding of s. 19 is that it provides that such instrument "shall not have effect" until the expiration of 21 days after it and the necessary information has been received by the Authority. It follows, we think, that if such an instrument subject to the Act is never sent to the Authority then it can have no effect and is unenforceable. It is not, however, invalid.

We must now decide in terms of the Stabilisation Act what the base rate was as between the parties, i.e., the amount of remuneration payable to Captain Hansen as at 1 January 1971. It was submitted by Mr Rumpit that the $86 was the base rate because of the provision in the agreement dated 30 April 1971 that such agreement "shall be deemed to have come into force on 1st January 1971". In our opinion such a submission is untenable. A fundamental purpose of the Stabilisation Act is to stabilise remuneration rates as at 1 January 1971, subject only to the exemptions provided for, and ordinary contractual rights are restricted accordingly. Section 32 states that in the event of conflict between the Stabilisation Act and any other Act, the provisions of the Stabilisation Act shall prevail. Except to the extent that the Act allows, parties to an agreement are not permitted to increase remuneration rates above the base rate. If by making the operations of agreements retrospective parties were enabled to create new base rates, then the Act's primary purpose would be neutralised. In our view, while it is competent for the parties, inter partes, to predate the operative date of their agreements they cannot under the Stabilisation Act, without the consent of the Authority, alter the base rate. In the present case the industrial agreement of 30 April 1971 was made at a time when the Stabilisation Act was in force. The agreement must be subject to the essential purpose of the Act which was to create a base rate to which the stabilisation scheme of the act was related. We hold therefore that the $86 cannot be regarded as the base rate for the purposes of the Stabilisation Act.

What then was the base rate? Accepting the evidence that there was a verbal agreement to increase the salary to $81.50 in May 1970, it appears to us that this is an "instrument" as defined (see paragraph (d) of definition of "instrument" in s. 2 of the Stabilisation Act). For the purpose of the Act it is clear that the base rate means the actual remuneration agreed upon whether the agreement is in writing or not. This $81.50 was increased to $83.94 in November 1970 as previously mentioned, so that the rate being paid as at 1 January 1971 was $83.94 and that in our opinion is prima facie the base rate. If that view is correct the percentage increase when the industrial agreement was made is less than 7 percent and accordingly there was no necessity to refer the industrial agreement to the Authority under s. 19.

We return now to the question of the correct remuneration to which Captain Hansen was entitled during the week ending 27 February 1972, taking into acocunt the industrial agreement, the provisions of the Stabilisation Act, and the effect of the January 1972 cost of living order. That cost of living order came into force on 31 January 1972 and as from that date the 9.1 percent was to be applied to "every rate of remuneration in . . . every industrial agreement . . ., for the time being in force" subject to the provisos in s. 16 of the Stabilisation Act. The provisos take effect "where at any time after 1st of January 1971 any rate of remuneration fixed by any . . . industrial agreement . . . has been increased". It is clear that the industrial agreement dated 30 April 1971 was in force as at 31 January 1972 and the minimum rate fixed for Captain

Hansen under that agreement was $86. It follows that $86 is the rate to which the 9.1 percent order attached, unless the proviso in subsection (4) of s. 16 of the Act is applicable. The proviso in effect says that where "at any time after 1st January 1971" any rate of reumuneration fixed by an industrial agreement has been increased then the 9.1 percent shall be effected by the amount of the increase. We hold that while as between the parties and as a matter of contract the industrial agreement operated as at 1st of January 1971 (i.e., on the expiration at 31 December 1970 – compare s. 11 of the Acts Interpretation Act 1925) we must also hold that the decision to make the increase to $86 was not made until 30 April 1971. For the purposes of giving effect to s. 16 of the Stabilisation Act we must have regard to the words "where at any time after 1st of January 1971 any rate of remuneration has been increased", and take into account the purposes of the Stabilisation Act. The major purpose of that Act was to make 1st of January 1971 the base rate date for the purpose of stabilisation, and the purpose of the proviso to subsection (4) of s. 16 is to make the rates which "are in force" on that date the base rate to which subsequent cost of living orders should relate. We have already noted that a primary purpose of the Act would be neutralised if the parties could after the passing of the Act pre-date their contracts so as to increase the base rate.

We therefore hold that as regards the application of the 9.1 percent cost of living order dated 18 January 1972 this must be related to the $83.94 which was the base rate as at 1st of January 1971. Accordingly the defendant is liable to the extent that the $86 which was being paid did not absorb the increase.

The above finding is made on the assumption that the allowances paid to Captain Hansen at the material times should not be brought into the calculation. We understood Mr Dromgool for the employer to say that these allowances had been cleared with the Inland Revenue Department as non-taxable being reimbursements for expenses. If this is so then it seems that the "allowances" should not be added to the "remuneration" for the purposes of the Act.

The defendant has not committed the particular breach of the industrial agreement with which it is charged though a lesser breach of the agreement has been shown. In any event, however, these proceedings were brought simply to obtain an interpretation and it is not a case in which a penalty should be imposed.

Dated this 8th day of December 1972.

A. P. BLAIR, Judge.