

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

A.155/84

*Director of Railways*  
*FWJ*

771

Special  
Consideration

IN THE MATTER of Part 1 of the  
Judicature Amendment  
Act 1972

BETWEEN NATIONAL UNION OF RAILWAYMEN  
OF NEW ZEALAND INDUSTRIAL  
UNION OF WORKERS an  
industrial union of workers  
registered under the  
Industrial Relations Act  
1973 having its registered  
office at Wellington

First Applicant

DAVID HUDSON STEELE of  
Picton, Senior Shunter

Second Applicant

A N D NEW ZEALAND RAILWAYS  
CORPORATION established  
by s 4 of the New Zealand  
Railways Corporation Act  
1981 for the purpose of  
carrying out the functions  
and powers prescribed by  
that Act and having its  
office at Bunny Street  
Wellington

Respondent

Hearing 25, 26 June 1984

Counsel G P Barton and J R Wilson for Applicants  
P D Green and J E Hodder for Respondent

Judgment 9 July 1984

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JUDGMENT OF DAVISON C.J.

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The applicants have brought these proceedings seeking a review of certain decisions of the respondent (the second respondent named having been dismissed from the proceedings) by which they seek to challenge the validity of Regulation 76 of the New Zealand Railways Corporation (Staff) Regulations 1982 ("the Regulations") and the right of the respondent to require the second applicant to work in excess of 40 hours per week.

The dispute involves the introduction by the respondent of a new shift roster and objections by members of the applicant Union to that roster.

Voluminous affidavits have been filed in these and associated proceedings and the facts relating to the roster dispute have been traversed at length. However, in the view I take of this matter the issues can be dealt with briefly by considering the legal implications of the relevant statutory provisions without embarking on a detailed analysis of the factual issues.

Dr Barton in opening the case for the applicants dealt at length with what he said were three major considerations in this case - safety, welfare and human rights. However, the issues before me for decision as set out in the pleadings involve consideration of much more mundane matters of statutory interpretation.

#### THE LEGISLATION

The New Zealand Railways Corporation was established by the New Zealand Railways Corporation Act 1981 ("the Railways Act"). The long title sets out that that was an Act - "to establish a corporation to maintain, operate, and develop the services at present carried on by the New Zealand Government Railways Department and to consolidate and amend the law relating thereto".

Part VII of that Act (ss 66 - 80) deals with "Staff Administration". Section 68 applies the State Services Conditions of Employment Act 1977 to the Railways. It provides:

"s68(1) The State Services Conditions of Employment Act 1977 shall, with any necessary modifications and subject to this section, apply to the remuneration and conditions of employment of officers and employees, including apprentices and temporary and probationary officers and employees, of the Corporation in the same manner as it applies to the remuneration and conditions of employment of employees in the State Services.

(2) For the purposes of the application of the State Services Conditions of Employment Act 1977 -

- (a) The Government Railways Industrial Tribunal shall have jurisdiction in relation to the employees of the Corporation; and
- (b) The Corporation shall be the employing authority. "

The State Services Conditions of Employment Act 1977 ("the State Act") Part I (ss 6 - 21) sets out the system and criteria for prescribing conditions of employment. It provides:

"s6(1) Except as otherwise provided in this Act and notwithstanding anything to the contrary in any other enactment, as from the commencement of this Act, the conditions of employment of employees of the State services shall be prescribed by an employing authority by determination under this Act and not otherwise. "

It will be noted that the conditions of employment are required by that section to be made by "determination" under the Act and not otherwise. A "determination" is defined in s 2 of the Act as meaning:

- " A determination made by an employing authority under this Act, and includes -
  - (a) An amending determination made under section 24 of this Act:
  - (b) A consolidating determination made under section 26 of this Act:
  - (c) A decision made under section 65(4) of this Act. "

The Corporation (being an employing authority by virtue of s 68(2)(b) of the Railways Act) on 1 July 1982 made a determination prescribing conditions of employment in the New Zealand Railways Corporation. However, in addition there were made pursuant to the Railways Act, the regulations which came into force on 1 April 1982. These regulations in Part VIII under the heading of "Duties and Conduct" set

out a number of instructions relating to duties and provided in Reg 76:

" When the exigencies of the Corporation so require and when so instructed by his controlling officer, an employee shall attend for duty at any time, whether or not the attendance involves the working of overtime. "

The applicants claim that instructions given to attend for duty, including overtime duty directed by a controlling officer pursuant to Reg 76 are part of an employee's conditions of service. But they say there is no power to provide for conditions of service other than by providing for them in a "determination" because s 6(1) of the State Act says the conditions of employment "shall be prescribed by an employing authority by determination under this Act and not otherwise".

Reg 76 therefore in so far as it purports to prescribe conditions of employment in a manner otherwise than by a "determination" is said to be ultra vires and invalid.

This argument raises the issue of whether Reg 76 does in fact, as the applicants claim, prescribe "conditions of employment" within the meaning to be given to these words by the State Act.

No great assistance can be gained from the interpretation section - s 2 of that Act. It merely provides: "'Conditions of employment' includes remuneration". There are no definitions in the Railways Act or the Regulations. However, s 7 of the State Act does detail the conditions of employment which may be prescribed by determination. It states:

"s7(1) The conditions of employment which may be prescribed in accordance with this Act shall be -

- (a) Annual and special leave, sick leave, holidays, ordinary hours of work, and the period to be worked before overtime rates become payable:

- (b) Rates of remuneration:
- (c) Rates of remuneration and conditions in respect of minimum earnings, overtime, travelling time, standing time, night work, shift work, and special duty, and in respect of work on Saturdays, Sundays, holidays, and at any other time outside the ordinary hours of duty:
- (d) Minimum rates of remuneration for adult employees and for married employees:
- (e) Separation allowances, locality allowances, dirty work allowances, and other allowances relating to conditions of work:
- (f) Tool allowances and allowances in the nature of additional pay for classes or conditions of work warranting the payment thereof:
- (g) Travelling, relieving, lodging, night, rest, camp, transfer, and meal allowances and expenses:
- (h) The terms and conditions on which uniforms and industrial clothing may be issued:
- (i) Rates of severance pay or redundancy pay:
- (j) In respect of the New Zealand Railways Corporation only, also payments to engine crews on the basis of mileage run during any shift and the conditions on which free travelling on the railways or travelling at reduced rates may be granted:
- (k) In respect of the Armed Forces only, also all allowances, grants, gratuities, and other similar payments, including overseas allowances made in respect of conditions of service in the Armed Forces. "

#### THE AUTHORITIES

The supremacy of s 6(1) of the State Act as establishing a code both comprehensive and exclusive for the purpose of fixing conditions of employment for those within the State Services (and also within the Railways by virtue of s 68(1) of the Railways Act) was established in the decision of the Court of Appeal in Combined State Unions v State Services Co-ordinating Committee [1982]

1 NZLR 742. Several passages from the judgment of the majority delivered by Woodhouse P. are pertinent:

" The starting point is s 6(1) of the 1977 statute. On the face of it the provision is one which asserts a unique jurisdiction without qualification and without compromise:  
' Except as otherwise provided in this Act and notwithstanding anything to the contrary in any other enactment, as from the commencement of this Act, the conditions of employment of employees of the State services shall be prescribed by an employing authority by determination under this Act and not otherwise'  
(Emphasis added).  
If it is indeed the legislative intention as counsel submitted that 'this Act' is to provide exclusive authority for settling and determining conditions of employment in the State services, the draftsman could hardly have found stronger language in which to express it. The matter is given a double emphasis. 'Notwithstanding anything to the contrary in any other enactment', it is said, the conditions of employment shall be prescribed 'by determination under this Act and not otherwise'. "

.....

" In the result we are satisfied that when the various provisions of the State Services Conditions of Employment Act are taken together the legislative purpose was to establish a code which would be both comprehensive and exclusive for the purpose of fixing conditions of employment for those within the State services; and that s 6(1) itself is deliberately designed to underscore that purpose and its intended achievement. "

To be valid, therefore, the regulations must satisfy two conditions. They must -

First be within the Regulation making provisions contained in s 102 of the Railways Act; and

Second they must not impose upon employees "conditions of employment" contrary to s 6(1) of the State Act which requires such conditions of employment to be prescribed by "determination".

As Woodhouse P. said in Combined State Unions v State Services Co-ordinating Committee (ante) p. 745:

" It is an important constitutional principle that subordinate legislation cannot repeal or interfere with the operation of a statute except with the antecedent authority of Parliament itself. It is a constitutional principle because it gives effect to the primacy of Parliament in the whole field of legislation. And as a corollary a rule of construction springs from it that the Courts will not accept that Parliament has intended its own enactments to be subject to suspension, amendment or repeal by any kind of subordinate legislation at the hand of the Executive unless direct and unambiguous authority has been expressly spelled out to that effect, or is to be found as a matter of necessary intendment, in the parent statute. "

#### THE ISSUE

Briefly described, the issue in this case is this:

Is the Corporation entitled to apply as part of the conditions of employment of its employees at Picton and Blenheim, the provisions of Part VIII (Duties and Conduct) of the Regulations, and in particular Reg 76 which was specifically invoked in the notice dated 22 May 1984 given by the Corporation to the second applicant, Mr Steele, requiring him to perform additional duty?

#### DECISION

##### (a) Validity of the Staff Regulations

It is convenient to consider immediately whether the staff regulations are valid. They were made pursuant to the Railways Act. Section 102(1) of that Act gives authority for making regulations for various purposes.

The Corporation relies on the following purposes:

- (a) Determining the manner in which and the terms and conditions on which candidates for employment in the Corporation may enter the service thereof:
- (c) Prescribing the respective duties to be performed by employees and the discipline to be observed in the performance of those duties:
- (k) Providing for the temporary employment of persons in the Corporation, and for any matters in relation thereto:
- (q) Generally providing for any other matters that by this Act are expressed to be prescribed or that are necessary to give full effect to this Act.

A consideration of the Act and of Part VIII of the regulations and the matters contained therein leads me to the conclusion that the disputed Regulation No 76 at least falls within the regulation making power given by s 102(1)(c) referred to above.

It was Dr Barton's submission, however, that Reg 76 prescribed a condition of employment which could only validly be prescribed by a determination made pursuant to the State Act and not by a regulation made under the authority of the New Zealand Railways Act. I am satisfied that that submission is correct if, but only if, Reg 76 does impose a "condition of employment".

Section 68 of the Railways Act makes the State Act (with any necessary modifications) applicable to employment in the New Zealand Railways Corporation. The State Act s 6(1) requires that conditions of employment be prescribed by "determinations" made under that Act and not otherwise. That section is paramount and overrides any provision of the New Zealand Railways Corporation Act to the contrary: see Combined State Unions v State Services Co-ordinating Committee (ante). But the Conditions of Employment which may be so prescribed are limited to those



set out in s 7 of the Act. The Corporation argues that s 7 does not cover the matters of "duties and conduct" contained in Part VIII of the Regulations and therefore such duties and conduct are not conditions of employment requiring to be prescribed by determination and may be validly prescribed by regulations. It says that the true effect of the two Acts is that "Conditions of Employment" (used in a general sense) are dealt with in two ways:

- (a) As to remuneration and allied matters by way of a determination made in accordance with the provisions of the State Act; and
- (b) As to general matters, including management powers, by provisions of the Railways Act and by the Regulations.

Dr Barton referred the Court to authorities in which the scope of the expression "Conditions of Employment" had been considered: Elston v State Services Commission (No 3) [1979] 1 NZLR 218, 235; British Broadcasting Corporation v Hearn [1977] 1 WLR 1004, 1010; Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, 227; Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 A.C.366, 386. However, for the purposes of s 6(1) of the State Act requiring conditions of employment to be prescribed by determination, the conditions of employment are limited to those set out in s 7 of the State Act itself and the authorities cited are of no assistance in deciding the issues in the present case. The statute in effect provides its own definition of Conditions of Employment.

It is clear that s 7 of the State Act by no means sets out all matters relating to conditions of employment which the Corporation might wish to impose on Railways employees. It is limited largely to hours of work, leave, remuneration and allowances. The only condition referred to in s 7(1) which might be suggested as covering the type of duties and conduct provided for in Part VIII

of the Regulations is that relating to -

"s7(1) (a) Annual and special leave, sick leave, holidays, ordinary hours of work, and the period to be worked before overtime rates become payable. "

But I do not interpret those words as being apt to include conditions relating to duties and conduct.

There is nothing in the section which in my view empowers conditions to be prescribed relating to the duties of employees or regulating the conduct of employees in the manner set out in Part VIII of the Regulations. That is understandable because the State Act applies to the employment of persons in many and varied classes of activities in differing branches of Government, each of which may require special conditions of employment appropriate to those various activities. The State Act s 7 merely allows certain minimum conditions to be prescribed by determination. Other conditions outside those provided for by s 7 may be dealt with by regulations or otherwise by the various organizations concerned.

A comparison between s 7(1) (a) (b) (c) of the State Act and s 102(1) (c) of the Railways Act which refer respectively to the conditions of employment which may be prescribed by determination and the matters which may be the subject of regulations highlights this:

s 7(1) enables conditions to be prescribed relating to -

" (a) Annual and special leave, sick leave, holidays, ordinary hours of work, and the period to be worked before overtime rates become payable.

(b) Rates of remuneration.

(c) Rates of remuneration and conditions in respect of minimum earnings, overtime, travelling time, standing time, night work, shift work, and special duty, and in respect of work on Saturdays, Sundays, holidays, and at any other time outside the ordinary hours of duty. "

s 102(1)(c) empowers regulations to be made -

" Prescribing the respective duties to be performed by employees and the discipline to be observed in the performance of those duties. "

I am satisfied that the matters dealt with in Part VIII of the Regulations - particularly in Reg 76 - are not Conditions of Employment within the meaning of s 7 of the Act and are not required to be dealt with by way of determination in accordance with the State Act. They were not made contrary to s 6(1) of that Act and are not invalid as being in breach of it.

The provisions of s 6(1) of the State Act, on the one hand, and s 102 of the Railways Act and the Regulations, on the other, are not so inconsistent or repugnant that they are incapable of standing together. If it is reasonably possible to interpret the provisions so as to give effect to both, that must be done:  
R v McNeish [1982] 1 NZLR 247, 248.

The conclusion that I have reached on this aspect of the case gives effect to each of the statutory provisions concerned and to the principles of interpretation referred to in McNeish's case.

Dr Barton had argued that the power given to make regulations under s 102(1) of the Railways Act is limited to regulations "not inconsistent with this Act" and that the regulations made are inconsistent with s 68 of the Railways Act which applies the State Act. This argument is, however, answered in the passages of this judgment in which I have found that the regulations were properly made and are not invalid.

(b) Application of Reg 76

The instructions given by the Corporation to work "rostered days off" and "tack ons" were given pursuant to Reg 76. I repeat it here for convenience:

" When the exigencies of the Corporation so require and when so instructed by his controlling officer, an employee

shall attend for duty at any time,  
whether or not the attendance involves  
the working of overtime. "

Dr Barton argued that the ability of the Corporation to give instructions under the Regulation depends upon there being "exigencies" of the Corporation. On a true construction he said "exigencies" are concerned with emergencies or urgent situations or the demands or requirements of a particular occasion or situation. The term cannot appropriately be used to deal with the conditions that arise or may arise by virtue of the problems encountered over the working of the new staff rosters and the exigencies of the respondent did not require Mr Steele to attend for duty and work overtime.

Mr Green for the Corporation answered Dr Barton by submitting that on the facts as disclosed in the affidavits the instructions given to Mr Steele were given by reason of the "exigencies of the Corporation" as that expression is to be interpreted, and in the circumstances such instructions were justified.

"Exigencies" is a well understood word in the English language. The Shorter Oxford English Dictionary (1973 ed) provides the following definitions:

" 'Exigence. 1. The state or fact of being exigent; urgent want; need, necessity. 2. A case demanding immediate action or remedy; an emergency; an extremity. Exigency. 1. Pressing state (of circumstances); stringency (of requirements).  
b. Pressing necessity; in pl. pressing needs, straits. 2. That which is needed; demands, needs, requirements. "

The Heinemann New Zealand Dictionary (1982 ed) gives the following:

" 'Exigency. 1. a) urgency. b) an emergency or urgent situation.  
2. (usually plural) the demands or requirements of a particular occasion or situation. "

On this application for review the Court is not required to decide whether the decision of the Corporation to instruct Mr Steele to attend work for duty was a correct decision but simply to decide whether the Corporation correctly interpreted Reg 76 and that its decision was one that it could lawfully make: see R v Boundary Commission [1983] 1 All ER 1099, 1110.

The precondition to the giving of such instructions is that there must be an "exigency" situation within the meaning to be given to that word. There must have been at the time "a case demanding immediate action or remedy - an emergency or urgent situation". That is, there must have arisen some emergency situation which arose outside of the operation of the ordinary duty roster established by the Corporation.

I have read the affidavits filed in these and the associated proceedings and I am satisfied that at the relevant time there did indeed arise circumstances of emergency or urgency which could have justified the Corporation concluding that there were "exigencies" justifying the giving of instructions to Mr Steele pursuant to Reg 76.

It follows then in my judgment that the Corporation was entitled in law to apply Reg 76 and to act validly in terms of it.

(c) The Employment Contract

As a further argument justifying the application of the Regulations to employment of Railways employees, Mr Green referred to the employment contract, and I deal with it in deference to his argument.

All permanent staff are required to complete and sign an application for employment before joining the Railways. The form includes the following statements:

" Any appointment will be made subject to the Government Railways Act 1949 and the regulations made thereunder."

The employing officer is required to certify:

" The employee has been supplied with a copy of the 'Extract from the Government Railways (Staff) Regulations 1953' and his (her) acknowledgment obtained and filed. "

An employee once accepted is given a booklet containing extracts from the Regulations. (The Regulations referred to in the booklet Nos 98 - 103 correspond with Regs 71 - 76 of the 1982 Regulations).

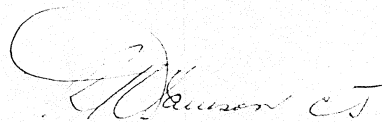
The employee is then required to sign a document that he has " Received copy of booklet entitled 'Extract from the Government Railways (Staff) Regulations 1953' which I have read and understood. "

Such documentation was completed by Mr Steele, and Mr Green submitted that the Regulations were by the Employment Contract incorporated into Mr Steele's terms of employment. I conclude, however, that if the Regulations were invalid then the situation would not be saved by arguing that the terms of the Regulations were incorporated into the terms of employment by contract simply as terms of the contract.

The contractual provisions purport merely to inform the employee of the terms of the regulations and obtain his acknowledgment that such regulations apply to his employment. The application of the regulations to the contract is dependent upon the regulations being valid and lawfully applicable to the employment. If they are invalid then the terms of them do not form part of the employee's terms of employment. The argument advanced by Mr Green would not save the provisions of the regulations if the regulations were in fact invalid.

For the reasons which I have set forth, the applicant's application for review is refused and must be dismissed.

Costs reserved.



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