The New Zealand
LAW JOURNAL

21 October 1980 No 19

COMMISSIONS OF INQUIRY

Earlier this year the Public and Administrative Law Reform Committee presented its report on Commissions of Inquiry to the Minister of Justice. With not less than three commissions currently competing for headlines at the moment (concerning A A Thomas; Erebus; Marginal Lands) not to mention other inquiries that are quietly pursuing their course (Danks Committee; Wellington Railways) it is certainly no understatement to say that "it is now well established that commissions of inquiry are part of the regular machinery of Government".

By the same token few would disagree with the Committee in saying:

> "We regard it as important that [commissions of inquiry] have adequate powers to perform the functions entrusted to them and that, at the same time, the citizen is properly protected from the misuse of those powers."

This note is primarily concerned with the safeguarding of the interests of the individual and affected groups, not only because the Committee has made important recommendations in this area, but also because the issue is a real one. One has but to recall the refusal of the application by Colin Moyle to be represented by Counsel before the North Commission; the refusal of the equivalent of party status to the New Zealand Law Society before the Taylor Commission (A A Thomas) and the difficult situation the Fitzgeralds found themselves in before the Marginal Lands Board Inquiry, to appreciate this.

The point becomes even more important as the Committee has preferred not to follow the proposals of the Law Reform Commission of Canada and recognise two different forms of inquiry — the Advisory Commission and the Investigatory Commission — each of which require different powers and balancing protections. In their opinion ". . . the functions of a Commission are diverse and frequently overlap. . . . A Commission should be able to move from an Advisory role to an investigatory function as required . . ."

Their recommendation is:

> "We consider that a better result could be achieved by providing adequate powers for all commissions of inquiry. The equivalent safeguards would also apply to all inquiries."

Those interested in appearing before a commission of inquiry will want to know their entitlement:

To be heard
To cross-examine witnesses
To be represented by counsel
To be paid
To challenge rulings on these points.

Entitlement to be heard

Under the Commissions of Inquiry Act 1908 any person who satisfied a commission that he had an interest in the inquiry apart from any interest in common with the public was entitled to appear and be heard. This provision is substantially retained and the Committee recommends in addition that any person who satisfies a commission that any evidence given before it may adversely affect his interests be given an opportunity to be heard in respect of

the matter to which the evidence relates. The Committee also adopts a recommendation of the Canadian Commission that "no report of a commission alleging misconduct by any person should be made until reasonable notice of the allegation has been given to that person and he has had the opportunity to be heard".

These recommendations cover the type of situation faced in the case of Colin Moyle and the Fitzgeralds and reflect a desire on the part of the Committee to ensure that the principles of natural justice are adequately reflected in the proceedings of a commission of inquiry.

The Committee also recommends that it be spelled out in legislation that every person entitled to be heard be empowered to give evidence and call and examine witnesses.

On the subject of whether any form of pre-inquiry procedure should be laid down to ensure that persons appearing before an Inquiry had sufficient information about the case they had to meet, the Committee felt that rather than devising rules to provide a minimum standard it was preferable not to formalise pre-inquiry procedures but rather to leave it to the commission of inquiry to determine its own. The preparation of a handbook which included procedural guidelines was urged as facilitating the standardisation of procedures and ensuring that all necessary steps are taken.

Entitlement to be represented by counsel

The Committee recommends that the right to be represented by counsel be provided by Statute.

Entitlement to cross-examine

Again the Committee recommends that every person entitled to be heard be empowered, at the commission's discretion, to cross-examine witnesses.

Entitlement to be paid

At present there is a limited power to pay or order payment of travelling and maintenance expenses to witnesses attending pursuant to a summons. The Committee recommends changes to this provision but the recommendation that will attract most interest is that a commission be empowered to meet the whole or part of the legal research or other costs of a submission that furthers the purposes of an inquiry to an exceptional extent. Here is the recommendation in full:

> We consider that by and large persons or groups with sufficient interest to appear before a commission should bear their own costs. This can be said to follow from the fact that they have a direct interest in the subject-matter of the inquiry. In some cases, however, a person or group could adduce evidence or make submissions of considerable value or importance which clearly promotes the public interest. The costs which would otherwise fall on the commission may even be reduced. We therefore favour a power whereby the commission could order that all or part of the legal, research and other costs of any person or group giving evidence before it could be met from public funds. We envisage that such payments would be rare. The power would be restricted to those cases where the evidence or submissions furthered the purposes of the inquiry to an exceptional extent.

If adopted this recommendation will give some form of recognition to the significant contribution members of the public have made over the years to the development of the findings of commissions of inquiry.

Challenging rulings

The Committee considered that the proceedings of a commission of inquiry should be amenable to judicial review. While they felt it possible "that the effect of the Judicature Amendment Acts of 1972 and 1977, together with the increasing emphasis on the common law of an obligation to be fair, as distinct from the obligation to act judicially, may have already brought the conduct of a commission of inquiry within the High Court's powers of review" it was preferred not to leave the matter at large. Consequently an amendment to the Judicature Amendment Act 1972 was recommended so that it applied to an inquiry as if it were the exercise of a statutory power of decision.

Conclusion

This comment covers but a small part of the full report. It is though an important part. In the opening pages of the report it is recognised that public inquiries are an important tool of Government. They provide a means of arriving at a balance between the public and private good; of assisting a Government to formulate policy; of enabling examination of conflicting expert opinion; and of testing the strength of opposition to a project. By giving more individuals and groups an opportunity to express

their views, public inquiries "provide public authorities with a more precise appreciation of the public's requirements and expectations."

From the citizen's point of view inquiries provide an "opportunity to participate in the process of decision-making which affects their lives."

A number of those people who are sufficiently public-spirited to have given their time and met the cost of appearing before commissions of inquiry have expressed dissatisfaction that procedures are left so much at large that they do not know with any certainty to what extent they are entitled to participate in this increasingly important part of the democratic process. Although the proposed recommendations may not seem particularly urgent, it would be a fitting and appreciated recognition of the services provided by many people over the years to accord the draft Bill appended to the report some measure of priority in the Parliamentary Order Paper.

TONY BLACK

CRIMINAL LAW

EXTENSIONS TO POLICE POWERS

The Public Issues Committee of the Auckland District Law Society questions the necessity of giving police power to require persons suspected of crimes to undergo bodily examination and sampling procedures. They suggest it has not been established that the substantial interference with traditional liberties this will involve will be justified in terms of improvement in the investigation of crime and generally doubt the utility and reliability of the information that will be obtained.*

Last year the New Zealand Criminal Law Reform Committee presented a report to the Minister of Justice which recommended that police be given new powers to require persons suspected of crimes to undergo bodily examination and sampling procedures. These procedures would include detailed scrutiny, where appropriate, of a person's naked body, the noting of physical measurements and markings, and the forcible (if resistance is offered) taking of samples of blood, saliva, dental impressions, and hair, plus fingerprints, palmprints and footprints. Such examinations could be carried out upon persons merely *suspected* of a crime, as well as persons arrested on a charge of having committed a crime. However the procedures would only be carried out after a District Court Judge had authorised them. The Committee also recommended a number of safeguards for suspected or arrested persons subjected to the procedure and these will be examined below.

The Government has not as yet acted upon these proposals. But if it now contemplates doing so, the New Zealand public should take a very close interest in the issue. We live in anxious times. People tend to perceive society as being under threat. A constant thread in suggestions that society is under threat is that crime and criminals are an increasingly dangerous problem. Both police and politicians tend to point to crime problems. And, of course, the media know that crime is always news.

In such a climate it is not surprising that there are continual calls for extensions to police powers. And it is not surprising that the debate is often bitter. Accusations of police malpractice are met by counter-accusations of anti-police smear tactics. Yet this sort of debate is essentially misleading. The debate is not about the indefensible versus the wholly defensible; things are never as clear as that. The debate is (or should be) about the more defensible and the less defensible. In other words, when extensions to police powers are proposed, the questions we should ask are "are these powers really needed?" "Will they achieve the desired results?" And finally, and most importantly, "Would giving police these powers lead to being destructive of the sort of open and democratic society we pride ourselves on?" Such an approach does not involve aspersions upon the integrity of police. The New Zealand Police Force has an exceptional record of freedom from corruption and malpractice. Yet we must always be careful that we do not move towards

a less open, less democratic situation by a series of over-hasty responses to what are suddenly seen as problems. Police are understandably preoccupied with establishing and maintaining social order; as they call for new powers to deal with what are seen as new threats to social order, it may be forgotten that the new order thus established may be a rather different order from that originally aimed at. Every proposal to extend police powers should be carefully scrutinised in the light of the questions noted above.

There are two initial issues raised by the proposal to allow bodily examination and sampling. First, there is the question of applying such a compulsory procedure to *suspects* (ie, persons against whom there is as yet insufficient evidence to justify an arrest). Secondly, there is the question of whether it is proper to authorise highly intrusive and possibly painful and humiliating procedures against arrested persons. These issues are closely interrelated.

Turning to the question of suspects, the first point to note is that by applying the procedures to suspects the Committee seems to contemplate that the procedures will be available on a lower standard of suspicion than that currently required for an arrest to be made. It has always been the law in New Zealand (with a few minor exceptions) that until a person is arrested he/she is free to go about his/her business without any interference at all. No one is compelled to answer questions by police, and no one is compelled to undergo any examination or detention by police prior to arrest. After arrest, police may require a person's particulars (name, address, etc) and may fingerprint and photograph him/her. The proposal of the committee is therefore a very major departure from the current situation.

Why are police powers before arrest so confined? The reason is that individual freedom is highly prized in our society. Consequently it is thought that freedom should not be interfered with until some reasonable evidence exists that the individual may have infringed society's rules, and should therefore be confined or subjected to further, more intrusive investigation. Until a policeman thinks there is enough evidence to charge a person with a crime (in other words, to publicly accuse him or her), that person may not be interfered with. The Criminal Law Reform Committee seems to be saying that now police ought to be able to detain and examine an individual (albeit with judicial authorisation) before that point is reached; that the individual can be detained and examined for the purpose of building up the case against him or her, or for the purpose of excluding him or her from the investigation. The proposed procedures are thus a major new mode of interference by the state with the individual. This does not automatically condemn the proposal, for we recognise today that many socially beneficial measures require such interference. But the fact that the intrusion proposed is so major means that there is a heavy onus upon the proposers to demonstrate the need for it. Indeed, at first sight it might be thought that the objection raised above is overwhelming. The same considerations apply, albeit with rather less force, to the proposals to allow such procedures after arrest; people charged with crimes are innocent until proven guilty (a trite phrase — but its repetition seems increasingly necessary today). People charged with crimes still have many rights to liberty. For example, the law generally contemplates that persons awaiting trial shall not be held in custody. We must therefore ask whether the Criminal Law Reform Committee have discharged the onus placed upon them by the considerations already mentioned.

The Committee justify their proposal by arguing that because forensic science now offers useful techniques of investigating crimes (eg, matching of bloodstains or fingerprints), and because "the rights of the individual are no more absolute that society's need for effective law enforcement", such techniques should, on balance, now be deployed. They recognise that their proposal involves a "nice balancing of interests". But these statements seem to beg some important questions about the nature of our liberties and rights. Are there perhaps some rights which are too important to be sacrified to "effective law enforcement"? And is that in fact the choice? Is it really the case that the enjoyment of such rights renders law enforcement wholly ineffective, or even significantly less effective? However the majority of the Committee conclude that because of the usefulness of modern forensic techniques to criminal investigation, and the possibility of thereby expediting such investigation, the procedures should be available to the police. The Committee also note that this procedure will be a regulated one; it will be subject to judicial scrutiny and other safeguards for the suspect. The safeguards include a right to have up to three persons of the suspect's choice present during the examination or sampling, time limits on the life of the judicial order authorising the detention and examination, and a right to object to the order on medical or religious grounds (but not to appeal against the making of the order in

the first place).

The first question that must be asked is just how useful and reliable the more intrusive procedures will be, and here there seems to be an omission in the Committee's report. There can be little doubt as to the utility and reliability of some of the samples which could be obtained, for example, fingerprints. Similarly, the ability to scrutinise both measurements and markings would seem useful, though rather less reliable given the need for witnesses to remember such details. Dental impressions would also be useful and reliable, albeit in the exceptionally rare case. However, the utility and reliability of blood samples (and saliva samples, which reveal blood-groups) is more doubtful. Blood-grouping technology is developing rapidly; it has been predicted that in twenty years a person's blood-group will be as distinctive and unique as his or her fingerprints. But that is not the situation today, and it may not be the situation for a long time to come. All blood-grouping can usually do at the moment is to exclude a person from further investigation by establishing (for example) that blood found, say, at the scene of a crime, and known to have been shed by the criminal, could not have come from the suspect. But the probability that a person wrongly suspected will be excluded varies according to the rarity of the blood-group involved and the number of tests that can be performed. In some situations, especially where small bloodstains are involved, the probability that an innocent suspect will be excluded might be as low as 60 percent, so that, at the end of the procedure, an innocent person could still remain a suspect. Conversely, it is only in the case where the blood-group involved is extremely rare that a match between the suspect's blood and that left at the scene of the crime could be persuasive evidence that the suspect committed the crime. And how rare would the blood-group have to be before such evidence could safely be treated as persuasive? Should the Judge or jury treat that evidence as persuasive where 1 percent of the population have such a group? Where 0.01 percent of the population have such a group? Similar problems of utility and reliability arise with respect to hair samples. The most that the Committee can say of such samples is that "useful comparisons can be made". Surely a stronger case should be made out for such a fundamental change.

It may therefore be thought that the utility and reliability of many of the types of samples which could be taken in the proposed procedures is not of a sufficiently high level to warrant the intrusive procedures required. The Committee's report is not sufficiently detailed on these matters to allay such doubts. And there is another large omission from the report. There are no studies, examples or statistics quoted by the Committee to suggest that a significant number of investigations have been or are being frustrated because such samples are not available. Nor did the Committee quote any studies which suggest that in the few overseas jurisdictions which have such procedures the process of investigation has been significantly improved. Is it only in the rare case that such procedures would be useful? This is the very information which is needed for informed decisions as to whether the loss of traditional liberty which the procedures involve is outweighed by the usefulness of the procedures. If the public could be confident that the investigation of crime would be significantly improved or expedited, that a considerable number of unsolved cases could be solved, then it might think that this is an advantage to society worth the cost of liberty. But in the absence of this type of information it is difficult to make this decision; so difficult that perhaps we should err on the side of caution and maintain the status quo.

There is a further matter omitted from the report which should have been included. In the United States, evidence which has been obtained by illegal means (eg, an unauthorised search) may not be presented to the Court in the course of any subsequent trial. If it is, the Judge will refuse to admit it. In other words, illegally obtained evidence will be excluded from consideration. United States Courts take the view that this is an appropriate and effective method of controlling and disciplining police misconduct, and that such control is essential to the protection of citizens from arbitrary police misuse of powers.

The approach of our Courts contrasts sharply. While Courts here may exclude evidence that has been obtained unfairly or illegally, the exclusion is discretionary, not automatic. The Courts are less willing to view exclusion as the appropriate means of disciplining police misconduct. The Courts are more inclined to exclude where the prejudicial effect of the evidence outweighs its probative value. The discretion to exclude evidence unfairly or illegally obtained is thus a more conservative approach than that of the United States. Yet the knowledge that illegally obtained evidence will always be excluded must act as a powerful motive for officials to keep to the rules in their investigations.

"SOLICITOR'S APPROVAL" — A PARTIAL SOLUTION

By PROFESSOR BRIAN COOTE, *University of Auckland* *

In his thoughtful letter published at [1980] NZLJ 296, Mr Alan Jenkinson agrees with the analysis of the cases given in the present writer's article on "solicitor's approval" clauses at [1980] NZLJ 78 but deprecates what he sees as the sympathies expressed. These he takes to lie with the imposition of constraints on the solicitors who have to operate under such clauses. The main thesis of the present writer's various articles and notes on "solicitor's approval" clauses certainly has been that, *if* an immediately binding contract for sale and purchase is to be created, the solicitors concerned must be placed under constraints since their clients would otherwise have undertaken no immediate obligation (unless merely to consult their solicitors, which in real terms could hardly have been intended) and hence would have provided no immediate consideration. The law knows no category of simple executory bilateral contract where one party, only, provides consideration and one party, only, is bound. But since the question has been raised, the writer's personal view, for what it is worth, is that the preferable solution to the problem of the "solicitor's approval" agreement is to treat such clauses, wherever such an interpretation is possible, as preventing the formation of any contract at all unless and until any required approval has been signified. The possibility of such a construction was discussed in [1976] NZLJ 40, 41-42. The purpose of this present article is to state the reasons for the personal preference.

The basic problem with land sales in New Zealand stems from the way in which they are commonly conducted. It would seem that in a great many cases they culminate with the signature by both parties, before they have taken professional advice, to a common form of contract prepared by an estate agent and into which may have been inserted additional clauses drafted either by the parties themselves or the estate agent. It is a system fraught with dangers for the lay parties, particularly at the house sale level, and is one which the associations of estate agents in England have agreed it would be unprofessional for their members to follow ((1966) 63 L Soc Gaz 267), cited at [1975] NZLJ 123, 124.

The English solution has, of course, been to adopt the "subject to contract" system under which neither party is bound until their solicitors have prepared and exchanged a more formal later document. In Scotland, it appears, the problem does not arise because the solicitors themselves fill the role of estate agents. In this country, on the other hand, the only concession made to the protection of the parties has been the inclusion of conditions in what the Courts have generally taken to be an immediately binding contract, the characteristic condition being "subject to finance". The disadvantage of the "subject to finance" clause is that the protection it gives is only partial. Indeed, that may well be true of any system of conditional common form contracts. Certainly, the English Law Commission reported in 1975 (Report on "Subject to Contract" Agreements: Law Com No 65) that in its view *no* system of immediate conditional contracts could adequately protect the parties. The reasons for this view were summarised at [1975] NZLJ 123, 125.

In these circumstances it is submitted that the "solicitor's approval" clause can fairly be seen as an attempt to give the parties the comprehensive sort of protection the "subject to contract" system provides in England, while remaining within the usages of the New Zealand practice of securing signed forms of agreement before the parties obtain professional advice. In the legal sense, if the object were to bind one party but not the other, the correct course would be to use a form of option. Similarly, if the intention were to leave both parties free, it would be to agree "subject to contract".

*When first published at p 396 the paragraph order in this article was inadvertently "scrambled". This publication is more in accord with Professor Coote's intent and we regret any embarrassment he may have been caused.

At least three reasons can be suggested why those courses are not followed. The first is the estate agent's desire to secure his commission. The second is the conservative use by estate agents without legal training of the forms with which they are familiar. The third is the very real convenience to all parties of having an already signed and exchanged agreement to hand once the condition has been fulfilled.

If, on the other hand, a fourth reason were a desire by one or other, or both, parties to bind the other of them without binding himself, the objection would have to be made that any such desire was incapable of fulfilment for the reason already given. That reason is that the law knows no category of executory bilateral contract binding one party, whether absolutely or conditionally, but under which the other is not bound at all. The nearest approach allowed at law is an option. That is a contract where one party, for consideration, binds himself to hold open the offer of another, later contract.

If it is correct that the intention behind "solicitor's approval" clauses is to give comprehensive protection to the parties akin to that they would enjoy under the English system, a price has to be paid, as it is in England. The fact that neither party is bound until approval is given means that they risk being "gazumped". In England, the sanction against such conduct is moral opprobrium and no doubt the same could become true in this country as well.

So far, the case for saying that "solicitor's approval" clauses prevent there being an immediate contract has been argued from the need to protect the parties and their assumed intention to meet that need. But the case, it is submitted, becomes even clearer when the alternatives are considered. For the reasons already given a finding of an immediately binding contract makes it necessary to hold that constraints of some kind have been placed upon the solicitors concerned in the granting or withholding of their approval.

A range of such constraints has been suggested, and canvassed in the writer's earlier articles. At one extreme is that of Cooke J in *Frampton v McCully* [1976] 1 NZLR 270, 277 and in *Boote v RT Shiels Ltd* [1978] 1 NZLR 445, 451, that the approval be confined to "conveyancing aspects". That test was influenced by *Caney v Leith* [1937] 2 All ER 532, a case involving the assignment of a lease as an incident to the transfer of a hotel business. The approval was expressly limited to the lease so that no question of approval of the bargain itself arose. In *Provost Developments Ltd v Collingwood Towers Ltd* (Supreme Court, judgment 15 November 1979) Holland J, quite rightly, it is submitted, saw a difference between a case such as *Caney v Leith*, supra on the one hand, and an agreement for sale and purchase such as the one before him where there was no express limitation of the approval and where the client could be expected to require and seek advice on the bargain itself in all its aspects, rather than on any one aspect of it alone. A situation in which the client expects and receives advice on the wider aspects of the bargain but in which the adviser might be compelled to withhold approval against his client's interests or contrary to his express instructions, or both, would obviously be an intolerable one for the adviser. It would be an intrusion into his normal duty to and relationship with his client of the most embarrassing and destructive kind. Worse still, if what happened in the *Provost Developments* case is any indication, it could lay open to public examination a relationship which in other circumstances is regarded as one of almost total confidentiality. It is difficult to suppose that the lay parties would either intend or envisage such a result.

On the other hand to recognise, as to a large extend did Holland J in the *Provost Developments* case, the realities of the solicitor-client relationship and to allow the solicitor to exercise his judgment on wider grounds, yet at the same time to hold that an immediately binding contract was formed, is to go to the opposite extreme. No doubt, technically, consideration might be found in an implied promise by the party concerned to consult his solicitor, and in a constraint on the solicitor not to act from malice or mere caprice. The real issue is whether a consideration so elusive and ephemeral is sufficient to support the inference of an intention to contract. It seems hardly credible that the one party would have intended to accept it as the price of his being bound immediately while the other of them was for practical purposes left free to do as he liked. Yet here, again, even so elusive a constraint could still constitute an intrusion on the relationship of solicitor and client and, potentially, render it open to some degree of public examination.

In truth, to cling to the notion of an immediate contract places the Courts in a dilemma. The more likely it is that the parties intended an immediately binding contract, the greater the constraints on the solicitor are likely to be, because the greater the constraints, the greater the price being paid for the other party to be bound immediately. On the other hand, the greater the constraints on the solicitor, the greater the intrusion on the relationship of

solicitor and client and, hence, the less likely it would be that the parties intended any such result. The proper way to escape from that dilemma, it is submitted, is for the Courts, wherever possible, to refuse to embark upon it in the first place and for them to hold, at least as a prima facie inference, that the use of a solicitor's approval clause means that no binding obligation has been accepted, and hence no contract has been formed, unless and until approval has been signified. That, as Mr Jenkinson has suggested, would be to do no more than give the words their normal literal meaning.

In *Carruthers v Whittaker* [1975] 2 NZLR 667, the Court of Appeal effectively solved the problem of the "authenticated signature fiction" for this country by recognising a common understanding that, on a sale of land, neither party is bound unless and until both have signed and copies have been exchanged. A similar service could now be served by making the formation of contracts subject to solicitor's approval, in the absence of strong indications to the contrary, depend upon the approval being given.

That would, of course, not in itself solve all the problems of consumer protection in land sales. Nor could it by itself solve all the problems of "solicitor's approval" agreements since, for the quite accidental reasons mentioned by Mr Jenkinson, the parties or their lay advisers may use words of present contract even though they bear no relation to the real intention of the parties. For these reasons, the present writer's view has been and remains that a statutory solution is also desirable.

CONFLICT OF LAWS

DOMICILE OF CHOICE

A member of the Baader-Meinhof Gang entered into a marriage of convenience in England. Extradition was sought and the question of domicile arose. Mr A A TARR* *examines the issues.*

Domicile is a concept traditionally employed in the Ango-American system of conflict of laws to link an individual to the laws of a particular country having its own legal system. It is often necessary to ascertain the domicile of a particular person for jurisdictional purposes, as well as for the purpose of discovering by what law matters of great personal importance to the person concerned are to be governed: eg, many kinds of status, capacity to make a will or to marry, and intestate succession, fall to be governed by the lex domicilii of the individual. In *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 321, Lord Westbury commented that

> "Domicile . . . is an idea of law. It is the relation which the law creates between an individual and a particular locality or country."

Consequently, it is vital that no person should be without a domicile and pursuant to this object the law ascribes to every person a domicile of origin at birth (*Udny v Udny* (1869) LR 1 Sc & Div 441 at 457; *Re Callaghan* [1948] NZLR 846; *Re Mackenzie* (1951) 51 SR (NSW) 293; Domicile Act 1976 (NZ), s 6), and to certain persons lacking full capacity, such as lunatics and minors, a domicile of dependence (*D'Etchegoyen v D'Etchegoyen* (1888) 13 PD 132; *Re Beaumont* [1893] 3 Ch 490 at 497; *Duncan v Duncan* [1963] NZLR 110; *Re G* [1966] NZLR 1028; Domicile Act 1976 (NZ), ss 6 and 7). This note, however, shall primarily be concerned with the circumstances in which persons of full capacity may acquire a new domicile, that is, a domicile of choice.

The acquisition of a domicile of choice in a particular country presupposes the concurrence of two distinct elements, namely, physical presence coupled with an intention to remain indefinitely in that country. As Scarman J stated in *Re the Estate of Fuld (No 3)* [1968] P 675 at 684:

> "A domicile of choice is acquired only if it be affirmatively shown that the *propositus* is resident within a territory subject to a distinctive legal system with the intention,

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> formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, eg, the end of his job, the intention required by law is lacking; but if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact — of the weight to be attached to the various factors and future contingencies in the contemplation of the *propositus*, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities."

(See also *Udny v Udny*, supra, at 458; *Browne v Browne* [1917] NZLR 668; *Lipanovich v Anmer's Lime Co Ltd* [1940] GLR 575; *Henderson v Henderson* [1967] P 77 at 80; *Hyland v Hyland* (1971) 18 FLR 461; compare *Winans v Attorney-General* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.)

The recent decision of Sir George Baker P in *Puttick v Attorney-General and Puttick* [1979] 3 All ER 463 illustrates the nature of the physical presence and intention required for the acquisition of a domicile of choice. The relevant facts were as follows. Astrid Proll, of Baader-Meinhof notoriety, a German national with a German domicile of origin, was granted bail in February 1974 while on trial in the Federal Republic of Germany for attempted murder and robbery. She absconded and in August that year was permitted to enter the United Kingdom on a six-month entry visa on producing an illegally obtained passport of another German national. She adopted the name and identity of the person described in the passport and lived at a series of East London "squats". In October she formed a casual relationship with Robin Puttick, an English national and domiciliary, and desperate to have her visa extended entered into a "marriage of convenience" with him in January 1975. The notice of marriage recorded the false particulars contained in the stolen passport and false information was also given about her place of residence. The parties continued their relationship for a few months after the ceremony but at no stage did they live together. They separated before the end of 1975 and, in 1976, Robin Puttick went off to India to live as a member of a religious sect. Still using the name and identity of the person described in the stolen passport, she was employed in various occupations and obtained work qualifications and documents such as a union card and a driving licence.

In September 1978 she was arrested in London and the Federal Republic of Germany sought her extradition under her former maiden name. However, under the extradition treaty in force between the United Kingdom and the Federal Republic the surrender of fugitive criminals from the state of which they were nationals was prohibited (Federal Republic of Germany (Extradiction) Order 1960, SI 1966 No 1375). Seeking to rely upon this she maintained that she was a woman married to a citizen of the United Kingdom and applied for registration as a British citizen under s 6(2) of the British Nationality Act. In support of that application she petitioned for a declaration under s 45(1) of the Matrimonial Causes Act 1973, which provided that any person whose right to be deemed a British subject depended on the validity of a marriage ". . . may, if he is domiciled in England . . ." petition for a declaration that the marriage was valid. The Attorney-General opposed the application on the ground, inter alia, that the petitioner was not domiciled in England and consequently had no locus standi to petition the Court under s 45(1) of the Matrimonial Causes Act.

Sir George Baker P held that the petitioner had not abandoned her domicile of origin and consequently was not entitled to present a petition under s 45 of the Matrimonial Causes Act. In reaching this conclusion he considered the matters following.

Section 1 of the Domicile and Matrimonial Proceedings Act 1973 (UK) provides that "the domicile of a married woman . . . shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile" (cf Domicile Act 1976 (NZ), s 5). Counsel for the petitioner argued that this section entitled a married woman to elect whether or not to take a dependent domicile. However, Sir George Baker P disagreed with this construction and concluded that the true construction of the section was that a woman's dependent domicile had been abolished. The learned Judge does however state (at 476D) that

> ". . . a marriage as normally understood would be strong evidence that a woman has acquired the same domicile as her husband,

> for example, when a foreign woman comes here and marries an Englishman and they settle down as a married couple, have children and so on; but it is only one factor in her choice."

Thus the fact of the petitioner's marriage to Robin Puttick was not conclusive evidence that she was domiciled in England, especially when the tenuous nature of their marriage relationship was taken into account.

The petitioner argued that in any event she had acquired a domicile of choice in England. She had been resident in England for over four years and at the time of her marriage to Robin Puttick she had decided to remain indefinitely in England. However, Sir George Baker P held that she had not discharged the onus of proving that she had abandoned her domicile of origin. He states (at 477D) that:

> "She never set up home here, although she resided and obtained work qualifications: but she did not want to go back to Germany, her domicile of origin, because she did not want to surrender to her bail, to be tried. Her primary purpose for living here was to avoid detection, and no abandonment of domicile of origin has been proved. She agreed also in her evidence that she might have returned to Germany if the charges against her were ever dropped."

As a result, her decision to reside in England was seen to be motivated by her desire to avoid trial in Germany, as opposed to reflecting an intention to make a permanent home in England. Sir George Baker P also considered as significant the fragile nature of her residence, having regard to the imminent prospect of her arrest and the likelihood of her fleeing to some other country if she apprehended such a threat to her liberty in advance, ie, she intended to remain in England only for so long as it was safe. Furthermore it was held that as her residence in England had been obtained by fraud and impersonation her residence was illegal, and she was barred from obtaining a domicile of choice in England.

Some points arising out of this judgment merit further consideration.

First, the inference drawn from Miss Proll's departure from Germany in order to evade trial is not easily reconciled with opinions expressed in other so-called "fugitive" cases. For example, in *Re Martin, Loustalan v Loustalan* [1900] P 211 a French Professor fled France in order to escape prosecution for an offence alleged to have been committed by him. The majority of the Court of Appeal (Rigby LJ and Williams LJ) inferred from his forced departure to a country of refuge an intention to relinquish his former French domicile in favour of a new domicile in the country of refuge. As Morris (J H C Morris, *The Conflict of Laws* 1971, at 24) remarks:

> "In the case of a fugitive from justice, the intention to abandon his previous domicile will readily be inferred, unless perhaps the punishment which he seeks to avoid is trivial, or by the law of that country a relatively short period of prescription bars liability to punishment."

(See also *Udny v Udny*, supra; *Briggs v Briggs* (1880) 5 PD 163.)

Second, no conclusive adverse inference can properly be drawn from the petitioner's admission that she might return to Germany if the charges were dropped. As Nygh (P E Nygh, *Conflict of Laws in Australia* 3rd ed, 1976, at 138) comments, "objective factors sometimes override subjective hopes". Her admission, it is suggested, falls squarely within the category of an expression of subjective hope; that is, the future contingency in her contemplation, given the gravity of the charges, is too remote to stand in the way of a requisite intention for the acquisition of a domicile of choice. For example in *Osvath-Latkoczy v Osvath-Latkoczy* (1959) 19 DLR 2d 495 a Hungarian political refugee stated that he would return to Hungary if the Russians relinquished their control of that country. This did not debar him from acquiring a domicile of choice in Ontario and the Court held that the contingency of his return was too remote and uncertain. (See also *Re Lloyd Evans* [1947] Ch 695; *May v May* [1943] 2 All ER 146; *Pletinka v Pletinka* (1965) 109 SJ 72.)

Third, while the motive for the petitioner's flight from Germany may militate against the inference that she intended to reside indefinitely in England, in every case the question is simply, has the propositus the requisite intention for the acquisition of a domicile of choice? The facts of the matter are that she settled down in England for some four years, acquired job qualifications and various documents necessary for everyday life in England, such as a union card and a driving licence. While it is no doubt true to suggest that she would have fled from England if she anticipated apprehension by the authorities, the very fact of her continued residence intimates that she did not in her own mind think that her ar-

rest was likely. A conditional or contingent intention to leave a country does not necessarily imply an absence of the requisite intention to acquire a new domicile, if that contingency in the contemplation of the *person* concerned is, in all probability, unlikely to materialise. (See *Gulbenkian v Gulbenkian* [1937] 4 All ER 618 at 626; *Gunn v Gunn* (1956) 2 DLR (2d) 351; *Griffiths v Griffiths* [1960] NZLR 572; *Re the Estate of Fuld (No 3)*, supra, at 684.)

Fourth, the precarious nature of the petitioner's residence within the forum is no bar to the acquisition of a domicile of choice. For example, in *May v May*, supra, it was held that the possible danger of an alien being deported at any time does not militate against the acquisition of a domicile of choice animo et facto. (See also *Boldrini v Boldrini and Martini* [1932] P 9; *Cruh v Cruh* [1945] 2 All ER 545; *Zanelli v Zanelli* (1948) 64 TLR 556; *Szechter v Szechter* [1971] P 286; *Lim v Lim* [1973] VR 370.) However, the presence, it seems, must be lawful. P M North (Cheshire and North, *Private International Law* 10th ed, 1979 at 175) states that "... no domicile of choice can be acquired in defiance of the law of the country entered". So a distinction is drawn between those cases where the intitial entry and residence is lawful but precarious in the sense that residence can be terminated at any time by the authorities, and those cases where the initial entry is unlawful or where permission to enter is acquired by fraudulent means. In *Solomon v Solomon* (1912) 29 WN (NSW) 68 it was held that a South Sea Islander who had entered Australia unlawfully, could not acquire a domicile of choice in New South Wales. Gordon J states (at 70) that

> "It is a curious proposition that a Court of Justice in New South Wales should hold that a man has acquired a domicile in New South Wales when the laws of the land forbid that man to be here."

Similarly in *Smith v Smith* 1962 (2) SA 930 the Federal Supreme Court of Rhodesia held that it was not possible for a person who obtains permission to enter a country by fraud, to acquire a domicile of choice in that country. In *Jablonowski v Jablonowski* (1972) 28 DLR (3d) 440, however, Lerner J did not accept the above two cases as being "persuasive" and decided that a person can acquire a domicile of choice even if his entry and residence thereafter is unlawful. It has been suggested that while it may be illegal or unlawful to take up or to continue residence in a particular place, there is no reason why this should affect the incidence of residence as the factual requisite of domicile (see J D McClean (1962) 11 ICLQ 1159; E Spiro, *Conflict of Laws* 1973, at 83). Residence is essentially a question of fact, and as Morris, supra (at 19), points out "there is no requirement of animus residendi." However, the incidence of illegality is material in that the country of the intended domicile is free to decline recognition of a change in domicile, where such domicile depends for its acquisition upon the violation of some law or laws of the forum (see *Solomon v Solomon*, supra; *R v Secretary of State for the Home Department, ex parte Hussein* [1978] 2 All ER 423).

The *Puttick* case demonstrates the difficulty of the task that faces an individual who alleges that he has exchanged a domicile of origin for a domicile of choice. Although the standard of proof is the civil one of a balance of probabilities (*Re the Estate of Fuld (No 3)*, supra), the difficulty inherent in the proof of a person's state of mind, means that an exhaustive and meticulous inquiry has to be conducted into all the circumstances, however trivial, of that person's life. In conclusion, one can only concur when Nygh (supra, at 139) suggests that

> ". . . the standards are so vague that it would be open to a Court to give full rein to its sympathies for a particular litigant."

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INDUSTRIAL LAW

INDUSTRIAL JURISDICTION A COMPLEX HIERARCHY OF COURTS PART I

By PROFESSOR ALEXANDER SZAKATS*

An examination of the role of the Arbitration Court and other tribunals in relation to the Industrial Jurisdiction of the Courts.

1 INTRODUCTION

During the last decade of the nineteenth Century the New Zealand system of industrial relations took a different direction from that of Britain, notwithstanding that early unionists, as well as employers, came from the "old country", and brought traditional attitudes with them. After the disastrous maritime strike in 1890, however, the view became prevalent that the state had not only the right, but also the duty, of intervening in employer-worker disputes in order to prevent violent conflicts. This philosophy gained statutory recognition with the passing of the Industrial Conciliation and Arbitration Act 1894.[1] The right to strike, which in Britain has been accepted as the cornerstone of the system, as an "essential element in the principle of collective bargaining",[2] as the "ultimate sanction" (together with management's right to lockout) "without which the bargaining power of the two sides lacks credibility"[3] in New Zealand was restricted to the extent of near disappearance.

The determination of rates of wages and conditions of work, though it starts with voluntary negotiations, if conflict arises is being processed through a statutory machinery. Perhaps it would be more correct to say that not one machinery exists but there are several, depending on the type of employment, whether private or public, and on the industry or branch of service. Besides the Arbitration Court, the most important tribunal on industrial matters and the focal point of the system, a complex network of special tribunals and similar bodies has been established by legislation, all with the task of preserving industrial harmony in their particular area of competence. The functions and powers of these bodies vary. Their main duty is wage determination, but the Arbitration Court has also substantial authority of pure judicial character. The special tribunals' judicial power is limited or even non-existent.

Ordinary Courts of law, that is the District Courts, the High Court and the Court of Appeal also have jurisdiction, either statutory or inherent, in many matters concerning aspects of individual employment or collective labour relations. The status of the High Court and the Court of Appeal in respect of the Arbitration Court is superior and they can exercise supervisory authority. The standing of the District Courts may either be equal with, or inferior to, that of the Arbitration Court depending on the type of action. As jurisdiction in specific matters arises from several unco-ordinated statutes, different Courts perform similar functions resulting in unexplained inconsistency in competence. Furthermore, the exercise of inherent jurisdiction may enable the Hight Court to cut through and disregard statutory procedures which provide "exclusive" power to the Arbitration Court.

This article intends to give an overview on the hierarchy of Courts and tribunals with industrial jurisdiction and to draw attention to some complexities and inconsistencies. One

* This paper was presented at the ANZAAS Jubilee Conference held at Adelaide in May 1980.

[1] Hereinafter quoted as the "IC & A"; after many amendments it was re-enacted in 1954, then repealed and replaced by the Industrial Relations Act 1973; as to the origin and history of the IC & A Act see N S Woods, *Industrial Conciliation and Arbitration in New Zealand*, Govt Printer, Wellington 1963 (hereinafter quoted as "Woods, *Industrial Conciliation*").

[2] Lord Wright in *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435, 463 (HL).

[3] Sir Otto Kahn-Freund, *Labour and the Law*, 2nd ed, London, 1977, 225-6.

may ponder on the truth of the saying that while the British method is characterised by "abstention of the law",[4] the New Zealand system excessively relies on the law and is overburdened with "legalism".[5]

II THE ARBITRATION COURT

1 A legislative tribunal

The principal function of the Arbitration Court after its establishment by the Industrial Conciliation and Arbitration Act 1894 was the settling of industrial disputes which centred around rates of wages and conditions of work. These types of disputes later became denoted as disputes of interest. The Court was envisaged and in fact acted as "a tribunal with legislative powers", "as an integral part of the whole system of labour regulation and as the pivot of that system".[6] To enforce its decisions the Court had power to impose penalties. Interpretation of industrial instruments and other similar functions also were granted to it, making the Court into a body which besides being a delegated legislative organ acted also as a pure judicial tribunal in matters that came to be called disputes of rights.

When the Industrial Relations Act 1973 repealed and replaced the Industrial Conciliation and Arbitration Act 1954[7] the Arbitration Court was divided on the basis of these two functions into two bodies: the Industrial Com-

[4] K W Wedderburn, *The Worker and the Law*, 2nd ed, Pelican, 1971, 13.

[5] B T Brooks, *The Practice of Industrial Relations in New Zealand*, Auckland, 1978, para 301.

[6] Woods, *Industrial Conciliation*, 43.

[7] Which earlier replaces the former Act.

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mission having the legislative power and the Industrial Court carrying on with the judicial functions. This arrangement, nevertheless, did not last long, and the 1977 Amendment Act to the Industrial Relations Act after abolishing both the Commission and the Industrial Court re-established the Arbitration Court in its former full dual jurisdiction. At the same time the power to make general wage orders, which had been in abeyance since 1969, was also restored to it,[8] but after not quite two years the Remuneration Act 1979 again deprived the Court of this par excellence legislative function. It was replaced by the Government's statutory authority to implement general wage adjustments by regulations.[9]

At present the reconstituted Arbitration Court, which is a Court of record,[10] consists of a Chief Judge, not less than two other Judges and two or more members appointed on the nomination of the Central Organisation of Employers and the Central Organisation of Workers repectively.[11] Judges must be barristers or solicitors of seven years standing.[12] The Court sits as a tribunal of three persons, the presiding Judge, a workers' member and an employers' member,[13] but in exceptional cases on the application of either party to a dispute of interest it may sit as a Full Court comprising the Chief Judge, or another Judge nominated by him, and four members being two on each side.[14]

The Arbitration Court has now jurisdiction both in disputes of interest and in disputes of rights. It also exercises such other functions and powers as are conferred on it by the IR Act or any other Acts.[15] These two different types of jurisdiction will be examined in more depth.

2 Disputes of interest: the legislative function

(1) *Prelude to arbitration*

A dispute of interest is defined by the IR Act as:

> "A dispute created with intent to procure a collective agreement or award settling terms and conditions of employment of workers in any industry, whether or not the agreement or award is to be in substitution for an existing agreement or award."[16]

Expressed otherwise, it denotes a dispute concerning rights not yet existing, but rights to be created, the would-be terms of the eventual settlement of the dispute.

The settlement process has three phases. The first stage is the creation of the dispute: usually the workers' union serves a claim on the employers' organisation for a new collective agreement. This claim, after its initial rejection, forms the basis for further bargaining. The parties to the dispute may reach a settlement which will be recorded in writing and registered by the Arbitration Court as a voluntary collective agreement.[17]

The second stage is conciliation. A dispute which has not been settled by a voluntary agreement cannot be placed before the Court without prior reference to a conciliation council.[18] It should be pointed out that the words "conciliation" and "mediation" are frequently used in Britain and in the United States in an interchangeable sense, as synonyms meaning that some third party assists the parties to the dispute by benevolent persuasion to settle their differences. Whether or not the parties actually settle is a matter for their decision, the third party has no power to order them. "Arbitration", if it is voluntary as to the arbitrator's decision, may have a similar meaning. Although the arbitrator's task is to investigate the dispute and then to formulate an award, this may remain a mere recommendation where the parties are free to reject it. Only if the arbitration is compulsory as to the enforceability of the award, will it bind the parties.[19]

In New Zealand each of the three expressions has a statutory meaning and content, distinct and clearly distinguishable from the others. "Conciliation" is the process which must precede the reference of a dispute of interest to the Arbitration Court,[20] while "arbitration" denotes the hearing before the Court leading to an award.[21] "Mediation" on the other hand is a less formal intervention by the ap-

[8] General Wage Orders Act 1977, repealed in 1979.

[9] See Part II 2(3), post.

[10] Industrial Conciliation and Arbitration Act 1973 (hereinafter quoted as "(IR Act"), s 32.

[11] Ibid, s 33.

[12] Ibid, s 37.

[13] Ibid, s 52.

[14] Ibid, s 52A.

[15] Ibid, s 48(1).

[16] Ibid, s 2.

[17] Ibid, s 65.

[18] Ibid, s 67.

[19] Kahn-Freund, op cit (in note 3), 95.

[20] IR Act, ss 63, 67-80.

[21] Voluntary arbitration outside the IR Act is still possible; in 1972 the Newspaper Publishers Association and the NZ Journalists Association elected Mr Nordmeyer, former Minister of Finance, to act as arbitrator in their dispute.

pointed mediators in any actual or threatened industrial dispute which may take place at any time, except when conciliation or arbitration proceedings are in progress relating to that dispute.[22]

Conciliation and arbitration in New Zealand are said to be compulsory, but this word also has a number of different senses.[23] In respect of the process in a conciliation council the meaning must be carefully examined. Section 68(1) of the IR Act provides that "any union, association or employer, being a party to the dispute may apply to the Court for the dispute to be heard by a conciliation council". The emphasis is on the word "may". The preceding section, s 67, merely makes conciliation the prerequisite to a subsequent Court hearing.[24] The interpretation clearly is that if the parties do not reach a voluntary settlement, they are under no duty to apply for conciliation, obliquely implying that they may resort to direct industrial action. Section 81(a) prohibits, until the dispute has finally been disposed of by the council or the Court, "anything in the nature of a strike or lockout", which indicates that before conciliation such actions are lawful and there is no compulsion to put in motion the conciliation and arbitration machinery; but when one party has applied for conciliation it becomes compulsory for both parties, though the applicant may at any time withdraw the application. Section 75 provides that a reference for conciliation is deemed to have been made as soon as the council is fully constituted.[25]

The conciliator, as soon as practicable after the Court has appointed him to hear the dispute, will form a council from equal numbers of persons nominated by the two sides and appoint a date for hearing. The duty of the council is "to endeavour to bring about a fair and amicable settlement" and for this purpose "in such manner as it thinks fit, expeditiously and carefully inquire into the dispute and all matters affecting the merits and their proper settlement".[26] If no settlement can be reached the dispute must be referred to the Court.[27] At this stage the reference is definitely compulsory, unless the dispute is withdrawn by the applicant party in the course of the inquiry before the council.[28]

It has been pointed out that in 80 percent of the conciliation proceedings a settlement is reached.[29] If so it will be embodied in a conciliated collective agreement and a copy of it deposited with the Court.[30]

(2) *The award-making process*

The third and final stage of the dispute settlement process takes the form of a hearing before the Arbitration Court. The parties can appear in person or be represented by an agent and may produce witnesses, books and documents as they think proper. It should be noted that no barrister or solicitor holding a practising certificate has the right to be heard in arbitration proceedings, not even under a power of attorney, except with the consent of all the parties.[31] The Court may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[32] The power to call for evidence clearly indicates that in contradistinction to the formality of adversary proceedings before ordinary Courts of law, the proceedings of the Arbitration Court could be classified as inquisitorial. The Court, by requesting evidence not produced by the parties, instead of merely listening to submissions, takes an active part in the conduct of the case so that all the relevant issues may be discovered and the best possible solution found.

Within one month after the commencement of the hearing the Court must pronounce its award.[33] Unlike a settlement through conciliation the award is the decision of the Court superimposed on the parties regardless of their will. According to some views arbitration and the ensuing award represent a continuation of collective bargaining by adding the Court as a third party, as the nominal maker of the collective instruments the terms of which are to be incorporated in the individual contracts of

[22] IR Act s 66; see J M Howells, *Industrial Mediation in New Zealand: the First Two Years*, Ind Rel Centre, VUW, 1977.

[23] See Kahn-Freund, op cit (in note 3), 93.

[24] It was held that where there had been no conciliation, the Arbitration Court had no jurisdiction: *Re Canterbury Maltsters and Brewery Employees' IUW* (1912) 14 GLR 565.

[25] See Mazengarb and Others, *Industrial Law*, Butterworths, Wellington (looseleaf, regularly updated, hereinafter quoted as "*Mazengarb*") para 123C.

[26] IR Act, s 77.

[27] Ibid, s 84(1).

[28] Ibid, s 76.

[29] N S Woods, "The Law and Industrial Relations", a paper delivered to the Royal Society of NZ, 1967; P J Luxford, "The Industrial Conciliation and Arbitration Act in Practice" in *Wage Fixing in New Zealand*, ed S J Callahan, Wellington — London, 1968, p 37, esp 41.

[30] IR Act, s 82.

[31] Ibid, s 54; such consent has never been given.

[32] Ibid, s 57.

[33] Ibid, s 86.

employment.[34] Awards, though resulting from a judicial process, are not judicial decisions in the real sense, being conclusive on past controversial issues, but their effect, especially in view of the blanket clause, is regulatory and normative of future employment contracts in a particular industry.

Salmond J stated in *New Zealand Waterside Workers Federation IAW v Frazer*:

> "An industrial award is in form a judicial decree, but in substance it is an act of legislative authority. It is the establishment of a set of authoritative rules regulating an industry determining not the present rights and obligations of litigants but the future relations and mutual rights and obligations of all persons who thereafter during the currency of the award choose to enter into contractual relations with each other as employers and employed in that industry. The making of an industrial award is as much an act of delegated and subordinated legislative authority as the making of by-laws by a municipal authority . . ."[35]

(3) *General wage orders: Encroachment on the Court's legislative functions*

General wage orders and standard wage pronouncements[36] by the Arbitration Court were for a long time the methods for simultaneous adjustment of pay rates in collective instruments. Until 1969 the Court exercised this power under a series of Regulations which were consolidated in the General Wage Orders Act 1969. In the early 1970s, to check inflation, strict wage controls were introduced by regulations which set up a succession of short-lived authorities for that purpose. The Remuneration Authority had power to veto wage settlements of the regular industrial tribunals, including the Arbitration Court. The Authority was replaced by the Wages Tribunal and this in turn by the Wage Hearing Tribunal. While these temporary bodies functioned under the respective regulations creating them the General Wage Orders Act 1969 was suspended.[37]

The General Wage Orders Act 1977 restored the Arbitration Court's power to make "a just and equitable review of rates of remuneration in awards and collective agreements".[38] A general order amended the provisions on rates of pay in all industrial instruments, including those made under the Agricultural Workers Act 1977 and agreements filed by unregistered societies of workers. The order was deemed to have been incorporated in all such instruments, but the Court could exclude certain classes of workers.[39]

The Remuneration Act 1979 repealed the General Wage Orders Act 1977[40] and gave power to the Government to issue remuneration regulations which may effect or provide for a general increase in rates of remuneration determined by awards and collective agreements.[41] While definite guidelines are laid down for the Court in making an order, in the case of regulations the criteria are merely expressed in the phrase "as appear to [the Governor-General] to be necessary or expedient for the purpose of promoting stability in rates of remuneration and other conditions of employment".[42] Regulations in the form of Orders in Council represent the collective view of the Government and being subjective are not justiciable as Courts of law have no competence to inquire into the Ministers' state of mind.[43]

In addition the Remuneration Act also encroaches, or provides authority to encroach, on the regular method of the three-stage in-

[34] Prof E L Sykes, "Labour Arbitration in Australia" (1964) 13 Am J Comp Law 216, 218 considered that an award is the product "of three-sided collective bargaining between management, union and the Court carried through the conciliation and arbitration stages"; Sir Arthur Tyndall, former Judge of the Arbitration Court from 1940 to 1965, held similar views; Tyndall, *The Settlement of Labour Disputes in New Zealand*, Ind Rel Centre, MIT, Boston, 1953.

[35] [1924] NZLR 689, 709 (SC); also *Point Chevalier Bakery (1956) Limited v Tyndall and Others* [1962] NZLR 178, (SC); as to blanket clause see Part II 3, post; see P A-Joseph, *The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand* Legal Res Found 1980.

[36] Standard wage pronouncements were merely guidelines for future awards to ensure an even level of wage rates in various industries; see Woods, *Industrial Conciliation*, 146 and passim.

[37] See A Szakats, *Introduction to the Law of Employment*, Wellington, 1975 (hereinafter quoted as "*Employment*"), para 56; *Mazengarb*, para 920, 923/2; on the history of general wage orders see Woods, *Industrial Conciliation*.

[38] General Wage Orders Act 1977, s 3(1) (repealed).

[39] Ibid, ss 5, 8 and 10; see *Employment*, paras 57 and 58; Szakats, *Trade Unions and the Law*, Wellington, 1968 (hereinafter quoted as "*Trade Unions*"), ch 4; *Mazengarb*, paras 921-979 (including the text of the G W O Act and the Wage Adjustment Regulations 1974).

[40] Remuneration Act 1979, s 9.

[41] Ibid, s 5.

[42] Ibid, s 4(1).

[43] *Liversidge v Anderson* [1942] AC 206 (HL); followed by *Jensen v Wellington Woollen Co* [1942] NZLR 394 (CA).

terest dispute settlement process by regulations which can nullify or amend collective agreements and even individual employment contracts. Only actual decisions "on merit" of the Arbitration Court and other tribunals are excepted. Furthermore, regulations may be used to appoint officers or constitute committees and other bodies with functions to be defined, presumably for the purpose of taking away important parts of the jurisdiction exercised by the Arbitration Court and other industrial tribunals.[44]

(4) *Apprenticeship orders*

Under the Apprentices Act 1948 the Arbitration Court has the task of making apprenticeship orders in respect of each industry.[45] This function must properly be classified as coming into the category of interest dispute settlement. An apprenticeship order prescribes matters to be included in apprenticeship contracts, and it has the character of legislation, in the same manner as awards.

Orders are made in respect of each industry for the whole of New Zealand and they apply for both sexes, except when special conditions are prescribed for females.[46] Before issuing the order the Court will hear the parties, and must take into account recommendations by the New Zealand Apprenticeship Committee which in turn has to ascertain the views of local apprenticeship committees.[47] The Vocational Training Council also can make recommendations.[48]

Apprenticeship orders prescribe wages, hours and other conditions of employment, the period of apprenticeship and the minimum age of commencement.[49] Awards and collective agreements must not apply to apprentices.[50]

The Court may delegate some of its powers in respect of orders to the New Zealand Apprenticeship Committee or to a local committee.[51]

Further functions concerning apprentices are judicial in character and will be dealt with later.[52]

3 The binding force of awards and collective agreements

At this point it seems necessary to consider briefly the juridical character of awards and collective agreements. These have been referred to as acts of legislative authority.An award binds not only the parties to the dispute but by virtue of the blanket clause future contingent parties will also be bound. In the words of the Act an award "shall . . . extend to and bind as a subsequent party thereto every union, association or employer who, not being an original party, is, when [the award] comes into force or at any time while it is in force, connected with or engaged in the industry to which [it] applies within the area to which [it] relates".[53]

A conciliated collective agreement when registered has the same binding force and effect as an award. Indeed the legislature has recognised this by inserting the amendment into the IR Act which provides that registration of a conciliated collective agreement "shall be deemed to be the making of an award" and that such an agreement "shall be deemed to be or be known as an award made by the Court".[54]

In contradistinction a voluntary collective agreement, though it must also be registered, retains its character as a settlement inter partes and it binds only the parties named in the document recorded in writing. Beside the primary original parties the agreement, nevertheless, has a direct binding force on every member of a union or association that is bound by it.[55]

These can be called secondary or positional original parties as they are bound by virtue of their position as members of a primary party. In addition during the currency of the agreement any union, association or employer within the area to which the agreement relates may

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[44] Remuneration Act 1979, ss 4(2)-(7) and 6; see *Mazengarb*, para 923/1; Szakats, "Downgrading the Arbitration Court: Wage Fixing by Regulations" [1979] NZLJ 390.

[45] Apprentices Act 1948, s 24; for details see *Halsbury's Laws of England*, New Zealand Commentary on *Employment* (Wellington, 1978) (hereinafter quoted as "Halsbury, Employment NZ").

[46] Ibid, s 13(1A) and (1B).

[47] Ibid, s 13(3) and (5).

[48] Vocational Training Council Act 1968; see *Halsbury, Employment NZ*, paras C945-C947.

[49] Apprentices Act, ss 13-18.

[50] *In re New Zealand Metal Trade Employees Award* (1967) BA 1033.

[51] Apprentices Act, s 14.

[52] See Part II 4(5) and IV 4, post.

[53] IR Act, ss 83(1) and 89.

[54] Ibid, s 82(9); s 82(4) provides that a registered collective agreement "shall be binding on the parties to it, and also on every member of any union or association that is a party to or bound by it"; subs (8) adds that it "shall, in addition to the parties to it, bind every worker who is at any time while it is in force employed by an employer on whom the agreement is binding in any employment to which the agreement relates".

[55] Ibid, s 65(5).

with the consent of the original parties join the agreement by filing a noice of concurrence with the Registrar of the Court.[56] Consequently the members of these associations as added parties will also become positional parties directly bound. Otherwise the coverage of the agreement can only be extended by voluntary concurrence and consent.

The difference in the legal nature, thus, is not between an award and a collective agreement, voluntary or conciliated, but between an award, including a conciliated collective agreement, to be called an award, on the one side, and a voluntary collective agreement on the other side. A voluntary collective agreement is reached after a bipartite method of settlement and it retains its bilateral contractual character. A conciliated collective agreement results from a tripartite method of settlement and it assumes all the characteristics of an award with an erga omnes binding force, notwithstanding that in form it shows the character of a bilateral agreement. The subsequent future contingent parties will be bound regardless of or even against their will, unless the Court grants total or partial exemption.[57]

4 Dispute of rights : The judicial function

(1) *What is a dispute of rights?*

The definition of a dispute of rights, unlike that of an interest, is not concise, assertive and positive. It refers to disputes concerning:

(a) The interpretation, application or operation of a collective agreement or award, or
(b) A matter of the interpretation, application or operation of an enactment or contract of employment, being a matter related to a collective agreement or award, or
(c) A personal grievance.

Further, the definition covers "any dispute that is not a dispute of interest, including any dispute that arises during the currency of a collective agreement or award".[58]

Points (a) and (b) present no problems. Personal grievance will be referred to in more detail later.[59] The negative definition as a residual provision, however, denotes an area of dispute which cannot always be firmly categorised whether it is of interest or rights. The legislative intent apparently has been to restrict disputes of interest to the time of negotiating a new collective instrument on the expiry of the old one, but matters may arise while an instrument remains in force which necessitate the construction of the term in such a manner that amounts to its amendment. This situation may occur when a dispute relates to matters covered in the instrument but not specifically and clearly disposed of by its terms,[60] such as travelling time; or whether the expression "suitable board and lodging shall include the providing of mattresses, pillows and stretchers" would also mean the provision of blankets, sheets and pillow cases. In the case of *Northern Industrial District (except Gisborne Judicial District) Builders Labourers, Quarry Workers, Tunnellers and General Labourers, Decision on Dispute referred by Disputes Committee* the Arbitration Court held that such disputes are essentially interest disputes, and inclusion of further matters required would amount to an amendment of the award.[61]

These borderline cases for a long time haunted disputes committees and the Arbitration Court.[62] In the *Northern etc, Foremen, Stevedores, Timekeepers and Permanent Hands Industrial Agreement*[63] the agreement in question did not refer to travelling time. The Court held that as the agreement had not covered this matter the omission must be presumed to have been deliberate, therefore the agreement had clearly disposed of the matter. Consequently it could not be a dispute of rights and the disputes committee had no jurisdiction in the matter. A contrary decision was reached in *Phillips Electrical Ltd v Wellington etc Federated Furniture IUW*.[64] The award covered "wood veneer workers" but it was unclear whether the two workers in question were included in the phrase. It was held that this matter "related to matters dealt with in the instrument but not specifically and clearly disposed of by the terms of the instrument", and the dispute therefore was one of rights.

After further uncertainty,[65] finally in a case

[56] Ibid, s 65(6).
[57] See for further elaboration of these points *Employment*, para 51(7); Szakats, "Collective 'Contracts' or Individual Status? Employment Under Management-Union Agreements" (1977) *15 Alberta LR* 243.
[58] IR Act, s 2.
[59] See Part II 4(4), post.
[60] IR Act, s 116(1)(b); see further Part II 4(5), post.
[61] (1961) BA 1341.
[62] On disputes committees see II 4(5), post.
[63] (1972) BA 1778.
[64] (1972) BA 2618.
[65] *Wellington Drivers IUW v Ford Motor Co Ltd* (1972) BA 2362.

stated the Court of Appeal clarified the issue: *AHI NZ Glass Manufacturing Co Ltd v The North Island Electrical and Related Trades IUW*.[66] Under the terms of the relevant collective agreement workers rostered for "on call work" were to be paid an extra amount. Besides this extra sum the union claimed additional annual leave for workers rostered for "on call" work as compensation for being on call. The Disputes Committee allowed an additional one day's leave for each seven weeks given to permanent rostered "on call" workers. The employer appealed to the Industrial Court[67] and argued that the claim for extra leave was in essence a dispute of interest, as it affected terms and conditions of employment and it could only be properly pursued at the appropriate time of negotiating a new instrument.

The Court of Appeal examining s 116 of the IR Act came to the conclusion that the only sensible way to interpret the new standard disputes clause was to treat the word "including" as being used in a restrictive or exhaustive sense. It held that:

> "... a particular dispute will not be of a kind falling within the disputes clause unless
> "1 It falls within the definition of a dispute of rights, s 2(1) and
> "2 Is not a personal grievance and
> "3 Is a dispute either
> "(a) on the interpretation of the award or collective agreement or
> "(b) on any matter related to matters dealt with in the award or collective agreement and not specifically and clearly disposed of by the terms thereof."

The Court of Appeal added that "if a dispute is of a nature which satisfies all three of the foregoing tests it will be within the jurisdiction of a disputes committee even though it is a dispute as to terms and conditions of employment".Richmond P expressed having some difficulty in deciding on whether the dispute related to matters dealt with in the collective agreement and not specifically and clearly disposed of by its terms. He considered that the question of jurisdiction may depend solely upon whether on the true construction of the agreement:

(a) the matter in dispute is related to other matters in the agreement and if so;
(b) the matter in dispute is not *specifically* and clearly dealt with by the terms of the agreement.

Applying the tests laid down by the Court of Appeal, the Industrial Court held that it had jurisdiction as:

(a) The dispute came within the defintion of a "dispute of rights".
(b) It did not involve a personal grievance or the interpretation of a collective agreement.
(c) There was a dispute as to additional leave which was a matter related to the matters of annual leave and "on call" work.

Jamieson J of the Industrial Court stated:

> "The remaining question is whether the dispute is on a matter which is not specifically *and* clearly disposed of by the terms of the collective agreement ... we are not faced with any dispute as to the clarity of the agreement but it is not enough for the matter to be clearly disposed of, it must also be *specifically* disposed of ... it cannot be said that a matter, the question of leave entitlement, as to which the agreement is quite silent, can in the proper use of language be said to have been specifically disposed of ... the disputes committee and this Court had and have jurisdiction to deal with the dispute."[68]

(2) *The extent of jurisdiction*

In deciding disputes of rights, in exercising its purely judicial functions the Arbitration Court has both original and appeal jurisdiction. The proceedings before it may be of penal, civil, or mixed character, but they all must relate "to industrial matters", "affecting or relating to work done or to be done by workers, or the privileges, rights and duties of employers and workers".[69]

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[66] [1977] Arb Ct 21; this Court of Appeal decision was published by the Arbitration Court.

[67] As it then was; when referring to the Arbitration Court in general terms the word "Arbitration" is being used, but when a case is quoted the Court that actually made the decision will be named; this method will apply to the Magistrates'-District Courts and the Supreme-High Court also.

[68] *AHI NZ Glass Manufacturing Co Ltd v North Island Electrical etc Trades IUW* (1978) Ind Ct 1, 5; see also *Westfield Freezing Co Ltd v Auckland Freezing Works and Abattoir Employees IUW* (1978) Ind Ct 7.

[69] IR Act s 2.

The list of functions involving the Court's original jurisdiction embraces a variety of actions. The Court may:

(a) Hear and determine questions connected with the construction of the Act or any other Act relating to industrial matters: s 48(2)(a).
(b) Hear and determine questions connected with the construction of an award, collective agreement, or determination or direction of the Court: s 48(2)(b).
(c) Make an order determining the rights of parties under any industrial instrument: s 48(2)(c).
(d) Order compliance with any industrial instrument or order broken or not observed: s 48(2)(d).
(e) Hear and determine enforcement and recovery actions: s 48(2)(e).[70]
(f) Order resumption of work in case of strike or walk-out affecting public interest: Commerce Act 1975, s 119C.[71]
(g) Hear and determine applications for a declaration to the effect that the Crown has acted in contradiction to the provisions of the Commerce Act 1975 in respect of a non-industrial strike: Commerce Act 1975, s 119E.[71]
(h) Deal with contempt or obstruction matters and impose penalties: s 144; the Court also acts under ss 42 and 43 of the Agricultural Workers Act 1977 in cases of contempt or obstruction of the Agricultural Tribunal. Under s 48 of the Aircrew Industrial Tribunal Act 1971, however, for such and other offences imprisonment and fines are provided on summary conviction by a District Court.[72]
(i) Hear and determine any case stated for its advice or opinion by a conciliation council or conciliator: s 80.
(j) Inquire into and determine questions relating to disputed elections: ss 48(2), 199-212.[73]
(k) Hear and determine demarcation disputes: s 119.[73]
(l) Hear and determine victimisation actions: s 150.[74]
(m) Hear and determine actions for recovery of wages: s 158.[74]
(n) Hear and determine actions for recovery of equal pay under ss 13 and 14 of the Equal Pay Act 1972.[74]
(o) Hear and determine questions as to equal pay including the interpretation of the Equal Pay Act 1972: Equal Pay Act 1972, s 12.[74]
(p) Inquire into and determine alleged irregularities in ballot procedures for the insertion of an unqualified preference clause in an award or collective agreement: ss 101F-101H.[73].
(q) Exercise functions of the Shipping Industry Tribunal in respect of fishing workers and persons employed in the fishing industry generally: Fishing Industry (Union Coverage) Act 1979: ss 6, 8 and 9.

As a tribunal of second instance the following powers are conferred on the Court:

(a) Hear and determine appeals from dispute committees; ss 48(2)(f) and 116(6).[75]
(b) Hear and determine grievance matters not resolved by grievance committees: ss 48(2)(g) and 17(4).[74]
(c) Hear and determine questions relating to registration and jurisdiction of unions: ss 48(2)(h), 168, 174, 177 and 179.[73]
(d) Hear and determine appeals from a District Court: s 49, Equal Pay Act 1972, s 14.[76]
(e) Hear appeals against suspension of non-striking workers in case of strike: s 128.[73]
(f) Hear and determine references or appeals on interpretation of an award from a dispute committee under s 29 of the Agricultural Workers Act.[77]
(g) Hear and determine matters relating to industrial unions, professional and trade associations referred to it by the Human Rights Commission under ss 70 and 71 of the Human Rights Commission Act 1977.[73]

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[70] District Courts also have jurisdiction; see part II 4(3) and Part IV 2 and 3, post.
[71] See Part II 4(3), post.
[72] See Part III 3 and 4, post.
[73] See Part II 4(5), post.
[74] See Part II 4(4), post.
[75] See Part II 4(1), ante and 4(5), post.
[76] See Part II 4(4) and Part IV 4.
[77] See Part III 4, post; see further *Mazengarb*, paras 17-31F.

(h) Hear and determine appeals or references in apprenticeship matters: Apprentices Act 1948.[73]

This enumeration should give an adequate picture of the complex powers vested in the Arbitration Court and the multifarious activities it has the duty to undertake. Some of these functions, nevertheless, deserve a further brief treatment.

(3) *Offences, fines and penalties*

Notwithstanding provisions in the IR Act to the effect that "the Arbitration Court shall have full and exclusive jurisdiction to deal with all offences"[78] under the Act, and that it "shall have full and exclusive jurisdiction to deal with all actions for the recovery of penalites under this Act",[79] this jurisdiction in reality is not exclusive and it may be questioned whether it is full. Section 147 of the Act as amended in 1978 has given direct jurisdiction to District Courts, to the exclusion of the Arbitration Court, in specified actions which are not of a criminal character for recovery of penalties. It is of some importance to observe that when the Act declares a certain act or omission an offence, then on summary conviction a fine may be imposed; when the act or omission constitutes only a breach of award or collective agreement, there is no mention of conviction and the monetary punishment is called a penalty.[80]

In actions to recover a fine the Arbitration Court must proceed under the Summary Proceedings Act 1957 in the same manner as if it were a District Court exercising summary jurisdiction.[81] There are no similar requirements in respect of penalties, and the procedure is prescribed in the Industrial Relations Regulations 1974.[82] Despite this difference it was held in *Inspector of Awards v Dearsly's Ltd*[83] that although the overall form of the proceedings is civil, an action for a penalty is penal in nature and the prosecuting party must prove the case beyond reasonable doubt.

District Courts, apart from the exception mentioned, have power to act in matters under the IR Act only on authority delegated by the Arbitration Court.[84] The actual enforcement of judgments in all cases will be made through the machinery of District Courts.[85]

For contempt or obstruction of the Arbitration Court or a conciliation council the Arbitration Court has, however, full and exclusive jurisdiction to convict the offenders.[86]

Under s 119B of the Commerce Act 1975 a strike or lock-out in respect of a non-industrial matter is an offence punishable on summary conviction by a fine. The section does not refer to the Arbitration Court and summary conviction indicates the District Court's jurisdiction. Section 119C, however, expressly gives the Arbitration Court power to order resumption of work and persons disobeying will be liable to substantial fines, if summarily convicted. While it is clear that the order for resumption can be made only by the Arbitration Court, it appears less clear whether that Court or the District Court should act in the penal proceedings. One may argue that while the Arbitration Court has exclusive jurisdiction in what can be called the administrative aspects of strikes and lock-outs, such as orders for resumption and declarations to the effect that the Crown has failed to comply with the order, enforcement is possible through the District Courts, either directly under the Summary Proceedings Act 1957 or under delegated authority.

(4) *Claims of a civil character*

Actions may be taken in the Arbitration Court to recover wages or to obtain redress for dismissal which but for the special statutory provisions normally should belong in an ordinary Court of law. Where wages fixed by an award or collective agreement have been shortpaid to a worker covered by that instrument, the method of recovery is a penalty action for breach commenced by the Inspector of Awards or the respective union to the use of the worker. The worker is not a party to the proceedings. The Inspector has to prove that the worker's position is subject to the instrument and that he has been paid at a rate lower than that legally payable. Unpaid arrears also can be claimed. Any arrangement inconsistent with the instrument is void. The limitation period is six years from the day on which the money became due and payable.[87]

Nothing prevents, nevertheless, the worker

[78] IR Act, s 144(1).

[79] Ibid, s 147(1).

[80] IR Act, ss 81, 125, 125A and 147; on District Courts generally see Part IV; on fines and penalties, IV 3, post.

[81] IR Act, s 144(2).

[82] Industrial Relations Regulations 1974 (SR 1974/51), reg 37.

[83] [1944] GLR 12.

[84] IR Act, s 49.

[85] Ibid, ss 144(4), (4A), (4B), 154 and 155.

[86] Ibid, ss 144(3), 145 and 146; as a Court of record the Court also has power to act under s 32.

[87] Ibid, s 158; *Airways Taxis Ltd v Newland* (1969) BA 1081; *Baillie and Co Ltd v Reese* (1906) 26 NZLR 451.

from commencing a civil action as the terms of the instrument are incorporated into his employment contract: *True v Amalgamated Collieries of Western Australia.*[88] The significance of such an alternative action has now diminished as since 1973 the limitation period of six years applies in both cases, while under the IC & A Act it was only two years.[89]

Similarly wages which should have been increased pursuant to the Equal Pay Act 1972 are claimable at the Arbitration Court which may also determine questions arising under that Act.[90]

The most important jurisdiction vested in the Arbitration Court is in respect of unjustified and victimised dismissal under ss 117 and 150 of the Act respectively. Although the same remedies may be granted, the legal bases for the action and the procedure to be followed substantially differ. Section 150 deals with the situation where an employee is dismissed because of involvement in union or union-connected matters as an alleged victimisation by the employer. These proceedings should be taken in the Arbitration Court by the Inspector of Awards or the worker's union. A penalty not exceeding $100 may be imposed on the employer. As this fairly modest amount did not prove to be an effective deterrent when the corresponding section of the IC & A Act was in force, the present statute has added the same remedies of a civil nature as are provided in grievance proceedings: reimbursement, compensation and reinstatement.[91] The burden of providing an independent reason not connected with union activities is placed on the employer.[92]

Grievance proceedings for unjustified dismissal under s 117 are not based directly on that provision of the Act itself, but on the grievance clause in the relevant industrial instrument. A grievance clause either in the form of the model clause in subs (4) of s 117, or in another form approved by the Arbitration Court must be inserted in all awards or collective agreements; if not actually included it is deemed to be included. The net result is that the grievance procedure can be operated only as a clause of the instrument and it applies only to workers covered by the award or collective agreement.The steps prescribed should be strictly followed: an attempt at informal settlement at the point of origin; when this fails, an attempt to settle by discussions between employer and worker representatives; when this also fails a grievance committee must be formed consisting of an equal number of representatives of the two sides, but not more than three, with or without a chairman. If the committee settles the grievance neither party has a right of appeal, but if no settlement is reached, the matter must be referred to the Arbitration Court. Many grievance cases reach the Court by reference.[93]

The personal grievance usually concerns unjustified dismissal, though other acts by the employer that disadvantageously affect the worker's employment may also constitute a grievance. Still nearly all cases deal with unjustified dismissal, as distinct from wrongful termination of the service contract. Whether or not reasonable notice has been given, which would make a common law dismissal lawful, carries no importance in a grievance claim, if the employee proves lack of justification. Furthermore, the range of remedies is much wider than damages in a common law action. Besides reimbursement of wages lost compensation granted may take into account hurt feelings, humiliation, loss of dignity and similar grounds which the common law refuses to recognise. In addition there is power in proper circumstances to order reinstatement of the worker in his former or in a similar position. Could this be called statutory specific performance? A grievance action opens up remedies to workers covered by industrial instruments superior to those available to employees in managerial or similar positions.[94]

Suspension also affects the worker's

[88] [1940] AC 537 (PC).

[89] In *Inspector of Awards v Malcolm Forlong Ltd* [1977] 1 NZLR 36, the Court of Appeal held that claims which originated before the coming into operation of the IR Act, 8 March 1974, are to be governed by the previous Act; see Part VI, post.

[90] IR Act, ss 12-14; for recovery of shortpaid remuneration action may be commenced in District Courts but appeal lies to the Arbitration Court.

[91] *New Zealand Insurance Guild Union of Workers v The Insurance Council of New Zealand* (1976) Ind Ct 173; see Szakats, "Unjustified Dismissal: Grievance and Victimisation" [1977] NZLJ 348.

[92] See *Cornhill Insurance Co Ltd v New Zealand Insurance Workers IUW* (unrep CA 100/79, 18.3.1980); see Part VI, post.

[93] IR Act, s 117(4); *Auckland Freezing Works and Abattoir Employees IUW v Te Kuiti Borough* [1977] 1 NZLR 211, CA; see also [1977] NZLJ 348.

[94] There are many decisions; only a few will be quoted: *Wellington etc Clerical Adm etc IUW v J N Anderson & Son Ltd* (1979) Arb Ct 333; *E McAuley v R Hannah & Co Ltd* (1979) Arb Ct 287; see also Szakats, "Trade Unions and the Legal Profession — or Rule of Law and Unjustifiable Dismissal", [1977] NZLJ 319.

employment to his disadvantage, but the remedy does not lie in grievance proceedings. Section 128 provides that in case of strike the employer has the right to suspend non-striking workers, if he cannot provide work normally performed by them. The worker or his union may directly appeal to the Arbitration Court which may confirm, reverse or modify the decision and may make other orders.[95]

(5) *Supervisory and administrative functions*

The Arbitration Court performs a number of various functions which can be classified as the exercise of administrative jurisdiction. Only a few salient features will be pointed out.

The procedure for the settlement of a dispute of rights is somewhat similar to that of a grievance. A model clause set out in s 116 of the IR Act should be inserted, or if not, it is deemed to be inserted in every award or collective agreement, and the dispute must be referred to a committee consisting of an equal number of representatives appointed by the parties. At this point, however, significant differences appear. The committee should have an agreed chairman or in case of disagreement a conciliator or his nominee should act as such. If the members of the committee are equally divided the chairman may either make a decision which will be the decision of the committee, or refer the matter to the Arbitration Court. Further, any party has the right to appeal to that Court.[96]

A dispute of rights of this nature can be called a group grievance affecting deleteriously at least two workers in their employment falling short of dismissal. Mostly it concerns working conditions and revolves around such problems as to whether or not a particular type of work qualifies for a special allowance provided in the instrument or whether supply of "protective clothing" includes boots. The committee has to find an answer within the four corners of the instrument and frequently doubt arises whether "interpretation" would really amount to alteration of the award, and the claim to that of a dispute of interest. This point has already been discussed in depth earlier.[97]

The Court's functions in respect of such matters as disputed union elections, ballot procedures on the inclusion of an unjustified preference clause in an instrument, appeals concerning registration of industrial unions or amendment of rules and demarcation disputes should also be more properly denoted as administrative, similar to some extent to the High Court's administrative jurisdiction.

The Arbitration Court has exclusive jurisdiction to conduct an inquiry, subject to the right of delegation to a District Court, as to any alleged irregularity in or in connection with an election for offices in a union. Upon the application of not less than 10 percent or 50 of the financial members, whichever number is the smaller, the inquiry will be conducted by a Judge of the Court alone.[98]

The significance of the provisions of s 119 of the IR Act, on demarcation disputes is that it specifically lays down a procedure for settling conflicts between unions in cases where each claim that its membership rules and instruments give exclusive right to its members in the particular employment in question. The section had no equivalent in the previous statute. As a result either the Minister of Labour was called upon to decide in the matter — and whatever decision he reached it opened up accusations of political bias — or the parties had to resort to the difficult procedure of asking the Arbitration Court which of two potentially applicable instruments covered a particular worker in one particular employment, and consequently which union he had to join. A conflict on the applicability of the principles of indivisibility and substantiality of employment, however, frequently raises different issues and the guidelines in the section provide a more suitable and realistic framework for resolving what are called genuine demarcation disputes.[99]

At this juncture mention should be made of the Fishing Industry (Union Coverage) Act

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[95] *Waitaki NZ Refrig Ltd v New Zealand Meat Processors etc IUW* (1977) Ind Ct 149; *Wellington Woollen Mills etc IUW v Feltex Carpets (NZ) Ltd* (1978) Arb Ct 59; as to suspension in state services see *Elston v State Services Commission* (No 3) [1979] 1 NZLR 218 (SC); Szakats, "Unlawful Suspension after Unilateral Variation of 'Terms and Conditions': The New Plymouth Electricity Workers' Case" [1979] NZLJ 292.

[96] *Shell Oil NZ Ltd v Wellington Drivers Union* (1979) Arb Ct 327 followed *AHI (NZ) Glass Manufacturing Co Ltd v North Island Elect etc Trades IUW* (1978) Ind Ct 1.

[97] See Part II 4(1), ante, and Part VI, post.

[98] IR Act, ss 199-212; *Re Election of the Waingawa Subbranch of the New Zealand Freezing Works IUW* (1972) BA 3004; similar procedure is followed by a Judge alone in inquiries into alleged irregularities in ballot procedure for the insertion of an unqualified preference clause in an instrument: ss 101F-101H.

[99] *New Zealand Fed Storemen etc IAW v New Zealand Meat Processors etc IUW* (1979) Arb Ct 291.

1979 which requires consent by the Minister of Labour before the Registrar of Industrial Unions can accept an application for registration of a union or an amendment of membership rules affecting fishing industry workers. After such approval the Registrar may exercise his discretion whether to register or refuse the application and any dissatisfied party has the right to appeal to the Arbitration Court. The Minister, however, has power to revoke his consent at any time until the amendment takes effect. Thus, it appears that when the Court directs the Registrar to accept an amendment, but the Minister revokes his consent before the registration takes effect, the Court's decision will be counteracted and nullified by executive action.[100]

Similarly it may be regarded as the exercise of administrative jurisdiction to act in an appeal against refusal of consent or registration of a contract of apprenticeship by the District Commissioner of Apprenticeship or a local apprenticeship committee. As the Court has power to modify the apprenticeship order in so far as it affects an apprenticeship contract, this function is in a grey area between the legislative and judicial authority.[101]

The Arbitration Court acts also to adjudicate complaints against industrial unions and professional or trade associations for alleged discrimination, if the grounds are outside those specified in the Human Rights Commission Act 1977 or the Race Relations Act 1971. In such cases the Human Rights Commission must refer the matter to the Arbitration Court, instead of to the Equal Opportunities Tribunal.[102]

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[100] Fishing Industry (Union Coverage) Act 1979, s 5; it is of some interest that as soon as application for registration of a society of workers as an industrial union has been lodged, consent may not be revoked; but the amendment takes effect when it is recorded by the Registrar: IR Act, ss 164, 173 and 178. *Re An Application by Federated Cooks and Stewards IUW* (1979) Arb Ct 321; *Re An Application by Auckland Harbour Board and New Zealand Container Terminal Operators Society of Employers* (1979) Arb Ct 271; see A Szakats, "Disharmony in Industrial Relations: The Fishing Industry (Union Coverage) Act 1979" (1980) 9 NZULR 82.

[101] Apprentices Act 1948, ss 9, 19 and 30; *Bregman v Hobehouse and Another* (1979) Arb Ct 301; see *Halsbury, Employment NZ*, paras C586-C596.

[102] Human Rights Commission Act 1977, ss 68-71; on the Equal Opportunities Commission see Part III 5, post; see *Mazengarb*, paras 1400-1493; Szakats, *Supplement to Employment*, para 40(3).

CORRESPONDENCE

Dear Sir,

Contingency Fees

A brief comment on the excellent article by Mr Anthony Grant in your issue of 19 August.

The article considers the question of charging on a contingency fee basis from the viewpoint of whether the Law Practitioners Act permits it. If anyone is minded to put the issue to the test, they should also bear in mind the question of whether it is acceptable ethically. Para 6.18 of the New Zealand Law Society Code of Ethics says that contingency fees are "not sanctioned" in New Zealand.

As an aside, I cannot resist pointing out that even when "sufficiently incensed" (to use Mr Grant's phrase) District Law Societies could not in 1918 and cannot in 1980, strike practitioners off the roll. In 1918, the jurisdiction lay with the Court of Appeal. In 1980 it is of course vested in the Disciplinary Committee as well, and in practice is exercised by that Tribunal although the Court's power remains.

Yours faithfully,

Tom Eichelbaum