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Research Essay for Prof. Keith - LAWS 502

# The Shipping Industry Tribunal

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## INTRODUCTION

This paper is an attempt to describe the origin and functioning of the Shipping Industry Tribunal. The Tribunal is considered a good example of an administrative tribunal established as a result of considerable evidence of the need for such a tribunal, but in the face of strong opposition from the organisations representative of those over whom the Tribunal was to have jurisdiction. It describes the statutory provisions authorising the Tribunal, it gives examples of situations in which the Tribunal has intervened in disputes, it describes the judicial review of the Tribunal's actions which has occurred and it explains how, in the light of that review, Parliament amended the authorising legislation. Finally, it considers the effectiveness of the Tribunal - one of the few New Zealand tribunals established to deal predominantly with industrial disputes which has the power to impose substantial penalties - in an industry in which many of the participants are effectively organised and frequently express strong opposition to further government involvement in the industry, particularly in industrial matters.

## BACKGROUND

The Shipping Industry Tribunal has its origins in the recommendations of the 1971 Commission of Inquiry into New Zealand Shipping. This Inquiry was established in response to recognition that the shipping industry was in a state of severe crisis and that there was a danger of the industry collapsing. For approximately a decade the ships had been frequently delayed by industrial disputes - in the case of one ship, the "Wainui", for five months in 1969. Many of these stoppages reflected the transition the industry was undergoing from a long period of relatively stable operation to a condition of rapid change in all of its aspects, which created pressures leading to instability and further change.

Established routes were being successfully challenged by overseas shipowners, technology was causing the sale of traditional ships which were subject to accelerating obsolescence, and greatly enhanced remuneration and working conditions reflected, in part, the hard bargaining of effective maritime trade unions. The traditional heirarchical shipboard organisation and accepted disciplinary measures were breaking down under the pressure of persistent challenge. In addition, a number of irresponsible and disruptive militants appeared bent on tearing away the fabric of the industry. The Commission of Inquiry recognised that -

> "if the situation of the last few years continues it can only lead to the destruction of the industry. A vital industry is bleeding to death." (pp 48 & 266 of Report)

New Zealand's merchant shipping legislation grew out of the United Kingdom Merchant Shipping Act, 1894. This was a consolidating statute which brought together legislation dealing with the broad spectrum of merchant shipping, enacted during the latter half of the nineteenth century. In the provisions for the employment of masters and seamen, it reflected the poor exploited nature of merchant seamen of the time and provided for government intervention in the engagement, employment and discharge of seamen. Punishments for shipboard offences against discipline were laid down and provisions was made for a state employee, the Superintendent of Mercantile Marine, to hear and rule on shipboard dispute referred to him.

New Zealand, together with other British Commonwealth countries, adopted many of the British methods of regulation and a large part of the 1894 Merchant Shipping Act was written, in toto, into local legislation. The principle maritime statute of the earlier twentieth century was the Shipping and Seamen Act, 1908. The present statute is the Shipping and Seamen Act, 1952, however many of its sections can be traced back, with little change in the provisions, to

those of the 1894 legislation in the United Kingdom. Paternalistic and often authoritarian provisions dealing with the welfare and employment of seamen are, in too many respects, badly out of step with the needs of the modern maritime environment. The 1971 Commission of Inquiry recommended a number of changes.

Since 1899, the Government has maintained Mercantile Marine Offices at the main ports "for the better performance or exercise of any duties or responsibilities with which the Minister or the Ministry is charged by or under this Act" (s 10), under the supervision of Superintendents of Mercantile Marine. The Act provides for the Superintendent to decide on disputes between the master (or owner) and a seaman on any question (s 151A) including disputes as to wages (s 77), however before any question other than one of wages could be referred to a Superintendent, the parties had to agree to the question being so referred. It was, of course, often difficult to get such agreement. The Superintendent was given the power to decide that any question referred to him should be decided by a Court of Law, or other appropriate authority, or under the dispute procedure of a relevant industrial agreement. This procedure could only be adopted with the consent of the parties who had referred the dispute to him.

Many of the problems in the industry had been caused by small and initially insignificant disputes being blown up out of all proportion because the parties would not abide by a Superintendent's ruling. The "Wainui" dispute in 1969/70, which proved to be an industrial and economic disaster for the shipping industry and for New Zealand, had its origins in disagreement over the engagement of one man. The existing machinery was becoming increasingly inept as a system for nipping disputes in the bud. The procedures and processes available under the Shipping and Seamen Act, the maritime awards and the Industrial Conciliation and Arbitration Act had for years been by-passed and what had commenced as small disputes and differences became matters of direct confrontation. In the "Wainui"

dispute, the decisions of a special committee established to settle the matter were ignored and there was no authority for enforcement or penalty for refusal to observe the decision.

The Commission of Inquiry looked across the Tasman for an example of prompt and apparently effective means of dealing with industrial disputes. After a period of frequent disruption in the 1950s, the Australian shipping industry had settled down to be relatively free of major disputes. The Conciliation and Arbitration Act, 1904 - 1970, provided for a Commonwealth Conciliation Commission, which had established the practice of specialisation by Commission members in the handling of disputes in particular industries. The legislation (ss 28 & 29) requires the Commision to take action on a dispute as soon as it becomes aware that there is a dispute, or one is likely, and whether or not notification has been given. Also, parties to a dispute must notify the Commision. The Commission is empowered to direct the parties to confer and to call upon the highest authority on each side to attend - a power regarded as important by those involved. In practice, immediately a dispute on a ship becomes known, steps are taken to get the matter settled, but if the advice then given is not readily accepted, the Commission makes an order ex parte, or alternatively, deals with the dispute by way of conference, either at a formal hearing or informally on board the vessel concerned. Ex parte orders, while not always obeyed, have proved very effective in the avoidance of, or reduction of, delays in sailing.

In the light of the Australian experience, the Commission recommended, firstly, that the Shipping and Seamen Act be amended to empower the Superintendent to act when asked to do so by either party to a dispute, the obligation to obtain the agreement of both parties being deleted, and to be free to refer the issue to some other person considered by him to be better equipped to deal with it, again without having to obtain the agreement of both parties involved in the dispute, and secondly -

"That consideration be given to providing, in the case of the shipping industry, for a suitable Court or Tribunal to have powers for the settlement of industrial disputes, similar to those vested in the Commonwealth Conciliation and Arbitration Commission....., the procedures being being designed to accent speed and informality."

The Air Crew Industrial Tribunal Act of 1971 had earlier made provision for the handling of disputes and questions on awards within that industry, however enforcement of the decisions had been left to other legislation, namely the Industrial Conciliation and Arbitration Act. The legislation providing for a "suitable Court or Tribunal" broke new ground on the New Zealand industrial scene.

MEMBERSHIP

A Bill to amend the Shipping and Seamen Act was introduced into the House on 24 September 1971. It provided, in s 151B of the amended Act, for a tribunal of not more than three persons to be appointed by the Governor General only after the Minister had consulted the organisations representative of the owners of New Zealand ships and of the masters and seamen employed in those ships. The organisations were consulted and nominations were duly made, however, in the event, three individuals other than those nominated were appointed. The appointees were: W. H. Carson, a retired Stipendiary Magistrate, who became Chairman; C. H. Benney, a former Under Secretary for Mines [1]; and H. L. Bockett, a former Secretary for Labour. It had been envisaged ( Hansard H 39 p 4990)

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(1) Mr. Benney resigned because of ill health in 1974 and his position was taken by Mr. Davey, also a former Secretary for Labour.

that the Tribunal would consist of members each stationed in Auckland, Wellington and a South Island port, who would be available at short notice to deal quickly with local disputes as they arose and before the parties to a dispute had time to take up hard and fast positions. On further consideration however it was decided that, as most of the head offices of the shipping companies and the national executives of the employee organisations were located in Wellington, time and money would be saved by appointing the three members from Wellington. Maritime disputes remain at the local level only briefly and members of the unions' national executive are quickly called in. As it has turned out, most of the Tribunal's sittings have been held in Wellington. The members of the Tribunal can individually or collectively exercise the functions of the Tribunal and hold office at the pleasure of the Minister.

In considering further the composition of the Tribunal, the comments contained in the Eighth Report of the Public and Administrative Law Reform Committee, issued in September 1975, are relevant. The Report recommends, inter alia, that -

> "Members of .....Tribunals of first instance should ..... be disinterested and possess qualifications and experience equipping them for membership of the tribunal concerned, having regard to its status and functions. In principle, particular interests ought not to be specifically represented on administrative tribunals. Members of administrative tribunals should be appointed for a term of not less than three years and there should be standard grounds for removal."( p 33 of the Report ).

The composition of the Shipping Industry Tribunal combines impressive legal, administrative and industrial relations experience and particular interests in the shipping industry are not represented, however general dissatisfaction over the members lack of experience in shipping and in dealing with its associated industrial disputes has been expressed by the maritime unions. In a recent discussion with

the writer, a senior master in the rail ferries, who has appeared before the Tribunal on several occasions, expressed his concern that the members, because of their lack of experience of seafaring, do not fully appreciate the circumstances of shipboard life which require special relationships between seafarers and which also generate pressures which can so easily lead to serious disputes. On the other hand, it would be difficult to find a person with suitable seafaring experience who could be described as disinterested and not specifically representive of particular interests. Basically, the disputes which do arise reflect the bad industrial relations which have characterised the industry for too long, and the members of the Tribunal are undoubtedly equipped by training and experience to deal with industrial disputes.

The Registrar of the Tribunal is an employee of the Marine Administration section of the Marine Division of the Ministry of Transport. He has the normal secretarial duties which, while the Tribunal is involved in a dispute, can be very demanding, and in addition, he writes a background report on each dispute for future information of the members in the event of further dispute and for the information of a member not present, for the Minister, the Ministry, and for the Labour Department. Although the employee organisations see the Tribunal as an arm of Government intervention in the functioning of the shipping industry, there has not been any overt criticism of the servicing of the Tribunal by an employee of a Government department.

FUNCTIONS

Basically, bad communication between the parties involved is the reason why so many disputes rapidly escalate to the stage where ships are held up, and the primary objective of the Tribunal would appear to be to keep the ships moving and the parties talking. Certainly the record over its almost five years of existence points to such a policy being adopted. The empowering legislation

requires the Tribunal to -

> "mediate, to make all such suggestions and do all such things as appear to it to be right and proper to encourage and assist the settlement by amicable agreement of questions to which the functions of the Tribunal extend...."
> ( s 151C )

The 1975 amendment ( 1975/29 ) inserted the words "to mediate" at the beginning to stress the primacy of the mediatory role - a role emphasised by the example of the Australian experience with the Conciliation and Arbitration Commission.

The Tribunal's record is one of success in talking to the parties and on a number of occasions this was all that was required for the parties to reach agreement, without further involvement of the Tribunal. For example, the "Wanaka", which had been held up in Lyttelton in October 1972 over an overtime payment dispute, was taken to sea after Mr. Bockett spoke by telephone to the Christchurch representative of the Seamen's Union.

In the event of mediation being insufficient to settle a dispute, or at least get a ship to sea, the Tribunal must decide, and the dicision may be an interim one, pending a hearing, or further hearing, which directs any action to be taken or refrained from by any person or class of persons or any specified organisation. ( s 151C (1) (c) ) Furthermore, it is to decide any question referred to it by a Superintendent of Mercantile Marine, or any question relating to any act or refusal of a shipowner or seafarer which has led to delay in the sailing of a ship or impeded the business of the ship, or which has involved refusal on the part of any one or more seamen to carry out duties customarily associated with the preparing of a ship for sea, or the loading or unloading of cargo or passengers. ( s 151C (1) (b)

The interim decision provisions were clarified and strengthened by the 1975 amendment following the Magistrate's Court hearing of the charges against Dromgoole ( post ). In recognition of the

frequent need for immediate action by the Tribunal pending the holding of a formal hearing of a dispute or question, the Tribunal was empowered to issue an interim decision prior to a hearing, provided that the parties involved are given an opportunity of being heard as soon as it is reasonably practicable. ( s 151D (7) ) Thus the Tribunal need not comply with that basic principle of natural justice, audi alteram partem, prior to an interim decision being handed down, but it must be heard subsequently. This departure from a rule which, in Lord Reid's judgement ( Ridge v Baldwin, H. L. 1963 )--

> "is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.",

is further reinforced by a provision of the amendming Act ( s3 ) which provides that any interim decision "may include direction imposing any requirement relating to the ship or crew". In theory therefore, a ship should not be delayed from sailing until a Tribunal hearing has been held.

There does not appear to have been any criticism of this modification of natural justice; certainly no reference was made to it during the debate on the second reading of the Amendment Bill, although the frequent need for immediate action by the Tribunal pending a formal hearing was mentioned by the Minister of Transport in moving that reading. ( Hansard 30 p 3941 ) Merchant shipping is a highly capital intensive industry - a 24 hour delay of a large container ship costs in the vicinity of $20 000 - and the prime objective is the optimal functioning of the ships. Reconciliation of the parties to a dispute is likely to be enhanced if the ships are not held up and this would appear to have been the thought in the minds of those drafting the Bill.

JURISDICTION

The 1971 legislation empowered the Tribunal to exercise its functions within any part of New Zealand in respect of -

"(a) Any New Zealand ship ( including a New Zealand Government ship );

(b) Any ship engaged in the home-trade;

(c) Any ship other than a New Zealand ship where the agreement with the crew for the time being in force had been entered into in New Zealand."

( The specific inclusion of New Zealand Government ships is necessary because, under section 3, the Shipping and Seamen Act does not apply to Commonwealth Government ships. The term "home-trade" basically means the trade of the two main islands in which ships do not proceed more than 150 miles from the coasts of those islands ).

It soon became clear however that this was too limiting, as it only enabled the Tribunal to deal with disputes in New Zealand, whereas ships with New Zealand crews were being delayed at ports other than New Zealand ports.

The 1975 amendment increased the extent of the Tribunal's jurisdiction significantly. In addition to exercising jurisdiction over all ships in New Zealand waters and all New Zealand ships wherever they may be, the Tribunal was provided with a procedure whereby it could exercise jurisdiction over Commonwealth ships outside New Zealand waters where the crew is engaged on New Zealand articles of agreement and a bilateral agreement with the country of registry of the ship has provided for the extension of the Tribunal's jurisdiction to that ship. Application of the provision is to be made by the Governor General by Order in Council. This is merely reiteration of a provision for the extension of jurisdiction to ships outside national waters, other than nationally registered ships, where there is bilateral agreement between the countries concerned, which appeared in s734 of the 1894 Merchant Shipping Act,

and subsequently in s4 of the Shipping and Seamen Act. It is a well established principle of international law that the flag state has primary jurisdiction in respect of persons and of activities taking place on board ships registered in its territory when these ships are on the high seas. Accordingly, the consent of a flag state is required before another state or a tribunal thereof can assume jurisdiction to settle disputes on a vessel whilst on the high seas, or when that vessel is in the territorial waters of another state.

A number of disputes on ships which, although not New Zealand registered ships, were manned by New Zealand seamen employed under New Zealand articles of agreement, had pointed to the need for the Tribunal's jurisdiction to extend to such ships when they are outside New Zealand waters. In 1974, for example, a dispute arose on board the "Union Auckland" in Japan. This is a British registered ship, demise chartered to the Union Steam Ship Company and manned by New Zealand seamen. The Tribunal had no power to intervene. Initial approaches to the United Kingdom Government on the extension of the Tribunal's jurisdiction to cover such British registered ships, wherever they may be, not surprisingly met with a cool reception. There is no equivalent to the Tribunal in British legislation and in its reply to the New Zealand Government the Government of the United Kingdom considered that such a move could well be against the intent of the British Commonwealth Merchant Shipping Agreement.

This Agreement provides for common qualifications as to the registration of ships, extra-territorial operation of laws by bilateral agreement, access to ports, ships' articles of agreement, certificates of competency for ships' officers, shipping inquiries, wages and effects of deceased seamen and offences on board ship. It came into force on 10 December 1931. The parties were the United Kingdom, South Africa, Canada, Australia, Eire, Newfoundland and New Zealand. South Africa withdrew in 1962. Canada, which has included Newfoundland since 1949, recently notified its intention

to withdraw from several of the provisions.(1)

New Zealand shipowners are demise chartering non-New Zealand registered ships more frequently than in the past and manning them with New Zealand seamen. Unless the agreement of the country of registry can be obtained, the Tribunal will not be able to deal with disputes which break out on such ships when they are outside New Zealand waters. To date, there have not been any Orders in Council made extending the Tribunal's jurisdiction. A conference of the remaining parties to the British Commonwealth Merchant Shipping Agreement is to be held in London later this year to discuss the problem as well as others arising from the great changes occurring in Commonwealth merchant shipping. During the second reading of the 1975 Amendment Bill, the Minister of Transport, Sir Basil Arthur, expressed the hope that soon the extension provisions could embrace all countries as necessary and that what is now done on a Commonwealth basis could be done internationally in the not too distant future. ( Hansard 30 p 3964 ). The draft of the revised parts of the Shipping and Seamen Act upon which the writer is working as part of a major revision of our maritime legislation, provides for the extension by Order in Council of such provisions as are stated in the Order, to the ships of any country other than New Zealand where the government of the country agrees thereto. This proposal differs from the existing legislation by removing the restriction to Commonwealth ships. It is anticipated that there will be considerable difficulties arising from possible infringements of the sovereignty of the flag state of a ship on which there is need for Tribunal intervention.

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(1) The Parties to the Agreement at present are:

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| Australia | Gambia | Malta | Sri Lanka |
| Bahamas | Ghana | Mauritius | Swaziland |
| Barbados | Guyana | New Zealand | Tonga |
| Canada | Eire | Nigeria | Trinidad & Tobago |
| Cyprus | Jamaica | Sierra Leone | United Kingdom |
| Fiji | Malaysia | Singapore | Zambia |

MANNING SCALES

The manning of New Zealand ships is to be in accordance with manning scales in the First and Second Schedules to the Shipping and Seamen Act, however in both manning sections of the Act ( ss 17 and 55 ) there is provision for the Minister, where he considers that the scale manning is insufficient for the safe and efficient manning of any restricted-limit ship, he may specify the manning by notice in writing to the owner. In Dromgoole's Supreme Court case, ( post ), the manning of the hydrofoil "Manu-Wai" was considered. As a restricted-limit ship. the "Manu-Wai" is required by the schedules to carry only a master and engineer. It had however been customary for a seaman, a member of the Seamen's Union, to be carried as well and in the view of the Marine Department Surveyor of Ships and of the masters and engineers employed on the hydrofoil, the third member of the crew was necessary because of the speed of the vessel and the crowded waters within which she operated. The Tribunal had made an interim order on 21 December 1973 which stated, inter alia, -

"That the existing complement of able seamen being members of the Seamen's Union shall be maintained....."

and in its further interim order of 9 January 1974, the Tribunal repeated this direction.

Speight J. concluded that the Tribunal's decision was based on the belief that the manning scale, i.e. a master and engineer, was inadequate "and that the Tribunal was rectifying that inadequacy." He thought it was clear that the Tribunal had considered matters exclusively reserved for those responsible for fixing the manning in the Act, namely Parliament, and in the case of restricted limit vessels, the Minister if he considers it necessary in the interests of safety and efficiency. He held that the Tribunal had attempted to usurp these functions and had therefore gone beyond the powers reserved to it. From the record of the Tribunal's hearings and the interim decisions given, it appears clear that the Tribunal did not consider that it was rectifying

any inadequacy in the manning scale. It was simply considering the customary manning which, in the interests of safety and efficiency was the desirable manning, as an interim measure. The schedules lay down minimum manning numbers and it is clear that where a manning which is in excess of the minimum, which is seen as necessary for safety and efficiency by expert advisers, and also which has been customarily adhered to, is required by the Tribunal to be maintained, the Tribunal was recognising the status quo and determing as it felt necessary "for the expeditious and just hearing of the question." ( s 151E )

Tc clear away any doubt, the 1975 amendment inserted a new subsection into section 151C which provides that any decision of the Tribunal made under that section may -

> "include a direction imposing any requirement relating to the ship or crew, whether or not that requirement is in excess of any minimum requirement ( whether relating to a manning scale or otherwise ) whatsoever prescribed by or pursuant to this Act."

The word "minimum" was inserted to make it clear that the Tribunal cannot impose any direction which could lessen safety standards already in existence. ( Hansard 30 p 3941, Sir Basil Arthur. )

The Tribunal may exercise any of its functions and powers of its own motion where it is satisfied that other processes of settlement available to the parties involved in the question have not been implemented or have not been effective, however the Tribunal most commonly enters a dispute on receipt of a written application by one of the parties. This has usually come from a shipowner whose ship has been held up by a dispute. The Tribunal may also exercise its functions and powers upon a question being referred to it by a Superintendent of Mercantile Marine.

PROCEDURE

The Act provides that procedure shall be within the discretion of the Tribunal and shall be private unless the Tribunal, having due regard to the parties to the proceedings and to the public interest, considers htat the proceedings should take place in public. Furthermore, the Tribunal is not bound to act in a formal manner, is not bound by any rules of evidence and may receive any evidence that it considers relevant. It is to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.

In practice, usually two members of the Tribunal attend a hearing, with Mr. Carson acting as chairman. The Act does not provide for a chairman, the nomination of one being within the discretion of the Tribunal and necessary for its effective functioning. On a number of occasions the Tribunal has sat on a Saturday (1) and has travelled to other New Zealand ports to conduct hearings and to obtain information about ships. (2) Wellington hearings are usually held in the Ministry of Transport Conference Room.

During the 21 December 1973 hearing on the "Manu-Wai" dispute, because it was not immediately possible for the Tribunal to travel to Auckland, communication with Mr. Dromgoole was made by telephone. Mr. Dromgoole was forewarned and the discussion which had taken place in Wellington between the two members of the Tribunal and the other parties to the hearing were described to Mr, Dromgoole over the telephone. Mr. Dromgoole was able to talk at length with Mr. Carson. In the Supreme Court it was argued that there had been a breach of natural

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(1) For example, in July 1974 a dispute between the Institute of Marine and Power Engineers and New Zealand Railways was heard on a Saturday in an attempt to get the ferries back to sea quickly.
(2) In 1973/74 the members visited a variety of ships at New Zealand ports to assess "substandard conditions" which had been the cause of a long standing pay dispute.

justice, because Mr. Dromgoole was not given reasonable opportunity to appear and that the conduct of the hearing was unfair in that the other parties were present in Wellington, but Dromgoole had to put his case over the telephone. Speight J. held that having regard to the wide liberty given to the Tribunal and the desirability of reaching a prompt decision, there was a fair hearing. The need for practical efficiency was greater than the dictates of abstract justice. The Judge thought that the whole tenor of the legislation providing for the Tribunal encouraged informality and promptness.

During the hearings every effort is made to reach a constructive decision, with adequate opportunity being given to the parties to state their case. At times, when contentious issues are being discussed, one or more of the parties is requested to temporarily leave the room, or the members of the Tribunal may leave to discuss matters privately. Some criticism of the degree of informality used has been expressed to the writer by shipmasters who have appeared before the Tribunal. In their opinion it is too informal and when masters appear in consequence of a disciplinary dispute, they feel that the master himself is on trial rather than a hearing being conducted into the justification for a dispute arising from disciplinary action taken. At times, with outspoken union executives sitting around the table, the conversation has become heated. At a hearing in 1973, ( Maritime Carriers 27/7/73 ) after verbally abusing Mr. Carson, a particularly vitriolic union executive walked out of a hearing threatening to involve the whole trade union movement in a nationwide stoppage. He ordered his members to defy the Tribunal's direction to sail the ships. Subsequently, however, at a meeting in the office of the Minister of Transport attended by the Minister of Labour, the Minister of Railways and the Secretary of the Federation of Labour, this individual was left in no doubt that the Government, with the full support of the Federation

of Labour, would take strong action against the union.

The Act goes on to provide that any party to proceedings before the Tribunal may appear personally or be represented. Where members of the unions are involved it is customary for them to be represented by executive officers of their respective union. To date no party had been represented by a barrister or solicitor, although shipmasters are stating that they will be represented in future by legal counsel unless the Tribunal shows them more respect.

Often the Tribunal does not hear all the parties to a dispute before issuing a direction. Its power to do so was clarified by s4 of the 1975 amendment, which stated -

" The Tribunal shall not, before issuing a decision under s151C (1) (b) of this Act, be bound to afford any party or any person or class of persons or organisation affected by the decision any opportunity to be heard. If the Tribunal makes such a decision without affording any party or any such person or class of persons or organisation an opportunity to be heard, it shall afford the parties and any such person or class of persons or organisation an opportunity to be heard as soon as reasonably practicable....."

For example, in December 1975 ( after the amendment was enacted ), when the "Ngapara" was held up in Wellington because the crew wanted the ship classified as a bulk carrier, which would entitle them to higher rates of pay, Mr. Carson, upon being requested by telephone by the Union Company to intervene, ( the request was later made in writing ) discussed the situation with the Industrial Relations Superintendent of the Company and immediately ordered directions to sail to be served on the crew members. This was done within three hours, the crew being ordered to resume normal duties forthwith. The reason for the making of the direction was stated as being "to avoid serious disruption to the services provided by the ship." In the preamble to the direction, the Tribunal stated that the question should, as soon as practicable, be the subject of discussion between the representatives of the Seamen's Union

and the Union Steam Ship Company, but that the normal operations of the ship should not be impeded. The seamen ignored the directive, but when the national president of the union intervened, they turned to and the ship eventually sailed. Although the Act requires that in the event of such an interim decision being issued, the parties shall subsequently be heard and a further interim decision confirming, modifying or rescinding the previous one be issued, or a final decision be issued, there was no further hearing or decision in this case.

On another occasion, ( "Union New Zealand" 6/11/75 ) Mr. Bockett ordered directives directing crew members refusing to take the ship to sea to do so immediately to be sent by telegram. These were duly delivered to the ship in Tauranga. Next morning the crew demanded an apology from the Tribunal for issuing directives without understanding the situation fully, claiming that their refusal to sail existed only in the master's mind and that, although there was no dispute before, there was one now in that the crew would not sail the ship until an apology was received. Later that day the trouble was resolved without further involvement of the Tribunal or an apology from Mr. Bockett, but this does illustrate the danger the Tribunal is exposing itself to in issuing directives without conducting a full hearing.

PARTICULAR POWERS

Under s 151E, the Tribunal is given the power to take evidence on oath - to date it hasn't done so; to give advice in advance of any hearing; to hear and determine the questions or proceedings in the absence of a party summoned or served with notice to appear - in one of the earliest hearings ( "Kowhai" July '72 ) although the then national president of the Seamen's Union refused to attend the hearing after being served with a summons to do so, the Tribunal proceeded with the hearing at Mount Maunganui and recommended that the parties meet to discuss the matter in dispute. It is not uncommon for summonses to be ignored where there are

several men involved and there is strength in numbers. The Tribunal can sit at any place - it normally sits in Wellington - refer any matter to an expert - it has referred safety matters to Surveyors of Ships and two assault cases to the Police. It is also given the power to direct parties to be joined or struck out, to amend any question or proceedings, amend or waive any error, defect or irregularity, summon the parties and witnesses and compel the production of papers and documents relating to the hearing.

DECISIONS AND PENALTIES

Section 151F provides that decisions are to be recorded in writing and may include a direction to give effect to that decision. A decision is to be binding on, and to be complied with by, every party or person or organisation to whom or to which it is directed and by every person who is a member of such organisation. No appeal lies from any decision except on the grounds of lack of jurisdiction and no decision shall be liable to be challenged, reviewed, quashed or called in question in Court.

There are substantial penal provisions. Where any maritime organisation or company commits an offence against the section, any person holding any office in the organisation, the manager and every director of the company, shall be deemed also to have committed the offence, unless he proves that the offence occurred without his knowledge, or that he did everything in his power to prevent the commission of the offence. Also, where any person holding any office in any maritime organisation commits an offence against the section, the organisation shall be deemed to have committed the offence. The same is to apply to a company where the manager or any director offend. The maximum penalties provided are a fine of $100 a day in the case of an individual and $20 a day where the offence is a continuing one, $2000 in the case

of a body corporate and $200 a day where the offence has continued. In Dromgoole's case, Speight J. remarked that this is one "of the few pieces of industrial legislation on the statute books today which has penal provisions."

In April 1975, charges were brought against the Seamen's Union, D. J. Morgan the national president and J. O. O'Neill the acting assistant Auckland area secretary for failing to comply with a Tribunal direction. The Union had ignored four directives to provide a crew for the "Karepo". The trouble had begun three weeks earlier when the crew refused to sail until their pay and conditions on board were improved. The prosecutions were ordered by Sir Basil Arthur, Minister of Transport, who stated that the seamen were "blatantly defying the Shipping Industry Tribunal." ( Dominion, 5/4/75 ) The Union announced its preparedness to call on the full trade union movement for support and stated that there were two issues involved -

> " the Karepo dispute and another of much wider implication which, if permitted to be realised, would mean that any trade union going into dispute with an employer could be penalised under industrial legislation." ( Evening Post, 7/4/75 )

The information against the Union alleged that it failed to comply with a decision of the Tribunal and that Morgan and O'Neill, as officers of the Union, failed to comply with the decision also. The crew of the "Karepo" very quickly released a statement that they

> " feel that in defying the Tribunal we are not setting a precedent, as the same Tribunal was very successfully defied by the shipowners recently as anyone can tell from the fact that the hydrofoil "Manu - Wai" is still not back in service as directed by the Tribunal." ( Otago Daily Times 4/4/75 )

On 5 May, the charge against the Union was dismissed by W. J. Mitchell S.M. on the grounds that becouse the Tribunal's order did not contain any steps which the Union should take to achieve the result of getting a crew on the "Karepo", the Tribunal had no jurisdiction to make such an order. The Tribunal direction had

simply directed each crew member to forthwith resume the performance of normal duties, including the taking of the ship to sea. The Magistrate said that signs had emerged that the Union was not able to guarantee that a crew would come forward to man the ship, however, the information was laid on the basis that ther had been a complete defiance of the order. ( Evening Post, 5/5/75 ) Counsel for the defence argued that the Tribunal's order was impossible as the Union had been asked to do something it was incapable of performing. In the light of this ruling, the charges against Morgan and O'Neill were withdrawn.

THE DROMGOOLE CASES

These two cases and the cases against the Seamen's Union referred to above are the only cases in which a Court has dealt with matters arising from the Tribunal's actions.

On 12 November 1973, Hydrofoil Services Ltd., in which company Mr. Dromgoole held a dominant interest, requested the Tribunal to intervene on its behalf in an industrial dispute between the Company and the Seamen's Union. Sailings of the "Manu-Wai" between Auckland and Waiheke Island had been interrupted on account of a wage claim which the Union had previously made to the Wages Tribunal and which had been declined, although that Tribunal left the door open for a fresh application if it was supported by further information. At the same time Mr. Dromgoole also asked for action from the Industrial Mediation Service. The Shipping Industry Tribunal did what appeared to it to be " right and proper to encourage and assist the settlement of the dispute by amicable agreement" and referred the matter to the Auckland Industrial Mediator, as the parties had already agreed to mediation by him. Unfortunately he was unsuccessful in negotiating an agreement which would have enabled the matter to be placed before the Wages Tribunal.

In September of that year, Dromgoole had dismissed a seaman employed on the "Manu-Wai" following a bad report on the seaman

by the master of the hydrofoil. Although, following representations from the Seamen's Union, the seaman was re-employed, he was again dismissed in November after the vessel had been placed on shore for repair. The Seamen's Union declared the vessel black because of the sacking and when it was to be placed back in service in December, the masters and engineers in the two crews - each crew normally consisted of three, master, engineer and seaman - refused to take the vessel to sea without a seaman in each crew. They were threatened with dismissal and as a result the Merchant Service Guild, representing the masters, requested the intervention of the Tribunal on 21 December 1973.

Because of heavy holiday bookings, the Tribunal found it impracticable to travel Auckland and decided to consider the matter in Wellington, where Mr. Carson and Mr. Bockett convened together with representatives of the Guild and the Seamen's Union. Mr. Carson communicated with Mr. Dromgoole in Auckland by telephone. Relevant extracts of the 1971 amendment were read over to Mr. Dromgoole, including the penalties provided for non-compliance with an order made by the Tribunal. Mr. Dromgoole was told what had transpired at the hearing and was then able to state his case to the Chairman. The Tribunal then issued an interim decision directing that the services normally operated by the "Manu-Wai" be resumed as soon as possible, that the status quo concerning the employment of the masters and engineers should be maintained and also that the complement of three on the vessel should be maintained, although there was no obligation to re-engage the seaman in question. Mr, Dromgoole attempted to comply with the order, but in his endeavours to get the "Manu-Wai" back into the water he was frustated by accidental ( or deliberate? ) mis-understandings by other parties. Accordingly, on 7 January 1974, he made representations to the Registrar of the Tribunal and two days later, at a hearing in Auckland, the Tribunal gave another interim decision "made with the express purpose of having the

"Manu-Wai back into service at the earliest possible date." It repeated the decision of 21 December and also directed the Seamen's Union to ensure that two able seamen - one for each crew - would be made available for engagement on the vessel. The Tribunal added that any appeal which the dismissed seaman might make to the Superintendent of Mercantile Marine - in accordance with s151A of the Shipping and Seamen Act - should be heard at the earliest possible date and dealt with speedily. The dismissed seaman did appeal, but it was disallowed. Notwithstanding these decisions, the services involving the "Manu-Wai" were not resumed. The Auckland Star reported Mr. Dromgoole as saying that he would defy the Tribunal's direction on the grounds that "it was illegal as it contravened the manning laid down in the Shipping and Seamen Act."

On 30 January 1974, Hydrofoil Services Ltd. filed a Notice of Motion in the Supreme Court at Auckland challenging the validity of both decisions of the Tribunal. However, 21 March, the Ministry of Transport laid ten charges in the Magistrate's Court against Mr. Dromgoole and Hydrofoil Services, all of which related to failure to comply with the decisions of the Tribunal.

THE MAGISTRATE' S COURT HEARING

The hearing was heard before Mr. Nicholson S.M. on 22 and 24 May 1974. Five informations were addressed to Mr. Dromgoole personally, alleging four acts in contravention of the Tribunal's decision on 9 January, and one in contravention of the decision of 21 December. Five similar informations were laid against the company, no doubt in reliance upon s151F where it stated -

> "Where the manager or any director of a company commits an offence against this section, the company shall be deemed also to have committed the offence. "

Counsel for Mr. Dromgoole argued, inter alia -

1. That there had not been any "decision" of the Tribunal in terms of s151F:

2. That there had been no proper application made to the Tribunal - s151C provides that the applicationshall be in writing:
3. That the directives were bad for their multiplicity:
4. That the decision of 21 December was invalid since there was no jurisdiction to conduct it in the manner employed - by telephone.

Mr. Nicholson directed his attention to two issues, viz. -

1. Could interim decisions given under s151C or s151E be the foundations for a prosecution under s151F; and
2. Did the Tribunal bring down decisions under s151F or merely interim directions under either s151C or s151E?

The relevant wording of s151C stated that one of the Tribunal's functions was -

> "To specify any action to be taken by any specified person or organisation as an interim or provisional measure pending the hearing and determination by the Tribunal of any question."

S151E provides that the Tribunal may, in relation to any question or proceedings before it -

> "Generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the question or proceedings."

Mr. Nicholson felt that the tenor of this was to give the Tribunal the opportunity to give directions on a trial basis, or to attempt informally to deal with emergency situations to avoid costly delays. Certainly, with the "Wainui" dispute fresh in their minds, this would appear to have been the intention of the Parliamentarians in enacting the 1971 amendments. Mr. Nicholson then referred to the penal provisions of s151F which refer to non-compliance with any decision under this section" and considered that there was a clear limitation on the scope for penal sanction to decisions which are in fact made in accordance with s151F. He therefore inferred that directions under s151C or S151E do not carry penalties for non-compliance.

In addressing himself to the second issue, he noted that the directions recited no reasons and concluded that this further pointed to the acts of the Tribunal having been made under s151E; therefore, neither of these determinations could provide the foundation for any prosecution under s151F.

While a strict interpretation of the wording of the statute leads to this conclusion, it is very likely that the effect was unintentional and arose out of an oversight in the drafting. In moving the second reading of the Amendment Bill, Sir Basil Arthur stated that the intention of the legislation had always been understood, "but until it was tested in court this loophole was not known to exist." ( Hansard 30 p 3941 ) The amendment thus omitted the words "under this section" from subsection (5) and substituted the words "made pursuant to section 151C of this Act".

In addition, a new subsection (7), already referred to on page 17 of this paper, was added to s151D permitting the Tribunal to issue an interim decision prior to a hearing, provided that the parties involved are given an opportunity of being heard as soon as is reasonably practicable, thus recognising the frequent need for immediate action by the Tribunal pending the formal hearing of a dispute or question.

## THE SUPREME COURT HEARING

The Notice of Motion asked for a review of the decisions of the Tribunal given on the 21st of December and 9th of January and that there be granted relief by certiorari to quash either or both decisions, prohibition to restrain the Tribunal from conducting any further hearing of the matter, mandamus to require the Tribunal to hear any proper application, declarations that either or both of the decisions were unlawfull or void, and directions pursuant to s4 of the Judicature Amendment Act 1972 upon the grounds , inter alia, that the Tribunal acted unfairly and/or contrary to the rules of natural justice through, inter alia, not affording the applicant a proper hearing, through not advising the applicant of the nature

of the evidence supplied by the other respondents, through not giving the applicant to appear and that the Tribunal acted without jurisdiction. The New Zealand Seamen's Union was named as the second respondent and the Institute of Marine and Power Engineers and the Merchant Service Guild as the third and fourth respondents respectively.

The hearing was before Speight J. on 17-21 June 1974. The argument centred around the Tribunal's directive of 21 December that the existing complement of seamen should be maintained, as throughout Mr. Dromgoole had vehemently maintained that the manning was specified by the manning scales in the schedules to the Act. The manning specified for a vessel such as the "Manu-Wai" is two men, a master and an engineer, although customarily a deck-hand had been carried also. The statutory manning scale is a minimum; there is no prohibition against carrying more men. The Tribunal had no jurisdiction to order a deckhand or any other man in excess of the manning scale. The second, third and fourth respondents took the view that the usual complement of three men was the minimum for safe manning. This was also the opinion of the Marine Division. The members of the Tribunal had previously said that adjudication of the manning question was beyond their competence and furthermore, they could not alter the statutory prescription of manning. The question was, had the Tribunal based its decision "on some matter which under the provisions setting it up it had no right to take into account" ( Lord Reid, Anisminic v Foreign Compensation Commission 1969 2 A. C. 147 ). Counsel for the Tribunal claimed that the Tribunal plainly thought that it was competent to say what was desirable manning as an interim measure from the point of view of industrial harmony, and he stressed the fundamental importance of this power to the Tribunal in the general discharge of its duties. He submitted that the Tribunal does have the power to order crew in excess of the statutory

manning scale if there are valid reasons which it nominates and "these reasons shall be given" ( s 151F ). The Tribunal's directive of 21 December gave only a brief reason.

From the evidence before him, Speight J. concluded that the Tribunal had attempted to usurp it's functions and had gone beyond the powers reserved to it.

No appeal was lodged against this decision, although it is quite possible that an appeal would have succeeded. Where the Act requires that reasons shall be given it does not require comprehensive reasons, and a brief reason was given. However, even a total failure to give reasons would not appear to be a jurisdictional error and it is therefore protected by the privative clause ( section 151F (4) contains the common form of privative clause ). There was not, in the view of the writer, a breach of natural justice because what was desirable as an interim measure - that the "Manu-Wai" be put back in the water and operated normally - was known by Mr. Dromgoole and everyone else to be the issue; past manning practice was a fact known to everybody concerned that no argument could get around and it would not, on the face of it, have required discussion.

The principle reason why an appeal was not lodged was a matter of public policy as the public was likely to tend to regard an appeal as an attempt by the Crown to resurrect a settled dispute and it might even regard an appeal as action in support of the unions. If the appeal was successful, the interim decision would have been restored, but this would not appear to have advanced the Tribunal's practical position in any way. Furthermore, there was the possibility that the lodging of an appeal would inhibit action by the Tribunal, on application made to it or on it's own motion, during the period while the appeal awaited a hearing.

In Dromgoole's two cases as well as in the "karepo" case, the decisions were against the Tribunal. This pleased those who opposed the Tribunal on principle and diminished its standing and effectiveness in the eyes of the maritime unions.

## SUMMARY AND CONCLUSION

When the 1971 Amendment Bill was referred to the Labour and Mining Bills Committee to enable interested parties to comment on its provisions, the maritime employee's unions heavily criticized the sections providing for the Tribunal. The attempt to introduce an administrative tribunal into the day to day functioning of the maritime industry was described as oppressive, repressive, reactionary and fascist. The national president of the Seamen's Union, Mr. W. Martin, regarded as a moderate by many of his members, used the well-worn trade union epithet "leg-iron legislation" in an interview with the Dominion (2 December 1971). He thought the Tribunal was being given dictatorial powers to settle maritime disputes. The Seamen's Union made no secret of the fact that it considered the Tribunal to be an unwelcome intruder into what it regarded as disputes which were only the concern of those involved- the employee unions and the employers. The November 1971 Seamen's Union broadsheet commented -

> "Seamen need not even be consulted on appointments to this powerful tribunal, yet its individual members can intervene in disputes whenever they please, cite whoever they please as parties and inflict heavy punishments on those who fail to obey their orders. This is industrial dictatorship. Seamen's representatives must prove their innocence if they are charged with contravening the decisions of the all powerful Shipping Industry Tribunal. This is contrary to the basic

principles of our legal system. Guilt - not innocence - must be proved."

The Government was firm. That month a nationwide stoppage by seamen to force withdrawal of the Bill resulted in deregistration of the Seamen's Union.

The Tribunal began functioning during the period when a new union was being formed, the report of the Commission of Inquiry was still being digested and many were acutely aware of the crises the industry was moving through and were resolved to arrest the decline that was clearly evident. It's first moves were essentially low key and dealt with disputes typical of those to come during the next four and a half years; ships held up because of dispute over shipboard disciplinary matters, the payment of hard-lying allowances and compensation for redundancy. The Tribunal quickly showed itself ready to sit down and talk at length to the parties involved and a sincere effort was made to keep the ships sailing through exercising a quiet conciliatory role. At the time of writing ( August ' 76 ), the Tribunal has been involved in 65 disputes, but it is very difficult to lift any sort of "batting average" out of the records. There have been 95 hearings and 22 directions. From the information available, however, it is not possible to analyse the effect of these directions as, although a direction may have been initially ignored by one of the parties to a dispute, subsequently, through further negotiation, the dispute is resolved and the ship sails. It may be that this would have occurred without the intervention of the Tribunal.

The records show that it is the employer organisations that have seen the Tribunal as a potentially useful body and Tribunal involvement has been almost entirely at the request of the shipowners. An exception to this occurred in October 1973 when the Seamen's Union appealed to the Tribunal over a ruling on wages by the Wellington Superintendent of Mercantile Marine, under s96 of the Act. The Tribunal allowed the appeal, but stated clearly that it's

finding in this case was not to be regarded as a precedent. In November 1974, the Tribunal entered a dispute of it's own motion when the master of the "Karetu" assaulted the Chief Steward, but this case was quickly handed over to the police.

The Seamen's Union and the Cooks and Stewards Union have repeatedly expressed their opposition and see the Tribunal as an arm of Government interfering unnecessarily in the power play of the industry. In August 1973, Seamen's Union executives Woods and Anderson saw the role of the Tribunal as -

> "only being able to wave big sticks to get ships away and it is unable to give a favourable decision to a union even if it wished to."

In fact while, in the penalty clause, it has "big sticks", they have only been used on one occasion ( the "Karepo" dispute already referred to ) and it has given decisions favourable to the unions; the coastal tanker dispute of December 1973 when the Tribunal ordered bad discharges, given by the master to three members of the Seamen's Union, to be rescinded and the men reinstated; in August 1974 the Tribunal agreed with the Cooks and Stewards Union that a night watchman should be employed on rail ferries.

Initially the Merchant Service Guild and the Institute of Marine and Power Engineers ( the officers' unions ) were strongly in support of the Tribunal, but as mentioned earlier, the shipmasters are expressing dissatisfaction and the engineers have been involved in several disputes on the rail ferries in which the Tribunal has found against them. The Auckland secretary of the Institute is on record as stating, in September 1974, that he will only appear in future if summoned under s151E and only if accompanied by a solicitor.

The environment in which the Tribunal is functioning is essentially an industrial one where powerful political pressures are continually exerted. It is thus an inherently difficult area for a judicial body to exercise it's authority in a fair and impartial manner. Not only must it possess and exercise a knowledge of

judicial process, it must also be aware of the dominant influence of industrial relations and labour politics and of the instability of an industry undergoing rapid change. An abstract weighing of the arguments of the parties to a dispute is not enough. The arguments must be heard and disputes determined with an appreciation of the environment in which they are generated and of the potential effect of rulings on the future functioning of the industry as a whole. This calls for a high degree of understanding of the judicial process, of the tactical manoeuvring of powerful unions at work in obtaining improved conditions for their members, and of the evolutionary forces at work within the industry. These skills will grow as the experience of the Tribunal grows.

While there is no hard evidence to show that the introduction of the Tribunal has been of direct benefit to the New Zealand shipping industry, there is no strong case for its removal. A thoroughly revised Part I and Part II of the Shipping and Seamen Act should be before a Parliamentary Select Committee during 1977 and the reaction of the industry to the proposals to continue the existing provisions for the Tribunal are awaited with interest. Consideration will be given to removing these provisions if a clear case is made against the Tribunal.

RESOURCE MATERIAL

Much of the background for this study was obtained, with the permission of the Chief Controller, Marine Administrative Policy, from the records of the Marine Division, Ministry of Transport. Other sources were -

Report of 1971 Commission of Inquiry into New Zealand Shipping

Hansard

Dominion newspaper

Evening Post newspaper

Otago Daily Times newspaper

Eighth Report of the Public and Administrative Law Reform Committee

Administrative Law Materials, V.U.W.

Judgements of Mr. Nicholson S.M. and Speight J. in the Hydrofoil Services Ltd v. The Shipping Industry Tribunal cases

rx SH SHORT, R.F. THE SHIPPING INDUSTRY TRIBUNAL.