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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

[redacted]

A. No. 440/85

IN THE MATTER		of the Judicature Amendment Act 1972 and an application for review
LR 285 AND		
IN THE MATTER		of the Waterfront Industry Act 1976
BETWEEN		THE HAWKES BAY HARBOUR BOARD Applicant
AND		THE WATERFRONT INDUSTRY TRIBUNAL First Respondent
AND		THE NAPIER PORT CONCILIATION COMMITTEE Second Respondent
AND		THE NEW ZEALAND HARBOUR BOARDS EMPLOYEES INDUSTRIAL UNION OF WORKERS Third Respondent

Hearing: 4 February 1987

Counsel: J.B. Stevenson for the Applicant
B.J. Banks for the 1st and 2nd Respondents
A.D. Ford for the 3rd Respondent

Judgment: 3/7/87

JUDGMENT OF HERON J.

In 1985 a dispute arose at the Port of Napier between the Hawkes Bay Harbour Board (The Board) and the Hawkes Bay Branch of the New Zealand Harbour Board Employees Industrial Union of Workers (The Union). The Union required a mechanic and electrician to be employed on shift work during the unloading of the ship "The Jepsen Napier".

The Board and the Union had been working Jepsen vessels in accordance with Principal Order No. HB 10 made pursuant to the Waterfront Industry Act 1976. That order contained the following provision:

> "Sufficient men shall be employed so as to enable the requirements of the job to be carried out efficiently, having regard to the number of machines needed and the number of workers normally engaged in addition thereto for conventional shipping customarily employed on the wharf at the port concerned."

For some time the Union had argued that such a provision was relevant to their contention that mechanics and electricians should be employed during the working of Jepsen Line vessels at the Port of Napier. It was also said that that mechanic and that electrician in any particular case should be paid by the Board in accordance with the principal order. In order to resolve the dispute the Board filed a reference with the second respondent following the Union agreeing to work the "Jepsen Napier" so long as that dispute was so referred. The Napier Port Conciliation Committee (the Committee) duly met, and referred the matter to the Waterfront Industry Tribunal pursuant to section 42(2), which reads:

> "Any Port Conciliation Committee may at any time whether before or after it has heard any interested parties in relation thereto, refer to the Tribunal for decision by any application made to the Committee concerning any dispute, or any question before the Committee."

Following that reference the Tribunal issued a decision in which it considered it had jurisdiction to consider the dispute, and the dispute was referred back to rule on the manning question. As far as I am aware it has never been resolved as these proceedings challenge the Committee's jurisdiction to act.

The issue between the parties is somewhat academic because with the advent of the Labour Relations Act 1987 the jurisdictional boundaries between the waterfront industry and other industries have been removed. Section 361(10) of the Labour Relations Act appears to preserve proceedings which are in train, but the Waterfront Industry Commission Amendment Act 1987 now has the effect of abolishing Port Conciliation Committees and the

Waterfront Industry Tribunal, which of course was a body chaired by a Judge of the Arbitration Court, now the Labour Court.

Mr Stevenson, in making reference to this when the case was argued earlier this year, was of course unable to anticipate conclusively the passage of the amending legislation, but it has arrived and my decision is made at a time when the bill has received the Royal assent but the Act not yet come into force. I can have regard to the general worth of a finding now, particularly because the difficulties that have arisen in this case are largely difficulties which are now removed.

Mr Stevenson said that a finding on jurisdiction involving, as it does, considerations of waterfront industry work, will have some overall value. It must be remembered that the Waterfront Industry Commission is preserved by virtue of the Waterfront Industry Commission Amendment Act 1987, but in the many amendments that are made to the Waterfront Industry Act the amending act does not alter the definition of "waterfront industry", and that still remains, as does "waterside work".

It is common ground that Harbour Board employees are generally subject to the Industrial Relations Act 1983, and their conditions of employment are covered by the New Zealand Harbour Board Employees Award, and the Industrial Relations Act. Waterside workers are quite different, and are subject to the Waterfront Industry Act. Up until the amendment I have referred to their terms of employment are governed in general by principal orders and disputes and matters relating to terms of employment are governed in the Waterfront Industry Tribunal. The Waterfront Industry Commission handles administrative matters relating to the employment and payment of watersiders. However the Waterfront Industry Tribunal is confined to matters within the waterfront industry as defined.

Certain cargo handling services are however now performed by Harbour Board employees, and as such they are thereby engaged in waterside work. Such workers are of course required to coordinate their work with watersiders, and they work alongside one another. As the requirement for shift work emerged, so did the requirement that those Harbour Board workers should also work shift work. As Mr Stevenson puts it, and it seems generally agreed:

1. Harbour Board cargo service workers work under the Industrial Relations Act, and the appropriate award for normal hours and supplementary hours.

2. Waterside workers work under the Waterfront Industry Act and a general principal order for normal hours and supplementary hours.

3. Harbour Board cargo service workers work under a principal order, while they are performing cargo service shift work.

4. Waterside workers also work under a principal order while they are performing shift work.

The relevant principal order in this case is Principal Order H.B. 10 and it relates to terms and conditions for Harbour Board employees engaged in the service of Jepsen vessels at the port of Napier (and others). The order refers to the fact that the conditions of employment prescribed therein shall govern the employment of Harbour Board employees engaged in the wharf transit and storage areas at conventional wharves serving Jepsen vessels at the Port of Napier. The order is made to supercede the terms of any Harbour Board employees award, and the work coverage governed by the Order is the "operation of mechanical cargo handling equipment supplied by the Harbour Board". It includes any "additional mechanical equipment required by the Board and such equipment shall be driven and operated by members of the New Zealand Harbour Board Employees

Union". The hours of work show that only shift work is involved. The dispute procedure contained in such an order is found in clause 11 which reads:

> "In order to facilitate the speedy resolution of disputes notwithstanding the fact that some workers engaged on the wharf operation shall fall outside the Waterfront Industry Act 1976, the parties agree to refer any grievances howsoever arising to the respective Port Conciliation Committee in accordance with the requirements of the aforementioned Act." (My emphasis.)

It must be remembered that Principal Order H.B. 10 was made by consent by employers's representatives and employees' representatives, namely the national union of both.

At the heart of this dispute is, of course, the reluctance of the employer to be involved in the additional expense required in the event that a mechanic and/or electrician are required to be available as part of the manning level when Jepsen ships are being manned, particularly because that would involve them in being paid in accordance with Principal Order H.B. 10, rather than overtime paid depending on whether they were called out or not. Accordingly a decision by a Port Conciliation Committee to include them in the manning requirements would be an additional cost which the employer wishes to avoid.

On the other hand, the Union sees the matter as being one where manning levels are to be agreed locally if possible, and if not, to be settled by the local Conciliation Committee. It relies on the merits of its case before that Committee to ensure that the proper manning is maintained. As I understand this case, if that manning will involve additional employees being paid on a shift basis, irrespective of the actual work performed, so be it. Not surprisingly such a dispute brings out fundamental differences, and gives rise to the reason why jurisdictional points are taken.

Mr Hart, an electrician, but also President of the Hawkes Bay branch of the Union, refers to the advent of the Jepsen Line

fully containerised lift on lift off vessels, and says that the Principal Order was designed to accomodate their advent. He says that the requirement in H.B. 10 that sufficient men be employed to enable the requirements of the job to be carried out efficiently, required him to approach the Board on behalf of the Union. He relates the nature of the dispute that developed, including the agreement, which he said was reached between the Union and the Board, that to avoid disruption the matter would be referred to the Port Conciliation Committee. He records, however, that Mr Trow first requested that the dispute be dealt with pursuant to clause 16 of the Harbour Board Employees Award. According to Mr Hart he indicated that the dispute had to be dealt with under H.B. 10. In any event the Board filed an application with the Committee, and because that application did not refer to the relevant order the Union filed its own application. In that application the Union said this:

> "A dispute exists between the Union and the Hawkes Bay Harbour Board in regards to the establishment of manning levels under clause 3(3)(1) manning shipping days to the servicing of Jepson Line vessels in the Port of Napier. W.I.T. Order No. 10. The Hawkes Bay Harbour Board and the Union have been unable to reach an inclusion of mechanics and electricians in the set manning scale for the working of the abovementioned line. We request that the Chairman to rule that during the working of such shift vessels that a minimum of one mechanic and one electrician be engaged on each shift worked."

Mr Hart says no question of jurisdiction was raised at that time, and was not raised until the matter went to the Waterfront Industry Tribunal. Mr Hart goes on to say:

> "Because however shift ships are being loaded and unloaded outside normal working hours as a matter of course it is not acceptable to the Union or its members to be asked to work overtime at rates of pay and on terms and conditions which are considerably less favourable than those applicable to other persons engaged to unload and load the shift ships. For instance if a shift ship is in port electricians may be engaged for the first shift but if the Board wants an electrician present for the second shift he will simply be asked to work overtime and gain none of the

> benefits which other persons who are properly engaged on shift work are entitled to in terms of agreements relating to such shift work pursuant to H.B. 10. By simply requiring a worker to work overtime instead of giving notice the day before of a requirement to work a second shift as is the case with other shift workers the Board only has to pay overtime rates and the worker has to be available for work the following day. If he is a shift worker then in terms of clause 13.2 of H.B. 10 men ordered for the second shift must be paid the full shift payment and in addition eight hours at ordinary time rate is paid for the next day and make themselves available for work at the commencement of normal hours of work on the following day."

The Court cannot become involved in the industrial merits or otherwise of this dispute (but for the jurisdiction point), that is a matter for the Committee, and possibly the Tribunal. The Court is concerned only with the jurisdictional question. But, in saying that, it seems to me that I have to look at the definition of "waterfront industry" and "waterside work", to see whether the mechanic and the electrician in the circumstances as presented to me, can be regarded as carrying out waterside work. In this Court, and before the Tribunal, the Board submitted that because the work of mechanics and electricians was that of carrying out repairs of broken down equipment, plugging and unplugging reefer units and repairing electrical equipment such was not within the relevant definitions of the Waterfront Industry Act and the Committee had no jurisdiction. The Tribunal, on that point as a factual finding, said:

> "The work of tradesman that is engineers and electricians engaged in the servicing maintenance and repairs of cargo handling equipment when a load on load off vessel is being worked at any port (under the provisions of the Principal Order H.B. 10) is waterfront work as defined by the Act. This is a finding that the Tribunal has jurisdiction to consider the dispute before it including level of manning. It follows that the Napier Port Conciliation Committee also had jurisdiction."

No reasons for that finding are given and no opportunity is given for ascertaining why the Tribunal reasoned that such work fell within either of the two definitions because as a matter of law it had to do so.

As Mr Ford reminds me, the Tribunal reference to waterfront work, as defined by the Act, is in fact incorrect. There is no definition of "waterfront work" and the Tribunal must have been referring to either the definition of "waterside work" or the definition of "waterfront industry". I do not think it matters a great deal. The inquiry must be directed to the statutory definitions. The definitions of waterfront industry and waterside work are quite extensive, but the categories into which the workers in this case could fall are, as Mr Ford concedes, quite limited. Mr Ford, whilst recording that the Union submitted that the use of the word "operation" as well as "driving" in one of the definitions involved incidental overseeing and therefore repair. The Union did not now seek to rely on that argument. I think that is a proper concession to make.

Mr Ford submits that in the context of the present case the work of a mechanic or electrician would fall within the definition of "waterfront industry" as the definition of "waterfront industry" embraces the carrying out of "waterside work", and waterside work in turn is defined as meaning, amongst other things, the loading and unloading of ships. He urges an unrestricted interpretation, to include all persons who are an integral part of the loading and unloading operation. If therefore it is necessary to have persons such as mechanics and electricians available should there be any breakdown in equipment, or should it be necessary to carry out other work to facilitate the loading or unloading operation, such as the connection or disconnection of reefer units, then they are engaged in the loading and unloading of a ship. Mr Ford makes the point made in the decision of the Tribunal, that:

> "It was inconceivable that any dispute involving drivers and tradesmen should have to be dealt with in two different manners and under two different jurisdictions. The men in question are after all working side by side."

He says that all duties which are an integral part of the loading and unloading operation should be regarded as waterside work.

Dealing with that general submission I cannot agree that in industrial relations terms such a broad interpretation can be given. To do that would be to cut across the quite elaborate definitions which have been included in the definition of "waterfront industry", which is described as the carrying out of "waterside work" and the carrying out within wharf limits of certain other work. To apply such a method of interpretation would be to create confusion in areas where strict demarcation is generally required, and where historical areas of interest have been preserved. Mr Ford was unable to point to any other part of the definition which remotely described the work done by the electrician and the mechanic in this case.

Mr Ford submits also that section 42(1)(c), which is the provision giving rise to the present reference to the Port Conciliation Committee, requires that Committee to:

> "Decide any local disputes that arise <u>in relation to</u> work within the waterfront industry, and take such action as it thinks fit to prevent or settle local disputes provided that demarcation disputes shall be referred direct to the Tribunal."

Whilst in a sense the dispute that has arisen is <u>in relation to</u> work within the waterfront industry because it impinges on it, it has to be work within the waterfront industry, and that promptly returns one to the definition. I do not think I can use those words to extend the definition carefully worked out in the definition section. To accede to that submission would allow any industrial matter, if it impinged on the waterfront industry, to be considered by a Port Conciliation Committee, and in my view it was not intended to give the committees that sort of jurisdiction. The overall need for demarcation is of course a feature of industrial law in New Zealand, for better or for worse.

In many cases which involve issues of demarcation a quite different attitude can be taken to avoid rigidity and the Waterfront Industry Tribunal obviously had those considerations in mind when it gave its decision. See Re Engineers and Electrical Workers Union [1974] 2 NZLR 670, p.677. Where however a statutory boundary is drawn which created jurisdiction, then no such flexible approach with all that has to recommend it, can be allowed.

Mr Ford submits, however, that even if the work in question is not within the waterfront industry or does not arise in relation to work within the waterfront industry, then the Tribunal nevertheless had jurisdiction to include clause 11 in Principal Order 10, which binds the parties to refer any grievances howsoever arising to the respective Port Conciliation Committee "notwithstanding the fact that some workers engaged on the wharf operation shall fall outside the Waterfront Industry Act 1976." There can be no doubt that the Tribunal has purported to direct its attention to some workers engaged on the wharf operation, but who fall outside the definition. The question must be asked as to whether, that having been done, the Tribunal had jurisdiction to do so. It is asking the same question in a different context. In particular, section 14(2) provides that:

> "A Tribunal in exercising its powers and function which include making principal orders it should have regard to
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> (a) the necessity for promoting the efficiency of work within the waterfront industry,
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> (b) the desirability of ensuring for the purpose of facilitating the rapid and economical turn round of ships and transit of goods through ports, the full and proper utilisation within the waterfront industry of (1) labour ... and (2) facilities."

Section 15 provides that the Tribunal may make principal orders not inconsistent with this Act.

Mr Ford reminds me that this order was made by consent on the application of the respective unions as I have already recalled. Again I think that the overriding consideration is the need to act in accordance with the Act. Section 21(c) makes that clear. I do not think that by consent the parties can confer jurisdiction, although I agree it goes a long way to establishing, at least in a prima facie way, that jurisdiction exists.

In Spencer Bower & Turner, Estoppel by Representation 3rd Ed. p.145 it is stated:

> "Not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same results cannot be achieved by conduct or acquiescence by the parties. Accordingly in all cases of the first class that is where it is sought by estoppel to enlarge the jurisdiction of any tribunal of limited jurisdiction, or to confer jurisdiction on any tribunal or person to whom it is not given by law, it has been held that it is impossible by contract to achieve these ends contrary to the revisions of a statute; similarly no estoppel can be invoked to produce a similar result."

In Dutton v. Sneyd Bycars Company Limited [1920] 1 K.B. 414 a labourer employed at the respondent's poison gas factory was affected by gas poisoning and incapacitated for work. He was paid his full wages and then after a period of time received payments which purported to be "workman's compensation". There were other actions by his employer giving rise to an expectation that he was in fact entitled to workmen's compensation. It was admitted that the employee was suffering from gas poisoning resulting from his employment, that the disease was one which was not scheduled to the Act as an industrial disease and that he had not obtained a certificate of a certifying surgeon under section 8 of the Workman's Compensation Act 1906. In reply it was contended on his behalf that the employers were estopped by their conduct from denying that the case came within the Act. The Judge in the Court

below held that an estoppel was established and ordered compensation to be paid.

Warrington L.J. said at p.420:

> "It is well settled law that no-one can enlarge the jurisdiction of such a court by contract and it is equally clear that he cannot do so by estoppel which is in fact based on contract."

The appeal was allowed, the Court of Appeal indicating that the Judge should have dismissed the application for want of jurisdiction.

Mr Ford referred me to "Waterside Work (d)" of section 2, which is clearly directed at other cargo handling work which the Tribunal may decide should be carried out by waterside workers in accordance with powers of the Tribunal to prescribe the class of work to be performed. I have looked at that definition to see whether that is not a power to extend jurisdiction given to the Tribunal itself. However, on close analysis I do not think that the work here can be described as "cargo handling work" which the Tribunal has decided should be carried out by waterside workers. I think the Principal Order would have to address itself to this specific question, as to whether work to be done by the mechanic and the electrician was in fact work which the Tribunal decided that waterside workers should perform. I do not think that that provision, which extends definitions by decision of the Tribunal, goes far enough to allow me to find that the general reference in Principal Order H.B. 10 to "notwithstanding the fact that some workers engaged on the wharf operation shall fall outside the Waterfront Industry Act 1976" is the sort of determination required and provided in definition (d) of Waterside Work.

Having dealt with all those matters, it seems to me that the particular tasks of the mechanic and electrician were not for the Tribunal or the Committee to determine, as a matter of manning and there has been an error going to jurisdiction and

this Court is required to review the same.

As to remedy, I was inclined to accede to Mr Ford's submission that no relief should be given. The parties had agreed to submit such matters to a decision making tribunal, and had it been allowed to proceed no doubt it would have reached a conclusion. That would have been in the interests of promoting the efficiency of work within the waterfront industry, particularly in respect of the matters set out in section 14 of the Act. The applicant originally suggested an alternative procedure pursuant to the New Zealand Harbour Boards Employers Industrial Award but later went along with an application to the Port Conciliation Committee.

Mr Ford urges upon me, having regard to the way in which this dispute came about, that I should refrain from granting an order declaring that the first and second respondents have no jurisdiction, or an order prohibiting them from dealing with the dispute. To refrain from making those orders, it seems to me, will be of no assistance to any party. It will leave the matter in limbo.

There will be an order declaring that the first and second respondents have no jurisdiction to hear the dispute, and they are prohibited from dealing with it. Fortunately the matter can be recommenced if it has to be under the umbrella of the new Act. That is the way it ought to be dealt with as I see it. It may be that these matters go to questions of costs, although it should be noted that the jurisdiction point was taken before the Tribunal. Any criticism of the applicant, I suppose, comes from its Union allowing clause 11 to be included in the Principal Order H.B. 10.

Accordingly there will be orders in terms of paragraphs (a) and (b) of the statement of claim, and I reserve the question of costs. I will hear further argument on that if required.

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