SUBMISSION OF EMPLOYMENT COURT CHIEF JUDGE TO THE PRODUCTIVITY COMMISSION IN RESPECT OF ITS DRAFT REPORT OF 12 JANUARY 2012

The Employment Court is referred to in the Commission's draft report, albeit very generally and/or anecdotally and I consider that the Commission may be assisted by the provision of accurate and objective information about its role in port employment and about Court judgments affecting employment relations at New Zealand's ports.

I do not comment on any other aspect of the Commission's draft report or about what employment law should or might be.

There are two general opening comments. First, although the phrase "the Employment Court" is used in the Commission's draft report, this is sometimes (and may in this case perhaps be) a misnomer for the employment law institutions collectively. These include the Department of Labour's Mediation Service, the Employment Relations Authority (which deals with the vast majority of employment litigation at first instance), the Employment Court and, subsequently, the Court of Appeal and the Supreme Court which are part of the employment law appellate structure. These institutions operate generally in a hierarchy. I cannot and do not speak for those other institutions although it may well be that the Employment Relations Authority, in particular, has dealt with a number of port employment cases which have not progressed further to the Employment Court. In this regard, it is important to note that Employment Relations Authority decisions are not determinative of the law, are not of precedent effect, and are required statutorily to be made in equity and good conscience and for the promotion of good employment relationships. As in all judicial hierarchies, numbers of cases form a pyramid with about 10 per cent only of all cases progressing between stages towards the apex.

The second point to be made at the outset is that ports as employment places have no special place in New Zealand employment law. Rather, the Employment Relations Act 2000 (the Act) and other employment related statutes apply as much to ports as they do to other employment situations. Parties to port employment relationships are required to comply with the same employment law as are other New Zealand

employers, unions and employees, and the Courts and other employment law institutions are similarly obliged to apply that law to port employment situations.

The research underlying this submission has taken account of all judgments issued by the Employment Court since the late 1980s port reforms and, in appropriate cases, to any appeals to the Court of Appeal from such judgments.

I have omitted reference to judgments which deal with personal grievances, that is claims by single employees that they have been unjustifiably dismissed from, or disadvantaged in, their employment by port companies. That is because the issues raised by the draft report are collective ones (rather than individual cases) based on interpretations of collective employment contracts and collective agreements. I have also excluded from commentary such collective cases as dealt with the lawfulness of drug/alcohol testing of ports' employees[1] because there was no suggestion in these cases that the issues affected international freight efficiencies. Indeed, such cases as there have been in the field of workplace drug and alcohol testing have tended to confirm the propriety of appropriate regimes in safety sensitive workplaces.

Whereas during the 1980s the High Court and, more latterly, the Labour Court, dealt relatively frequently with injunction cases about strikes, picketing, and other activity at ports affecting what the Commission has identified as "restrictive work practices", since the port reforms of the late 1980s, such proceedings have become rare and even non-existent for long periods despite the same and even enhanced legal mechanisms being available.

As the Commission will no doubt be aware, strikes (and lockouts) are only lawful when they are related to collective bargaining and even then with additional constraints. Picketing, if it is unlawful, is amenable to interim injunctive relief in proceedings for what are known colloquially as the industrial torts, common law actions for inducement to breach contract, conspiracy, and other longstanding and recognised causes of action in tort. Few, if any, such cases have arisen affecting ports over the last 23 years although the causes of action remain available to employers and others affected.

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[1] See, for example, *Maritime Union of New Zealand Inc v TLNZ Ltd* (2007) 5 NZELR 87.

The relevant cases and summaries of them are set out in two schedules. In the first schedule are cases decided by the Employment Court involving port employers and collective issues. One of those cases also deals with the role of custom and practice.

The second schedule contains cases dealt with by the Employment Court (although not confined to port employment) dealing with custom and practice.

The Commission's draft report cites the judgment of the Employment Court in *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Amcor Packaging (New Zealand) Ltd*[2] as authority for the very broad proposition that the common law supports "customary arrangements" which, I infer, include "restrictive work practices". The Employment Court's judgment in that case, however, concerned the disputed interpretation of a collective agreement. It was not a case of customary arrangements being determined to be operative and enforceable terms and conditions of employment. In the course of determining which of two disputed interpretations of the collective agreement was correct, the Employment Court followed the recent judgment of no less authoritative a court than the Supreme Court of New Zealand in the *Vector Gas*[3] litigation about commercial contracts. Both employment law and commercial contract law recognise not only that the way in which a contract is performed by the parties may be a relevant consideration in rejecting an interpretation contrary to the way in which that party performed the agreement, but also that an estoppel may be created in the circumstances precluding such a party from relying on an inconsistent interpretation. In this sense, the Employment Court has followed both the general law of commercial contracts in New Zealand and the recent authoritative judgment of the Supreme Court in so stating the law. Rather than this being a conclusion that "the way we have always done it must dictate the way we will continue to do it", the law reflects the commonsense reality that parties should not be permitted to perform a contract in one way but later argue for an interpretation of it that is inconsistent with that history of performance.

Finally, it may be useful to point out that the Employment Relations Act 2000 contains mechanisms for resolving unsuccessful collective bargaining including

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[2] [2011] NZEmpC 135.
[3] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

where one party seeks to retain the status quo but the other party wants more fundamental change. There are two such statutory mechanisms. The first is known colloquially as facilitated bargaining under ss 50A-50I of the Act. Very broadly this is collective bargaining facilitated by, and conducted under, the auspices of the Employment Relations Authority in which a recommendation for settlement (including announced publicly) can be made. If "facilitated bargaining" is unavailing, s 50J allows for what may be called "determinative resolution" or "fixing" in which, if there are serious and sustained breaches of duties of good faith in relation to collective bargaining, a member of the Employment Relations Authority may determine the relevant terms and conditions of the collective agreement which will be imposed upon the parties. Although facilitated bargaining takes place from time to time in situations of collective bargaining impasse (including, I understand, in port employment situations), I am not aware of any s 50J fixing having taken place although this may be because of a combination of the relatively strict statutory preconditions and a reluctance of even the most immovable parties to collective bargaining to relinquish their power to determine the outcome.

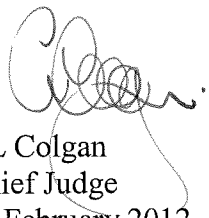
I should add for completeness that there are a few statutory examples of settlement of collective bargaining by final offer arbitration coupled with a prohibition upon strike or lockout action, the most prominent of which is in respect of the employment of police officers.

Because it features in the Commission's draft report, I asked that the research prepared for this submission include the time periods from conclusion of hearing to judgment in each of the cases cited. The average delay from hearing to judgment was 40 days and although I do not know what the current equivalent figure across the Employment Court in respect of all cases is, my impression is that this would be about the same.

I acknowledge the caveats that the Commission has put on its recording of submissions made to it in its draft report about the identities of the bulk of submitters and the anecdotal nature of some submissions and material supporting them.

I hope that this analysis of relevant cases actually decided by the Employment Court may assist the Commission in making objective, fact-based findings about port employment issues.

If I can be of any further assistance to the Commission about the matters contained in this submission and within the constitutional constraints on a Judge addressing such matters, please do not hesitate to get in touch with me.



GL Colgan
Chief Judge
27 February 2012

SCHEDULE 1

The following cases are summarised in reverse chronological order:

In 2010 the Employment Court issued its judgment in *Maritime Union of New Zealand Inc v Ports of Auckland Ltd*[4] (an electronic copy of which is attached). This case dealt with the lawfulness of the actions of Ports of Auckland Ltd in engaging employees on fixed term individual employment agreements. The Court found that although these fixed term agreements were lawful under s 66 of the Act, they were unlawful under s 61(1)(b) of the Act because they were inconsistent with relevant collective agreement provisions. The Court also found that the manner in which Ports of Auckland Ltd went about that exercise was in breach of the statutory good faith provisions of the Act. It may be pertinent to note that at [23] the Court refers to what might be a custom and practice in that workplace of stevedores progressing on a career path from being casual to "permanent" employees. The Court found that this "generally accepted" practice was not "enforceable in law". The judgment applied statute law (ss 61 and 66 of the Act) to the provisions of the collective agreement then in force between the parties.

Ports of Auckland Ltd appealed against the Employment Court's judgment to the Court of Appeal: *Ports of Auckland Ltd v Maritime Union of New Zealand*[5] (an electronic copy of which is attached) but the appeal was dismissed.

Next, in *Port of Napier Ltd v Rail and Maritime Transport Union*,[6] a port company sought an urgent interlocutory injunction to prohibit its employed crane drivers from refusing to train employees of a new contractor company on grounds that their refusal constituted unlawful strike action and that the union had interfered with contractual relations by inducing the port company's employees to breach their employment agreements. The Court found that there was only a weakly arguable case of union instigation or promotion of the crane drivers' refusals to train employees of the new contractor. The plaintiff also had an only weakly arguable case that it was entitled

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[4] [2010] NZEmpC 32.
[5] [2010] NZCA 229.
[6] [2007] ERNZ 826.

contractually to direct the crane drivers to participate in training of another employer's employees in associated but separate stevedoring work and that a refusal to comply with the employer's directions would be unlikely to amount to a strike. The Court found that even if the drivers' refusal did arguably meet the statutory definition of strike action, there was only a weakly arguable case that the drivers could not reasonably invoke s 84 of the Act relating to health and safety in justification of otherwise unlawful strike action. The port company's application for interlocutory injunctions to restrain the Union from inciting its employees not to cross the picket line, and to restrain certain employees from refusing to train new contractors, was unsuccessful. The case went no further substantively.

In *Drake v Port of Wellington Ltd*[7] the Employment Court was asked to make a compliance order against the port company relating to minimum staffing requirements for marine pilots. Employment agreements contained a provision requiring the port company to actively employ a minimum number of marine pilots at all times. The number so engaged fell below that minimum and Employment Tribunal made a compliance order directing the port company to comply with the collective agreement but it failed or refused to obey that direction for three months. The port company was ordered to pay a penalty for its serious contempt of the Employment Tribunal's order.

In 1997, the Employment Court dealt with an argument of custom and practice in a port case, *Rail and Maritime Transport Union Inc v Northland Port Corporation Ltd.*[8] The issue in the case was whether there was any obligation under a collective employment contract to give priority to Union members for ship repair work. The port company had two separate relevant workforces on different sites under different collective arrangements. One carried our ship repair work and another carried out ship building work. The port company wished to alter that arrangement by integrating the two workforces under a newly formed wholly owned subsidiary company and could give no assurances to the employees that previous arrangements would be maintained after the expiry of the relevant collective employment agreements. Upon implementation of the integrated workforce proposal, union members rejected a direction to work together and were dismissed. Following a hearing of an application

[7] [1998] 3 ERNZ 104.
[8] AEC 14A/97, 10 June 1997.

for interlocutory injunction, the question arose whether the parties' long established practices and understandings of the status quo affected the position.

The Court held that the employees were entitled to have their collective contract interpreted in the context of both an established practice and assurances as to the status quo. Interpreting the collective contract in the light of that custom and practice, the union members were entitled to perform the ship repair work unless it fell within recognised exceptions. This is a case in which custom and practice of port employment, albeit affecting ship repairing and ship building work rather than freight movement, arose in the context of interpreting a collective contract.

In *Ports of Auckland Ltd v New Zealand Waterfront Workers' Union*[9] a port company sought an interim injunction preventing the union from being a party to a strike and requiring it to advise its members not to strike. The issue behind the industrial action was the installation of a computerised system to instruct straddle carrier operators which containers to move. The employer required operators to attend training in a classroom environment but union members refused to attend during their usual working days despite a requirement in the collective contract that they would be willing and available to undergo training. These events occurred against a background of long and difficult negotiations about the introduction of the new computer system. The Court granted an interim injunction restraining strike action and requiring the union to direct its members accordingly on the basis that there was a very strongly arguable case that the employees' actions were an unlawful strike.

In *Ports of Auckland Ltd v New Zealand Waterfront Workers Union*[10] a question arose about the contractual rate of pay of employees on a day off taken in lieu where a statutory holiday had been worked. The applicable collective contracts provided for several different rates of pay in different circumstances but did not set expressly the rate for days in lieu. The Court held that, in respect of one of the collective contracts, the negotiated and mutually deliberate inclusion of wording dictated the rate payable to employees for work periods actually worked and therefore was not payable for days off in lieu of public holidays worked. In the absence of express provision in the

[9] AEC 43/93, 31 August 1993.
[10] [1993] 2 ERNZ 988.

other collective contracts, evidence of past and current practice applied. In all cases it appears that the Court found for the lower ordinary rates of pay contended for by the port company.

In *Leonard and Dingley Ltd v NZ Waterfront Workers Union*[11] the stevedoring company plaintiff unsuccessfully sought a compliance order restraining the union and one of its organisers from aiding or abetting a strike and being party to a strike. Union members had refused to work using an LPG powered forklift in the hold of the ship because it had not been run for 30 minutes in the open air before being lowered into the ship's hold and there were concerns about toxic fume emissions from the forklift during the first 30 minutes of its operation. Arguments for the 30 minute waiting period included that it was a term or condition of employment and, alternatively, that any strike was justified on health and safety grounds. The employer was found not to have demonstrated that the 30 minute running period was not a term or condition of employment. The finding followed a 1975 waterfront industry tribunal order recognising and requiring the start-up period. Despite subsequent awards not mentioning this requirement, the Court was not satisfied that the 1975 order did not still apply.

In *New Zealand Marshalling & Stevedoring Co Ltd v New Zealand Waterfront Workers Union*[12] the Court dealt with a dispute concerning the interpretation of an award which permitted part-time employees to be employed at the Port of Tauranga. The numbers of such part-time employees were, however, restricted by the award provision. The case turned on the interpretation of the phrase "absent workers" in the formula for determining that proportion. The Court found in favour of the employer's interpretation, the award provision being unambiguous, and there was no need to have recourse to the background facts.

In *NZ Stevedoring Co Ltd and NZ Forestry Corporation Ltd v NZ Waterfront Workers IUOW & Ors*[13] the employer and an affected party applied successfully for an interim injunction to restrain a strike by union members. The underlying dispute concerned the number of employees required to operate a swinging derrick installed on a ship,

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[11] [1991] 2 ERNZ 329.
[12] [1991] 1 ERNZ 1.
[13] [1990] 2 NZILR 342.

used in this case to load and unload logs. The union contended that while the derrick could be single manned, it was unacceptably dangerous for an inexperienced operator to do so alone. Before port restructuring in the previous year, it had been common for two watersiders to be assigned to each derrick. The Court concluded that the union had not demonstrated that it had reasonable grounds for a health and safety strike which was declared to be unlawful and an interim injunction was issued to restrain the union's strike action, in effect mandating single person derrick operation.

In *NZ Assn of Waterfront Employers v NZ Waterfront Workers IUOW*[14] a stevedoring company did not use tally clerks during the unloading of cargo from a vessel on the Auckland waterfront. The union took issue with this decision and, under some pressure, the stevedore reluctantly employed a tally clerk on the weighbridge. The union then required that two additional tally clerks be employed but the stevedore resisted. The matter went to a Port Conciliation Committee which noted that the change appeared to depart from the longstanding practice of employing tally clerks to perform duties for customers under terms and conditions of a collective agreement but declined to require two additional tally clerks to be employed. The Labour Court accepted that there appeared to be a longstanding practice to employ tally clerks to perform "customary duties" under a collective agreement when vessels were being discharged and this was reinforced by the terms of the collective agreement. The employer argued that its requirements for the function of tally clerks must ultimately govern the situation and the decision by it not to use tally clerks was an exercise of the employer's right to manage. The union relied on long-established custom and practice to employ tally clerks and on the provisions of the collective agreement. The Court held that there was a long-established practice or custom in the trade to employ tally clerks except where the cargo was bulk gypsum, that the practice was not contrary to the express words of the collective agreement, and that where the practice would normally involve the employment of tally clerks, they were to be employed as required by the employer. Asked whether discharge of a vessel involved any person carrying out what would be the duties of tally clerks, the Labour Court directed that they must be employed even if the consignee or consignees had not required their engagement. However, if it could be established, either as a matter of practice or on the particular facts, that no person was required to exercise any of the duties or

[14] [1989] NZILR 180.

functions of a tally clerk at any point, including delivery to the consignee, the employer might be able to establish that such services were "not required by the employer" in terms of the collective agreement so that the practice of employing tally clerks should not apply in a particular case. This is perhaps the case in which waterfront custom and practice featured most in the decisions of the Court although it must be noted that it was decided by the Labour Court under the regime of the Labour Relations Act 1987 and in respect of pre-port reform practices.

SCHEDULE 2

Other custom and practice cases decided by the Employment Court (although not affecting port employers) include, first, *Progressive Meats Ltd v Meat & Related Trades Workers Union of Aotearoa Inc.*[15] This was a case under the Holidays Act 2003 and, in particular, about whether Queen's Birthday holiday would otherwise have been a working day. In applying the provisions of the legislation, and to determine whether the employees would have worked on the day in question, the Court looked to custom and practice in the absence of any existing provision in the collective agreement. In this case, the plaintiff employer engaged its staff throughout the year at the meat works rather than laying them off at the end of each season. Employees were guaranteed a minimum weekly pay in return for which their employer had considerable flexibility in work scheduling. To accommodate fluctuations in the slaughtering work, staff were either employed doing other work in the factory or were told that there would be no slaughtering work on certain days. Employees could apply to come to work on non-slaughtering days and undertake other work if it were available. Employees were informed that there would not be slaughtering work on Queen's Birthday 2004. The Court held that the custom and practice about working on non-production days was that employees would have to request work and there would have to be the prospect of employees earning less than the $400 minimum weekly wage guaranteed to be eligible for work. The Court found that Queen's Birthday 2004 was not a day on which the employees would ordinarily have worked because, although there was some non-production work to be done, it would have been offered on the following day. Because the $400 minimum would have been made up later during the week, the plaintiff would not have offered the employees work on the holiday. The Court relied on the practice of the plant to conclude that employees would not have been at work for the day and were not therefore entitled to the relevant daily pay for the public holiday.

Finally, in *Asure New Zealand Ltd v New Zealand Public Service Association (No 2)*[16] meat inspectors employed by the plaintiff worked at an AFFCO meat processing plant

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[15] (2008) 5 NZELR 219.
[16] [2005] ERNZ 789.

which had recently been upgraded. There had previously been a longstanding practice that the meat inspectors enjoyed separate facilities (showers, locker rooms, lunch rooms etc) than those used by the AFFCO employed staff, but these separate facilities were removed during the upgrade and the collective agreement between the parties made no mention of such separate facilities. The union argued that the employer was required to continue to provide separate facilities because the longstanding custom and practice of doing so became an implied term of the collective agreement and because separate facilities were required as a matter of health and safety. The Court rejected the custom and practice argument – it was for the plant owner (AFFCO) to provide the facilities and the Court held that there was no custom and practice that the employer of the meat inspectors would provide separate facilities. The Court found that the employer's direction to the meat inspectors to work in shared facilities was lawful.