

IS TECHNOLOGY A BARGAINING ISSUE?

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PART I

A.

INTRODUCTION

This article examines how our industrial system is responding to worker demands for bi-lateral control over the introduction of technology into the workplace. In *New Zealand Federated Clerical and Office Staff Employees I.A.W. v Wellington Law Practitioners I.U.E.* the Arbitration Court was asked to arbitrate on the clerical and office staff employees' demand for a right to bargain over the introduction of word processing machines.¹ Observing the new micro-electronic technology to be "of great moment in industrial relations" affecting "many and varied fields", the Court gave a carefully considered decision explaining that it could not sanction the demand. As an acknowledged test-case justifying the Court's departure from its practice of not providing reasons for its decisions on purely arbitral matters,² this decision establishes the precedent the Court will follow in dealing with worker demands to mitigate the effects of technological change. This is notwithstanding the Court's caution that it is not bound by any factual precedent in matters of arbitration³ (expressed also in the Memorandum to the Award⁴). In this instance the Court's reasons for rejecting the union's demand constitute a jurisdictional barrier to award terms securing bi-lateral control, which effectively negates the freedom the Court reserved to modify its approach in future proceedings beyond the terms of the Law Practitioners Award.

In view of the technology clause sanctioned, Part II of this article examines the range of claims the Court's ruling will allow workers — irrespective of individual industry requirements—to pursue in conciliation and arbitration. Discussed also are the residual statutory alternatives availing workers actually confronting employer decisions to install new technology. Part I provides the background. This examines the legal question which, despite much of the Court's discussion of economic matters,⁵ was the principal issue for decision: namely, whether the subject of the union's demand was an industrial matter within the meaning of the Industrial Relations Act 1973⁶ capable of satisfying the Act's jurisdictional requirement. In view of the Industrial Court's ruling on this requirement

¹ (1980) A.C.J. 267, per Horn C.J., Sir Leonard Hadley dissenting. (Hereinafter cited as the *Law Practitioners'* case.) For the exact terms of the union's demands, see *infra*, Part II.

² Acknowledged *ibid.*, transcript, at 2.

³ *Ibid.*

⁴ New Zealand Law Practitioners Award, dated 5 August 1980.

⁵ Principally in response to the submissions of the Federation of Labour (Mr K. G. Douglas advocate).

⁶ For the definition of "industrial matters", see section 2 (quoted *infra*).

only three years previously,⁷ it suffices to mention that the Arbitration Court's decision on the new technology was predictable.

B.

GENERAL

Involved in the introduction of technology into the workplace may be changes in production methods, transfers of operations, new raw materials and power sources and permanent shifts in product markets.⁸ Yet from neither the worker's nor employer's standpoint does the question regarding its introduction present a new genus of industrial dispute. In essence, the conflict is between productivity and job security. In almost all cases, new technology serves not only to maximise marginal revenue but also to minimise marginal cost through a reduction of the labour input. Simplified thus, the legal question posed is as old as the industrial system itself: ought managerial decisions that enhance profitability but which result in redundancies to be matters over which a union has a right to bargain?

In respect of technology, only in degree does this issue impose new burdens on the industrial system. When the above question was judicially put for the first time in 1904, the judge's example of a labour-saving invention was an automatic fuel feeder for the working of locomotive furnaces.⁹ No doubt for workers ordinarily performing this function, its introduction caused no less concern than that expressed by clerical workers facing the introduction of word processors. But unlike today's computer technology, its impact on the demand for labour was confined in scope to that particular function in that particular industry. Also unlike today's technology, the development of mechanical labour-saving devices such as the railway's automatic fuel feeder kept more or less in tandem with the creation of job opportunities.

"Innovation speeded up" has changed this. This is how one economist describes the rate of post-war technological development.¹⁰ In contrast to the automatic fuel feeder of 1904, today's technological advances benefit all sectors—affecting "many and varied fields"—regardless of industry classifications.¹¹ Economists believe it is also one of the principal causes of post-war industrial instability.¹² The rate by which it is accelerating is evidenced by the diminishing time interval between the idea and its development into a marketable product.¹³ Producers of technology force their product on the market and the market need to be competitive forces it on

⁷ *New Zealand Bank Officers I.U.W. v ANZ Banking Group Ltd* I.C. 71/77, reported (1979) Ind. Ct. 219, per Jamieson J. (Hereinafter cited as the *ANZ Bank* case.)

⁸ See generally A. Manson, *Technological Change and the Collective Bargaining Process* (1973) 12 W. Ont.L.Rev. 173, reviewing the procedures in Canadian collective agreements regulating the introduction of technology.

⁹ *Clancy v Butchers' Shop Employees Union* (1904) 1 C.L.R. 181 (H.C.A.), per O'Connor J., at 206-207. See *infra*.

¹⁰ See A. Shonfield, *Modern Capitalism* (1974), Ch. III entitled as quoted.

¹¹ See the Arbitration Court's observations, *Law Practitioners'* case, 268.

¹² Eg., Shonfield, *supra*, note 10, at 230.

¹³ See *ibid.*, at 41 (note 4), illustrating with reference to the development of the telephone (1820-76), radio (1867-1902), television (1922-36) and more recently transistor technology (1948-53).

the employer. As the rate of technological achievement quickens, the treadmill employers tread to maintain their competitive advantage becomes faster and the burden of increased capital cost—incurred in purchasing technology—greater.¹⁴ The other side of the cost-accounting equation to offset that burden, of course, is the reduction of labour cost, which technology itself promotes.

In the competitive market economy, redundancies do and will continue to occur amid the ebb and flow of resources to areas that serve the consumer's wants. Traditionally the market economy was able to absorb these redundancies, and maintain a reasonably stable demand for labour, by virtue of the job opportunities this resource reallocation created. The problem post-war technology poses is that the job opportunities it creates cannot match the reduction it causes in the overall market demand for labour. What will become more apparent this decade is that as fast as the redeployment of resources primes that demand, the faster will technology develop and the greater will become the discrepancy between supply and demand for labour. Even the Arbitration Court in the *Law Practitioners* case was disposed to comment:

It is clear that new technology, whatever its scope, has increased, is increasing and will increase. . . . It is also clear that in a number of instances in industry, specific jobs will become unnecessary and that future job opportunities may not be created.¹⁵

Even economists with their faith in economic cycles would agree that this is a bleak forecast. The Treasury estimate discussed was of a shortfall of 250,000 jobs by the year 1985. This, for a country that can expect a working population of little more than two million people, depicts the failing of our market economy to promote productivity, growth *and* the job opportunities New Zealand's employment policy promises. Now consider the legal question in the *Law Practitioners* case, whether an employer decision to introduce technology is a permissible subject of award regulation. Immediately the Arbitration Court addressed this question, its references to technology could just as well have been references to the automatic fuel feeder of 1904¹⁶—the fact that technology “has increased, is increasing and will increase” notwithstanding.¹⁷

C. THE JURISDICTIONAL REQUIREMENT

(a) *The significance of “dispute” in relation to “industrial matters.”*

Section 2 of the Industrial Relations Act defines the concept of “industrial matters” thus:

‘Industrial matters’ means all matters affecting or relating to work done or to be done by workers, or the privileges, rights, and duties of employers or workers in any industry, . . .

¹⁴ “[With] the more rapid obsolescence of machines and equipment, as technology advances, costs are saddled with a larger proportion of the value of the plant which has to be written off each year”; Shonfield, *ibid.*, at 361.

¹⁵ At 271.

¹⁶ See *supra*, text corresponding to note 9.

¹⁷ *Supra*, note 15.

Paragraphs (a) to (c) of the definition specify by way of extension further subjects of industrial matters, but it is on the primary definition, above, that courts focus in delineating the Act's operation. It takes its effect through the definition of "dispute" as:

... any dispute arising between one or more employers or unions or associations of employers and one or more unions or associations of workers in relation to industrial matters.¹⁸

From the initial conciliation and arbitration statute of 1894,¹⁹ the Act has been structured so as to render the creation of a dispute a jurisdictional requirement which must be satisfied to invoke the Act's procedure for its settlement.²⁰ Formerly, the significance of this requirement was confined to the activities of conciliation councils for the making of collective agreements and the Court of Arbitration for the making of industry-wide awards, fixing the terms and conditions of employment.²¹ Even so, this preserved to the Court of Arbitration (and ultimately the High Court pursuant to its supervisory jurisdiction over the former) a potent instrument of control over employment relations; it has long been held that jurisdiction to regulate non-industrial matters cannot be given or extended by consent, and that any provision in a collective agreement or an award of this character will be struck down as an excess of jurisdiction.²²

Since the passage of the Industrial Conciliation and Arbitration Amendment Act 1970, however, the jurisdictional requirement has been enhanced by the division of disputes into disputes of interest (created to procure industry-wide awards) and disputes of right (involving any dispute that is not a dispute of interest, including *inter alia* disputes over the interpretation and application of existing awards).²³ The 1970 amendment also introduced separate procedures for the settlement of rights disputes (invoked by convening a disputes committee with power to bind parties subject to a right of appeal or the dispute being referred to the Arbitration Court for a final and binding settlement). The present Act reproduces these procedures in substantially unaltered form,²⁴ and being available only in respect of "disputes" they are similarly circumscribed by the concept of industrial matters. This means that in addition to the former prohibition on non-industrial award clauses, the Arbitration Court (or at first instance a dis-

¹⁸ Industrial Relations Act 1973, s. 2.

¹⁹ Industrial Conciliation and Arbitration Act 1894, adopted soon thereafter by the States and Commonwealth of Australia. For an historical account of the similarities of language in these statutes see *Australian Tramway Employees' Association v Prahran and Melvern Tramways Trust* (1913) 17 C.L.R. 680 (H.C.A.), at 697-99 per Isaacs and Rich J.J.

²⁰ See the authorities cited in Mazengarb and Smith's *Industrial Law* (4th ed., 1975; Smith, Szakats and Schellevis eds.), notes on s. 2, at 11.

²¹ Cf. now, ss. 82 and 83 of the Industrial Relations Act 1973, granting industry-wide coverage formerly reserved for awards to collective agreements reached in conciliation.

²² See *New Zealand Waterside Workers' Federation I.A.W. v Frazer* [1924] N.Z.L.R. 689, particularly at 710-11.

²³ See now, Industrial Relations Act 1973, s. 2.

²⁴ Industrial Relations Act 1973, ss. 115-116.

putes committee) is also denied jurisdiction to bind parties in respect of non-industrial matters during the currency of an award.²⁵

By virtue of this embargo either party to the industrial relationship can, with impunity, seek refuge under the Act and claim immunity from the other's demands. Although issues arising within the general spectrum of employment relations may be of pressing concern to a particular party, they cannot be pursued if beyond the statutory definition of "dispute".²⁶ Courts in the exercise of their functions have held fast to the definition in insisting that the character of a demand is unaffected by and, for determining whether there exists a "dispute", assessed independently of industrial action taken in support of the demand.²⁷ Indeed the jurisdictional concept of "dispute" is a double-edged constraint in this regard—for what freedom may remain to go outside the Act to force agreement on matters beyond the Act's jurisdictional limits, the Commerce Amendment Act 1976 excludes by creating the offence to strike or lockout "concerning a matter [w]hich is not an industrial matter".²⁸

Thus, an Arbitration Court ruling that a demand is "non-industrial" preserves only the legal freedom to negotiate informally outside the Act via request without coercion. This is not to imply that informal "house agreements" on contentious matters are never reached in this way.²⁹ But in the absence of bargaining power, how often will a reluctant party concede to, or even consider, the other's request? Also, in the event of a party's refusal to consider the other's demand how realistic is it to insist the latter simply accept that refusal—and invoke none of the forms of direct industrial action traditional to the management-union relationship—on the strength of an external ruling of the Arbitration Court that a matter is "non-industrial"?³⁰ Observe the leading case on industrial matters in New Zealand, discussed presently.³¹ No sooner had the Industrial Court ruled the ANZ Bank's staff-

²⁵ Hence the decision in the *ANZ Bank* case, *supra*, note 7 (discussed *infra*). For analysis of this decision, see P. A. Joseph, *The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand*, Legal Research Foundation Publication No. 17, 1980, examining generally the Act's jurisdictional requirement.

²⁶ See the *ANZ Bank* case, *ibid*.

²⁷ *Australian Federation of Air Pilots v Flight Crew Officers Industrial Tribunal* (1969-70) 119 C.L.R. 16, at 39 per Taylor J. See also *Cromwell and Bannockburn Colliery Co Ltd v Otago Board of Conciliation* (1906) 25 N.Z.L.R. 986, per Cooper J.

²⁸ Section 119B; by virtue of s. 119A the term "industrial matter" having the meaning assigned by s. 2 of the Industrial Relations Act 1973. The s. 119B offence is notable in that, in addition to imposing criminal liability, the section also imposes civil liability at the suit of any person suffering loss or damage "as if the strike or lock-out were a tort independently of this section"; s. 119B(3).

²⁹ E.g., see the New Zealand Oil Industry Redundancy agreement (operative as from 2 December 1980 for a period of 12 months certain, and thereafter subject to either party wishing to review the agreement), containing relocation, retraining and redundancy compensation clauses applying in the event of new computer technologies affecting workers by status or loss of job. See also the agreement dated 10 April 1981 between the Hawkes Bay Farmers' Meat Co and the N.Z. Freezing and Related Industries Clerical Officers' I.U.W., noted *Mazengarb's Industrial Law Bulletin*, Vol. 1 Issue No. 1, July 1981, at 9-10.

³⁰ Cf., Commerce Amendment Act 1976, s. 119B, *supra*.

³¹ *ANZ Bank* case, *supra*, note 7.

loan policy to be non-negotiable by the union than strike action secured the compromise which that ruling precluded through the formal disputes procedure.

As a matter of practicality and law, therefore, one would expect the judicial construction of industrial matters to embrace all bargaining subjects common to employment relations (no less, subjects peculiar to particular employment relations). If the object of the legislation is to institutionalise—not outlaw—industrial conflict, then there is much to be said for one early New Zealand judge who refused to limit the legislation: “‘Industrial matters’ as defined”, Stout C.J. said, “include every kind of dispute that can arise between an employer and his workmen”.³² Yet this is not the benchmark courts have adopted.

(b) *The ANZ Bank case*

The Arbitration Court in the *Law Practitioners* case offered no analysis of the term “industrial matters” other than to observe:

... the scope of the section is well discussed in *New Zealand Bank Officers I.U.W. v Australia and New Zealand Banking Group Limited*, I.C. 71 of 1977, a decision of the Industrial Court delivered by Jamieson J. In that case, although the factual issue was quite different, there is a full discussion of the phrase ‘industrial matter’ and we set out hereunder some lengthy quotations from that decision.³³

The *ANZ Bank* decision and the authorities on which it is based have been examined elsewhere.³⁴ However the criticism of the reasoning in that case³⁵ is worth repeating for it applies equally to the Arbitration Court’s ruling on the technology question. In the Industrial Court Jamieson J. observed the similarities of language between the equivalent Australian and New Zealand statutes, determined that the Australian cases are “of strong persuasive authority” in New Zealand, and resolved “[w]e may start with *Clancy’s* case”. In fact it is by reason of this eager acceptance of *Clancy’s* case that Jamieson J.’s decision has been severely criticised: if one examines the many subsequent Australian authorities³⁶ it is seen that these simple reiterate the construction upon which the judges in this early case seized.

Clancy was a 1904 decision of the High Court of Australia holding that the regulation of shop trading hours of butchers’ shops did not so proximately affect the employment relationship as to qualify as an industrial matter.³⁷ The Court focussed on the first limb of the definition pertaining to “work done or to be done by workers”.³⁸ According to the High Court,

³² *Taylor and Oakley v Mr Justice Edwards* (1900) 18 N.Z.L.R. 876 (C.A.), at 885.

³³ Transcript, at 4.

³⁴ P. A. Joseph, *supra*, note 25. For further analysis of the authorities, see J. Hughes, *Redundancy and the Law in New Zealand* (1980) 9 N.Z.U.L.R. 122, at 125-134 and 138-142.

³⁵ Joseph, *ibid.*

³⁶ Listed by Jamieson J. in the *ANZ Bank* case, *supra*, note 7 (cited ironically by counsel for the Bank Officers’ union); and see generally the cases discussed in the articles, *supra*, note 34.

³⁷ But see the Shops and Offices Act 1955, s. 3, deeming the question of shop-trading hours in New Zealand to be an industrial matter for purposes of the Industrial Relations Act 1973. See now Shop Trading Hours Act 1977.

³⁸ Industrial Relations Act 1973, s. 2.

this must be construed to mean “work *actually* done by the employee or *actually* provided by the employer to be done, that is, as he thinks fit to provide, but that they do not in any way refer to the quantity of work which the employer is to provide. . . . they [the words in question] have nothing to do with prescribing what work shall be provided by an employer”.³⁹ In this construction, Griffiths C.J. emphasises the word “actually”. But:

. . . unfortunately the word does not appear in the statute. Nor is there any statutory direction that ‘work done or to be done’ means work *actually* provided by the employer ‘as he thinks fit to provide’. No doubt a worker engaged solely on piece rates would be surprised to learn that industrial matters has ‘nothing to do with prescribing what work (if any, according to the same judge) shall be provided by the employer’.⁴⁰

Was not the concession Griffiths C.J. made inevitable, therefore?

. . . there is a visible difference between this construction and the words of the section. The point did not pass unnoticed. The Chief Justice conceded that ‘in one sense’, though without explaining in *which* sense, the regulation of shop trading hours did fall within the definition. The extent of the explanation offered was that ‘[e]vidently some limitation of the meaning [of industrial matters] is necessary’.⁴¹

However, whatever the viability of the High Court’s construction upon this first limb the answer it gives to the technology question is clear. If industrial matters have nothing to do with “the quantity of work which the employer is to provide”, or indeed with “what work shall be provided”,⁴² then they have nothing to do with the introduction of computer technology affecting both the type and quantity of work the employer provides. It was as though to clarify this that the second judge in *Clancy*, O’Connor J., instanced the railway’s automatic fuel feeder, the introduction of which his Honour said “would very largely affect the amount of work to be done by employees”.⁴³ Yet “[c]ould it be contended for one moment that there was jurisdiction in the Arbitration Court to prohibit the use of such apparatus on the ground that it affected the work to be done . . .”, his Honour asked, “or that it had power to direct what kinds of machinery should be used . . . ?”⁴⁴

Significantly, O’Connor J. was not contending that the introduction of this labour-saving device would *not* affect the work to be done, which is all the definition requires, but rather that it would only indirectly do so.⁴⁵ In

³⁹ *Supra*, note 9, at 202-203 per Griffiths C.J. (emphasis added).

⁴⁰ Joseph, *supra*, note 25, at 14.

⁴¹ *Ibid.*, quoting Griffiths C.J., *supra*, note 9 at 202.

⁴² Per Griffiths C.J., corresponding to note 39.

⁴³ *Supra*, note 9, at 206.

⁴⁴ *Ibid.*, at 206-207.

⁴⁵ See also *R v Commonwealth Conciliation and Arbitration Commissioner ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443, at 450 per Barwick C.J.: “Demands which in themselves do not directly involve the [employer-employee] relationship will not be industrial in the relevant sense, however much the relationship . . . may be *indirectly* affected by the result of acceptance or refusal of the demand.” For comment, see Joseph, *supra*, note 25, at 30-32.

explanation, his Honour pointed to the need to judicially curtail the Act: “[O]nce we begin to introduce and include in . . . [industrial matters] matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part”.⁴⁶ Even on the basis of O’Connor J.’s example, however, the distinction (between matters directly and indirectly affecting work to be done) does not withstand analysis. Simply, how could the introduction of the automatic fuel feeder, which on O’Connor J.’s admission “would very largely affect the amount of work to be done”,⁴⁷ be categorised as only indirectly affecting work done or to be done? Bearing in mind that the adverbs underlying O’Connor J.’s distinction are separated in meaning by degree only, this is tantamount to saying that the introduction of this device would *very largely, only indirectly* affect the work to be done; or, to reverse matters, that an employer decision directly, but scarcely, affecting the work process qualifies as an industrial matter.

In the *Law Practitioners* case, the Arbitration Court approved two further statements⁴⁸ which Jamieson J. quoted from *Clancy*. First:

The words ‘privileges, rights or duties of employers or employees in any industry,’ clearly refer to matters of mutual obligation. They imply *ex vi termini* that there are two parties, one of whom owe a duty or possesses a right as against the other.⁴⁹

This statement pertains to the second limb of the definition but which, in this dictum, is construed to exercise effectively the word “privileges” from the section. The limitation this imposes is illustrated by the *ANZ Bank* case in which employees’ privileges were unilaterally withdrawn without, it was held, creating a “dispute”. The Bank Employees’ Union sought to invoke the disputes procedure in its award to negotiate the Bank’s proposal to alter its policy of providing low-interest staff loans. Clearly this was a proposal “affecting or relating to . . . privileges . . . of workers” in the banking industry in the employ of this particular Bank, but because “[t]he award contains nothing to create any rights or duties in relation to the availability of staff loans” there was held to be no “dispute” by which to invoke the dispute of rights procedure.⁵⁰

A decision that technological change in the workplace is of the same status as the Bank’s staff loan policy requires more, however, than just confining this second limb to rights and duties *stricto sensu*: it necessitates either a refusal to recognise the inclusion of this limb or that it be further confined to include only those rights and duties which the first limb words “work done or to be done” contemplate. This is discussed below.

The second statement approved from *Clancy*, consistently with other judicial dicta of the period, epitomises why courts at the turn of the century sought to limit the legislation for the express purpose of preserving employer

⁴⁶ *Supra*, note 9, at 207.

⁴⁷ *Ibid.*, at 206.

⁴⁸ At 271.

⁴⁹ (1904) 1 C.L.R. 181, at 201 per Griffiths C.J.

⁵⁰ *ANZ case*, *supra* note 7, per Jamieson J.

freedoms. As the argument to exclude the early case-law on this basis has been fully explored elsewhere, the following is but a reference to it.⁵¹

In *Clancy*, Griffiths C.J. cautioned:

In construing the [Industrial Conciliation and Arbitration] Act it should be borne in mind that it is an Act in restriction of the common law rights of the subject, and . . . it is a reason why the meaning should not be strained as against the liberty of the subject.⁵²

The “subject” was, of course, the employer who, until the introduction of industrial conciliation and arbitration, enjoyed unmitigated freedom of contract in employment relations. The mechanics of the market theory of the period reveal why it was imperative for the commercial courts to legally guarantee that freedom,⁵³ even if it meant disavowing in part the statutory language of industrial conciliation and arbitration.

“Competition is the life of trade”, one judge of the period remarked, “I can see no limit to competition.”⁵⁴ This was not simply a formula for economic efficiency, but rather the grundnorm of a political economy. It converted courts to the belief that “[a]ll the law has to do . . . is secure a fair field for the unrestricted exercise of industrial enterprise”.⁵⁵ Assuming many traders in competition, each so small that individual traders responded only to movements in price determined by supply and demand:

. . . price flexibility was the best guarantee that the community’s resources would be put to their most socially desired uses. In the ideally functioning economy which the model implied, movement in price monitored a movement of resources to and from economic sectors that served the consumers’ wants. To ensure the proper functioning of the model it was essential, therefore, for there to be perfect resource mobility. It was essential, *therefore*, for the employer, the owner or organiser of productive capital, to be free from any restriction individually or collectively imposed by labour on his entrepreneurial activity.⁵⁶

The employment contract defining the incidents of service was developed in this light, as a period response that would tolerate no impediment to the free functioning of the market. Indeed, as Selznick observes “[a] truly contractual theory of employment did not emerge until the concept of a

⁵¹ See P. A. Joseph, *Management’s Labour Relations Prerogatives and the Unproductive Debate: Still the Classical Economics and the Entrepreneur’s Lot* (1979) 14 U.B.C. Law Review 75.

⁵² *Supra*, note 49. See also *Australian Tramway Employees’ Association v Prahran and Melvern Tramway Trust* (1913) 17 C.L.R. 680 (H.C.A.), at 687 per Barton A.C.J.: “[T]he common law rights of citizens are to be regarded as unhampered except so far as a Statute diminishes them expressly or by necessary implication. Certain rights then remain with an employer. He may . . . carry on his business in such . . . manner as seems best to him, and he may decline to give employment except on such conditions as he thinks conducive to the success of his enterprise.”

⁵³ See Joseph, *supra*, note 51, at 85-95.

⁵⁴ *Mogul Steamship Co v McGregor Gow & Co* [1892] AC 25 (HL), at 50-51 per Lord Morris.

⁵⁵ Quoting from the Ninth Report of the Royal Commission of Inquiry into the Organisation and Rules of Trade Unions (1869) (UK), para. 64.

⁵⁶ Joseph, *supra*, note 51, at 132-133.

free market gained ascendance in economic life".⁵⁷ But to ensure a relationship of command and servility, the theory could not afford to be consistent—the contractual imperative for a free labour market (effected principally by developing the common law concept of wrongful dismissal⁵⁸) did not prevent courts adapting the notion of sovereign authority from earlier master-servant law:

Though labour too was a resource commending mobility, it was not the resource by which society measured its wealth. The employer, as entrepreneur, was the figure to whom the common law responded. He was the instrument of resource reallocation: it was *his* property, and *his* use of it, that would prevent 'a waste'.⁵⁹

Historically, what is most peculiar about industrial conciliation and arbitration is that it was conceived amid this thinking, yet was anathema to it. As a system of state regulation of labour disputes, it threatened to supplant the employer's common law—contractual—rights to conduct his business free from the restrictions labour sought to impose. These indeed were the "common law rights" of which Griffiths C.J. spoke,⁶⁰ and which the early courts sought to preserve against the state's intrusion.

But do they still warrant the restriction these courts imposed on the legislation? Consider what has happened since the first conciliation and arbitration statute, not least the complete transformation of the market that commended the theory to which courts in *Clancy's* time responded. Observe the intensifying concentration of post-war industry. In 1976 the markets of nearly one third of all New Zealand industries were dominated by the three largest enterprises in each market, these enterprises aggregating between 67-100 percent of the total output/sales in each of these markets.⁶¹ (Ironically, the high capital requirements of post-war technology is identified as a principal cause of the concentration of capital accompanying this degree of market power.⁶²) It suffices to add that this does not compare with the notion of many small traders in competition, ensuring the efficient allocation of the community's resources exclusively in response to market price fixed by supply and demand.

(c) *Technology and "industrial matters"*

The importance of the *ANZ Bank* decision for New Zealand's industrial

⁵⁷ P. Selznick, *Law, Society and Industrial Justice* (1969), at 130-131.

⁵⁸ Extending a limited right to damages but excluding the remedy of specific performance; see respectively *Addis v Gramophone Co* [1909] AC 488 (H.L.) and *New Zealand Dairy Factories and Related Trades Employees' IUW v New Zealand Co-operative Dairy Co* [1959] N.Z.L.R. 910. Selznick, *ibid.*, at 135 comments "the main economic significance [of this concept] was the contribution it made to easy layoff of employees in response to business fluctuations". See further, Joseph, *supra*, note 51, at 89-94.

⁵⁹ Joseph, *ibid.*, at 132-133.

⁶⁰ See the dicta quoted, *supra*, text corresponding to and in note 52.

⁶¹ See J. Ellis, *Industrial Concentration*, Research Paper No. 20, N.Z. Institute of Economic Research (1976). For further empirical evidence of the extent of separation of ownership and control in New Zealand companies, see G. Fogelberg, *Changing Patterns of Shareownership in New Zealand's Largest Companies*, Research Paper No. 15, Dept. of Business Administration, Victoria University of Wellington (1978). For discussion, see Joseph, *supra*, note 51, at 122-126.

⁶² See Shonfield, *supra*, note 10, at 373-74.

system this decade cannot be under-estimated. Never in New Zealand had the question of industrial matters been fully explored, and one might speculate that but for this decision the Australian authorities commencing with *Clancy* might never have achieved prominence in a New Zealand court; apart from one 1951 Court of Appeal decision,⁶³ only in the early cases dealing with the preferential employment question had the definition been judicially considered.⁶⁴

What cannot now be doubted, however, as a result of the *ANZ Bank* decision, is that there is in New Zealand a *sui generis* body of matters deemed "industrial" beyond which unions cannot formally negotiate. Only by reference to the early decisions drawing on contractual and master-servant analogies can today's courts distinguish these from, in particular, "managerial" matters. The Australian courts are adamant, to quote Barwick C.J.: "Whilst it is a truism that both industrial disputes and awards made in their settlement may consequentially have an impact upon the management of an enterprise and upon otherwise unfettered managerial decisions, the management of the enterprise is not itself a subject-matter of a industrial dispute."⁶⁵

It was on this basis that the Clerical and Office Staff Employees' attempt to secure the right to consultation prior to managerial decision to install word processing machines failed, as being managerial and not industrial in character. Yet wherein lies the statutory justification for this decision? The first limb of the definition of industrial matters embraces "all matters affecting or relating to work done or to be done by workers".⁶⁶ The installation of word processing machines not only affects or relates to "work done or to be done", it clearly changes it both as to the nature and quantity of work provided or to be provided pursuant to the employees' contracts of service.⁶⁷ Consider also the second limb of the definition, embracing "all matters affecting or relating to . . . the privileges, rights, and duties of employers or workers in any industry". If the introduction of technology enables the employer to reduce his labour force, does not the decision to install it affect the rights of workers? A decision to introduce, for example, word processing machines is a decision *inter alia* to create redundancies⁶⁸ which is a decision to terminate the existing right to employment secured by the employees' contracts of service; whether the reason for termination be justifiable or otherwise⁶⁹ the definition unambiguously speaks of matters

⁶³ *Wilson and Horton Ltd v Hurlle (Inspector of Awards)* [1951] N.Z.L.R. 368, upholding an award clause requiring payment for travelling time but without referring to the Australian authorities.

⁶⁴ See *Taylor and Oakley v Mr Justice Edwards* (1900) 18 N.Z.L.R. 876 (C.A.); *Magnor v Gohns* [1916] N.Z.L.R. 529 (C.A.); *Butt v Frazer (Judge of the Court of Arbitration)* [1929] N.Z.L.R. 636 (Full Ct of the S. Ct.); *Federated Seamen's Union v Sanford Ltd* [1930] N.Z.L.R. 460 (C.A.); *Wood v Thomson and the N.Z. Seamen's Union* [1972] N.Z.L.R. 53 (C.A.).

⁶⁵ *R v Commonwealth Conciliation and Arbitration Commissioner, ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443, at 451.

⁶⁶ Industrial Relations Act 1973, s. 2 (quoted in full *supra*).

⁶⁷ See Part II, *infra*.

⁶⁸ *Ibid.*

⁶⁹ Cf., Industrial Relations Act 1973, s. 117.

affecting the rights of workers, and the Arbitration Court has always insisted that workers within its principal jurisdiction are distinguished by their engagement under such a contract.⁷⁰

Indeed, does not the second limb speak also of the privileges and rights of employers? This embraces the notion of managerial prerogative itself, managerial prerogatives being either privileges or rights employers enjoy. By the same fact a management-union difference over the exercise of an assumed managerial prerogative is a difference in relation to an industrial matter which, by virtue of the compulsory bargaining procedures of conciliation and arbitration, extinguishes the unilateral right of decision that managerial prerogative implies. Viewed thus, the statutory definition excludes the very distinction (between "managerial" and "industrial" matters) which the *ANZ Bank* case incorporated from the Australian decisions and on which the Arbitration Court relied to uphold the employer's unilateral right of decision to introduce computer technology.

PART II

D. THE LAW PRACTITIONERS' CASE

(a) *The immediate impact of the decision*

Various word processing systems are available in New Zealand.⁷¹ Broadly, word processors are electronic systems which prepare, edit, store and retrieve text, either as a "stand alone" device (in which the entire system is contained in one desk-sized unit), or as part of a "shared logic" system (in which several units share a wider storage and processing facility). The potential of the machine in terms of production and reduced overheads has led to it being described as "the saviour of the New Zealand legal practice".⁷² The machine has also been viewed as "a major threat to office employment levels which threatens to . . . deskill . . . dehumanise and reduce the career prospects for typists".⁷³

In the *Law Practitioners'* case the union's original claim in conciliation was:

- (a) Where the employer is contemplating the introduction of new computer technology including word processing machines, the employer shall have full discussions and consultations with the delegate and union concerned prior to such decisions being made.
- (b) Where any dispute arises in relation to this clause and cannot be disposed of by the employers' and workers' representatives the provisions of [the dispute of rights procedure] shall apply.⁷⁴

⁷⁰ E.g., see *McMullin Holdings Ltd v Auckland Clerical Workers' I.U.W.* [1969] N.Z.L.R. 530 (Ct. Arb.). Cf., Part X of the Industrial Relations Act 1973.

⁷¹ See generally D. Orme, "Word processing for Law Firms", (1979) NZLJ 211 and "Word Processing—Coping with Changes in Technology in Your Firm" (1979) NZLJ 243.

⁷² In an article of that title by B. D. Thomas (1980) NZLJ 302.

⁷³ Combined Unions National Servicing Office, "Report Back of the Inter-Union Working Party on New Technology" unpublished paper, September 1979, para. 1(e).

⁷⁴ At 268.

The clause ultimately fixed by the Court (Sir Leonard Hadley dissenting) read:

- (a) When an employer is considering the introduction of new computer technology (including word processing machines) the employees likely to be affected by any decision arising therefrom will be first advised.
- (b) When an employer has decided to introduce such technology the employer concerned shall consult fully with the employees affected and the representative of the union.
- (c) When the introduction of such technology will result in redundancies, the employer concerned shall notify the union to enable discussions on redundancy to take place. Such notification shall be in accordance with [the redundancy] . . . clause of this award.
- (d) The award has been issued accordingly including the Memorandum as set out above.⁷⁵

The significant difference between the claim and the eventual clause lay in the latter's absence of any reference to resolution through the disputes procedure in the award. Thus, once the employer has fulfilled his or her obligation to consult, "the matter is at an end".⁷⁶

The written submissions to the Court concentrated principally on technological and economic matters.⁷⁷ However, the Court's decision that the installation of word processors was not an "industrial matter" and could not give rise to a dispute under the Industrial Relations Act was purely legal and based upon the analysis of "industrial matters" set out in the *ANZ Bank* case, which was cited at length in the judgement of Horn C.J. In particular his Honour stressed that the Act "does not commit . . . authority to regulate generally the manner in which the industry shall be carried on".⁷⁸ The decision to install new machinery was "a decision for the employer".⁷⁹

At the heart of the dispute lay the question of control over work, "the central issue in industrial relations".⁸⁰ The written submissions of the Union concentrated on a demand for "the maximum amount of consultation with unions and workers"⁸¹ before the installation of new computer technology and denied that this amounted to an attempt to control the introduction of technology.⁸² The New Zealand Employers' Federation (NZEF) argued that "the aim is 'participation' which in turns implies 'control'".⁸³ The

⁷⁵ New Zealand (excluding Northern and Taranaki Industrial Districts) Law Practitioners' Award, Arbitration Court of New Zealand, Document 586.

⁷⁶ Dissenting Opinion of Sir Leonard Hadley, *ibid.*

⁷⁷ We are obliged to Mr Paul Duignan, research worker with the Federation of Labour, for full copies of the written submissions in the case.

⁷⁸ Citing *Cocks'* case.

⁷⁹ At 273.

⁸⁰ J. Purcell and R. Smith, "The Control of Work", London, 1979 page 1.

⁸¹ *Submissions*, page 20.

⁸² *Ibid.*, p.2.

⁸³ *Submissions*, page 3.

argument is not new to industrial relations in New Zealand.⁸⁴ For present purposes the legal significance of control is twofold. First the presence of control is an important element in identifying the contract of employment (the legal relationship upon which much of the Act is based),⁸⁵ although the emphasis has shifted from actual control⁸⁶ to a right of control in peripheral aspects of work.⁷⁷ Here it has been argued that the essence of the control test is to be found in the terms of the contract⁸⁸ which in this context incorporate the provisions of the relevant award by virtue of section 231 of the Act. Since all awards severely curtail the employer's right of control (or managerial prerogative) by virtue, *inter alia*, of containing the section 117 personal grievance procedure, it would appear that recognition of the claim in the *Law Practitioners'* case would present no conceptual difficulties in purely contractual terms. Nevertheless the same issue of managerial prerogative is relevant to the second legal issue raised, whether the question was an "industrial matter" and thus capable of resolution by a disputes committee. Here the Court accepted the argument of the N.Z.E.F., Horn C.J. stating that "provision for reference to a disputes committee and ultimately a reference to this Court, could be used as a matter of control"⁸⁹ which took the claim beyond the boundaries of "industrial matters". It might be argued that "control" from one side or another is never absent from the legal relationship of employer and worker and that the primary purpose of the disputes procedures under the Act is to regulate negotiation concerning such matters. Further, that the post-installation dispute as to the consequences of introduction, which the Court seemingly contemplated, might have the same effect of "controlling" technology in practice.⁹⁰ However, the following discussion will be restricted to the immediate implications of the Court's decision for the law on industrial negotiation contained in the Industrial Relations Act 1973. As noted above the Court "does not regard itself as bound by any factual precedent in matters of arbitration". Recognising that "different approaches may need to be adopted for other industries as further technological changes occur"⁹¹ Horn C.J. referred to "industrial matters" as at present understood.⁹² Yet there is nothing to suggest that any radical revision in the Court's view of its jurisdiction will occur in the near future.

⁸⁴ It lies at the heart of discussions on "industrial democracy". See New Zealand Employers' Federation "Employee Involvement", Wellington 1977, D. Smith, "The Employers' Federation Declares its Hand" (1978) 28 Lab. and Emp. Gazette, No. 2, p.71 and R. G. Trott "Worker Participation—A Trade Union Viewpoint", (1978) 28 Lab. and Emp. Gazette, No. 3, p.21.

⁸⁵ See the definition of "worker" in s. 2 of the Act.

⁸⁶ See Bramwell L.J. in *Yewens v Noakes* (1880) 6 Q.B.D. 530 at p.532.

⁸⁷ See *Zuijs v Wirth Bros. Pty. Ltd* (1955) C.L.R. 561 at pp.570-571. Though not without criticism: C. P. Mills, "Defining the Contract of Employment" (1979) Australian Business Law Review 229 at pp.239-241.

⁸⁸ Mills, *ibid.*, page 245.

⁸⁹ At 271.

⁹⁰ See further J. Hughes, *op.cit.* n.34

⁹¹ At 267.

⁹² At 273.

(b) *Implications for informal bargaining*

Before considering the long-term implications of the *Law Practitioners'* case for bargaining within the framework of the Act, one wider implication is worth noting. Commenting on a submission that the Minister of Labour had indicated that the new technology was an apt subject for bargaining, Horn C. J. remarked that:

We do not suggest, by any means in this decision, that we wish to impose or suggest that there should be any constraint on full negotiation and bargaining between unions of workers and unions of employers as well as between individual employers and unions on questions of technological changes in industry whether general or particular.⁹³

With respect it is difficult to reconcile this statement with the effect which the decision seems likely to have—precluding bargaining within the formal industrial conciliation and arbitration system on the introduction of technology. Not only will the decision seemingly affect future disputes of interest in this way but also the renegotiation of those awards currently containing clauses which contemplate the use of the dispute of rights procedure on the issue of installation. Such clauses fall into two broad classes. First, a clause aimed primarily at protecting the individual worker from the consequences of the technology, by precluding alteration of workers' positions until the change in work methods has been discussed.⁹⁴ Secondly, a clause aimed more broadly at joint investigation of the technology itself, for example:

Where in any establishment there is likely to occur or appears likely to occur a displacement of a worker or workers due to the advent of automated methods of manufacture, the question shall be jointly investigated by representatives of the workers' and employers' organisation as they may arrange. Failing agreement the matter shall be dealt with [under the disputes of rights procedure in the award]. Attention is drawn to the provisions . . . for the settlement of Personal Grievances.⁹⁵

The resolution of such disputes now appears to be a matter beyond the jurisdiction of the relevant committee or of the Arbitration Court.⁹⁶ Thus it may be predicted that one effect of the *Law Practitioners'* decision will encourage the growth of "informal" bargaining outside the ambit of the Industrial Relations Act. Indeed, it may be that Horn C.J. was referring to such bargaining in commenting on the submission above. Little recent research is available on the extent to which unions and employers negotiate

⁹³ At 272.

⁹⁴ A fairly common clause in airline awards. See Cl. 13 of the Air New Zealand Limited, Safe Air Limited Aerial Employers' Award (1979) Book of Awards 4077 and Cl. 17 of the Societe Internationale de Telecommunications Aeronautiques Societe Co-operative Clerical Employees Voluntary Collective Agreement (1979) Book of Awards 8757.

⁹⁵ Cl. 23(A) of the W & R Fletcher (New Zealand) Limited Matura Employees Voluntary Collective Agreement (1979) Book of Awards 4629. See also Cl.22(a) of the New Zealand Dairy Factories Employees Award (1979) Book of Awards 10927.

⁹⁶ See generally *New Zealand Waterside Workers' Federation I.A.W. v Frazer* [1974] NZLR 689, at page 710 per Salmond J.

outside the formal system⁹⁷ but informal or unregistered house agreements are common. Machinery similar to that employed in negotiating voluntary collective agreements under the Act could be utilised without difficulty and without eventual submission of the agreement to the Court. Those factors which lead to the popularity of voluntary collective agreements—ease of administration, negotiating advantages and “individualisation” of issues⁹⁸—apply equally to informal bargaining. It has recently been held that an unregistered industrial agreement between a union and an employer is not a contract enforceable by an individual employee, albeit a member of the union.⁹⁹

(c) *What negotiable issues are left within the formal framework?*

(i) *Effects of installation on working conditions*

The National Computer Centre (U.K.) has identified eight stages in the introduction of micro-electronic technology into the workplace:

1. Before microprocessors are considered
2. Initial study
3. Feasibility study
4. Systems analysis and outline design
5. Systems design, programming and implementation planning
6. Installation, testing and implementation
7. Day to day running
8. Review and continuing development.¹

To adopt the terminology of industrial negotiation, the introduction of micro-processors is a “perishable issue” in that, once the decision is taken to introduce the equipment, the range of negotiable items diminishes. As progress is made through stages one to eight the negotiable issues will narrow, making it difficult to reverse decisions taken at the previous stages and leaving little opportunity to bargain on what are considered to be objectionable features of the technology: “[once] a system has been designed, changes are difficult to effect and important features of job content and promotional opportunities are set”.² In holding that “the introduction of any new machinery or method into a workplace is a decision for

⁹⁷ See D. F. Smith and D. J. Turkington, “A Profile of Voluntary Collective Bargaining in New Zealand”, Wellington, 1981. For an earlier paper see M. A. Wilson, “Collective Bargaining in New Zealand Outside the Industrial Conciliation and Arbitration Act”, (1970), Auckland University Law Review, 37.

⁹⁸ See “The Role of Voluntary Collective Agreements”, Labour and Employment Gazette, Vol. 31, No. 1, March 1981, 36.

⁹⁹ *Re Andrew M. Patterson Ltd*, unreported, High Court, Auckland 7 December 1981, M. No. 1080/80, Prichard J.

¹ H. Farrow, “Computerisation Guidelines”, Manchester, 1979, pp.21-27 (cited by A. Francis, and P. Willman, “Microprocessors: Impact and Response”, Personnel Review Vol. 9, No. 2, p.9).

² Francis and Willman, *op.cit.*, at p.15 who point out nevertheless that microprocessors can be reprogrammed at relatively low cost.

the employer”³ the Arbitration Court has clearly established that stages one to five of the introductory table are beyond the formal boundaries of negotiation under the Act and outside the jurisdiction of the Court itself. The Court accepted nevertheless that

the consequences to employees resulting from such a decision may well be industrial matters. Methods of operating, even methods of installation, where they affect working or operating conditions may be within the scope of ‘industrial matters’ and could be covered by award provisions including disputes procedures.

Also that “. . . [a] retraining scheme in preparation for redundancy, . . . might be the subject of a claim relating to an industrial matter if the retraining takes place whilst the relationship (i.e. employer and employee) enures”.⁴ Nevertheless, by effectively excluding the possibility of formal negotiation at the stage of, say, feasibility study and systems design, the Court has reduced the practical effect of such a “residual” right to challenge consequences insofar as working or operating conditions are concerned. The negotiations which take place will concern options which have hardened simply by virtue of the equipment having been installed.

In examining the consequences of the introduction of micro-electronic technology, union negotiators confront the same dilemma as that raised by redundancy generally: the union is faced with a threat the inevitability of which it may not be willing to concede, yet it must ensure that its members are protected if the threat is realised.⁵ In the *Law Practitioners’* case the dilemma was reflected in the union’s attack upon the technology for its effect upon working conditions taken with its claim that the introduction of the equipment represented “an undeniable progression which should be recognised in the rate of pay for word processor operators”.⁶ The threat to working conditions allegedly posed by word processors falls into three main categories: danger to health, loss of work skills and reduced job satisfaction (the same adverse consequences allegedly ensuing from other micro-electronic technology). Whilst the Arbitration Court recognised that some consequences of the installation of word processors would be industrial matters the Court did not deal with such consequences in detail. However there is clear authority that dangerous aspects of working conditions fall within the scope of industrial matters and are open to negotiation and eventual arbitration.⁷ Thus claims that word processors are unacceptably

³ At 273.

⁴ At 273, quoting the supplement to Vol. 1 of D. L. Mathieson, “Industrial Law in New Zealand”, Wellington, 1970, at p.73.

⁵ The adage that on being told to unite with nothing to lose but their chains the response of many New Zealand unions would be to negotiate a chain allowance, may arise from such a dilemma.

⁶ Page 9 of the applicants’ submissions.

⁷ *Australian Federation of Air Pilots v Flight Crew Officers Industrial Tribunal* 42 A.L.J.R. 44.

noisy and "cause eye strain . . . posture problems [and] pose a radiation hazard" may legitimately give rise to a dispute under the Act.⁸

It is arguable that the effect of word processors upon work skills and job satisfaction also falls within the definition of the "industrial matter." One criticism of the new technology is that its capacity to monitor individual workers' productivity may lead to occupational stress.⁹ For example, the Universal Product Coding system (UPC) imprints codes on products which are read by a Point of Sale terminal (POS), a computerised scanner at the check-out counter, obviating the need for individual pricing. The POS monitors work performance by keeping a check on the speed of transactions which the operator carries out.¹⁰ Similarly many word processors can be programmed to issue instructions and even disciplinary warnings if input speeds or time at the machine do not meet the employers' targets.¹¹ Thus the technology may be used both to increase the pace of work and to monitor the response of individual workers to that increased pace. Where the Court can be persuaded that such a system results in occupational stress that adversely affects the health of workers, no jurisdictional problem should arise. Even where the change does not have such an effect the role of the contractual relationship in defining industrial matters should resolve any dispute as to jurisdiction since, in contractual terms, the altered conditions of work could be regarded as an attempt at unilateral variation of terms. The contractual analysis here has been said to provide "the description in legal terms of the balance between managerial prerogative and the rights of employees in relation to the terms on which they work"¹² and is thus particularly appropriate to the present issue. Nevertheless, recognition of the problem as an industrial matter is of little value without an adequate remedy and the question then arises: What remedy is available in these circumstances? The obvious answer is an award clause limiting the use of the relevant technology by excluding certain applications of it. For example, one current award dealing with efficiency speed for typographers states that "[s]peed shall not be held to constitute the sole basis of efficiency" and that "computer produced statistical data relating to output shall not be the sole basis for determining the efficiency of any operator".¹³

⁸ S. Macdonald and T. Mandeville, "Word Processors and Employment", *Jo. of Ind. Rel.*, vol. 22 no. 2, June 1980, p.137 at p.145. Similar criticisms are made of Visual Display Units (VDUs), a form of automated records management involving computerised records and microfilmed documents which are recalled from a data bank on the VDU (and which are a feature of some word processors). The Department of Health found no evidence to support allegations of radiation hazards from VDUs but did concede eyesight and posture problems, largely arising from misuse of the equipment ("Visual Display Units" Report ref. W/1/80).

⁹ L. Coutts, "Work processors take a toll of those who use them", *Modern Office and Data Management*, 31 October 1979, p.3.

¹⁰ M. Varnham, "When the Chips are Down", *Ind. Rel. Review*, Vol. 1, No. 4, November-December 1979, page 17 at p.22. See generally R. D. Lansbury, "New Technology and Industrial Relations in the Retail Grocery Industry", *Journal of Industrial Relations*, Vol. 22, No. 3, Sep. 1980, page 275.

¹¹ Association of Professional and Executive Staff, "Office Technology", London, 1979, pp.29-32.

¹² M. R. Freedland, "The Contract of Employment", Oxford 1976, p.41.

¹³ Cl. 34 of the New Zealand Metropolitan, Provincial, Suburban and other Newspapers' Printing and Publishing Employees' Award (1979) Book of Awards 2457.

In the absence of such a clause Horn C.J. noted in the *Law Practitioners'* case that "for the purposes of the present award an industrial matter includes actions . . . which may have an adverse effect on the present working conditions . . . of some workers presently in employment"¹⁴ and that "the personal grievance procedures could be used in some instances to protect the interest of a worker who is being adversely affected by any change".¹⁵ Yet, unless the change leads to the worker being treated as constructively dismissed and thus able to bring an action for unjustifiable dismissal under the section 117 grievance procedure, the alternative limb of that section would have to be adopted: that action by the employer other than unjustifiable dismissal (not being action of a kind applicable generally to workers of the same class employed by the employer) has affected the worker to his or her disadvantage. Here two problems will arise for the union. First, it seems likely that most issues relating to the introduction of new technology will be "action of a kind applicable generally to workers of the same class" and thus excluded by definition. For example, permanent selective introduction of POS terminals or word processors within the same place of employment is unlikely to occur. Secondly, even if this difficulty can be resolved, there are inconsistent judgments of the Arbitration Court as to whether any effective remedy is available under section 117 where the employer's action falls short of dismissal. In *New Zealand Insurance Guild I.U.W. v The Insurance Council of New Zealand* Jamieson J. remarked that, because subsection 7 of section 117 (which provides remedies) is confined to "the case of an alleged unjustifiable dismissal", in cases not involving dismissal the Court can do no more than "make a persuasive finding".¹⁶ However subsection 4(i) of section 117 (which applies to grievances arising both from dismissal and otherwise) states that the Court "may make a decision or award by way of final settlement which shall be binding on the parties". In a recent case Horn C.J. inferred from this latter subsection that the Court has "wide, but unspecified powers" in non-dismissal cases.¹⁷ It is respectfully submitted that Jamieson J.'s approach is more consistent with the drafting of the section. Subsection 7 since it deals expressly with the available remedies is arguably the dominant subsection in this respect, subsection 4(i) being concerned with the final stage of the standard grievance procedure. If subsection 4(i) is read subject to subsection 7 no inconsistency arises, the "decision or award" referred to by the former being limited by the plain provisions of the latter. If this is correct, failing coverage by an award provision, the worker "disadvantaged" by the introduction of new technology has no effective remedy under the grievance procedure unless he or she is dismissed or constructively dismissed.¹⁸ In both cases it seems that the introduction of the equipment would need to be selective before the section

¹⁴ At 271.

¹⁵ At 273.

¹⁶ (1976) Ind. Ct. 173 at p.179.

¹⁷ *New Zealand Bank Officers' I.U.W. v Bank of New Zealand* (1980) Arb.Ct. 155.

¹⁸ No case brought under section 117 on the basis of "constructive dismissal" has succeeded to date, although the concept has been recognised: see e.g. *Taylor v Rangiteiki Plains Dairy Company Ltd.*, (1980) Arb.Ct. 405.

could come into play at all. The same limitation would seem to apply to the use of the grievance procedure in respect of workers whose skills have been adversely affected by technological change (another category recognised as an industrial matter by Horn C.J. in the *Law Practitioners'* case).¹⁹ Here it may be noted that the new technology can have contrasting effects on skills. It may remove the traditional skills associated with a job and thus render it less satisfying (this is said to be the case e.g. with the replacement of "hot metal" typesetting with computer-controlled typesetting systems).²⁰ Yet it may increase the skill element in some tasks so as to effectively "re-skill" them. In the former case compensation will be sought for additional monotony and in the latter a higher price will be expected in reward for the increased skill involved. Despite controversy elsewhere concerning the category into which the word processor falls,²¹ in the *Law Practitioners'* case there was consensus. The Employers' Federation stressed that technological innovation offered "the opportunity for job enrichment by reducing or eliminating the need for onerous and unpleasant tasks"²² and the Clerical Workers' Union argued that the word processor "requires further operator skills than does a typewriter [and] demands not only further training but a more logical and analytical approach to the work".²³

(ii) *Retraining*

In reaching its decision the Arbitration Court remarked that "[f]actors such as retraining for other job opportunities must nevertheless be taken into account and doubtless will be looked at from time to time".²⁴ Where the need for retraining arises from the introduction of micro-electronic technology disclosure of information (and particularly the timing of such disclosure) becomes crucial. It has been suggested that the ideal stage for such disclosure is when the employer is "focussing on a range of possible choices for new technology".²⁵ But this falls within stage two of the introductory table under (i) above and is thus outside the present ambit of "industrial matters". The award clause resulting from the *Law Practitioners'* case, whilst providing for affected employees to be "advised" when new computer technology was being "considered" and for "full consultation" when the decision to install had been taken, placed no time limit on these obligations. The requirement for employees to be advised amounts to less than a requirement that information be disclosed at the initial "advisory" stage and, in view of the jurisdictional point raised previously, "consulta-

¹⁹ At 273.

²⁰ Combined Unions National Servicing Office, "Report Back of the Inter-Union Working Party on New Technology", unpublished paper, September 1979, para. 5.

²¹ See generally the Report of the Committee of Inquiry into Technological Change in Australia ("the Myers Report"), volume 1, paras. 3.162 to 3.169.

²² *Submissions*, p.17.

²³ *Submissions*, p.9.

²⁴ At 273.

²⁵ G. Baker, "Microchips and Industrial Relations", *Industrial Relations Journal*, Vol. 11 No. 5, Nov/Dec 1980 page 7 at page 15. This concern was reflected in the written submissions to the Court by the Clerical Workers' Union (at pp.15-20) and the Federation of Labour (at p.7).

tion' is permitted only after the decision to install has been taken.²⁶ Moreover these obligations are unilateral rather than negotiable in nature.

The remaining avenues for disclosure as a matter of legal obligation are slight. The Employer's Federation suggest as a general guideline that employers introducing new equipment should ensure that "all employees affected . . . receive accurate, clear and timely advice".²⁷ Yet in their written submissions before the Court in the *Law Practitioners'* case the Federation stated that "employers cannot be too specific or categorical as to the nature of these changes, particular as the nature of investment decisions often change during evaluation".²⁸ Since, by virtue of section 77(11) of the Industrial Relations Act 1973, employers are expressly excused from disclosing such information in conciliation council it seems that the accuracy, clarity and timeliness of the advice suggested by the Employers' Federation cannot be legally enforced. Nor need such advice be given at all in the absence of an award clause. Where such a clause exists an employer's failure or refusal to consult would render the employer liable to an action for breach of award. But the penalty is minimal and was described as "no deterrent" by Sir Leonard Hadley in his dissenting opinion.

Award clauses providing for retraining of workers on the introduction of new equipment or redundancy are increasingly common and present few legal difficulties.²⁹ In the former case it is usual for express provision to be made for progressive retraining of existing staff in the use of new equipment³⁰ and such provision is well within the scope of "industrial matters".³¹ Even where retraining is not mentioned in the award, clauses providing for transfer to "suitable alternative employment" in lieu of redundancy have been held by the Arbitration Court without more to "contemplate a training or retraining period, i.e. a period during which efficiency can be obtained . . . retraining is or may be part of any suitable alternative employment".³²

(iii) *Redundancy and adverse effect upon opportunities*

Horn C.J. stated that "an industrial matter includes actions which may result in the redundancy of some worker or which may have an adverse effect on the . . . opportunities of some workers presently in employment".³³

²⁶ For other limitations in the obligation to 'consult' see *Cornhill Insurance Co. Ltd v N.Z. Insurance Guild I.U.W.*, unreported, Arbitration Court, Auckland, 9 December 1981, (A.C. 162/8, D.R. 199/81).

²⁷ "Change for the Better", Wellington 1980, at p.16.

²⁸ Submissions, 6.

²⁹ For a typical example, see clause 12 of the Motueka Abattoir Company Limited Employees' Voluntary Collective Agreement (1979) Book of Awards 1277.

³⁰ See e.g. cl. 25.1 of the New Zealand Metropolitan, Provincial, Suburban, and other Newspapers' Printing and Publishing Employees' Award (1979) Book of Awards 2457.

³¹ D. L. Mathieson, "Industrial Law in New Zealand", Wellington 1970, p.258. *R v Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Ltd and Others* (1977) 16 SASR 6, Supreme Court of South Australia.

³² *New Zealand Printing and Related Trades I.U.W. v Wellington Typesetters Limited*, unreported, Arbitration Court, Wellington, 9 March 1981, (A.C. 20/81, D.R. 240/80).

³³ At 273.

The relationship between "industrial matters" and redundancy clauses in awards has been dealt with elsewhere.³⁴ Insofar as future opportunities are concerned, Horn C.J. confined the Court's jurisdiction to workers presently in employment. This indicates that the Court would not consider broader arguments concerning the high degree of "casualisation" in employment thought to accompany the new technology³⁵ and the protection of employment opportunities for future members of the workforce³⁶ (women in particular³⁷). Such issues are beyond the traditional boundaries of industrial matters,³⁸ which the Court showed no inclination to extend.

E.

CONCLUSION

Although the installation of micro-electronic technology is not considered arbitrable it will continue to play a significant role in bargaining within the formal system. The threat to change from labour intensive production to capital intensive methods ("machines don't strike or work to rule"³⁹) is already a bargaining factor in award negotiation. Unions which are well placed to enforce agreements outside the institutions of the Industrial Relations Act have reacted by negotiating and enforcing restrictions on the installation of technology. As one union secretary (and industrial lawyer) recently remarked of conciliation councils, "beneath the legal rules there is an underlying reality which determines the responses of both parties, and . . . this reality is about bargaining strength not fair play in accordance with the law".⁴⁰ The trend that can be expected to continue is for stronger unions to move away from institutionalised collective bargaining on technology, preferring instead informal "single-issue" bargaining. The notable examples are the recent informal agreements in the freezing industry. As these prohibit the introduction of new technology unless agreement has been reached in joint consultation or, in the event of impasse, supported by the decision

³⁴ Hughes, *op.cit.*, note 34.

³⁵ New Zealand Shop Employees' Association, "Microprocessors in the Retail Industry", Paper delivered to the Combined Unions Technology Conference, April 9 and 10, 1980, p.3.

³⁶ The Director of the Research and Planning Division of the Department of Labour, recently forecast "enormous changes in the workplace, probably involving further losses of many of the jobs which have traditionally absorbed unskilled school leavers" ("New Technologies and Industrial Relations", Industrial Relations Centre, Victoria University of Wellington, 1980).

³⁷ See "The New Technology and the Employment of Women". P.S.A. Research Discussion Paper No. 15 and Vocational Training Council "The Impact of New Technology on the Training and Employment of Women", Women's Advisory Committee Discussion Paper.

³⁸ See *R v Portus; ex parte Australia and New Zealand Banking Group Ltd* (1972) 127 CLR 353 at p.359 per Menzies J.; ". . . the matter in dispute must be one within the sphere of the relations of the businessman as employer with a person as employee".

³⁹ The Executive Director of the Employers' Federation, quoted in the "Proceedings", note 36 *supra*, at p.44.

⁴⁰ J. Reid, "Lawyers in the Industrial Arena", A.U.L.S.A. Paper 1980.

of a disputes committee,⁴¹ their terms are wider in scope than the original claim in the *Law Practitioners'* case. Contrary to the Court's justification for refusing to sanction that claim, Part I of this article shows that there is no legal obstacle to the inclusion of such agreements within the conciliation and arbitration system.

Nor do the implications end with the law on industrial bargaining. The alleged consequences of introducing new technology include higher unemployment, redundancies, de-skilling, declining pay differentials, inter-union disputes and new hazards at work.⁴² The Arbitration Court is already familiar with demarcation disputes and redundancy claims arising from this source.⁴³ The fundamental question now is "whether the traditional New Zealand approach to industrial relations, industrial conciliation and arbitration, can cope with the stresses placed upon it by the new technologies":⁴⁴ the *Law Practitioners'* decision does little to suggest that it can.

⁴¹ Consultation Agreement between the New Zealand Federation of Labour and the Auckland Farmers Freezing Co-operative Limited, 13th January 1981; Agreement between the New Zealand Freezing and Related Industries Clerical Officers I.U.W. and the Hawkes Bay Farmers Meat Company, 10th April 1981.

⁴² G. Barker, "Microchips and Industrial Relations", *Industrial Relations Journal*, Vol. 11, No. 5, Nov/Dec 1980, p.71.

⁴³ *Canterbury Clerical Workers I.U.W. v N.Z. Printing, etc. I.U.W. and Christchurch Press*, unreported, Arbitration Court, Christchurch, 20 November 1981, (A.C. 154/81).

⁴⁴ F. J. L. Young, introduction to "Proceedings of a Seminar: New Technologies and Industrial Relations", note 36 *supra*.