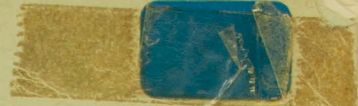


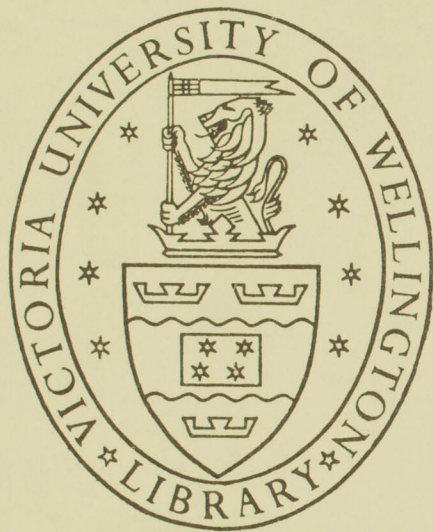
RXST STRINGFELLOW, K. The Post Office Appeal Board.



Stringfellow

UB Admin R.P.

1979



Introduction:

The New Zealand Post Office is the department of State responsible for the administration of the Post Office Act 1959¹. In order to effectively carry out its diverse functions which range from postal services to the complex field of telecommunications, the Post Office employs a staff of some 38,900.² The Post Office Appeal Board is one of a group of Crown employment Appeal Boards and was established in the early 1920s - the first Chairman of the Board was in fact carrying out his functions in the period 1918 - 1920.³

Background:

THE POST OFFICE APPEAL BOARD

The Post Office, in common with many large organisations, has a highly structured system of classifying its employees. Employees may gain advancement within this system by way of promotion to established graded positions vacated by resignation, retirement or advancement of the previous incumbent. A second avenue of advancement is available by way of an application for regrading of an existing position or the establishment of a new position. However, in the former system, the incumbent's right to retain a position following regrading is not guaranteed.

Two Standing Committees advise the Director-General in these matters:-

- (1) The Promotion Board⁴
- (2) The Grading Committee⁵

The Grading Committee was created when the Post Office Act 1959 was last amended in 1978. On the occasion of the Bill⁶ the Postmaster General noted 'the Bill provides for occupational classification to replace divisional classification and to discontinue the previous system of 5 yearly service-wide reviews of grading in the Post Office. Provision is made for the establishment of classification and grading committees such as are found in other branches of the State services.' The

Kathy Stringfellow

¹ Annual Report of the Post Office, 31 March 1978

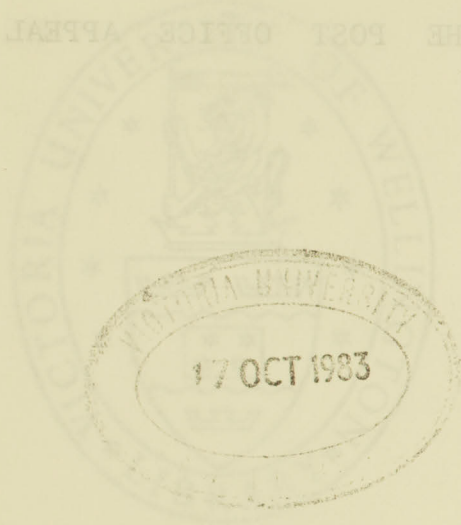
² See Appendix 1.

³ Part 2111 of the Post Office Act 1959

⁴ S 215A, 215B, 215C Post Office Amendment Act 1978

⁵ Parliamentary Debates, 7 July 1978 p 1607

THE POST OFFICE APPEAL BOARD



Kathy Strangellou

440132

Introduction:

The New Zealand Post Office is the department of State responsible for the administration of the Post Office Act 1959. In order to effectively carry out its diverse functions which range from postal services to the complex field of telecommunications, the Post Office employs a staff of some 38,900.¹ The Post Office Appeal Board is one of a group of Crown employment Appeal Boards and was established in the early 1920s - the first Chairman of the Board was in fact carrying out his functions in the period 1918 - 1920.²

Background:

The Post Office, in common with many large organisations, has a highly structured system of classifying its employees. Employees may gain advancement within this system by way of promotion to established graded positions vacated by resignation, retirement or advancement of the previous incumbent. A second avenue of advancement is available by way of an application for regrading of an existing position or the establishment of a new position. However, in the former system, the incumbent's right to retain a position following regrading is not guaranteed.

Two Standing Committees advise the Director-General in these matters:-

- (1) The Promotion Board³
- (2) The Grading Committee⁴

The Grading Committee was created when the Post Office Act 1959 was last amended in 1978. On the introduction of the Bill⁵ the Postmaster General noted 'the Bill provides for occupational classification to replace divisional classification and to discontinue the previous system of 5 yearly service-wide reviews of gradings in the Post Office. Provision is made for the establishment of classification and grading committees such as are found in other branches of the State services.' The

¹ Annual Report of the Post Office, 31 March 1978

² See Appendix 1.

³ Part XIII of the Post Office Act 1959

⁴ S 218A, 218B, 218C Post Office Amendment Act 1978

⁵ Parliamentary Debates, 7 July 1978 p 1607

Promotion Board is required by the Post Office Act to discriminate on the basis of merit⁶ in recommending candidates for promotion. The expression 'is best merited' in S190 of the Post Office Act on a Court of Appeal ruling is to be construed as meaning best merited at the time when the appointment is made - Sewell v Sandle⁷. The effect of this decision has been largely nullified by the Post Office Amendment Act (No. 2) 1973 and the insertion of ss(3) to S190.

From time to time, reporting committees are assembled to provide relative merit assessments of candidates eligible for promotion. A number of merit reporting systems are employed by the Post Office but generally, all contain the following features:-

- (1) personal interview of the candidate
- (2) consultation with the candidate's controlling officers
- (3) reconciliation of assessments to produce an order of merit
- (4) the arranging of a report mark by fitting the order of merit to a defined distribution curve.

The Classification and Grading Committee is to be supported by Grading Criteria Committees. These Committees are now being formed and their precise manner of operating is not yet discernible.

The interests of the employee are protected by an Appeal Board empowered to review any determination of the Director-General, when requested to so by an employee with a grievance. Thus the Appeal Board has the jurisdiction to hear and determine any appeal⁸ in the matter of promotion, grading and discipline. Rights of appeal are defined exhaustively in S196 of the Post Office Act.

This paper examines the constitution and procedures of the Post Office Appeal Board and in the the light of vastly differing conditions which prevailed at its inception, recommendations for change are also suggested.

⁶ Alp v Sewell [1974] Unreported decision of Court of Appeal 24/74
also slipped through on the unamended interpretation of S190

⁷ [1973] 2 NZLR 584

⁸ S197

Constitution of the Post Office Appeal Board

It has been pointed out on many occasions⁹ that the composition of Tribunals vary not only in terms of the numbers of their members and their qualifications, but that a wide variation also exists in such matters as appointment, tenure and the special qualifications which may be deemed necessary for the holding of such office. The Post Office Appeal Board shares, in common with other Tribunals, some deviations from the constitutional and procedural provisions which the Administrative Law Reform Committee has developed and stated¹⁰ as the desirable criteria for the qualifications of Tribunal members and their appointment.

The Post Office Appeal Board is constituted under S194 of the Post Office Act, and consists of four members. The Governor-General appoints two members of the Board under S194 (1) (a) while S194 (1) (b) and (c) provide for a permanent officer of the Postal and Telegraph Branches respectively, to be appointed by the Postmaster-General on the nomination of the Post Office Association (Inc.). The Act further provides, although the constitution of the Board is to be four members, by reference to S194 (2), the officers appointed by the Post Office Association may act only in respect of appeal of officers from their own particular branch - at any one time during a hearing the Board comprises, therefore, three members. In practice, both members are present at a hearing, but the non-participating member sits to one side of the proceedings and takes no part in the hearing being conducted. However there is provision for the appointed officer, Postal or Telegraph, to be part of the constituted Board, 'by reason of illness or absence or from other cause'¹¹ of the other officer.

Qualification of the Chairman

Much of the general acceptability and confidence with which a Tribunal will be viewed by the public or those who may bring a case before such a body, will rest on the Chairman. The

⁹ G. S. Orr Administrative Justice in New Zealand (1964)

6th Report of Public and Administrative Law Reform Committee

¹⁰ 8th Report of Public and Administrative Law Reform Committee p 3

¹¹ S194 (2) Proviso

Franks Committee¹² clearly stated -

We attach great importance to the quality of chairmanship. Objectivity in the treatment of cases and the proper sifting of facts are most often best secured by having a legally qualified chairman, though we recognise that suitable chairman can be drawn from fields other than the law.¹³

In line with modern requirements, the Immigration Act 1964 (and as enacted by amendment in 1978) sets out the constitution of the Deportation Review Tribunal and states under S22B (2)(a) that the criterion for the appointing the Chairman shall be not less than five years' standing as a barrister or solicitor of the Supreme Court. However, in the area of the Public Service where much of the legislation is relatively old, a legally qualified Chairman is required only in the case of the Police Appeal Board. The Post Office Act carries no stipulations as to the qualification of its Chairman, and no statutory provision is made for legal expertise. Under Post Office Post & Telegraph Staff Regulations 1951 (hereinafter referred to as the P. & T. Regulations)R123, it is stated that the Governor-General shall from time to time appoint one of the persons under the old equivalent of S194 (1)(a) of the Post Office Act, to be the Chairman of the Board. In seeking the view of the Post Office administration on this matter¹⁴, the Public & Administrative Law Reform Committee recommended that the State Services Act should be used as a guide for any legislative amendment indicating the desirability of having a legally qualified Chairman. S61 (2)(a) of the State Services Act enacts that the chairman shall be 'a Stipendiary Magistrate or a retired Stipendiary Magistrate or an officer or a retired officer or other person.' The then Director-General of the Post Office, Mr W. J. Sewell indicated in his reply¹⁵ on this matter, that such a legislative change would only have the effect, so far as the Post Office was concerned, of placing added emphasis on the desirability of having a legally qualified Chairman, and consequently there was no Departmental objection to such a legislative amendment. The present Chairman of the

¹² Report of the committee on Administrative Tribunals & Enquiries

¹³ pl2

July 1957, Cmnd. 218

¹⁴ Letter dated 12 July 1974

¹⁵ Letter dated 22 August 1974

Post Office Appeal Board, Mr C. A. McFarlane¹⁶ thought it desirable to have a legally qualified person as Chairman and expressed the view that the legislation should be left open to ensure that a situation did not arise where the Justice Department was left 'to go to the bottom of the barrel' in order to make a recommendation which complied with the stipulation that the person be, for example, a Stipendiary Magistrate or retired Stipendiary Magistrate. The preliminary jurisdictional question which has to be made before a hearing, does in fact occupy a large percentage of the Board's work - it will be seen then, that perhaps the lack of legal expertise can lead to a decision that an action does not lie, when strictly speaking it may well.¹⁷

Post Office Appeal Board

	Appeal Does Not Lie	Ratio of Appeals Do not lie to Appeals Heard
1974/75	37	.21
1975/76	57	.35
1976/77	58	.42
1977/78	78	.48
1978/79	75	.59

The Secretary

The declared policy of the Public and Administrative Law Reform Committee¹⁸ is to prefer that the Secretary to the Tribunal be quite separate from the Department involved. Thus, the Deportation Review Tribunal is provided with secretarial, recording and other services by the Secretary of Justice, to enable the Tribunal to exercise its functions and powers.¹⁹ The Permanent Head, in the case of both the Government Railways Appeal Board and the Post Office Appeal Board²⁰ has the authority to appoint an officer of his Department to be the Secretary of the Board. The past Chairman of the Post Office Appeal Board and the Department were both agreed²¹ that the diverse nature and geographical spread of Post Office activities made it

¹⁶ Interview - 16 July 1979

¹⁷ See p28 Appeal of D. A. Hercus against a decision that an appeal did not lie.

¹⁸ 8th Report p36

¹⁹ S22 B (5) (as enacted 1978)

²⁰ Regulations 86 and 124 respectively

²¹ Letters (supra)

administratively desirable for the Secretary to be fully conversant with departmental procedures. As the Regulations provide for the procedure of an appeal to be set in motion by the appellant notifying the Director-General, who then forwards the appeal, together with his answer to the Secretary of the Board, ready access to documentation was an additional factor of importance to the Post Office, in the Secretary remaining a Departmental officer. Mr McFarlane, himself an experienced Assessor, had a practical knowledge of the type of secretarial and clerical services which the Department of Labour provided, for example, to the State Services Appeal Board in order that it could discharge its functions.²² He was of the opinion that the Department of Labour was capable of providing the Post Office Appeal Board with such assistance, but that the disadvantages of such an arrangement still outweighed the advantages. However, Mr McFarlane considered that ideally, the Secretary should have a knowledge of the industrial situation, but not be engaged directly with the Industrial Division of the Post Office. Consequently, the recently appointed Secretary came for the Recruitment section of the organisation. The Franks Committee also noted²³ there was a feeling in the minds of some people, that because the majority of clerks of tribunals were provided by the Departments concerned, there was the possibility of influence by the Department. Nevertheless, after weighing factors such as career structure, with that of valuable experience to be gained by giving the staff of Departments²⁴ a period of service as clerks of Tribunals, / ^{the Franks' Committee} considered present arrangements should continue - with the proviso that the duties of a clerk or secretary were specifically limited and care taken that the secretary never appear to take part in any decision making of the Tribunal. The Secretary of the Post Office Appeal Board does not take part in the deliberations of the Board²⁵.

22 S65

23 Franks Committee (supra) p 13 & p 14

24 Letter (supra) - This factor as also considered important by J. Darnell, ex Director-General and Chairman of the Board

25 Interview - Mr G. Paterson 23 July 1979

Tenure of Board Members

S194 (1) (a) of the Post Office Act states that the two members of the Board appointed by the Governor-General hold office at pleasure. The two members holding office on the nomination of the Post Office Association, probably also hold office at pleasure, particularly in the light of S25 (f) of the Acts Interpretation Act 1924 which states, 'words authorising the appointment of any public officer or functionary, or any deputy, include the power to remove or suspend him.....' Although the nominated members of the Board may hold office at pleasure of the Minister and thus have no security of tenure, it is possible to imply a 3 year duration of tenure from the P. & T. Regulations. R101 states an elective member of a Board 'holding office shall...continue to hold office until his successor is declared elected...' and for the purposes of interpretation R99 'Election date' speaks of a triennial election to the Appeal Board. In practice, the Post Office Assn. members do hold tenure of office for three years, and this is provided for in the Rules of the Post Office Association (Inc.)²⁶ The present Chairman of the Board was appointed for an initial period of three years, with a further extension of term for one year - he felt that such flexibility was desirable. The Franks Committee saw as one of the factors favouring Tribunals over the Courts, was the expert knowledge of their particular subject - it would seem such expertise is more readily built up by appointing Tribunal members for a period of at least three years. Although expertise in Post Office policy has been retained in the Appeal Board by appointing from retired Departmental personnel, nevertheless, it is felt that in line with the Public & Administrative Law Reform Committee policy²⁷ all appointments should be for at least three years with, in addition, the provision for reappointment. The recommendation that tenure should should never be at pleasure would require specific drafting such as the Police Appeal Board legislation,²⁸ where removal from

²⁶ Appendix 5, Rule Book p49

²⁷ 8th Report - p 35

²⁸ S46 (4)

office by the Governor-General is for disability, neglect of duty, or misconduct.

Qualification and Appointment of Other Board Members

(a) It will be noted from Appendix 1, that the person (other than the Chairman) nominated by the Governor-General under S194(a) has always been a past employee of the Post Office.

(b) Under P. & T. Regulations 100 -121 there is an elaborate procedure for a Triennial election of the two other members of the Appeal Board S194(b) and (c). It would seem that the Post Office Association has devised its own procedures for ensuring that any nominated member of the Appeal Board will adhere to the Association's policy. The Rules of the Post Office Assn.²⁹ states the election procedure is 'Sections are invited to nominate candidates for the positions and the Executive Council elects the members from these nominations.' In practice, the nominees are members of the Post Office Association Executive, so that the agreements negotiated by the Association will be protected and there is some accountability to Executive for appeals and their ultimate outcome.³⁰

(c) The historical reasons for a Postal and Telegraph Branch division to remain the criterion for election to the Board would seem not to apply in 1979. Post Office Assn. Rules now state the criteria to be:

Telegraph Member - shall be a permanent officer of Telegraph, Buildings, C. & M., Technicians (all spheres), Drawing Office, Technical Services or Workshops Branches, Engineering Associates or Professional Engineering staff.

Postal Member - shall be a permanent officer of any branch not represented by the Telegraph Member.³¹

Such partisan representation has been a feature of the Post Office Appeal Board since its inception. The Post Office Engineers' Association has felt some disquiet, due to the increasingly complex and technical nature of the appeals which their members bring before the Board, that as the Telegraph Member has never been professionally qualified³² within the engineering sphere,

²⁹ Method of Election - p 49

³⁰ D. T. Reddish, Service Advocate, Interview 2 August 1979

³¹ Eligibility for Nomination - p 49

³² See Appendix 1.

many of their submissions have not been fully understood. It would seem that this problem is likely to increase substantially in the coming years. If, as it would appear, the original intention of having nominated members on the Appeal Board was to ensure that such problems would not occur, the Post Office Engineers' Association's only remedy is to pursue the long and tedious route of election to the Post Office Association Executive, and then secure nomination as an Appeal Board representative. There would seem to be a need for at least some measure of reform in this area, and for the Regulations to be amended in accordance with current practice.

The Rule Against Bias

Natural justice requires that the tribunal should be disinterested and impartial. At common law, no man can adjudicate in a matter in which he has a direct pecuniary or personal interest. Thus in the P. & T. Regulations 126 (7), the common law has been reinforced by statute and no member of the Board may act in an appeal affecting himself. The other limb of the bias rule which may disqualify an adjudicator, is the presence of a 'real likelihood of bias,' as examined by Hutchinson, J. in Healey v Rauhina³³. After analysing the tests 'real likelihood' and 'reasonable suspicion' the learned Judge adopted that of a 'real likelihood of bias' test. Thus members of a Tribunal could have well-known attitudes to issues as for instance in the Post Office Appeal Board. Mr. Moriarty, one of the members appointed under S194 (a) is called the 'Departmental Representative' by both the Post Office and the Post Office Association, as were his predecessors - no doubt an indication of Departmental choice at the recommendation stage. The Post Office Association members must go to appeals with the views of the Association, which have been expressed as 'the percentage of appeals allowed is not large and it should not be.'³⁴ Mr McFarlane is also Chairman of the Board of Directors of Standard Telephone & Cables whose principal customer in New Zealand is the Post Office. Nevertheless the decision of a Tribunal will not be vitiated for bias unless the bias has shown itself in a manner prejudicial to the person whose rights are at stake. The test for bias would not seem to be a very stringent one for domestic tribunals.

³³ [1958] NZLR 945

³⁴ 'Katipo' Magazine of P.O. Assn, April 1978, p.69

THE RULE REQUIRING A FAIR HEARING

The right to be heard

Originally developed in proceedings before justices³⁵ the scope of application of the audi alteram partem rule to administrative bodies has fluctuated over the years. In the 1950s, following the Privy Council's dictum in Nakkuda Ali v M.F. De S. Jayarantne³⁶, the rule was restricted to those bodies which, having 'legal authority to determine questions affecting the rights of subjects'³⁷ also had a 'super-added...duty to act judicially.'³⁸ Nakkuda Ali was criticised by the House of Lords in Ridge v Baldwin³⁹ and although the Privy Council has never said that it was wrong, it reversed its position in effect in Furnell v Whangarei High Schools Board⁴⁰ where it was said that natural justice as not 'a leaven to be associated only with judicial or quasi-judicial occasions.' It is now generally accepted by New Zealand courts that whether the principles of natural justice apply to the functions of an administrative body 'does not turn on any fine classification of that function as judicial or administrative, but...upon a realistic examination of the legislation, the circumstances of the case and the subject matter under consideration.'⁴¹ Since these were essentially the same matters the courts considered when they were grappling with the question whether a tribunal was required to act judicially, what appears to be a significant change in theory may make little difference to the law in practice.

Whether a tribunal is bound by the audi alteram partem rule must be answered by applying the tests laid down by the courts, and will depend on the facts and circumstances of the case in question. The statutory scheme of the legislation may be examined as to specific aspects of the audi alteram partem rule/^{to} Post Office Appeal Board procedure.

³⁵ S. A. de Smith Judicial Review of Administrative Action 3d ed.

³⁶ [1951] A. C. 66

London, 1973, p. 136

³⁷ R. v Electricity Commissioners [1924] 1 K.B. 171, 205

³⁸ R. v Legislative Com. of the Church Assembly [1928] 1 K.B. 411, 415

³⁹ [1964] A.C. 40

⁴⁰ [1973] A.C. 660, 679

⁴¹ Lower Hutt City Council v Bank [1974] 1 NZLR 545, 549

Prior Notice of a Hearing

P. & T. Staff Regulation R126 (1) provide that any appeal under the Post Office Act is to be lodged not later than 30 days after notification of the decision appealed against has been issued by the Department. The 30 day rule has been further defined in Personnel Instructions as:-

<u>Nature of Appeal</u>	<u>Date of Commencement of Period of 30 days</u>
Against promotion	The day following the date of issue of the first list in which announced.
Against grading	The day following the date of notification to the officer concerning the Director-General decision regarding the re-commendation of the Classification and Grading Committee.
Against a fine, surcharge, .. reduction of salary, reduction in grade or class or dismissal	The day following the date of of the penalty issued by the district controlling officer
Against non-advancement to a special merit salary step, or the withholding of an annual increment	The day following the date of notification of the decision issued by the district controlling officer
If having considered the Director-General's view on	
(a) an appeal being allowed, or	
(b) no grounds for the appeal existing ⁴²	

the Board considers that a ground does exist, the Secretary forwards to the appellant, the answer of the Director-General, and a notification of the time and place fixed for a hearing of the appeal.⁴³ Natural justice, generally requires that adequate notice be given to person directly affected by 'proposed administrative acts, decisions or proceedings.'⁴⁴ This should be done to enable all parties to adequately prepare for, and to appear at a hearing when one is held. Many cases in which there has been a finding that the audi alteram partem rule has been breached, there was no notice of the action taken given to the person vitally affected.⁴⁵

⁴² R 126 (2) and (3)

⁴³ R 126 (4)

⁴⁴ S. A. de Smith (supra) p. 172

⁴⁵ as for example N.Z. Dairy Board v Okitu Co-op Dairy Co [1953] NZLR 366

From the time an appeal is lodged until the Board sits, there is a time lapse of approximately two months.⁴⁶ The acknowledgment of the appeal by the Secretary, indicates generally, when the sitting will take place. As the number, length and place of Appeal Board sittings depends on the number of appeals lodged (R 125 requires that the Board meet not less than twice yearly, and in practice this is approximately once a month) when a firm appeal date and time has been fixed, the appellant is given ten days' notice⁴⁷ of the sitting. Departmental premises are used whenever the Board holds a hearing.⁴⁸ The Post Office Association advises its members to lodge appeals immediately, and if it is found that there is no purpose in proceeding with a hearing, to withdraw the appeal - such action being regarded as purely 'part of the machinery.'⁴⁹

Oral or written proceedings

The rule that a defendant is not entitled to an oral hearing was settled by the House Of Lords in the case of the Local Government Board v Arlidge⁵⁰ where it was held that an appellant to the Local Government Board was not entitled as of right to be heard orally in front of the deciding officer, before the dismissal of an appeal. Again in Wiseman v Borneman⁵¹, Lord Wilberforce asked the question 'Is it fair that the Tribunal should decide on this material: or, in the interests of natural justice, or fairness, ought there to be read in a requirement either to allow the taxpayer an opportunity to see and answer the counter-statement, or, perhaps to allow him some kind of hearing?'⁵² and gave the answer that the tribunal was entitled to make its determination on the documents as specified in S28 (4) of the Finance Act 1960. Consequently it is possible to say, in a given circumstance^{if} it is essential for a fair hearing, then an oral hearing should be given.⁵³ The Post Office Appeal Board is authorised under P. & T. Regulations 126 (4) that having advised an appellant of the hearing date, if the appellant is present, the evidence shall be taken in his presence or in

⁴⁶ Interview - G. Paterson 23.7.79

⁴⁷ R 126 (4)

⁴⁸ "

"

"

⁴⁹ 'Katipo' Magazine of P.O. Assn, April 1978, p. 69

⁵⁰ [1915] A.C. 120

⁵¹ [1971] A.C. 297, ⁵² 320

⁵³ K. J. Keith - A code of Procedure for Administrative Tribunals?
Legal Research Foundation, 1974

the presence of his representative or in the presence of both. This right to an oral hearing is however, subject to the right of the Appeal Board to make the preliminary decision as to whether an appeal will lie or to accept the concession of the Director-General as to a successful appeal⁵⁴ - such a decision will be made on the written papers only. As it is possible to argue that natural justice requires the hearing to be oral, the Appeal Board has adopted a fairly liberal policy on the allowing of a hearing, even if the initial decision was that an appeal did not lie under the Act.^{be} With reference to the right to cross-examine, it would seem to/a feature of most Tribunals which allow oral hearings, however, it is submitted that there is no general right to cross-examine. Thus in Re Royal Commission on the State Services⁵⁵; it was a matter for the discretion of the Commission whether cross-examination of witnesses would be permitted.

Representation

Statutory authority for representation is varied - some expressly provide that parties may be represented by legal counsel and a few, particularly under the Industrial Relations Act 1973, S78 (3), forbid it. The arguments for and against legal representation were clearly expressed by the Franks Committee⁵⁶ when it stated that representation before a Tribunal by a lawyer could well have an effect on the informality of proceedings. However, it was also conceded, that not every person has the ability to defend himself on his own, and coherently present his own case. Natural justice does not lay down an absolute rule that person is entitled to legal representation, but suggests that it will vary with the circumstances. Lord Denning observed in Pett v Greyhound Racing Assn. Ltd⁵⁷-

I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.⁵⁸

However in Pett v Greyhound Racing Assn Ltd (No.2)⁵⁹ and in Enderby Town Football Club Ltd v The Football Assn Ltd.⁶⁰ legal

⁵⁴P. & T. Regulations R126 (2) and (3)

⁵⁵ [1962] NZLR 96

⁵⁶ p.20

⁵⁷ [1968] 2 All E.R. 545,

⁵⁸ at page 549

⁵⁹ [1970] 1 Q.B. 46

⁶⁰ [1971] Ch 591

representation was not permitted.

The P. & T. Regulations R 126 (5) provide that an appellant - shall be entitled to be present and to be represented by any person at the hearing of his appeal, unless the Board unanimously decides that any such attendance and representation are unnecessary.

There is no such proviso on the Department itself as R 126 (8) allows very widely, for representation to be by 'the Director-General, or by counsel, or by an officer...nominated by the Director-General.' Yet again P. & T. Regulations R58 (13) and R91 (2) use the formula of counsel or agent for disciplinary inquiries. Mr McFarlane gave two instances for a retention of the exception to R126 (5) -

- (a) If the Director-General advises the Appeal Board that an appeal should be allowed, such a matter would be decided by the Board without the appellant being called for in person and representation was also felt to be unnecessary.⁶¹
- (b) In preliminary decisions by the Board as to its jurisdiction to entertain any appeal as laid down in S196 of the Post Office Act. The Post Office was strongly of the view that such a safeguard was necessary in that the Board must 'retain some control against an unfettered right of officers to demand hearings on completely unmeritorious and frivolous grounds.'⁶²

Nevertheless, the Department felt able to follow the Public and Administrative Law Reform Committee recommendation⁶³ when the enabling legislation for Classification and Grading Committees was passed by Parliament in 1978. S218B (6) allows the officer to be represented by counsel, by an officer, or an employee of the Post Office Association. There would appear to be the need for more consistent legislation in the area of representation.

The use of legal representation by appellants appearing

⁶¹ P. & T. Reg. R. 126 (2)

⁶² Post Office letter 22 August 1974, p. 2

⁶³ 8th Report, Para. 64, p. 37.

before the Appeal Board has not been exercised to any great extent, and is in fact, discouraged by the Post Office Association

Solicitors Representing Appellants
for the last 5 Years

In all appeals under S196 of the Post Office Act		As a % of Appeals Heard
1974/75	3	1.9
1975/76	-	-
1976/77	1	.75
1977/78	2	1.3
1978/79	2	1.8

This is possibly due to the role which the Post Office Association has played in representing its membership who lodge appeals. The Association advises its membership⁶⁴ that any member who proceeds with an appeal would be offered the services of a Service Advocate, at no cost to the member, in accordance with Rule 133. The rule states, 'In the event of a member finding it necessary to appeal against non-promotion, dismissals etc, the Association shall on request supply a Service Advocate who will present the case to the Appeal Board.'⁶⁵ It is Post Office policy to provide the Post Office Association with a list of the people who have lodged appeals, and to supply the merit assessment of the appellant and the appointee appealed against⁶⁶. This information is not supplied to the appellant himself. Preparation of the appellant's case then proceeds in consultation with the Service Advocate and he will present submissions on the appellant's behalf at the hearing.⁶⁷ It is also policy to allow a Service Advocate to appear in an 'appeal does not lie' case, a right apparently denied to the employee.⁶⁸

PROCEDURE AT A POST OFFICE APPEAL BOARD HEARING

(a) The absence of one party

The P. & T. Regulations, S126 (4) provides specifically that having advised an appellant of a hearing time and date -

If the appellant or his representative fails

⁶⁴ 'Katipo' (supra) p 69

⁶⁵ Rules of Post Office Association p39

⁶⁶ See Appendix 2 Standard letter of P.O. Assn.

⁶⁷ Interview - D. T. Reddish, Service Advocate - 3 August 1979

⁶⁸ See Appendix 3 Standard letter of P.O. Assn.

to appear at the hearing, the Board may determine the appeal in his absence on the evidence as is available.

As the Franks Committee noted⁶⁹ the principle that hearings should be conducted only in the presence of the parties concerned, could not be adopted literally, as by absenting himself from the hearing, an appellant could hold up proceedings indefinitely. Thus the Regulations confirm the common law position.

(b) Conduct at the Hearing

(i) S194 (4) authorises the Post Office Appeal Board, subject to the provisions of the section and any Regulation thereunder, to regulate 'its procedure in such a manner as it thinks fit.' In Jeffer v N.Z. Dairy Production & Marketing Board⁷⁰ where the Board operated under a similar provision, and could, therefore, hear interested parties orally or by receiving written statements, or by appointing a person to hear and receive evidence from interested parties for its own information, nevertheless,

The board failed to hear the interested parties as it was under an obligation to do in order to discharge its duty to act judicially in the determination of zoning applications.⁷¹

This point, that statutory powers, are it seems, bound by the rules of natural justice was also made in Re Wellington Fencing Materials Assn⁷². Thus, 'the Commission is in my view, master of its own procedure, subject to the specific provisions of the Act and of any regulations thereunder, and subject, of course, to the observance of principles of natural justice...'⁷³

(ii) A definite order of events to be followed at a Tribunal hearing is rarely legislated for, but does promote clarity. The Post Office Appeal Board usually follows a Court-like order, but it does have the discretion to vary its procedure and frequently does - with sometimes disconcerting results! Thus in one case⁷⁴, after the Service Advocate had made his final

⁶⁹ at page 19

⁷² [1960] NZLR, 1121

⁷³ at page 1126

⁷⁴ 27 March 1979 - Appeal

⁷⁰ [1967] 1 A.C. 551 ⁷¹ at page 565

submissions, the Chairman asked the appellant if ^{he} had any more questions - immediately, the appellant launched into a lengthy and repetitious recapitulation of his grievances, which possibly did not help his case. In the appeal of D. A. Hercus⁷⁵ in which Mr Hercus was represented by a lawyer, the Chairman invited the Departmental Advocate to make his submissions first, before the appellant's case was presented. In view of the Board's almost total lack of consideration of the submissions made on behalf of the appellant in reaching a decision that an appeal did not lie, I feel the order of presentation did not help Mr Hercus's case.

(c) Evidence, Disclosure and Official Notice

(i) 'Unless statute otherwise requires, administrative tribunals are not obliged to comply with the rules of evidence developed by the Courts and Parliament.'⁷⁶ It was proposed by the 6th Report of Public & Administrative Law Reform Committee that in the case of Tribunals, it was not necessary for there to be a strict adherence to the rules of evidence applicable to Courts and consequently Tribunals should be able to make use of any information which will allow them to deal effectively with the matter placed before them. Lord Loreburn laid down in the Board of Education v Rice⁷⁷ that in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty of act in good faith, and to listen fairly to both sides, as that was a duty which lay on everyone who decided anything. However, the Board could 'obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.'⁷⁸ It was also said in R v Deputy Industrial Injuries Commissioner, Ex parte Moore⁷⁹ that a statutory tribunal must base its decision on evidence having some evidential value - as a principle of natural justice. S218B⁸⁰ of the Post Office Amendment Act 1978

⁷⁵ 28 March 1979 - Appeal

⁷⁶ K. J. Keith (supra) p 14

⁷⁷ [1911] A.C. 179

⁷⁸ at page 182

⁷⁹ [1965] 1 Q.B. 456, 476

⁸⁰ S218 B (5)

confirms the right of Classification and Grading Committees to receive evidence from any source.

The Franks Committee ⁸¹ points out that the presence of a legally qualified chairman would enable the correct weight to be given to hearsay and written evidence. At the present time, any matter on which Chairman of the Post Office Appeal Board feels there is a need for legal advice, (rarely) use has been made of the Crown Law Office, or, Mr McFarlane indicated he was happy to use the Post Office Legal Department⁸².

(ii) This raises the related question of a party having an adequate opportunity of knowing the case he has to meet so that he can prepare his answers to it. The P. & T. Regulations state very perfunctorily⁸³ that the Director-Generals' answer to the appeal, will be forwarded to the appellant when the hearing of an appeal has been entertained by the Appeal Board. Thus in C. F. Thomson v Post Office Appeal Board⁸⁴ the grounds stated by the appellant were that -

- (1) I am considerably better fitted for the post than the appointee by reason of my experience and better ability.
- (2) The system of reporting on applicants used in the present case makes a proper assessment of work more difficult if not impossible, rather than advancing proper merit.
- (3) The weighting of factors in the reports is not the weighting which should be given in assessing merit for promotion rather than ability to perform at the lower level.
- (4) The above points are shown by the fact all applicants were within the same category.

The reply made by the Director-General was -

In the opinion of the Promotion Board, Mrs. Lysaght and Mr Thomson are of equal merit. As Mrs Lysaght is senior in classification she is considered to be better entitled to the position.

The appellant will have to wait until the actual hearing before being appraised of further material which will be presented by

⁸¹ p. 22

⁸² Interview (supra)

⁸³ R. 126 (4)

⁸⁴ Unreported Decision of the Supreme Court M.96/74 p.3

the Departmental Advocate. It must be even more disconcerting when for policy reasons no further evidence is offered by the Departmental Advocate and the appeal is still disallowed.⁸⁵ Sometimes natural justice may be held to be satisfied if the material is presented at the hearing⁸⁶ ^{and} there appears to be no set rule that invariably, advance notification should be given of material. As we have already seen, merit assessment marks are supplied to the Post Office Association, not the appellant, initially.

The Chairman of the Appeal Board also advised⁸⁷ that when the Board is deliberating on regrading appeals, the report of the Regrading Committee, giving the principles upon which it carried out its work, will be available - this report is not available to the appellant. This matter was raised by Mr L. B. Roper⁸⁸ in the Supreme Court, where it was reported -

The applicant not only suggested that the Director-General had done no more than formally confirm the pertinent passage in the report....but that at the hearing the applicant and his counsel had been denied access to that document.....I carefully examined it and am satisfied that the applicant was fully informed of such passages therein as were directly relevant to his caseI therefore need not pause to consider the objection raised at an earlier stage that this report should not have been even received by the Board.

It is submitted that if relevant factual material is not disclosed to the party so affected, there is prima facie a breach of natural justice, no matter at what point the material arose, before, during or after the hearing.⁸⁹ Viscount Haldane, L.C. stated 'It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so....'⁹⁰ However, an argument may be made, based on Denton v Auckland City⁹¹ in which Speight, J. found there was a breach of the principles of natural justice when a Town Planning Committee of a local authority failed to disclose that they were

⁸⁵ Appeals of Assistant Engineers - 1977

⁸⁶ S. A. de Smith p. 179

⁸⁷ Interview (supra)

⁸⁸ [1975] Unreported decision of Supreme Court A471/74 p5

⁸⁹ S. A. de Smith p. 179

⁹⁰ Local Government Board v Arlidge [1915] A.C. 120, 134

⁹¹ [1969] NZLR 256

in possession of a report covering not only a factual summary but also comment, relating to the application. Regrading Committee reports in the Post Office contain elements of fact and opinion - there will be facts as to seniority and experience, and opinion, that is as to the merit assessment evaluated by the Reporting Committee (a) supported by local controlling officers, a majority report, or (b) not supported by local controlling officers, a minority report. However, it may also be argued that there are exceptions to the general rule of disclosure. Therefore, perhaps in the case of regrading assessment, to reveal the full policy on which the Promotion Board acted would be to inhibit frankness of comment by the Regrading Committee and disclosure might also affect the person concerned at the work face. It is also to be remembered that in private industry, the criteria, measurement and selection of candidates for promotion is seldom revealed to the person concerned.

The problem still arises when the Chairman of a Tribunal is not legally qualified and needs to take independent legal advice. In Wislang v Disciplinary Committee⁹² verbal communication with a barrister in the absence of the plaintiff as to whether the committee had jurisdiction to determine the matter was not a breach of natural justice. However in the case of L. B. Roper's appeal⁹³ which was remitted from the Supreme Court back to the Post Office Appeal Board to answer the question raised - Professor Mathieson advised the Board throughout. Did the Board act on material unknown to the appellant and which was, as a consequence, incapable of being contraverted? As was said by Speight, J.⁹⁴ 'It goes without saying that it is improper for a Tribunal to receive evidence, to hold private interviews, even to make inspections without giving a right of hearing to the litigant so that he may reply.' It is of course, well accepted that a Judge or Magistrate may consult his colleagues on a point of law.

⁹² [1974] 1 NZLR 29, 34

⁹³ Interview - L. B. Roper, 15 July 1979

⁹⁴ Wislang v Disciplinary Committee (supra) 34

(iii) Administrative Tribunals develop an expert knowledge of their particular field and can be expected to place considerable reliance upon relevant information within their own personal knowledge. All members of the Post Office Appeal Board are present or past employees of the Post Office and can use their own personal knowledge and experience to test and evaluate material presented by the parties. Background knowledge and experience may come from such a wide variety of sources that it is not feasible to require disclosure of the subjective reasoning on which some judgments are based. However, it is argued that 'it is necessary to impose effective procedural checks to guard against a tribunal acting upon inaccurate information within its knowledge or misapplying its knowledge, and to ensure that the parties are permitted to know and address submissions to all the crucial issues.'⁹⁵

Witnesses

The power of tribunals to summon witnesses varies considerably. S 197 of the Post Office Act authorises the Appeal Board to 'summon and examine witnesses on oath or otherwise.' In practice the Board makes extensive use of the oath. The P. & T. Regulations R126 (6) also give a discretion to the Board to permit, at the appellant's request, a person to appear at the hearing and to give evidence on his behalf. There is also an extensive discretion⁹⁶ to accept the written statements of witnesses who cannot attend in person and to pay witnesses travelling expenses. However the full powers of subpoena which the Commission of Inquiry Act 1908 grants, does not apply to witnesses summoned by the Post Office Appeal Board, for example, there is no penalty for non-attendance and there is no grant of immunities and privileges of non-incrimination. This is in contrast to disciplinary inquiries, where P. & T. Regulations R 91 (4) do make such a grant of non-incrimination.

Reasons

There is no general rule of English law that reasons must be given for administrative (or indeed judicial) decisions⁹⁷

⁹⁵ J. Smillie 'The Problem of 'Official Notice' Reliance by Administrative Tribunals on the Personal Knowledge of their Members.' [1975] Public Law p84

⁹⁶ P. & T. Regulations R126 (9) and (10)

⁹⁷ S. A. de Smith (supra) p 128

Such an imposition can be with more frequency, required by statute - thus, the Deportation Tribunal is required to give its decision in writing, with reasons.⁹⁸ The State Services Commission, the Police Department and the Railways all expressed reluctance to give reasoned decisions.⁹⁹ As G. S. Orr noted¹, if a reasoned decision is required, it is more likely to be a satisfying one and not arrived at arbitrarily, as the Tribunal will have spent some time evaluating the hearing evidence and applying the relevant law. The duty to supply reasons when requested to so, is imposed by the Tribunals and Inquiries Act 1971 on many statutory tribunals in the United Kingdom. The Public and Administrative Law Reform Committee felt that, if requested, tribunals should give reasons². The Post Office Appeal Board operates on a generally informal but dignified procedure when conducting appeals and has remained unmoved, or expressed extreme reluctance to any request for a reasoned decision. There is no statutory obligation compelling the Board to do so, as was found in Clark v Wellington Rent Appeal Board³. There it was stated by O'Regan, J. that by simply repeating 'three of the matters to which it was required by the statute to have regard. Such are not reasons for the assessment. They are a bald statement of the statutory requirements upon which 'in particular' it founded its decision.'⁴

The Post Office has indicated⁵ that reasons should not be allowed as 'appellants declare the grounds on which they are appealing, and the appeal is heard on that basis. It follows, I think that the grounds of the appeal were or are not proven as the case may be.....'. A past Chairman of the Board thought reasons for decisions would only 'lead to the building up of a body of precedence[t]. This is most undesirable as it can lead to a lot of worthless argument',⁶ - failing in this approach to recognise that Tribunal's can and do build up expertise in the matter of distinguishing cases, just as the Courts do. The present Chairman of the Board considered that the reasons for a decision were in fact well-known by both parties to an appeal

⁹⁸ 4th Schedule (as enacted in 1978) Immigration Act 1964 S7 (1)

⁹⁹ 8th Report - Public & Admin Law Reform Com. p40

¹ Administrative Justice in N.Z. - p.74

² 6th Report - p 12

³ [1975] 2 NZLR 24

⁴ at page 26

⁵ Letter (supra) & 8th Report p 41

⁶ Letter (supra) p2

- and if the Service Advocate was taking the case for the appellant, he was in just as good a position to give reasons as the Board itself. Nevertheless, if reasons were asked for and if there was some justification, the Board did provide reasons. Mr. McFarlane was used to giving reasoned decisions in the other spheres of his work, but felt that the situation in which the Appeal Board operated, consultation between parties and the helping of both sides to present a proper substantiated case was more valuable than giving formal reasons. Such a conciliation process, however, ignores the fact that reasons will allow a person who has right of appeal to determine whether he has good grounds to pursue a further remedy, and will inform him of the case he will have to meet, if he does decide to seek redress from the Courts.⁷ Reasons are also a valuable check on both the exercise of formal and informal decision-making. Thus, Haslam, J stated '[He] was under no obligation to give any reasons, and as already observed, it is hard to imagine how he could reasonably be expected to do so in the case of every employee whose position called for periodic regrading...'⁸ However, in referring to a letter sent by the Secretary of the Appeal Board, the appellant was informed (in part) -

....it was claimed that the grading of your position of Office Solicitor should be not less than Special 12.

In the course of your statement, you produced evidence by way of comparison with senior executive positions in the Post Office and with legal positions in the Public Service which you claimed supported the case for the lifting of your position to the grade mentioned above.

The Board carefully examined this evidence, but came to the conclusion that the claim for a regrading of your position to Special 12 could not be substantiated. Accordingly, it disallowed the appeal....

⁷ G. Flick - 'Administrative Adjudications and the Duty to give Reasons' Public Law [1978] p 17

⁸ L. B. Roper v Post Office Appeal Board (supra) p8

The conclusion was reached that as reasons for any decision must be an expression of a logical process, the grounds of the letter did little more than inform the appellant that he had failed to make out his contentions to the satisfaction of the Board. Consequently, as the Board failed to answer the question raised by the appeal - should the Director-General's grading of Special 6/Special 9 for the applicant's position be set aside, and if so what grading would be substituted - the matter was referred back to the Board for reconsideration.

In the appeal of R. B. Wilkinson under S196(a) (now repealed and replaced by a new S196 (a)) it was contended by the appellant that there were two interpretations which could be placed on the word 'relating':-

1. 'relating taken as referring to the content of the specific position held by the appellant. This is, I believe, the traditional interpretation.
2. 'relating' taken as referring to the content of similar positions to that of the appellant within the same Section of the Organisation⁹

In rejecting this interpretation, the final remark of the Chairman¹⁰ was '...from the regrading point of view and by the reading of the Act, we have to consider the individual's position as being the basis upon which an appeal is being made.' After an initial refusal, on policy grounds to supply reasons for the decision, the following were given -

Having regard to the totality of the evidence provided by the appellant and the Department, and taking into account the relativity of other positions in the Professional Engineering sphere, it was held that the position held by Mr Wilkinson is correctly graded.¹¹

While accepting, as Haslam, J. did, that it would be inappropriate to subject an expression of the Board's decision to pedantic scrutiny¹² - those offered to Mr Wilkinson would not appear to be logical or 'reasons.'

⁹Submission of R. B. Wilkinson - Regrading Appeal

¹⁰Tape of the Appeal Hearing 1978

¹¹Letter of the Secretary of the Appeal Board 2 April 1979

¹²Haslam, J. at page 9 Roper v Post Office Appeal Board (supra)

Arguments advanced against the giving of reasons, are those of the imposition of additional administrative burdens on the particular Tribunal, leading to 'canned' reasons, or that reasons could hinder the manner in which a discretion is exercised.¹³ The Franks Committee saw fairness¹⁴ as one of the characteristics of good administration - fairness would seem to require the giving of reasons when so requested.

Costs

S 197 (1) of the Post Office Act authorises the Appeal Board to make such order as it thinks just for the payment of the costs of the appeal by the Crown to the appellant or by the appellant to the Crown. Under S197 (4) the Appeal Board may deem an appeal to be frivolous, and impose an appropriate penalty. This provision has never been used by the present Chairman¹⁵ - an attitude which is in agreement with Post Office Association policy on the matter¹⁶.

Appeal and Review

The Post Office Appeal Board has no power to state a case for the opinion of the Supreme Court on a question of law and there is no right of appeal on questions of law to the Supreme Court from any determination of the Board. The Railways Appeal Board may state a question of law to the courts, and there is provision in many of the more recently passed empowering Acts¹⁷ to provide such access to the Courts.

The Fourth Report of the Public & Administrative Law Reform Committee¹⁸ summarised the grounds upon which the Courts will review administrative action -

- (1) The action or decision is ultra vires
- (2) An error of law has been disclosed on the face of the record of the tribunal making the decision
- (3) There has been a breach of natural justice

Due to the scope of the various remedies available and their limitations, the means by which review could be obtained was facilitated by the Judicature Amendment Act 1972. Three of the

¹³ G. Flick (supra) p19

¹⁴ p 5

¹⁵ Interview (supra)

¹⁶ Interview (supra)

¹⁷ Deportation Review Tribunal, S22 E, S22F (as enacted 1978)

¹⁸ p 8

Post Office Appeal decisions to come before the Courts, were brought under S4 of that Act, for review. Within the limitations of the Judicature Amendment Act 1972 (since further amended) and after pointing out the need for an applicant to state explicitly the grounds for the application¹⁹, Wild, C. J. found no error on the face of the record. In the two other cases a declaration was made under S4 setting aside the decision of the Board. It may also be possible to seek a declaration under the Declaratory Judgments Act 1908, in the terms of Ss 2 and 3.

However, with the introduction of the Classification and Grading Committees,²⁰ S218B (6) enacts a privative clause. The Public and Administrative Law Reform Committee²¹ contends that the restriction on the Court's power to review errors of law which do not go to jurisdiction should be enacted only in exceptional cases. The insertion of this subsection in the legislation was not mentioned in any of the readings of the amending Bill. The Post Office Act does not give a right of appeal but at common law a decision by an inferior court is subject to review and a privative clause like S218B (6) leaves 'unaffected the power and duty of a superior Court to compel the observance by inferior Courts of the statutory limits of their jurisdiction.'²² The courts drew a distinction between the case where a judge made 'an erroneous decision in the exercise of his jurisdiction and...an erroneous assumption of jurisdiction which he did not possess.'²³ Although this distinction has become blurred since Anisminic Ltd v Foreign Compensation Commission²⁴ it is clear from the Court of Appeal's decision in Attorney-General v Car Haulways (N.Z.) Ltd²⁵ that not all errors of law are jurisdictional errors in New Zealand, so that it is still necessary, but more difficult, to make the differentiation. The inclusion of a privative clause at a time when the general trend is one of easier access to the courts may be indicative of Parliament's intention to protect the Committee's findings from judicial review, in order that it may develop a consistent policy. (This was not so interpreted in

¹⁹ Thomson v. P.O.A.B. (supra) p 8 ²⁰ P.O. Amendment Act 1978

²¹ 6th Report, p 13

²² N.Z. Waterside Workers' Fed Ind Assn of Workers v Frazer [1924] 70 2

²³ Van de Water v Bailey [1921] NZLR 122, 124 per Salmond J.

²⁴ [1969] 2 A.C. 147

²⁵ [1974] 2 NZLR 331

Anisminic, but the legislation there contained detailed directives, which is not the case in the present legislation). A proper distribution of functions between court and tribunal should be maintained, and the ability of an employee to pursue his rights to the Courts, should not be so encumbered - even though the Courts have moved towards a less restrictive attitude on jurisdictional error.

S218B (9) also enacts that any decision of the Appeal Board on an appeal from S 196 (1) (a) 'shall be final'. As there is no statutory right of appeal from Appeal Board Decisions, it is submitted that this formulation will not have any effect on the supervisory jurisdiction of the Supreme Court.²⁶ No doubt this restrictive legislative was in accordance with Post Office and Post Office Association policy. However, such legislative "over-kill" in the area of a citizen's rights should not be necessary, except in exceptional circumstances, particularly in view of the increasing tendency to protect and uphold rights of access to judicial remedies.

Appeal Board Policy

The Department and the Post Office Association have created a situation where in many instances, the appeal process is viewed as a 'safety valve.'²⁷ The making of an appeal has become a tool in a personnel management system, geared to a freely available hearing body. In a large organisation, such a system does much to foster good staff/management relationships, especially when an appellant is accorded a private hearing and has the help of an advocate to present his case. Nevertheless, when a statutory appeal board becomes integrated into such a system, there is still the problem to be faced that an appellant coming before the Board, desired more than a hearing - he did in fact, expect some positive action on the presentation of a well-reasoned appeal. Consequently 'policy' decisions which prevent a successful appeal may lead to a sense of disillusionment that the Appeal Board is not fulfilling its statutory function. This feeling however, is

²⁶ K. J. Keith (supra) p 41

²⁷ Mr J. Darnell - letter (supra) p 2

probably not present in the majority of cases. Most of the Board's work is concentrated within the promotion and regrading area and the disciplinary function occupies a very small component of its total activity.

Disciplinary Appeals

1974 - 1979

1974/75	-
1975/76	2
1976/77	1
1977/78	2
1978/79	3

It is possible to make the assumption that a 'policy' decision was involved in the appeal of Mr D. A. Hercus. The Department and the Post Office Assn are in agreement that wherever possible, a candidate being promoted is to be favoured over a candidate being transferred. In the above-mentioned appeal, Mr Moriarty of the Appeal Board contended that had Mr Hercus been appointed at Grade .07 (a proposal acceptable to Mr Hercus) there would have been no component of promotion and therefore, the appeal was outside the jurisdiction of the Board.²⁸ It is submitted that there is merit in Mr Hercus's arguments,²⁹ but the more usual interpretation of 'promotion' would be preferred, for policy reasons.

Conclusion

In this survey of the Post Office Appeal Board, it is possible to conclude that reform is long overdue in the areas of the constitution of the Board and the procedures it is required to comply with, as imposed by statute and regulation. The Post Office Association has, in protecting its members rights from within a 'closed shop' and single industry union organisation, formed a close liasion with the Post Office on matters of policy connected with the Appeal Board and its functions. The nature of this long established relationship between employer and union would make it appear unlikely that agreement for change in a manner consistent with the recommendations of the 6th Report of

²⁸ Tape of Appeal proceedings - 29 March 1979

²⁹ See Appendix 4 - Submissions of D. A. Hercus

the Public and Administrative would be achieved.³⁰

Uniformity of itself, will not impart any inherent quality of 'soundness' in Tribunals. Nevertheless, it would seem to be a matter of some importance that Tribunals which have operated over a long period should themselves, and the people they were designed to serve, be the beneficiaries of the considerable body of research which has been accumulated in this important area of Administrative Law. The arguments which flow back and forth concerning the best method to be adopted to achieve reform in this sometimes politically sensitive area, should not be used to hide the fact that the Post Office Appeal Board legislation is in need of an overhaul.

1927/31	A. P. Davis	Chief Postmaster
1931/41	R. T. Allen	Chief Inspector
1941/42	H. McGill	Chief Industrial Director
1947/53	C. L. Mays	Deputy Director-General
1963/76	A. G. Hildreth	Chief Inspector, CPO
1976	P. A. Bradley	Chief Inspector, Industrial Div.
Telegraph Posts		
1919/21	A. R. J. Alexander	Superintendent, Telegraph
1921/22	S. A. O'Leary	Superintendent
1922	T. B. Bennett	Superintendent, Telegraph
1922/23	M. R. G. Brown	Chief Superintendent, Telegraph
1928/32	J. D. Burns	Superintendent, Telegraph
1932/35	H. V. Ward	Superintendent
1935/37	G. A. Wilson	Superintendent, Telegraph
1937/43	A. C. Wells	Chief Inspector, Telegraph
1943/49	G. A. Wilson	Superintendent, Telegraph
1949/54	H. Pollock	Chief Insp. 1951-54, Chief Insp.
1954/60	S. J. Murray	Deputy Superintendent, Telegraph
1960/62	J. C. Stapleton	Chief Superintendent, Telegraph
1962/65	J. V. McCann	Deputy Chief
1965/67	S. A. Pollock	Superintendent, Telegraph
1967/69	E. J. Hurtle	Senior Superintendent, Telegraph
1969/73	S. Lister	Superintendent, Telegraph
1973/76	J. C. Stapleton	Chief Superintendent, Telegraph
1976	S. J. Bradley	Superintendent, Telegraph

³⁰ Paragraphs 24 - 48

APPENDIX ONE

Chairman

Composition of the Appeal Board

1918/20 F. V. Fraser
 1920/35 E. C. Cutten
 1935/36 E. Page
 1936/38 E. D. Mosley
 1938/42 H. H. Young
 1942/59 J. A. Gilmour
 1959/60 W. H. Freeman
 1960/73 H. J. Thompson
 1973/75 J. B. Darnell
 1975/ C. A. McFarlane

All Magistrates

Ex Director-General
 Ex Director-General

Government Members

1918/19 Richardson
 1919/24 G. B. Dall
 1924/37 H. P. Donald
 1937/41 R. I. Allan
 1941/47 H. McGill
 1947/63 C. L. Mayo
 1963/76 H. C. Hildreth
 1976 P. A. Moriarty

Ex Second Assistant Secretary
 Ex Chief Postmaster
 Ex Inspector, GPO
 Ex Divisional Director
 Ex Deputy Director-General
 Chief Inspector, GPO
 Ex Principal, Industrial Div.

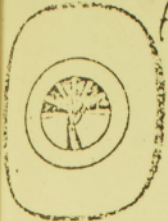
Telegraph Members

1918/19 E. R. J. Alexander
 1919/22 S. A. Ogilvie
 1922 P. D. Bennett
 1922/28 W. H. G. Brown
 1928/32 J. D. Burns
 1932/35 H. V. Ward
 1935/39 G. A. Wilkes
 1939/45 A. C. Wells
 1945/49 G. A. Wilkes
 1949/54 M. McLeod
 1954/60 B. J. McIvor
 1960/62 J. G. Stapleton
 1962/65 J. P. McConway
 1965/67 B. B. Boland
 1967/69 F. J. Harris
 1969/73 R. Latter
 1973/76 J. G. Stapleton
 1976 S. J. Bradley

Superintendent, Telegraph
 Telegraphist
 Superintendent, Telegraph
 Asst. Supervisor, Telegraph
 Supervisor, Telegraph
 Telegraphist
 Supervisor, Telegraph
 Staff Welfare Officer
 Supervisor, Telegraph
 Senior Sup. Dist. Eng. Office
 Deputy Superintending Tech.
 Senior Supervisor Telegraph
 Overseer (Lines)
 Supervisor, Telegraph
 Senior Supervisor, Telegraph
 Supervising Technician
 Manager, Telegraph
 Supervising Overseer (Lines)

Postal Members

1918/19	H. A. Slyfield	Inspector, GPO
1919/20	C. G. Camp	Asst. Supervisor
1920/28	R. B. Renolds	Supervisor of Postmen
1928/32	E. R. Blewett	Accountant
1932/37	W.G.F. Pinkham	Senior Clerk
1937/49	A. Robertson	Postmaster
1949/50	R. Gannaway	Supervisor, Clerical Branch
1950/54	G. D. Robson	Supervisor, Clerical Branch
1954/58	C. E. Evans	Staff Welfare Officer
1958/64	G. A. Broadley	Manager, PSG
1964/67	C. E. Bailey	Accountant
1967/73	W. G. Paine	Asst. Manager, Sav. Bank Branch
1973/77	J. K. Thompson	Postmaster
1977	H. Bayram	Supervisor, CPO



AB1

POST OFFICE ASSOCIATION (Inc.)

KATIPO HOUSE, 89 GHUZNEE STREET, WELLINGTON, NEW ZEALAND
GENERAL SECRETARY, I. E. REDDISH,

Your Ref.
Our Ref. A. 21

P.O. BOX 6254, TE ARO
TELEPHONE 844-090
TELEGRAMS "KATIPO"

Dear

I have now received from the Secretary of the Appeal Board a list of those officers who have appeals pending for the next session of the Board, which is expected to commence

As the number of appeals to be handled is considerable, it is essential that the preparation of cases be commenced as early as possible.

I will be filling the appointment of Association Advocate for the next round and offer my services should you require them. If you wish to avail yourself of the offer would you kindly advise me by return mail to enable me to complete my preparations for the next session.

Each appeal hearing is commenced by the appellant reading to the Board his statement of case, the object of which is to outline the general reasons for the appeal and the issues involved.

To assist you in preparing your statement of case the following sets out the general requirement.

Your statement should be headed -

"Appeal of against
for the position of Class"

Mr Chairman and Gentlemen, "

This is followed by -

- (a) A brief outline of your Departmental career, particularly that covering the last few years.
- (b) The reasons for your appeal (i. e. at least equal merit and seniority or greater merit etc.)
- (c) List the grounds in support of the contentions listed in (b) and why you consider you should have been given the promotion in preference to the appointee.

You will need a total of six copies of your statement, four for the Board, one for yourself and one for my use.

Should you experience any difficulty in the preparation of your statement do not hesitate to get in touch with me for advice or assistance.

As soon as is reasonably possible I would appreciate receiving a copy of your statement.

I understand that you received a . . . merit assessment and the appointee a . . . merit assessment. To be successful with an appeal you would have to convince the Appeal Board that your assessment should have reached a standard of . . . which would have, in the eyes of the Promotion Board, allowed you to be considered of at least equal merit with the appointee or of greater merit.

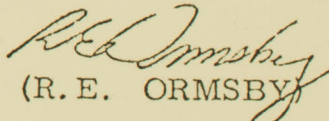
However, our present reporting system which required a fixed percentage pattern makes any endeavour to throw doubt on the accuracy of the marks awarded by reporting officers a most difficult proposition. In fact, only if there had been a breach of the Reporting Instructions could I hold out much hope of an appeal succeeding. Unless an appellant's arguments can be verified by reliable witnesses who can substantiate the appellant's submissions then I see difficulty in having an appeal allowed.

The people who are prepared to support your appeal must be officers who have acted as your controlling officers during the last reporting period and preferably be in a position to compare you with other similarly graded officers in your own sphere.

You may like to give this aspect some thought and let me know if any support is forthcoming in that direction.

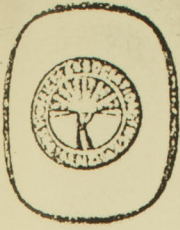
If you decide not to go ahead with an appeal it is essential that you notify the Secretary, Post Office Appeal Board, Post Office Headquarters, Wellington, immediately as this will eliminate the need to undertake unnecessarily a great deal of preparatory work on your behalf.

Yours faithfully,


(R. E. ORMSBY)

SERVICE ADVOCATE

(A. B. 1.)



APPENDIX THREE

POST OFFICE ASSOCIATION (Inc.)

KATIPO HOUSE, 89 GHUZNEE STREET, WELLINGTON, NEW ZEALAND

GENERAL SECRETARY, I. E. REDDISH, C.B.E. M.B.E.

Your Ref. _____

Our Ref. A. 21

P.O. BOX 6254, TE ARO

TELEPHONE 844-099

TELEGRAMS "KATIPO"

28 July 1977

Mr J. L. Gordon,
Senior Technician,
C. P. O.,
NAPIER

Dear Sir,

Referring to your appeal against the date of your appointment to Senior Technician, Napier, I appeared before the Appeal Board and made a submission on your behalf. As requested I challenged the Director-General's decision not to provide an appeal hearing for you.

Your reasons were noted by the Board but unfortunately it was advanced that the Post Office Act did not provide a right of appeal to cover the reasons submitted by you and thus the appeal was declared "not to lie".

Yours faithfully,

(R. J. McCOMBE)

SERVICE ADVOCATE

APPENDIX FOUR

Appeal Nos. 644 and 698

IN THE MATTER of The Post Office Act
1959

AND IN THE
MATTER of An Appeal by
DAVID ALLAN HERCUS
Re Appointment 75278

SUBMISSIONS OF APPELLANT

These submissions relate to the question to be determined as to whether the appeal lies in accordance with Section 196 of the Post Office Act 1959, against the appointments of Messrs. D.J. McGregor and J.O.S. Bradley to vacancies numbered 37 and 38 respectively.

It is respectfully submitted as follows:

1. Rights of appeal lie against the decision of the Director-General in accordance with Section 196(1) (b) of the Post Office Act 1959.
2. The appellant is presently Supervising Engineer (Transmission), Engineer in Chief's Office, Post Office Headquarters, Grade 035-00-07 at an annual salary of \$17,263.00. This is the top grade and salary for the position of Supervising Engineer in the Post Office. The appellant has held this position since March of 1973 and for the twelve months immediately prior to that appointment was on the lower grade and salary step of Supervising Engineer.
3. The next position in the Professional Engineering occupational class is that of Divisional Engineer at an annual salary of \$18,377.00 to \$19,642.00. Promotion to Divisional Engineer is by appointment to advertised vacancy only. Hence it is impossible for the appellant to advance on salary scale under his present designation and any promotion for the appellant must be by way of appointment to an advertised vacancy.

4. Vacancy numbers 37 and 38 were advertised on vacancy list No. 170 POHQ 100/44 of the 27th of June 1978 at a salary listed as \$14,084.00 - \$14,966.00 / \$15,956.00 - \$17,079.00. In the interval between advertisement of the vacancy and appointment to the position these salaries were adjusted in accordance with amendments to Government Servant Salaries to \$16,270.00 - \$17,263.00 / \$18,377.00 - \$19,642.00.
5. The vacancies advertised accordingly offered salaries of a higher level than the salary of the appellant, and the reason for the application of the appellant was the more attractive salary offered. The appellant did not endorse his application in any way to indicate that he was applying for these vacancies on transfer. The lower salary scale offered was equivalent to the (then) salary of the appellant. If the appellant had applied for the same salary level his application would have indicated that he was applying on transfer. As already stated there was no such indication and it therefore follows that the appellant was applying for the appointment at the salary level of (now) \$18,377.00 - \$19,642.00.
6. It is therefore submitted that the appellant was applying for appointment to a position on a higher salary level than is possible within the framework of his present designation. This, it is submitted, would clearly be promotion for the appellant. "Promotion" is not defined within the Act. Section 5 (j) of the Acts Interpretation Act provides that:

"Every Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and

of such provision or enactment according to its true intent, meaning and spirit."

Putting such a fair, large and liberal interpretation on the present Act, it is submitted, would render promotion to include an increase in salary.

Promotion is defined in the Shorter Oxford Dictionary as being:

"Advancement in a position, preferment, The action of helping forward, the fact or state of being helped forward; furtherance advancement."

and the word promote is defined:

"To advance (a person) to a position of honour, dignity or emolument, especially to raise to a higher grade or office."

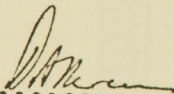
IN THE ALTERNATIVE it is respectfully submitted as follows:

7. That should the Board not agree with the appellant's contention that his appointment could only have been to the higher salary level, then it is submitted that promotion would clearly have been established in that the appellant would, by appointment to the position, have placed himself within a framework whereby salary increments were open to him without application to an advertised position. In support of this submission the appellant respectfully draws the Board's attention to Appointment List No. 1 POHQ 100/3 of the 3rd November 1978. This list shows the promotion of a number of Principals to the salary of \$18,377.00 - \$19,642.00. These Principals, who had previously been on salaries of \$17,263.00 had been Principals for only two years and their promotions were not announced as the result of the advertised vacancies. It would be reasonable to assume, therefore, than an appointee to the present positions, if only appointed on the lower salary scale, could reasonably expect promotion to the higher

salary scale within two years.

As already stated in paragraph 3 of these submissions, the appellant is not in a position open to increments under his present designation.

Dated at Wellington this 28th day of March 1979


.....

Appellant

Source: Secretary of P.O. Appeal Board

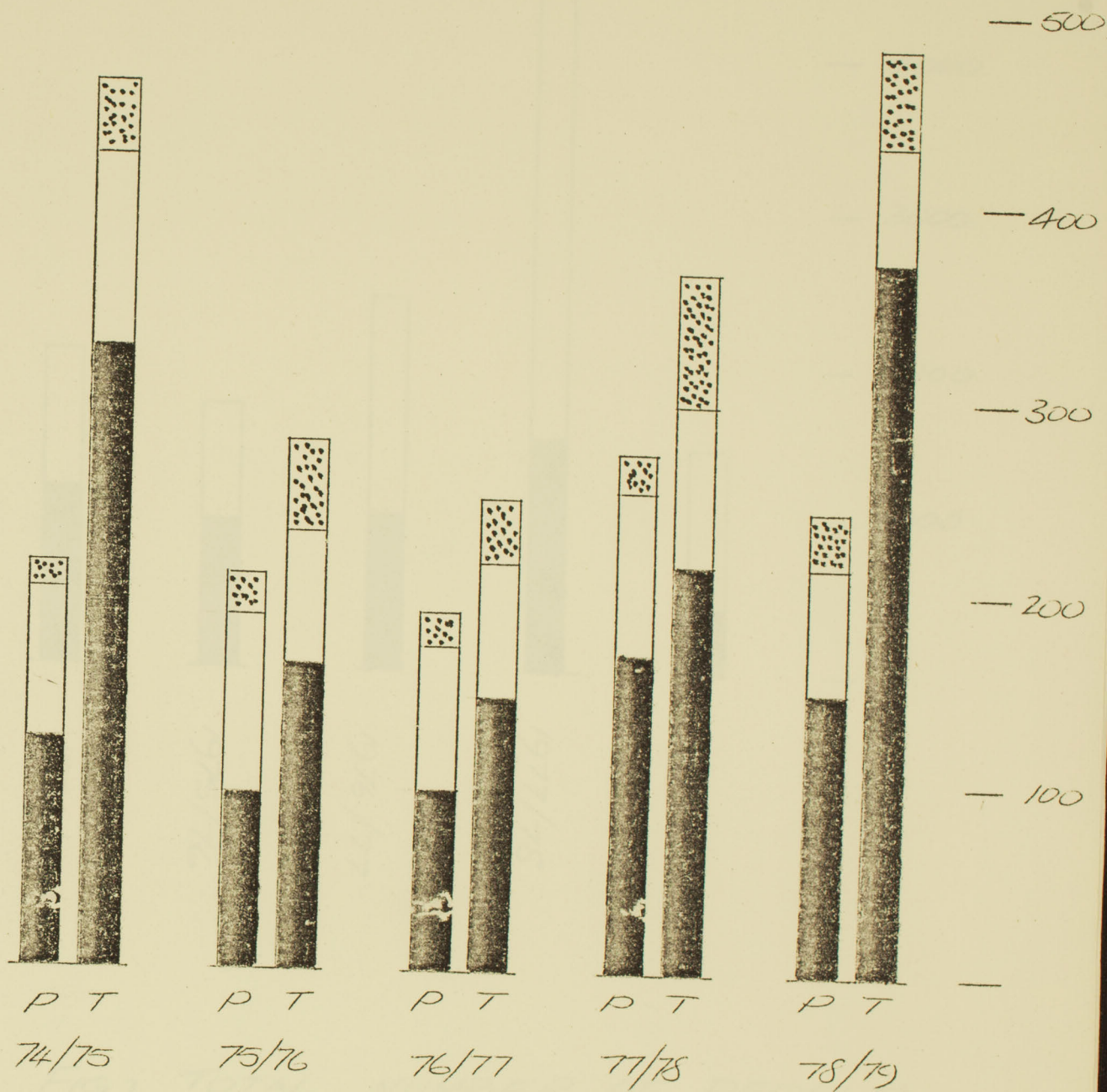





FIG 1. ANALYSIS OF APPEALS LODGED 1974-79.

-  Appeals withdrawn
 -  Appeals heard.
 -  Appeals lapsed, or funds not to be
- P = Postal T = Telegraphic.

Source: Secretary of P.O. Appeal Board

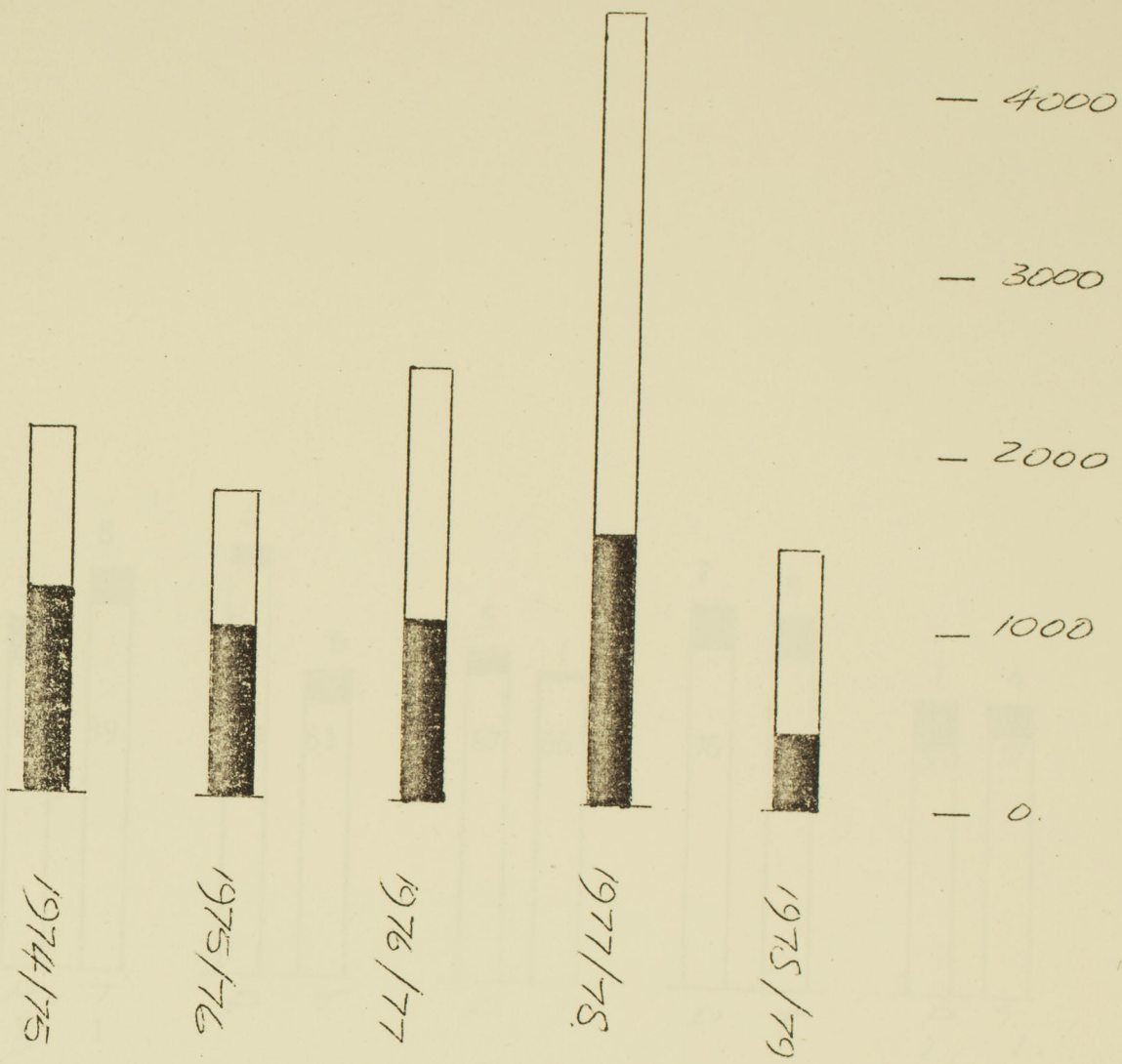


FIG 2. TOTAL NUMBER OF PEOPLE APPEALED AGAINST.

□ Postal
■ Telegraph

Source: Secretary of P.O. Appeal Board

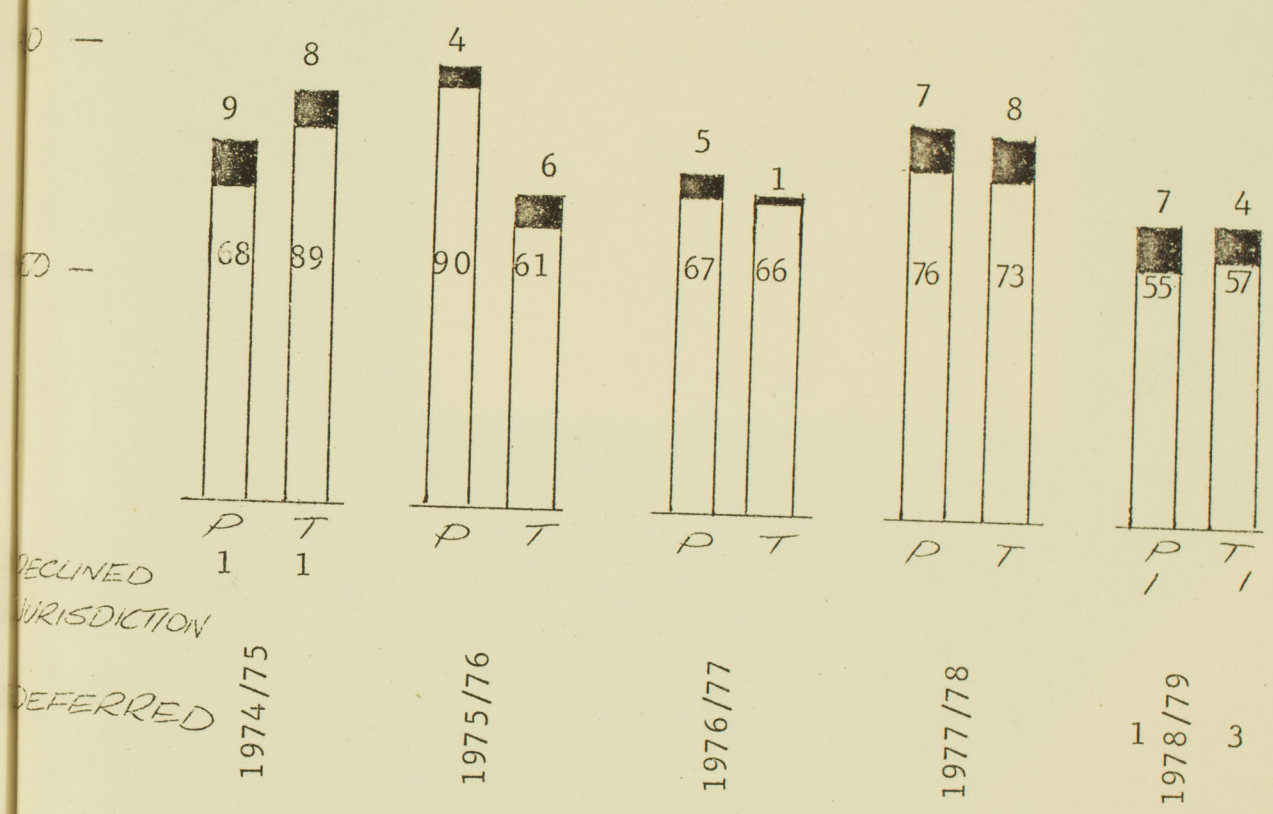


FIG. 3. ANALYSIS OF APPEALS HEARD

DISALLOWED
 ALLOWED

VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

F
Folder SPRINGFELLOW, K.
St The Post Office Ap-
peal Board.
440,132

LAW LIBRARY

DU	84/1925
PLEASE RETURN BY	
-2 AUG 1964	
TO W.U. INTERLOANS	

A fine of 10c per day is
charged on overdue books.

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00443327 0

