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Freedom to Strike: The Myth of Voluntarism?

M. YUSUF CASSIM*

Holding trade unions liable in tort, especially in proceedings for an interlocutory labor injunction, does not encourage trade unionism and collective bargaining. In *Dunlop S.A. Ltd. v. Metal and Allied Workers Union*,¹ the court, in an urgent application, enjoined a trade union from inciting or in any other way instigating an unlawful strike by the employees of the applicant's businesses located in various parts of the country. Although it was only a temporary prohibition, it is likely to have a permanent effect in matters concerning labor disputes. The "postponement of collective action," observed a commentator, "invariably means its abandonment."² In *Dunlop*, Justice Booysen rightly found that the respondents could not claim the protection of the Labour Relations Act of 1956,³ as that immunity extends to tortious acts committed in the furtherance of a lawful strike, and is only applicable to registered trade unions.⁴

This Article examines the legal restrictions imposed by the Labour Relations Act on the right to strike, and argues that the law plays too dominant a role in the affairs of industrial relations. The legally-regulated system is in conflict with the basic principle of the voluntarist philosophy of allowing industry to make its own bargains and disagreements. This Article concludes that the law of strikes is blatantly interventionist, and therefore likely to discredit the law itself.

COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE

"Where the rights of labour are concerned," said Lord Wright in *Crofter Hand Woven Harris Tweed Co. v. Veitch*, "the rights of the employer are conditioned by the rights of the men to give or withhold

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1. 1985 (1) S.A. 177(D).

2. See generally O. KAHN-FREUND, *LABOUR AND THE LAW* (2d ed. 1977).

3. Labour Relations Act, No. 28 of 1956 (South Africa 1956).

4. 1985 (1) S.A. 177(D).

their services. The right of the workmen to strike is an essential element in the principle of collective bargaining."⁵ The Wiehahn Commission⁶ found that the mandatory conciliatory procedures that employees must follow, according to the Labour Relations Act of 1956⁷ (the LRA), before resorting to strike action, do not negate the rights to freedom of association and collective bargaining in South Africa. Indeed the Commission's report supports a regulated system to control industrial conflict.⁸

Roger Rideout's synopsis of Kahn-Freund and Hepple's rationale for the need to permit resort to strike as a means of enforcing and improving terms of employment is instructive.⁹

First, the right to strike is the means by which unions, as bargaining agents, equate their position with that of the employer. This is known as the equilibrium function. Justice Oliver Wendell Holmes aptly noted:

Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . . If it be true that workmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interest by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.¹⁰

Nowhere is the myth of freedom of contract more prevalent than in the employment contract. The worker as an individual has to accept the conditions which the employer offers. The ensuing relationship is "between a bearer of power and one who is not a bearer of power."¹¹ It is through workers acting in solidarity that a semblance of parity is struck, making collective bargaining viable.

5. [1942] A.C. 435, 463.

6. The South African government appointed a commission to investigate and propose changes to the existing labor laws. N. Wiehahn was appointed chairperson of this commission.

7. *Supra* note 3.

8. See N. WIEHAHN, *THE COMPLETE WIEHAHN REPORT* 428, 548 (1982).

9. R. RIDEOUT & J. DYSON, *RIDEOUT'S PRINCIPLES OF LABOUR LAW* 451 (4th ed. 1976). See also O. KAHN-FREUND & B. HEPPEL, *LAWS AGAINST STRIKES* 4-8 (1972).

10. *Vegeahn v. Gunther*, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting). Justice Holmes had previously formulated this argument in *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 8 (1894).

11. O. KAHN-FREUND, *supra* note 2, at 6.

Second, the sanction of strike, or threat to strike, deters management from unilaterally changing conditions of work without prior consultation. The deterrent value is particularly effective in enforcing collective agreements, those "autonomous rules" created by collective bargaining.

Third, a legal compulsion to work is abhorrent to systems of law imbued with a liberal tradition. Thus, workers cannot be forbidden to strike simply because they do so in concert with others.

Last, the strike at times is a necessary release of psychological tension. The above reasons do not suggest that any legal restriction upon industrial action is detrimental to collective bargaining. For instance, the Beampte in Germany, having a high degree of fidelity to the State by virtue of his status, is generally considered as being unable to strike.¹² Freedom to strike should not, however, be suppressed to the extent of making the rights to associate and to bargain illusory.

WHAT IS A STRIKE?

The complex definition of strike, found in the Labour Relations Act, comprises three requirements: (i) there must be a combination of persons; (ii) ceasing to work or in any other material respect interfering with their terms of employment; and (iii) with the object of inducing or compelling the employer either to comply with any demands, or to refrain from changing any terms of employment, or to restore any conditions previously in operation, or to agree to employ, suspend or terminate the employment of any person.¹³

In essence, a strike is a concerted withdrawal of labor pursuant to an industrial objective or any other matter. Clearly, the LRA extends liability extensively, and the increasingly popular tactical weapons of collective bargaining, such as the "go-slow,"¹⁴ the "work-to-rule"¹⁵ and the "overtime ban" fall within the scope of strike action. Arguably, a refusal to cooperate by workers may sufficiently interfere

12. *Id.* at 234.

13. Labour Relations Act, *supra* note 3, § 1.

14. A go-slow is generally regarded as a breach of "an implied undertaking of the worker that, in so far as he is capable of doing so, he should work at a reasonable speed." O. KAHN-FREUND, *supra* note 2, at 265.

15. "A work-to-rule may take many different forms, some of which may involve a breach of contracts of employment . . . [t]he worker is not required to do more for his employer than what his contract requires," but needs to carry out the lawful instructions of the employer not in an unreasonable way which will have the effect of disrupting the employer's business. B. HEPPLER, HEPPLER & O'HIGGINS, *EMPLOYMENT LAW* 137 (4th ed. 1981).

with the employment relationship to give rise to a strike. The English Court of Appeal, in *Secretary of State Employment v. A.S.L.E.F. (No. 2)*,¹⁶ censured collective action that resulted in the individual employee breaching his implied duty not to disrupt the employer's business. In that case the railwaymen's justification for their go-slow and work-to-rule as a strict observation of railway rules and regulations was not acceptable. They deliberately breached their implied obligation to make every effort to facilitate the working of trains and the prevention and avoidance of delay. Lord Denning emphasized the wilfulness of the disruption:

If he, with the others, takes steps wilfully to disrupt the undertaking, to produce chaos so that it will not run as it should, then each one who is a party to those steps is guilty of a breach of his contract. It is no answer for any one of them to say 'I am only obeying the rule book', or 'I am not bound to do more than a 40 hour week.' That would be all very well if done in good faith without any wilful disruption of service; but what makes it wrong is the object with which it is done.¹⁷

LEGAL CONTROL OF STRIKES

The LRA places certain specific limitations on the right to strike. Ringrose summarized the restrictions set forth in section 65 of the LRA as follows:

There is an absolute prohibition of strikes by:

- (i) employees covered by any agreement or award which is legally binding in terms of the Labor Relations Act, and which covers the matter in dispute, at any time during the currency of such agreement or award;
- (ii) employees who are covered by a wage determination published in terms of the Wage Act, or who are covered by any other

16. *Secretary of State for Employment v. A.S.L.E.F. (No. 2)*, [1972] 2 All E.R. 949 (C.A.).

17. *Id.* at 967. Lord Denning elaborated as to how the Railways Board rule book, is to be reasonably construed:

They must be construed according to the usual course of dealing and to the way they have been applied in practice. When the rules are so construed the railway system, as we all know, works efficiently and safely. But if some of these rules are construed unreasonably, as, for instance, the driver takes too long examining his engine or seeing that all is in order, the system may be in danger of being disrupted. It is only when they are construed unreasonably that the railway system grinds to a halt. It is, I should think, clearly a breach of contract first to construe the rules unreasonably, and then to put that unreasonable construction into practice.

Id. at 965.

order or wage regulating measure that deals with the matter in dispute, if these have been in operation for less than a year; (iii) the employees of a local authority, or of an employer who provides essential services, at any time; (iv) employees whose object is to achieve some purpose unrelated to terms or conditions of employment.

There is a conditional prohibition:

Where the prohibitions referred to in (i), (ii), (iii) and (iv) above do not apply, striking remains illegal for any employee or any other person if there is an industrial council with jurisdiction, until either:

(i) the council has reported on the dispute in writing to the minister; or (ii) a period of 30 days has elapsed from the date on which the dispute was referred to the council, or such further period as the council may fix has expired; whichever happens first.

If the industrial council's constitution provides for the compulsory reference of disputes to arbitration, however, striking by members of a party to the council remains illegal indefinitely.

If there is no industrial council having jurisdiction over their employment, employees may not strike until application has been made for a conciliation board and one of the following events has occurred:

(i) a board has been established and has reported to the minister in writing; or (ii) a period of 30 days had elapsed from the date on which the minister approved of a board, or such further period as the board may fix; or
(iii) the minister has refused to approve the establishment of a board; or
(iv) 30 days have elapsed since application was made for a board and the minister has not taken a decision.

On the other hand, if the industrial council or conciliation board considering a dispute decides to refer it to arbitration according to the terms of the Act (i.e. voluntary arbitration), striking is illegal pending the making of an award or the cessation of arbitration proceedings, whichever comes first.

There remains one more condition to be complied with if a strike is to be legally declared by a registered trade union; a majority of the paid-up members of the union must, by secret ballot, have indicated that they are in favor of a strike.¹⁸

Despite these limitations, however, work stoppage activity is a

18. R. RINGROSE, *THE LAW AND PRACTICE OF EMPLOYMENT* 219-20 (2d ed. 1983).

common occurrence in South Africa; indeed most strikes are invariably illegal in terms of the LRA.¹⁹

The LRA permits strike action in form only. In substance, the provisions of section 65 considerably weaken the collective bargaining process in South Africa. Viewed in isolation some of the restrictions are justifiable. For instance, the outlawing of strikes where the national safety or health may be imperiled is a legitimate protection against the costs of curtailing bargaining power. On the other hand, the imposition of a "cooling-off" period in every instance of industrial conflict undermines the process of counteracting the inherently superior collective power of the employer.²⁰

The regulation of strike action by the LRA is not, however, necessarily anachronistic, nor is it a serious deprivation of any fundamental right.²¹ Workers on strike not only disrupt their contractual relationship with their employer, but also pose potential risk of injury and damage to the public at large. Otto Kahn-Freund recognizes this feature of striking:

The centralization not only of the supply of services, but also of some essential goods means that any stoppage or delay or slowing down is likely to expose to serious hardship masses of people who do not have the slightest influence on the outcome of the dispute . . . [t]he victim of this change in the target and nature of many strikes is to an appreciable extent the working class itself.²²

19. *Strikes in South Africa in the period 1973-1982:*

| Years | 1973 | 1974 | 1975 | 1976 | 1977 | 1978 | 1979 | 1980 | 1981 | 1982 |
|-------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|--------|
| Total Number of Strikes | 370 | 384 | 274 | 245 | 90 | 106 | 101 | 207 | 342 | 281 |
| No. of workers involved | 98378 | 59244 | 23323 | 28013 | 15304 | 14160 | 22803 | 61785 | 92842 | 189022 |

The above table is extracted from SOUTH AFRICAN REVIEW: SOME FOUNDATIONS, NEW FACADES 220 (1983), which in turn is based on information supplied by the Department of Manpower (DOM). The 1982 figures are however based on independent research and do not include the Aggett political strikes. According to figures released by the Minister of Manpower a total of 60,332 workers took part in 336 strikes in 1983 resulting in a loss of 969,504 manhours. An additional 27,256 manhours were lost through work stoppages by 4,137 workers. (Hansard 21 January 1984, Questions: Col. 274). On the other hand the Willy Bendix's Industrial Relations Trend Consultant's survey shows that there were 190 strikes in 1983 (i.e., 56.5% of the official figure) resulting in a loss of 1,012,381 manhours. "Industrial Monitor" Indicator 2 (1984) 5. In 1984, according to the DOM, there were 469 strikes and work stoppages involving 181,942 workers, 80% of which lasted less than three days. Commentary on the 1984 Manpower Report Tabled in Parliament, Daily News, Apr. 23, 1985.

20. See O. KAHN-FREUND, *supra* note 2, at 1-17.

21. See *id.* at 17.

22. O. KAHN-FREUND, LABOUR RELATIONS: HERITAGE AND ADJUSTMENT 76-77 (1979).

Let us briefly examine the extent to which the right to strike is a fundamental right in some of the other developed nations.

Although the National Labor Relations Act of 1935 in the United States guarantees to employees the right to engage in concerted activities,²³ that right is not an unqualified one:

(i) Striking for certain prescribed objectives, inter alia; secondary purposes, strikes for work-assignment purposes and those for recognition as a bargaining agent when another union is lawfully recognized.²⁴

(ii) Section 8(d) provides for the familiar "cooling off" period of sixty days before a union can resort to strike to modify or terminate an existing collective bargaining agreement. Within thirty days after giving notice of the intention to strike, the union must also notify the Federal Mediation and Conciliation Service and the appropriate state mediation agency of the existence of the dispute. During the sixty-day notice period to the employer, the workers continue to render their services to the employer.²⁵ In the health care industry the "cool-

23. Section 7 of the NLRA provides that:

[E]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

National Labor Relations Act of 1935, § 7, 29 U.S.C. § 151 (1935). See also sections 8(a) and 8(b)(1)(A) which specifically protect the right to strike from infringement by an employer or by a union respectively.

24. *Id.* § 8(b)(4). Inducements or encouragements to withhold services directed at those who normally deal with the disputed work are deemed primary, whereas inducement and encouragements directed at other persons are deemed secondary, for example, picketing at a gate reserved for those whose contracts are not related to the work in dispute. See A.B.A. SEC. LAB. & EMPLOYMENT L., 2 THE DEVELOPING LABOUR LAW 1143 (2d ed. 1983). Section 8(b)(4)(D) prohibits industrial action where the object is to force the employer to assign particular work to employees in a particular labor organization to the exclusion of other employees. Thus unions cannot resort to strike action in the traditional jurisdictional dispute, in which two unions have collective bargaining agreements with one employer and each claims the work for its members. See *New Orleans Typographical Union Local No. 17 v. National Labor Relations Board*, 368 F.2d 755 (5th Cir. 1966). Section 8(b)(4)(C) prohibits a union from engaging in economic pressure to require an employer to recognize or bargain with a particular labor organization as the representative of its employees where there already exists another union certified as the bargaining representative of its employees. C. MORRIS, *supra* note 24, ch. 23.

25. In *Hooker Chemicals and Plastic Corp.*, 224 N.L.R.B. 1535 (1976), the National Labor Relations Board held that where one party gives the sixty-day notice but does not file the thirty-day notice with the Federal Mediation and Conciliation Service (FMCS) until after more than thirty days following the sixty-day notice, the other party must nevertheless observe

ing off" period is ninety days, and in the event of failure to reach settlement section 8(g) requires the Union to give the institution concerned a further ten-day notice of its intent to strike.

(iii) Like public employees in South Africa, there is an absolute prohibition against striking by employees of the federal government.²⁶

(iv) Strikes that imperil the national health or safety may, at the instigation of the President, be enjoined for eighty days under Title II of the Taft-Haftley Act, during which time various mediation and fact-finding services are made available to the parties.²⁷

In Great Britain there is no positive right to strike. The right is seen simply as "a right to withdraw labor in combination without being subject to legal consequences."²⁸ This freedom, without which workers could not bargain collectively, derives from the language of statutes which protect those who act "in contemplation or furtherance of a trade dispute" from judge-made liabilities for tort and crime.

Before proceeding to list the limitations on liberty to engage in industrial action, it is significant to observe that recent legislation is justified as "there can be no salvation for Britain until the special privileges granted to the trade unions three-quarters of a century ago are revoked."²⁹ The present policy is thus seen as designed to curb collective bargaining and thereby favoring the employer.³⁰ The regulation of industrial action ensures that "the collective strength of workers is to be limited boundaries of the employment unit."³¹ Thus:

(i) Workers are not permitted to take industrial relation to a trade

a thirty-day moratorium following the initiating party's untimely mediation notice before calling a strike or lockout. *Id.* at 1538.

26. 5 U.S.C. § 7311 (1980). *See also* *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 883 (D.D.C. 1971), in which a three-judge district court held that "there is no constitutional right to strike" and "the right to strike cannot be considered a 'fundamental' right." *Id.* at 883.

27. *See generally* Rehmus, *The Operation of the National Emergency Provisions of the Labor Management Relations Act of 1947*, 62 *YALE L.J.* 1047 (1953).

28. Royal Commission on Trade Unions and Employers Associations, 1965-1968 Cmnd. 3623 para. 935. *See generally* K. WEDDERBURN, *THE WORKER AND THE LAW* chs. 7, 8 (2d ed. 1971). *See also* K. Wedderburn, *Labour Law and Labour Relations in Britain*, 10 *BRIT. J. INDUS. RELATIONS* 270 (1972); O. KAHN-FREUND, *supra* note 2, ch. 8; and O. KAHN-FREUND & B. HEPPLER, *supra* note 9.

29. F. HAYEK, 1980'S UNEMPLOYMENT AND THE UNIONS 52-58 (1980); F. HAYEK, 3 *LAW LEGISLATION AND LIBERTY* 80-97 (1979).

30. *See* Lord Wedderburn, *Labor Law Now-A Hold and Nudge*, 13 *I.L.J.* 73, 80-81 (1984).

31. LORD WEDDERBURN OF CHARLTON, *INDUSTRIAL RELATIONS AND THE LAW IN THE 1980'S: ISSUES AND FUTURE TRENDS* 22 (to be published) (eds. P. Fosh and C. Littler).

dispute when their own employer is not a party of the dispute.³²

(ii) Only disputes between workers and their own employer are allowed. Moreover, the dispute must relate wholly or mainly to the workers' own conditions, i.e., a genuine dispute between an employer and his employees.³³

(iii) There exists no protection with respect to industrial action intended to put pressure on employers to maintain union and recognition only practices.³⁴

(iv) The right of peaceful picketing is limited to "attendance at or near" a worker's own place of work.³⁵

32. The Employment Act, 1980, § 17. For Lord Wedderburn, "the essence of autonomous trade unionism has always been effective solidarity across the lines of employment so that the strong can aid the weak." See *The New Framework in Europe* in INTERNATIONAL ISSUES IN INDUSTRIAL RELATIONS 34, 56 (1982). Section 17 exposes all forms of sympathetic and solidarity action to tortious liability for any consequential injury caused in the performance of commercial contracts, unless the target "associated employer" is involved directly in supply of goods or services in substitution for those disrupted in the dispute, or where the supply turns out to be under a commercial contract made between the primary and the secondary employer. The Employment Act, 1980, § 17. These exemptions have been restrictively interpreted. Thus, where a ship owned by "A" and chartered to "B" was blocked (because of underpayment of crew) while in port by the International Transport Federation by persuading lock-keepers to refuse to let the ship out, in breach of their contracts of employment, "A" was granted an injunction. The exception to liability for secondary action was not available in as much as the employer in dispute "A" and the employer in the secondary action (employer of the lock-keepers) were not in direct contractual relationship. The contract for the use of the dock was between the port authority and the charterer "B." See *Marina Shipping Ltd. v. Laughton*, [1982] 1 All E.R. 481 (C.A.). In *Merkur Island Shipping Corporation v. Laughton*, [1983] 2 W.C.R. 778 (H.L.), the House of Lords confirmed the approach of the Court of Appeal, thereby rendering most backing of solidarity action as unlawful.

33. The Employment Act, 1982, § 18. Section 29(1) of the Trade Union Labor Relations Act of 1974, now repealed, covered disputes between employers and workers or between workers and workers which were connected with widely couched matters concerning working as well as trade union activities. In this way, participants in industrial action within the definition of a trade dispute (the golden formula) were protected against tortious liability.

34. The Employment Act, 1982, § 14. If any person (in practice, a union) exerts industrial pressure in order to secure a union-labor-only clause in a contract, to induce an unlawful refusal to contract or tender on the ground of the employment of non-union labor, or to interfere with the supply of goods or services on that ground, the usual immunities from suit in tort under the Trade Union and Labor Relations Act 1974 (section 13) are expressly withdrawn from that industrial pressure, so that the union may be sued for an injunction and damages. See Lewis & Simpson, *Disorganizing Industrial Relations: An Analysis of sections 2-8 and 10-14 of the Employment Act 1982*, 11 I.L.J. 228 (1982).

35. The Employment Act, 1980, § 16. Pickets are in any event not immune from prosecution of a number of minor criminal offenses; not only under the Highway Act and the Police Act, but also under section 7 of the Criminal and Protection of Property Act 1875 in addition to local by-laws. They may also commit various torts, for example nuisance; see *Hubbard v. Pitt*, [1975] I.C.R. 308 (C.A.); *Kavanagh v. Hiscock*, [1974] I.C.R. 282 (Q.B.). See generally R. LEWIS & B. SIMPSON, *STRIKING A BALANCE EMPLOYMENT LAW AFTER THE 1980 ACT* 153-80 (1981).

(v) Trade Unions are liable for tortious wrongs arising from industrial conflict with respect to acts authorized or endorsed by a list of responsible persons, who are by statute declared to be agents of the union.³⁶ Strikes and other industrial action not enjoying the protection of the law may thus well bankrupt the union. Amounts of damages up to 250,000 pounds for a union of 100,000 members or more can be awarded.³⁷

(vi) The Trade Union Act of 1984, provides that the union and its officials must ensure, prior to authorizing or endorsing a strike or other industrial action, that a ballot is held. Failure to receive majority support results in tortious liability for injury caused as a result of the industrial action.³⁸

(vii) The Conspiracy and Protection of Property Act 1875, makes it an offense for any person to breach a contract of employment (e.g., by going on strike) in circumstances where the person appreciates or has reasonable cause to believe that human life is likely to be endangered, or that valuable property is likely to be exposed to destruction or serious damage.³⁹

(viii) In addition to the previously described restrictions on the pursuit of industrial action in the United Kingdom, the Minister of Crown is empowered for reasons of national security to prevent workers rendering essential services from being represented by a union.⁴⁰

German workers enjoy the freedom to abstain from work collec-

36. The Employment Act, 1982, § 15. See Clark & Wedderburn, *Modern Labor Law: Problems, Functions and Policies* in *LABOUR LAW AND INDUSTRIAL RELATIONS: BUILDING ON KAHN-FREUND 202* (Lord Wedderburn, R. Lewis & J. Clark eds. 1983).

37. The Employment Act, 1982, § 16. Section 16 sets forth the maximum amounts of damages to be awarded against various tortious actions (other than actions for personal injury or arising out of the ownership, occupation, possession, control or use of property where the maximum does not apply). The limits are:

- (a) £10,000 if the union has less than 5,000 members;
- (b) £50,000 if over 5,000 but less than 25,000 members;
- (c) £125,000 if over 25,000 but less than 100,000 members; and
- (d) £250,000 if over 100,000 members.

Id. § 16(3).

38. The Act received Royal Assent on July 26, 1984. See Trade Union Act, 1984, §§ 10, 11.

39. Conspiracy and Protection of Property Act, 1875, § 5. See also the Merchant Shipping Act, 1970. In terms of section 42, a seaman abroad and on board are prohibited from striking. *Id.* § 42.

40. Employment Protection (Consolidated) Act, 1978, § 138(4). Thus, in 1984 the Minister decreed that the 5,000 civil servants involved in the secret gathering of electronic intelligence at the government communications headquarters in Cheltenham fell outside the scope of statutory rights to organize and belong to a union.

tively in order to achieve better wages and working conditions. The liberty to strike is, however, confined by other legal rules.⁴¹

THE UNION STRIKE

Strike action can only be initiated through a procedure that grants joint decision making to members. An essential component of this procedure is balloting. The approval of the main executive board is required and commences after the failure of collective bargaining. The executive board will consider the financial condition of the branch union contemplating a strike, the possibility of a lockout, as well as the existence of a peace obligation, before reaching a decision to hold a ballot. Where the strike ballot takes place and the required majority is attained, the executive board proclaims a specified day to strike.⁴²

Strikers are protected against dismissal or other employer sanctions. The Union, however, is responsible for the performance of emergency work, as well as preventing excesses (e.g., picketing which may cause injury to property) during the strike.⁴³

Non-union strikes are illegal;⁴⁴ the justification being that there exists a statutory settlement procedure. Non-union strikers have ingeniously succeeded in classifying their action as a demonstration, protected by freedom of speech.

Clearly, then, if German law is regarded as recognizing the right to strike, our law is as commendable. Striking in Germany is lawful when it concerns a conflict of interest and is resorted to only after the procedures for settlement have been exhausted.⁴⁵ Similarly, South African legislation regulating industrial action provides for a mandatory conflict resolution process⁴⁶ and arguably is no more Dra-

41. The right to strike in union-organized strikes was recognized by the constitution of the states after 1945 and, uniformly for the German Federal Republic, by the decision of January 28, 1955 and April 21, 1971 of the Big Senate of the Federal Labor Court. The trade-union strike suspends the obligation to work, and since April 1971 the Court restricts lockouts to suspension of the payment of wages, thus preventing the collective dismissal of the workers. See generally INDUSTRIAL CONFLICT—A COMPARATIVE LEGAL SURVEY chs. 1, 3 and 5 (B. Aaron & K. Wedderburn ed. 1972). See specifically Th. Ramm, *Federal Republic of Germany* in 5 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 135-43 (R. Blanpain ed. 1979).

42. See *id.* para. 609-10.

43. *Id.* para. 611.

44. *Id.* para. 613.

45. *Id.* para. 617. Strike action cannot be used in legal conflicts, which are adjudicated by the labor court.

46. Labour Relations Act, *supra* note 3, § 65.

conian than the systems surveyed above. We shall again return to this theme.

CRIMINAL LIABILITY FOR INDUSTRIAL ACTION

The object of the LRA is to avoid industrial disruption. The Act provides for a voluntary system of self-regulation by management and labor, mediation and arbitration, compulsory conciliation, and a structure to develop and promote fair employment practices.⁴⁷ Coterminously, strikes and lock-outs are extensively regulated, permitting such action in well-defined circumstances.

Any person partaking in a strike or instigating or inciting any employee to strike in contravention of section 65 commits a crime, punishable by a fine up to 2,000,000 Rand or imprisonment for a period not in excess of two years, which may be imposed without a fine, or both.⁴⁸

The following categories of employees commit the statutory offense when striking. Any person instigating or inciting any of these employees to strike also runs afoul of section 65.

(a) Employees rendering essential services (i.e., those engaged in providing light, power, water, sanitation, passenger transportation, or fire extinguishing services and those employed by local authorities are prohibited from striking in any circumstance.⁴⁹

(b) Employees whose terms and conditions of employment are governed by an industrial council agreement, award, or determination cannot take strike action. In addition, strike action over a wage dispute is prohibited during the first year in which a wage determination is in operation.⁵⁰

47. See generally Labour Relations Act, *supra* note 3.

48. *Id.* § 65(3).

49. *Id.* §§ 65(1)(c), 46. In terms of other statutes, teachers, employees of provincial authorities and municipalities, doctors, dentists, pharmacists and psychologists employed by the state, nurses, and all hospital employees are also prohibited from striking. See Nursing Act, No. 50 of 1978, and the Medical, Dental and Supplementary Health Service Professions Amendment Act, 1978.

50. Section 65(1)(d) ensures that the parties abide by the agreements that result from the process of collective bargaining. Section 23 vests upon industrial councils the duty to negotiate agreements between employer and employee parties that not only will prevent disputes from arising, but will also settle any disputes that have arisen. An arbitration award deals with the subject-matter of the dispute referred by the employer and employees, and its effect is final and binding. See Labour Relations Act, *supra* note 3, § 49(1). Section 65(1)(b) refers to a determination in terms of the Wages Act, 1957, which deals with wages and other conditions of employment made binding on employers and for the benefit of employees who are not organized as a unit to command collective bargaining. *Id.* § 2(3).

(c) In all other cases, there is a mandatory "cooling-off" phase before employees may lawfully strike. A dispute must be referred to the industrial council, where one has been established and where the disputants are parties thereto, which has thirty days to resolve the matter. In the absence of such a council, the party contemplating strike action must apply for the establishment of an ad hoc board, which, if constituted, will attempt to conciliate and reach a settlement.⁵¹ If the council or conciliation board, fails to settle a dispute, then strike action will be permissible provided a majority of workers vote by secret ballot to strike.⁵²

Section 65 of the LRA is further reinforced. First, it is an offense for a registered trade union, its office-bearers, officials, or members to partake in or induce others to strike where the union is party to an industrial council, the constitution of which provides that disputes that cannot be settled are referred to arbitration.⁵³ Second, a conspiracy to commit any act which constitutes a strike is illegal.⁵⁴ Third, trade unions are prohibited from rendering financial assistance for purposes of sustaining an illegal strike.⁵⁵

PICKETING

Strikers who picket have not merely withdrawn their own labor, but seek to directly persuade others to join their side of the dispute. Picketing is generally considered as coercing other individuals and causing public disorder.

A picket, in its very nature . . . tends and is designed by physical intimidation, to deter other men from seeking employment in places vacated by the strikers. It tends and is designed to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical

51. A conciliation board consists of an equal number of representatives of the employer and the employee parties concerned and is established by the Minister to settle a dispute. *Id.* § 35. Where the Minister refuses to appoint a conciliation board, the union can lawfully strike. Otherwise, the union has to await the report of the board. This vests in the Minister the power to avoid strike action, moreover the Minister can extend the period within which the board has to report in its attempts to settle the dispute. *Id.* § 65(i), (ii).

52. *Id.* § 65(2)(b).

53. *Id.* § 65(2)(a).

54. See section 65(1)(a), which provides "No employee shall in pursuance of any combination, agreement or understanding . . . commit or . . . incite, instigate, command, aid . . . any employee so to commit or so to take part in committing, any act or omission contemplated in paragraphs (a) or (b) of the definition of 'strike' . . . other than a purpose referred to in paragraph (ii) of the said definition." *Id.* § 65(1)(a).

55. *Id.* § 65(3)(A).

intimidation and fear. Crowds naturally collect, disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason.⁵⁶

There may, however, be instances of peaceful picketing which aim to communicate a cause to the public. It is submitted that picketing is not inherently intimidating and, therefore, not per se unlawful. Indeed, to the United States Supreme Court, picketing is a means of publishing the facts of a labor dispute and an exercise of freedom of speech.⁵⁷ Clearly, picketing serves effective organizational and recognition functions. At an incipient stage of organization, a strike alone will likely be ineffective, while picketing can result in the interruption of deliveries to and pick-ups from the employer and of other forms of patronage by customers. The resulting economic losses may well induce the employer to recognize the union and the employees to join the union.

Picketing that results in any employee being incited or instigated to partake in a strike or to continue a strike in contravention of section 65, is declared unlawful.⁵⁸ Moreover, the LRA does not provide any protection to peaceful pickets. Of course, if picketing is violent, there will be criminal liability for assault, malicious injury to property, intimidation⁵⁹ and public order offenses as there would be in any other circumstance. However, even peaceful picketing may constitute the offenses of trespassing,⁶⁰ squatting,⁶¹ or obstructing roads and

56. *Pierce v. Stablemen's Union*, 156 Cal. 70, 79, 103 P. 324, 328 (1909).

57. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

58. *See Labour Relations Act, supra* note 3, § 65(1).

59. *See Intimidation Act, No. 72 of 1982, § 1.*

60. *Trespass Act, No. 6 of 1959, § 1.* It would appear that even if an employer wrongfully or unlawfully purports to terminate a contract of employment, the employee has no right to remain upon the employer's premises. *See Venter v. Livini*, 1950 (1) S.A. 524 (T); *Kew Hotel (Pty) Ltd. v. Hartman*, 1935 S.A. 684 (N.P.D.). In *R. v. Smit*, 1955 (1) S.A. 239 (C.P.D.), Justice Watermeyer confirmed the conviction of the appellant on a charge of trespass on the basis that the:

[a]ppellant knew that he was dismissed from employment, and after dismissal he was warned not to enter the premises. Notwithstanding such warning he entered the premises. His entry was therefore willful. He entered not to work but to participate in a strike which was in breach of his contract of employment. Nowhere in his evidence did the appellant say that he thought he had the right to enter the premises,

thoroughfares.⁶² There is also the risk of contravening the Internal Security Act, by committing the serious statutory crimes of subversion and attending a prohibited gathering.⁶³

CIVIL LIABILITY FOR INDUSTRIAL ACTION

The character and objects of trade unions are such that their activities constantly interfere with the labor and trade activities of others, making them potentially liable in contract and tort.

CONTRACT

The legal position of the individual who takes part in industrial action depends upon the effect of that action on his contract of employment. A concerted refusal by striking workers to carry out their contractual duties is always a breach of contract.⁶⁴ Even if the strike is legal, the common law entitles the employer to dismiss the employee who refuses to perform his contractual obligations.⁶⁵ A "go-slow" is a breach of contract because it is the implied duty of the worker that, in so far as he is capable of doing so, he should work at a reasonable speed. An overtime ban would be a breach of contract if the employer is entitled under the contract to demand overtime, but not if overtime is genuinely voluntary on the part of the employee.⁶⁶ Where workers engage in strike action, the contractual concepts of "breach going to the root" and "repudiation" overlap, enabling the

and I am satisfied that the Crown established not only an unlawful entry but also a willful trespass.

Id. at 244.

61. Prevention of Illegal Squatting Act, No. 52 of 1951, § 1.

62. A number of provincial and local enactments prohibit the encumbering of streets, footways and roads or the obstruction of free passage along them. See, e.g., § 130(1) of the Uniform Road Traffic Ordinance. See also J. MILTON & N. FULLER, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE: STATUTORY OFFENSES 640 (1971).

63. See §§ 54 and 57 of the Internal Security Act, No. 74 of 1982, respectively. Any person who interrupts any industry or undertaking with the aim of bringing about industrial or economic change commits the offense of subversion and is liable on conviction to a sentence of imprisonment not exceeding twenty years, and where the accused could foresee violence as a result of his conduct to a period not exceeding twenty-five years. *Id.* § 54(1)(b), (2)(b), (2)(i)-(ii).

64. See *Simmons v. Hoover, Ltd.*, [1977] I.C.R. 61, 70; *Stratford & Son Ltd. v. Lindley*, [1905] A.C. 269, 335 (H.L.); *Haddow v. Inner London Education Authority*, [1979] I.C.R. 202.

65. *Ngewu v. Union Co-op Bark and Sugar*, 1982 (4) S.A. 390, 405 (N); *R. v. Smit*, 1955 (1) S.A. 239, 241(H) (C.P.D.).

66. See *supra* note 15.

employer to dismiss the striking workers.⁶⁷

In practice, however, employers do not sue their employees for breach of contract. Workers are usually fired, making it pointless to seek damages against the individual worker.⁶⁸ This amount is small in comparison to the costs and inconvenience of litigation and recovery of any award. Furthermore, where negotiations are in progress, suing employees for damages can only exacerbate the employer's relations with the employees, who in all likelihood will appear in court only when the disruption is over.

The employers' ability to dismiss striking workers, even those on a lawful strike, is not considered a serious impediment to the collective forces embroiled in a dispute. The law of tort, on the other hand, is a major weapon in the armory of the employer not only against

67. See R. CHRISTIE, *THE LAW OF CONTRACT IN SOUTH AFRICA* 496-501 (1981). In *Simmons v. Hoover, Ltd.*, [1977] I.C.R. 61, the Employment Appeal Tribunal said that "a settled, confirmed and continued intention on the part of the employee not to do any of the work which under his contract he had been engaged to do, which was the whole purpose of the contract . . . appears to us to be repudiatory of the contract of employment." *Id.* at 76. Thus, without an implied obligation not to wilfully disrupt (which is hard to conceive of) any industrial action involves a breach of contract. However, it may well be that there are forms of work-to-rule which are not more than a strict application of the rules as properly construed, and thus not amounting to a breach. A withdrawal of voluntary overtime clearly does not involve a breach of contract. See *supra* note 15. See also *Power Packing Casemakers Ltd. v. Faust*, [1981] I.C.R. 484.

68. It is submitted that liability of the employee is limited to the loss caused by his own breach of contract, even though he knew his fellow workers also intended to break their contracts at the same time. Ringrose states that the damages awarded to the employer will be limited to the value of the employee's services during the period between the date he actually leaves and the date he would have been entitled to leave if he had given notice. See R. RINGROSE, *supra* note 18, at 56. In addition, damage to the employer includes the cost to the employer of hiring a substitute worker. Thus, the employer is under a duty to mitigate his damages. See *Victoria Falls & Transvaal Co., Ltd. v. Consolidated Langlaate Mines, Ltd.*, 1915 A.D. 1; *Holmdene Brickworks (Pty) Ltd. v. Roberts Construction Ltd.*, 1977 (3) S.A. 670, 689(A). Justice Corbett makes the point that the law requires that the victim of the breach must have acted reasonably in the adoption of remedial measures. The Basic Conditions of Employment Act, 1983, stipulates the notice period that an employee must give to terminate the contract of employment. This cannot be less than one work day's notice during the first four weeks of employment. After the first four weeks of employment, in the case of weekly employers, it must be one week's notice. In the case of a monthly employee, it must be two week's notice. Basic Conditions of Employment Act, No. 3 of 1983, § 14. The employee failing to so terminate the contract of employment commits a criminal offense. Recovery of the amounts payable under section 14 by way of civil action is precluded, however, except in an amount in excess of the minimum laid down by section 14 and owing in terms of the contract of employment. In addition, civil action is precluded where the Attorney-General has declined to prosecute or the employee has been acquitted on the relevant charge. *Id.* § 30. See *Manoim v. Veneered Furniture Manufacturers*, 1934 A.D. 237; *Lichtman v. Friedland*, 1940 T.P.D. 313; *MacVoi (Pty) Ltd. v. Perumal*, 1940 N.P.D. 1.

striking workers but also against those who organize and promote industrial action.

In *Murdoch v. Bullough*⁶⁹ the defendant, an official of the South African Industrial Federation Union (baking and milling section), had declared a boycott designed to pressure the plaintiff baker into replacing its black deliverymen with white employees. The defendant advertised in newspapers and circulated notices calling upon union members and sympathizers to boycott the plaintiff. The defendant also approached regular customers of the plaintiff, advising them that continued patronage of the plaintiff could result in action to their detriment. The plaintiff sought damages for defendant's unlawful and malicious attempt to create a trade boycott against him.

Justice Mason distinguished legitimate trade union activities from those of tortious industrial action: "one of the three fundamental rules of justice is said to be not to harm one's neighbor; this is qualified by another rule that a person is not to be regarded as doing wrong or acting maliciously who merely exercises his own rights."⁷⁰ The defendant's concern that the plaintiff's refusal to employ a white vanman was prejudicial to the union's interest did not find favor with the court, and thus did not give the defendant the liberty to interfere with the plaintiff's business.⁷¹

INTERFERENCE WITH TRADE OR BUSINESS

Murdoch v. Bullough authorizes actions based on interference with trade or business. Its ambit is uncertain, but its effect is devastating to trade union business. The court does not make clear whether unlawful means is a requirement for liability. Justice Gregorowski did not require it: "I find it nowhere stated in the cases . . . that you are at liberty to injure a man in his trade as long as you do not use unlawful means."⁷² He did, however, find unlawful means: the "publication of circulars and advertisements seem to . . . be illegal as they are injurious to the plaintiff, they could have been interdicted. They are calculated to harm the plaintiff . . . Surely such publications are not permissible."⁷³

Justice Mason suggests that the criteria for establishing liability

69. 1923 T.P.D. 495.

70. *Id.* at 508.

71. *Id.*

72. *Id.* at 519.

73. *Id.*

is whether the defendant had just cause, such as commercial competition.⁷⁴ Conceivably, had the plaintiff discriminated against white workers, the defendant would have had just cause to pressure the plaintiff to desist from treating members of the defendant's union less favorably because of their race (or for that matter sex, marital status, color, or ethnic or national origins).⁷⁵

In a 1958 English case, officials of the Musicians' Union were held not liable for organizing a boycott of a dance-hall that ran a color bar among dancers.⁷⁶ The pursuit of the closed shop has been justified as advancing the business interests both of employees and employers by securing or maintaining the advantages of collective bargaining.⁷⁷ In *Crofter*, the principle of justification was further extended:

A perfectly lawful strike may aim at dislocating the employer's business for the moment, but its real object is to secure better wages or conditions for the workers. The true contrast is, I think, between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such cause just.⁷⁸

Unlawful means to attach liability for interference with trade requires clarity in our law. *Murdoch v. Bullough* establishes fundamental points of the common law without adequate discussion of the principles.⁷⁹ Clearly, the defendant was liable under the *Lex Aquil-*

74. *Id.* at 508.

75. The Sex Discrimination Act, 1975, and the Race Relations Act, 1976, of the United Kingdom prohibit discrimination on the grounds of race, sex or marital status in the selection of employment. The legislation seeks to control both methods of selection designed to discriminate against the groups in question (direct discrimination) and also methods of selection which have the effect of disfavoring the group concerned even though not designed to achieve that effect (indirect discrimination). Sex Discrimination Act, 1975, § (1)(a), (b). Under the legislation it is unlawful for employers to make discriminating arrangements for selection for employment, to make job offers on discriminating terms, or to engage in discriminatory refusal or failure to offer employment. *Id.* § 6. Discriminatory job advertisements are made unlawful. *Id.* § 38. Aggrieved applicants for employment or employees can complain to industrial tribunals, which can grant declaration, compensation or recommendations that the employer cure or mitigate discrimination. *Id.* §§ 63(1), 265(1). The Equal Opportunities Commission may conduct formal investigations, issue non-discrimination notices and may bring County Court proceedings for injunctions to restrain persistent discrimination. *Id.* §§ 67(2), 257(1), 271(1). P. DAVIES & M. FREEDLAND, *LABOUR LAW TEXT AND MATERIALS* 450-55 (1979); R. RIDEOUT & J. DYSON, *supra* note 9, at 319-44.

76. *Scala Ballroom (Wolverhampton), Ltd. v. Ratcliffe*, [1958] 3 All E.R. 220.

77. *Reynolds v. Shopping Federation Ltd.*, [1924] 1 Ch. 28.

78. *Crofter Hand Woven Harris Tweed v. Veitch*, [1942] A.C. 435, 469.

79. *Id.* at 495.

lia.⁸⁰ The wrongfulness lies in the methods employed. The defendant's exerted duress on customers to breach their contracts with the plaintiff, and not to engage in any further dealings with him. Additionally, defendant's applied persuasion and pressure on those who supplied goods to the plaintiff that he required for his trade. Therefore, the conduct of the defendant was rightly censured by the court. Indeed, for Justice Gregorowski, the plaintiff had been "threatened" and "molested."⁸¹ Damages are essential to the cause of action, and must have either been incurred, or been about to incur, as a result of the unlawful interference.

INDUCEMENT OF BREACH OF CONTRACT

Industrial action, whether it be striking, picketing, or secondary action, invariably involves persuading employees to breach their contract of employment with the employer in dispute, or the employer not in dispute but who can use his position as customer or supplier to apply pressure to the employer in dispute to reach a settlement. Knowingly inducing (or procuring) a third party to breach his contract to the damage of the other contracting party without reasonable cause is a tort.⁸² Thus, employers have a remedy in tort against industrial action aimed at breaches of employee contracts, as well as against commercial contracts.⁸³

For purposes of industrial action, it is important to distinguish persuasion from the communication of mere information or advice. "A mere statement of, or drawing of the attention of the party addressed to, the state of the facts as they are is not inducement but only transmission of information; and before it becomes an inducement giving rise to liability it must contain some element of pressure, per-

80. *Id.* at 516-17.

81. *Id.* at 495.

82. LEE & HONORE, *THE SOUTH AFRICAN LAW OF OBLIGATIONS* 306 (2d ed. 1978). Intention is an essential component of this tort, negligence will not suffice. *Alliance Building Society v. Deretitch*, 1941 T.P.D. 203, 216.

83. See *A.J.T. Stratford & Son, Ltd. v. Lindley*, [1965] A.C. 269, [1964] 2 All E.R. 109 (H.L.). The watermen's union had put an embargo on barges hired out by Stratford Ltd. (plaintiff). The Union officials (defendants) had instructed their members employed by the hirers not to handle the barges (in breach of their employment contracts), so that existing customers could not return their barges to the plaintiff at the end of their hiring contracts. The object was to put pressure on the plaintiff. In response, *Bowker and King Ltd.*, an associate of the plaintiff, refused recognition to the union. The House of Lords found that liability in tort existed for both inducing breach of employment contracts, as well as in respect of the hiring contracts. *Id.*

suation or procurement.”⁸⁴

LIABILITY IN TERMS OF THE LRA

Neither common law nor criminal law principles facilitate strike action.⁸⁵ Whatever freedom of strike exists in our society is to be found in legislation. This freedom is circumscribed by provisions of the Labour Relations Act. A strike that does not comply with the provisions of section 65 is illegal. On this basis, the union in *Dunlop* was restrained from inciting others to participate in the illegal strike.⁸⁶ Indeed, any “suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity”⁸⁷ by the union with the object of influencing them to partake in a strike not sanctioned by the LRA, attracts criminal and civil liability for both the inciter and the strikers.

INJUNCTIONS

The above analyses clearly indicate that the law favors the employer. In practice, however, the substantive law infrequently factors into industrial disputes. The procedural remedy of an injunction is invariably used by the employer to frustrate the endeavors of its opponent. The interdict effectively stops a strike action from proceeding, pending trial of the substantial action. This notches a significant victory for the employer; he is relieved from the pressure to which he would otherwise be subjected. Moreover, interim relief can be sought and granted at great speed, thereby weakening the momentum of collective action by the workers. Our courts are inclined to grant interlocutory interdicts to employers; both the balance of convenience, as well as the prospect of the dispute being argued at the trial stage, militate against the continuation of industrial action.⁸⁸ Undoubtedly,

84. Evershed, M.R., in *Thomson D. C. and Co. Ltd. v. Deakin*, [1952] Ch. 646, 686.

85. See generally HOSTEN, EDWARDS, NATHAN & BOSMAN, *INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY* 158 (1977).

86. *Dunlop S.A. Ltd. v. Metal and Allied Workers Union*, 1985(1) S.A. 177(d), 178-79.

87. *Id.* at 188(E).

88. The requisites for the grant of an interim interdict pending determination of the main action are categorized in Jones and Buckle as follows:

The applicant for such temporary relief must show:

(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, *prima facie* established, though open to some doubt;

(b) that, where the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his rights;

industrial action is disruptive of the orderly process of production, but against this must be weighed the possibility that workers cannot "strike while the iron is hot," the dispute in all probability is going to be resolved on less favorable terms for the employees.

THE STATUTORY IMMUNITY

While the common law doctrines of tort render trade union activities unlawful, legislation endeavors to encourage the spread of collective bargaining arrangements. Section 79 of the LRA gives immunity to registered unions, its office-bearers, officials and members from the imposition of tortious liability for any act committed in furtherance of a strike.⁸⁹ The scope of the protection afforded by section 79 depends upon two matters: the union must be registered, and the strike must be lawful.⁹⁰ Paradoxically, most strikes in South Africa are illegal and resorted to by unregistered unions.⁹¹ The requirement of a legal strike to enjoy the immunity falls within the framework of a regulated system of collective bargaining. The rationale in giving protection exclusively to registered trade unions is arguably anachronistic. Not only does the LRA provide conciliatory forums for resolution of disputes, involving an unregistered union, but it also imposes rigorous requirements before the unregistered trade union can lawfully engage in strike action.⁹²

(c) that the balance of convenience favors the granting of "interim relief."

P. JONES & H. BUCKLE, *THE CIVIL PRACTICE OF THE MAGISTRATES' COURT IN SOUTH AFRICA* 71 (7th ed. 1980).

89. Section 79 reads as follows:

No civil legal proceedings shall be brought in any court of law against any registered trade union or employers' organization, or against any member, office-bearer or official of any such union or organization, in respect of any wrongful act committed by that union or organization, or by that member, office-bearer or official on behalf of that union or organization in furtherance of a strike or lock-out: Provided that this section shall not apply to any act committed in furtherance of any strike or lock-out in which, or in the continuation of which, any employee, employer or other person is by section sixty-five forbidden to take part, or to any act the commission of which is a criminal offense.

Labour Relations Act, *supra* note 3, § 79.

90. Registration of a union qualifies it for access to the institutions and facilities (e.g., stop orders for union dues) of the LRA. *Id.* § 6. For a strike to be lawful it must comply with section 65.

91. The notable exceptions are the 1984 strikes of the National Mineworkers Union and that of 1983 at Hammarsdale, Natal Thread Company.

92. Since the Labour Relations Amendment, Act 2 of 1983, an unregistered trade union, provided it is representative of the employees, can apply for the establishment of a conciliation board to endeavor to settle a dispute with the employer. *See* section 35. Moreover, section 65 prohibits a strike where no industrial council exists unless application has been made for the establishment of a conciliation board.

UNEMPLOYMENT BENEFITS

An unemployed person participating in a work stoppage cannot claim unemployment benefits. The Unemployment Insurance Act⁹³ disqualifies a contributor:

if he is unemployed by reason of a stoppage of work due to a trade dispute in the industry in which he was employed or in any other industry, so long as the stoppage of work continues, unless he has during such stoppage of work become unemployed after becoming *bona fide* employed elsewhere in suitable work, or unless he satisfies the claims officer that:

- (i) he has at no time been a party to the dispute and had no direct interest in the subject-matter of the dispute;
- (ii) no person who was employed at the contributor's place of employment in an occupation similar to the occupation in which the contributor was employed, has at any time been such a party nor so interested in the subject-matter of the dispute;⁹⁴

State neutrality is usually advanced to explain why social security benefits should be withdrawn from those engaged in a trade dispute.⁹⁵ For Rideout, the disentitlement of strikers is justified because "the purpose of the insurance scheme is to protect those who become unemployed through the ordinary fluctuations of trade or business rather than because of strikes or lock-outs."⁹⁶

A person who during the stoppage becomes *bona fide* employed elsewhere and thereafter finds himself unemployed falls outside the scope of the disqualification. The second category of exemption from the disqualification is problematic. The claimant must establish:

- (i) that he was not participating in or directly interested in the trade dispute which caused the stoppage of work, and
- (ii) that none of his fellow-workers were party to or interested in the dispute giving rise to the stoppage of work. The latter requirement was repealed in the English statute in 1975.⁹⁷

93. Act No. 30 of 1966.

94. *Id.*

95. See R. RIDEOUT & J. DYSON, *supra* note 9, at 486. Section 19(1) of the Social Security Act, 1975 (which is similar to § 35(13)(d) of Act 30 of 1966) is set out, and its provisions critically analyzed.

96. See R. RIDEOUT & J. DYSON, *supra* note 9, at 487.

97. Section 19(1)(b) of the Social Security Act, 1975, was repealed by skill of the Employment Protection Act, 1975. Section 19(1)(b) read as follows: "that he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at his place of employment any of whom are participating in or financing or directly interested in the dispute." Social Security Act, 1975, § 19(1)(b).

The Donovan commission could find no adequate justification for the “grade or class” provision in section 19(1)(b) of the Social Security Act of 1975 as it

considers the position of workers in relation to a particular trade dispute, not according to whether they are personally involved in the dispute in the sense that they are individually participating in, financing or directly interested in the dispute, but according to whether they belong to a group of workers containing workers who are personally involved. It assumes that a group of workers doing much the same kind of work in the same place and under the same conditions and circumstances have a corporate identity and a special relationship one with another—a “community of interest”—quite apart from their position in relation to any particular trade dispute . . . In our view the reasoning thus said to underlie the grade or class provision is fallacious. In order to ascertain whether a class of persons has a common interest simply because it is a class one needs to know what common attribute it is which marks such persons of as a class. This the law makes no attempt to do. It simply assumes, apparently, that if a group of workers in the same place of employment can by some means be identified as a “class” or “grade” then automatically they possess a common interest as such: and no investigation is required to possess a common interest as such: and no investigation is required to disqualify them from receiving unemployment benefit beyond discovering whether there is at least one of the class participating in the trade dispute, or financing it, or indirectly interested in it. This seems to us not so much the recognition of an interest as the invention of it. The capricious results where the provision can and does produce are themselves some indication of the invalidity of the assumption which underlies it. If for example the process workers at a particular works go on strike on an issue which concerns them alone and one member out of a total of 100 maintenance workers strikes in sympathy, the remaining 99, if laid off, will all be disqualified from receiving unemployment benefit, though they have no interest in the strike and are indeed hostile to it.⁹⁸

Thus, for the same reasons that found favor with the Donovan Commission, the provisions of section 35(13)(1)(d)(ii) of the trade dispute disqualification should be repealed.

Unlike English law, the dispute need not have occurred at the

98. Report of the Royal Commission of Trade Unions and Employers' Associations 1968. Cmnd 3623, paras. 974-75. P. DAVIES & M. FREEDLAND, *supra* note 75, at 702-08.

claimant's place of employment.⁹⁹ As long as the claimant is unemployed by reason of a work stoppage, it does not matter whether the trade dispute was in the industry where he was working, or in any other industry, since either way he is disqualified. The onus is then for the claimant to show that he falls within the exemption of the section. He may seek to show that he is not a party to the dispute, nor directly interested in the subject matter. In an English case,¹⁰⁰ a colliery repairer lost employment due to a stoppage of brushers. Repairers who could be required to work as brushers were offered such work, but refused to take it. It was held that they were participating in the dispute. In another decision, however, some form of active support was required. Thus, if the worker is prevented, against his will from reporting for duty, he will not be held to be actively participating in the dispute on that ground alone.¹⁰¹ In *Coates v. Modern Methods & Materials Ltd.*,¹⁰² the Court of Appeal held that the test for taking part in a dispute focuses on an employee's objective actions and not his subjective motives. This approach is unsatisfactory since an employee may support a strike out of fear or intimidation.

STRIKES AND UNFAIR LABOR PRACTICES

The all-embracing definition of "unfair labor law practice"¹⁰³

99. The Social Security Act, 1975, § 22.

100. R. RIDEOUT & J. DYSON, *supra* note 9, at 489.

101. See *McCormick v. Horsepower Ltd.*, [1981] W.L.R. 993 (C.A.).

102. [1982] 3 W.L.R. 764. The case concerned two employees, Coates and Venables, who were dismissed for taking part in a strike. They alleged that the Industrial Tribunal had jurisdiction to hear their claims of unfair dismissal because a third employee, Leith, had also participated and had not been dismissed. See Employment Protection Consolidation Act, 1978, § 62. The employer had taken the view that Leith had not participated, because although she had not gone into work during the strike, this was not because she actively supported the strike, but because she would receive abuse from fellow-workers if she were to work. The Industrial Tribunal held that Leith was participating, and that consequently the Industrial Tribunal had jurisdiction to hear the claims of the other workers. The Employment Appeal Tribunal allowed an appeal by the employer, but the Court of Appeal by a majority vote, in turn allowed the appeal of the employees. Lord Justice Kerr (with whom Lord Justice Stephensen concurred on the result) did not doubt that the employee's reasons or motives for partaking in a strike were not relevant in determining whether or not the employee has participated. Lord Justice Eveleigh dissented, considering that motive was crucial. He took the view that to participate in the strike the employee must be acting in concert with others, and that this was not the case where the employee was not a willing participant. See also *Naylor v. Orton & Smith Ltd.*, [1983] I.C.R. 665 (E.A.T.).

103. Unfair labor practice means:

(a) any labor practice or any change in any labor practice, other than a strike or a lockout, which has or may have the effect that:

(i) any employee or class of employees is or may be unfairly affected or that his or their

crystallizes the need to create a body of law regulating the employment relationship.¹⁰⁴ Collective bargaining, the keystone of the Labour Relations Act, presupposes the availability of procedures for regulating and resolving conflicts. The availability of these procedures is advanced as the rationale for the specific exclusion of strikes and lockouts in the definition of "unfair labor practice." Justice Booysen in *Dunlop* makes the point:

One of the objectives of the Labour Relations Act is that employees shall not strike until an opportunity has been given for them to meet their employers either in an industrial council, if one exists, or, if not, by means of a conciliation board, to endeavor to settle their differences.¹⁰⁵

In *Ngobeni v. Vetsak (Co-op) Ltd.*,¹⁰⁶ the Industrial Court, based on similar reasoning, declined to reinstate employees who had been dismissed for engaging in a work stoppage. The employer had refused

employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labor unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labor practice or any other change in any labor practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a).

See Labour Relations Act, *supra* note 3, § 1. An important function of the Industrial Court is to settle disputes concerning alleged unfair labor practices. *Id.* § 17(1)(f). DeKock aptly sums up this function as follows: "[T]he industrial court is expected, if not encouraged to 'make a new law' in building up precedents and especially in identifying 'unfair labor practices' and determining disputes concerning such practices." A. DEKOCK, *INDUSTRIAL LAWS OF SOUTH AFRICA* 622A (1984). The Wiehahn Report put it as follows:

In its deliberations, the industrial court should take into account the sociological, economic, psychological, anthropological and other extra-legal factors that play a role in the labor situation. In this regard the court should therefore also be able to consider the socio-economic and socio-political implications of issues before it. This would emphasize the considerations of equity as a basis for this court's decisions and recommends that the industrial court, *inter alia*, investigates and hears alleged cases of unfair dismissal, inequitable changes in conditions of employment, underpayment of wages, unfair treatment and other case of grievances.

See WIEHAHN, *supra* note 8, at 96, 97. For a comprehensive analysis of the concept "unfair labor practice," see S.A. Diamond Worker's Union v. S.A. Diamond Cutter's Association (1982) 2 I.L.J. 87, 114-20. Where the court makes a finding of an unfair labor practice, it can make such decisions "as it deems equitable having regard to all the circumstances." Thus, it can make an order reinstating employees in their employment, where their dismissals constitute an unfair labor practice. See A DEKOCK, *supra* note 103, at 624, 624(A).

104. N. Cassim, *Unfair Dismissal*, 5 I.L.J. 275, 288-92 (1984).

105. *Dunlop S.A. Ltd. v. Metal and Allied Workers Union*, 1985(1) S.A. 177(O), 180(H). Justice Booysen quotes de Kock, *supra* note 103, at 580-581.

106. (1984) 5 I.L.J. 205.

the Union's request for stop-order facilities for union dues and a wage increase. Instead of filing a suit under the unfair labor practice jurisdiction, the union members took strike action. The employer responded by dismissing the striking workers, who in turn applied to the court for reinstatement orders. The response of the court was predictable.

Notwithstanding the flagrant disregard of the machinery provided by the Act for resolution of any grievances they might have had, and their unlawful action in refusing to return to work, the applicant's now seek protection under that very statute which they choose to ignore.¹⁰⁷

The court correctly held that management must retain the right to employ the normal process of industrial discipline in the course of an industrial dispute. But the presiding officer failed to realize that management must treat all workers involved in a dispute equally. It did not matter to the court that seventy-one percent of the dismissed employees were subsequently re-employed. The remaining workers had no remedy as "the unfairness of the dismissal is not sought in the reasons of the dismissal, but in the result of the conclusion of a contract of employment."¹⁰⁸

In *Die Raad van Mynvakbonde v. Die Kamer van Mynwese van Suid-Afrika*, the Industrial Court expressed the view that selective dismissals and re-engagements of workers partaking in a lawful strike may constitute an unfair labor practice.¹⁰⁹ Indeed, taking cognizance of the liberty to strike guaranteed by the LRA upon compliance with section 65, the court was of the view that employers could not readily rely on their common law right to terminate the contract of employment when workers engage in a lawful strike. Such a dismissal may well be an unfair labor practice, thereby enabling the court to order the reinstatement of the dismissed workers. The court enumerated the criteria that may be taken into consideration in determining whether the termination of the employment relationship in the event

107. *Id.* at 214(A) and (B). See also *Rikhoto v. Transvaal Alloys (Pty) Ltd.*, (1984) 5 I.L.J. 228. The Industrial Court cautions workers against resorting to strike action: "Mr. Brassey suggested that the workers were entitled to stop work instead of coming to the industrial court for redress. This is to fly in the face of the law. Even if the workers have to wait three months . . . it still does not entitle them to take the law in their own hands." *Id.* at 242(H).

108. *Ngobeni*, (1984) 5 I.L.J. at 213(D).

109. (1984) 5 I.L.J. 344, 361.

of a legal strike amounts to an unfair labor practice.¹¹⁰ The legal effect would be that the strike suspends the employment, which is revived again when the strike is over.¹¹¹

The *Ngobeni* decision is distinguishable. The court was dealing with an unlawful strike. Nevertheless, the court should have considered the reason why there was selective re-engagement. Clearly, it cannot be good industrial relations practice to permit the employer to dismiss all those who went on strike, and then to discriminate against those employees involved in trade unions by not offering them re-employment. Employees who strike illegally can only expect the protection of the court unless it can be shown that there had been discrimination between employees—an unfair labor practice that some employees have been sacked and some not, or that some have been taken back and some not. The English legislation vests jurisdiction in the Industrial Tribunal to consider the reasonableness of the decision to sack or not to re-engage if the dismissals or offers of re-engagement are selective.¹¹² There is a three month time limit from the date of dismissal after which the employer is permitted to re-employ any of the dismissed employees.¹¹³ The three month rule weakens the principle of no selectivity. For Lord Wedderburn, it “erodes the solidarity of strikers” and “weaken(s) trade union action.”¹¹⁴

CONCLUSION

Allan Flanders distinguishes a strike from an individual worker's refusal to accept a job unless the employer improves his offer.¹¹⁵ The assumption behind every strike is not that the workers will seek em-

110. *Id.* at 361 (C)-(H).

111. Y. Claasen, 'Stakings reg - 'n nuwe teorie', (1978) T.R.W. 1-20. *See also* Lord Denning's observations in *Morgan v. Fry*, [1968] 2 Q.B. 710.

The truth is that neither employer nor workmen wish to take the drastic action of termination if it can be avoided. The men do not wish to leave their work for ever. The employers do not wish to scatter their labor force to the four winds. Each side is, therefore, content to accept a "strike notice" of proper length as lawful. It is an implication read into the contract by the modern law as to trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike: and revives again when the strike is over.

Id. at 728.

112. Employment Protection Consolidation Act, 1978, § 62. *See also* I. SMITH & J. WOOD, *INDUSTRIAL LAW* 254 (2d ed. 1983).

113. Section 62 amended by section 9 of the Employment Act, 1982. *See* Wallington, (1983) 46 M.L.R. 310; *Midland Plastics v. Till*, (1983) I.R.L.R. 9.

114. Clark & Wedderburn, *supra* note 36, at 140.

115. A. FLANDERS, *MANAGEMENT AND UNIONS: THE THEORY AND REFORM OF INDUSTRIAL RELATIONS* 213-20 (1970).

ployment elsewhere if the employer fails to meet their demands. On the contrary, the objective of the striking workers is to get reinstated as soon as possible upon resolution of the dispute. Where the employer has replaced the strikers by other workers, the strike ceases to be an effective sanction and turns into a futile gesture. Both the objective and behavior of strike action is encapsulated in the definition suggested by Davies and Freedland:

A strike is therefore a temporary refusal to work in accordance with the prevailing employment contracts (or on other conditions that are not specified or implied in the contracts), combined with the firm intention, at least on the part of the great majority of workers involved, of not terminating their contracts. And even in those cases where workers strike in spontaneous protest, without any calculation of the prospect of success, it is still the case that: sooner or later, however bitter the dispute, employees must work and the employer must have them return to work. It is no answer to suggest that the individual may elect to seek another place of employment; the employee body must remain. A few defections will not change the character or problems of the body.¹¹⁶

The Labour Relations Act is predicated on the belief that the price of labor and other terms and conditions of employment should be fixed by collective bargaining. For Cox, Bok and Gorman, management and labor get together where the law promotes negotiations over the terms of a collective bargaining contract. Another factor that makes collective bargaining work is the strike. It is through the appreciation that the risks of losses that a strike can cause are so great that compromise is cheaper than economic battle: "the strike or the fear of a strike is the motive power that makes collective bargaining operate."¹¹⁷

The LRA recognizes the function that strikes serve. As long as our labor policy is predicated on the system of collective bargaining, the risk of strikes cannot be wholly eliminated. The anomaly is that in practice most strikes occur without compliance with section 65, and hence are illegal. Section 65 of the LRA, in essence, preserves the right to strike as a last resort and after the work-force has exhausted all attempts at direct negotiation, including the facilities of third-party intervention, to reach a settlement.

116. P. DAVIES & M. FREEDLAND, *supra* note 75, at 14.

117. A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 484 (9th ed. 1981).

Clearly, then, the workers need the protection of the law while engaged in a lawful strike. Section 65 of the LRA will be a justifiable restriction on strike action, provided that the employees are protected against dismissal while engaged in a lawful strike. The reasons are overwhelming. First, the right to strike is extensively regulated, on the premise that the LRA creates forums for negotiation and conciliation. Second, by enjoining the dismissal of employees partaking in a legal strike the aspirations of the LRA will be fulfilled by maintaining an orderly and just balance of power between management and labor. Third, the Industrial Court has indicated that the dismissal of lawfully striking workers may constitute an unfair labor practice.

The right to strike is not a fundamental human right. The applicable laws of the countries surveyed in this Article exemplify that legitimate restrictions can be imposed on strike action. It is also clear that the common law favors the employer. Ensuring that workers cannot be dismissed while partaking in a legal strike,¹¹⁸ while also extending immunity from tortious liability in cases of lawful strikes to unregistered unions, its officials and members, will make the law appear fair and command the respect of those contemplating industrial action.

118. In terms of the German precedent, striking workers will not be entitled to any wages. *See supra* note 41.

