

LABOUR RELATIONS — A TAKEOVER BY THE STATE ?

The New Zealand Experience

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THE ROLE OF LAW IN LABOUR RELATIONS

The debate on the question of the role of law in labour relations is not new. At the one extreme, there is the oft quoted statement of Professor Wedderburn that "Most workers want nothing more of the law than it should leave them alone" so that "legal sanction and lawyers make their greatest contribution to industrial life by being self-effacing rather than obtrusive."¹ To similar effect is Professor Kahn-Freund:

"The desire of both sides of industry to provide for, and to operate an effective system . . . is a stronger guarantee of industrial peace and of a smooth function of labour-management relations than any action legislators or Courts or enforcement officers can ever hope to undertake."²

Such warnings do not, however, deter legislators and politicians from invoking law as a major means of establishing and maintaining a greater degree of stability and peace in industrial life. In moving the second reading of the 1976 Industrial Relations Amendment Bill (No. 3) (which contained many new restrictions on strike action) a New Zealand Cabinet Minister claimed that law must "act as a deterrent to those bent on recalcitrant or destructive action." Similarly, the President of the United Kingdom National Industrial Relations Court had this to say in 1972 when fining the Transport and General Workers Union £55,000:

"Without the rule of law and Courts to enforce it, each one of us would be free to push and bully our fellow citizens and, which may be thought more important) our fellow citizens would be free to push and bully us. In a free-for-all none of us would hope to be

the winner. The justification for law, the Courts and the rule of law is that they protect us from unfair and oppressive actions by others; but if we are to have that protection we must ourselves accept that the law applies to us, too, and limits our freedom. In civilised countries nearly everyone accepts this and agrees that is a small price to pay. There remain the few who want to use the laws which suit them and disobey those which do not. If the rule of law is to have any meaning, the Courts must in the last resort take action against these few and impose some penalty."³

The fining of, and imposition of injunctions on, trade unions and their leaders has brought into sharp focus the conflict which exists between the philosophy that all must obey the law (and that unions in particular are not above the law) and the view that the protagonists of labour relations should be left alone to reach their own solutions by way of negotiation, mediation and collective bargaining. There have been any number of instances in recent years, not only in the United Kingdom but also in Australia, New Zealand and other countries, where there has been resistance by unions to the enforcement of

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1—*The Worker and the Law* (2nd ed., 1971), p. 13.

2—"Legal Framework" in *The System of Industrial Relations in Great Britain*, ed. Flanders and Clegg, p. 43.

3—*Heston's Transport v T.G.W.U.* (1972) 2 All E.R. 1214, 1222.

Court orders against them, where union officials have been imprisoned as a consequence and where widespread strike action has resulted or been threatened. In each instance, Government intervention has normally followed and an explosive situation defused by means of a conciliated settlement of the original dispute or by the setting up of ad hoc machinery for resolving the dispute.

It is tempting to conclude from these instances that law is at worst harmful and at best irrelevant in the field of industrial relations. More than sixty-five years ago, the great philosopher Ehrlich in fact warned that legal rules and Court decisions had no substantial efficacy on the conduct of workers. "Law suit and compulsory execution are to (the worker) little more than mere words," he said, compared with the non-legal norms of the workplace which dictate his behaviour and conduct. According to Ehrlich, the fear of dismissal and unemployment, the desire for promotion and, most importantly, his affiliation to his fellow workers (especially through the medium of a trade union) provide the true explanation of his willingness to continue at his workplace and the manner in which he does so.⁴

One of the difficulties with the debate about the role of law in labour relations is that it is overly simplistic. Views become polarised on all fronts. I suspect that the views of those who claim to be opponents of legal regulation are strongly coloured by the injunction or penalty cases. Their horizons probably do not extend beyond these instances. Thus they will not for example have in mind the fact that in most countries it has proved necessary to enact factories and machinery legislation for the safety of workers. These were matters that were originally the subject of negotiation between unions and employers but the problems surrounding the settlement of such issues in that manner ultimately led to State intervention and the assumption of Governmental responsibility for ensuring that adequate standards were attained by employers. The means adopted was law.

On the other hand, those who clamour for law, or more law, often fail to distinguish between law as enacted on the statute book and its efficacy as implemented. Too often industrial laws have been

enacted which are ignored and forgotten and which therefore only serve to create an unhealthy void between the theoretical system and that which operates in practice.

Law does not of course permeate or regulate all industrial relations activities. When the industrial relations field is viewed as a whole, it will be seen that there are a number of areas of employer-employee relations which have been regulated or determined by quite different means. Broadly speaking, there are for example matters which have traditionally been the subject of collective bargaining between unions and employers, with little or comparatively little legal direction. Thus, at least until recent times, wage rates tended to be fixed by bargaining and negotiation with little external influence other than that of rates fixed in a similar manner in other industries. Conditions of employment relating to such matters as entitlement to sick pay, travelling allowances and so forth were also treated in this way.

There are other areas where the law has also been largely reticent but which have not been the subject of collective bargaining. These include such matters of employer or company policy as to what will be produced or manufactured and how it will be marketed, the establishment of systems of work, the allocation of work and so forth. These (and others like them) have traditionally been regarded as falling within the general rubric of employer or managerial prerogative.

It is the purpose of this paper to show that in recent years quite dramatic changes have become evident in the customary handling of industrial relations matters. In particular, disputes and claims that were formerly the subject of collective bargaining between employers and unions have increasingly been taken out of that domain and made the subject of legal regulation. Further, and probably as a consequence of that development, unions have begun to lay claim to areas of managerial prerogative and to assert a right to bargain over matters that were previously regarded as being outside their jurisdiction. But these also are areas where developments in legal regulation already threaten to overtake the incipient and tardy attempts by the trade unions to assert bargaining rights.

In describing and tracing these recent

4—Fundamental Principles of the Sociology of Law (1936, Harv. U.P.), p. 66.

developments, particular attention will be paid in this paper to the situation in New Zealand but, where appropriate, reference will be made also to the experience of other countries.

RECENT DEVELOPMENTS IN NEW ZEALAND INDUSTRIAL RELATIONS

Industrial Relations in New Zealand has throughout this century been characterised by a highly developed legal system regulating collective disputes. In the early 1890's the trade unions of the country had taken a fearful hammering from the employers in a maritime dispute which had started in New South Wales and spread to New Zealand. As a direct result of the crushing victory enjoyed by the employers, there were considerable fears by the Liberal Government of the time that the way would be open for more unscrupulous employers to exploit the situation and take advantage of the disarray and weak position in which the unions found themselves. As a direct result, the first of the Industrial Conciliation and Arbitration Acts was passed in 1894.

That Act established a central Arbitration Court with wide powers to settle disputes that arose between employers and unions and also to lay down in the form of awards minimum wage rates and basic conditions of employment which were to operate in a particular industry where the employer or employers on the one hand and the union or unions on the other hand were unable to reach an agreement by way of collective bargaining. In addition, the legislation enacted legal procedures by which collective bargaining was to take place under the chairmanship of an independent conciliator wherever employers and workers were unable to reach an immediate agreement.

With various ups and downs, the Industrial Conciliation and Arbitration legislation operated fairly effectively from that time until the late 1960's. A number of important amendments were made to the Acts from time to time, including a requirement first enacted in the 1930's that workers in an industry covered by an award settled by the Arbitration Court or by a collective agreement registered with the Registrar of the Court were required to join the trade union which was a party to that award or agreement. In 1973, the legislation was

consolidated and re-enacted with modifications as the Industrial Relations Act 1973.

In the years since the Second World War, industrial strife in New Zealand has emerged and spread. Previously, there had been comparatively few industrial stoppages and indeed at different times New Zealand had been held up to the world as being a nation that was virtually strike-free. In 1951 a major stoppage on the waterfront had led to the National Government assuming legal powers derived from national emergency legislation which enabled the police and armed forces to crush the strike and to remove key union figures from their positions of office. The unions retired, beaten by the power of the State, but in the early part of the 1960's an increasing number of stoppages over dismissals began to emerge. New Zealand drifted into a minor recession in 1967 and in 1968 matters came to a head on the industrial front when the Arbitration Court accepted submissions from the Employers' Federation and refused to make a cost of living indexation award (in New Zealand called General Wage Order) on the grounds that the economy could not bear such an increase. Industrial action which resulted saw the joining of forces between the Employers' Federation and the Federation of Labour in what was termed the "unholy alliance" by the then Minister of Finance. A joint application was made to the Court for an order notwithstanding the earlier rejection. The Court (which is a tripartite body consisting of a Judge and two lay-members nominated respectively by the Employers' Federation and the Federation of Labour) this time granted a 5% General Wage Order by way of a majority decision, the Judge dissenting.

Thereafter, the Federation of Labour (still smarting from the original nil order and the Judge's continued dissent) made it plain that it would have as little to do with the Court in any of its jurisdictions as possible and would resort wherever possible to direct bargaining as a means of obtaining the benefits that they sought or settling the disputes that arose. The next few years saw considerable confrontation between employers and unions and, certainly in the more militant industries in particular, legal procedures were commonly by-passed and disputes and claims settled in accordance with the rela-

tive industrial strength of the parties.

In 1971 the National Government introduced into Parliament a Bill establishing a system of wage control restricting the increases which could be given to award rates and to individual employees. A central Tribunal, known as the Stabilisation of Remuneration Authority, was established from which approval was required before any wage increase could be given. That Bill was duly passed by Parliament but, in accordance with its terms, it expired 12 months later. However, at that date further and similar wage controls were enacted by way of statutory regulation pursuant to general authority given by the Economic Stabilisation Act 1948 (which gave wide powers to enact delegated legislation where necessary for the good of the economy). Those regulations remained in force, despite union opposition and pressure, until the National Government of the day was removed from office in the General Election at the end of 1972.

The incoming Labour Government at that time repealed the regulations and for a period of some months there were again no direct controls over wage rates. This saw a time once more when the unions exerted their industrial strength and considerable gains were made by them in the form of large increases. Eventually, as inflation began to bite, the Labour Government was forced to bring down its own regulations restricting wage increases. It endeavoured however to provide a degree of flexibility (which in practice often worked inequitably) by allowing increases in certain exceptional cases to be passed on where approval was obtained from a central Tribunal.

Labour's failure to halt the decline in New Zealand's economy saw a National Government re-elected in 1975 with a continuation of wage regulations (with some modifications) until the second-half of 1977. At this time they were relaxed considerably but under public threat from the Government that, if unions were not moderate in their claims, stricter controls would be reapplied. Rising unemployment in New Zealand in the last two years, together perhaps with the public statements of the Government, has in fact ensured that recent wage claims by the great majority of unions have been comparatively restrained.

The situation at the moment therefore is that direct legal controls in recent years have severely curtailed wage bargaining. The current economic depression and the threat of further legal control has in effect led to the demise of traditional union activity in this area. While this is true specifically of New Zealand, it is suggested in this paper that, to the extent that comprehensive Government control over economic activity is rapidly becoming a permanent feature in all developed nations, so too is the ability of unions and employers to determine their own destiny in the settling of wage rates restricted.

Wage controls were not the only threat to union activity in New Zealand in recent years. The increasing militancy of unions in the late 1960's and through the 1970's also inspired a reaction from the National Government, which had been re-elected at the end of 1975, in the form of the introduction of severe anti-strike measures. The Labour Government, which had held political power in the preceding three years, had liberalised strike laws in 1973 to give unions greater legal freedom to take industrial action. In 1976, however, the National Government introduced an amending Bill to the existing legislation containing what were described by some as the toughest and most repressive anti-strike measures known in the world. The Bill was referred to a Parliamentary select committee to hear limited submissions from interested parties but the measures were eventually enacted. Oddly, not all of the changes were enacted as amendments to the Industrial Relations Act; some of the provisions were tagged on to the Commerce Amendment Bill that was also before Parliament at that time.

These new provisions warrant a closer examination. It is important to note first however that the definition of "strike" contained in the New Zealand Industrial Relations Act is a very wide one and covers many forms of industrial action falling short of a complete stoppage, including a work to rule, a go slow, a refusal to work overtime, the reduction of normal performance of work and a refusal to accept engagement for any work in which the employees are usually employed.

The Commerce Amendment Act 1976 made it an offence to be a party to, incite, instigate, aid or abet a strike or a lock-out

which was not a dispute over an "industrial matter," or which the employers and workers, or their respective unions, did not have the power to settle by agreement, or which was intended to coerce the New Zealand Government (in a capacity other than that of employer) either directly or by inflicting inconvenience upon the community. This provision was aimed at what were called political strikes and was a direct sequel to the taking of industrial action by a number of unions in protest against the berthing at New Zealand ports of American nuclear war ships at the invitation of the New Zealand Government. The section, apart from making such action an offence, also provided that any person suffering or apprehending loss as a result of such action was able to obtain any or all of the remedies available in civil proceedings to the same extent as if the strike or lock-out were a tort independently of the section (provided only that no award of damages could be made against an individual).

A further section in the Commerce Amendment Act gave the Arbitration Court the power to order that full work be resumed where the public interest was affected as a result of industrial action. The section required that the Court **must** make an order where it was satisfied that either the economy of New Zealand (including in particular its export trade) or the economy of a particular industry or industries was or would be in the immediate future substantially affected or, alternatively, if the life, safety or health of members of the community was endangered. The Court was also given power to determine a procedure for the settlement of the issue of the strike or lock-out and also to order the taking of any necessary measures for the safety and health of workers concerned directly or indirectly in the dispute. Finally, the Court was empowered to make orders for the cessation of any industrial action in the nature of a rolling strike. Failure to comply with any order of the Court constituted an offence and in particular a breach of an order by a union conferred a related liability on any members of the management committee of the union who wilfully failed to inform any worker bound by the order that failure to comply with it was declared an offence.

The power given to the Court to order resumption of work appears to have been modelled on the cooling off provisions initially enacted in the United States and later provided in the United Kingdom Industrial Relations Act of 1971. It will be recalled that, shortly after the latter provision was enacted, the Secretary of State applied to the United Kingdom Industrial Relations Court and obtained an order requiring striking railway workers to resume work.⁵ That action was then followed by a further application to the Court requiring a compulsory ballot of the railway workers, the result of which was a declaration of overwhelming support for the union's action in recommending the strike.⁶

In New Zealand an application for a resumption of work order is able to be made by any Minister of the Crown, any person who proves to the Court that he is directly affected by the strike or lock-out or by any organisation representing any person so affected. The first application to be made to the Court for such an order was made by an organisation called "Strike Free" which, led by a law student who had previously successfully obtained an injunction in the Supreme Court against striking bus drivers, held itself out as being a public interest group dedicated to eradicating and eliminating strikes from the country. Strike Free sought an order in respect of a freezing works stoppage that was occurring at the time, notwithstanding the fact that negotiations were well advanced for the settlement of the dispute. The Court refused to give an early fixture for the hearing of the application and, by the time it was heard, the strike had been concluded. Strike Free nevertheless asked the Court to make an order on the grounds that the strike might reoccur. The Court in turn invited counsel for Strike Free to withdraw the application and, when on instructions that invitation was rejected, the Court dismissed the application with a heavy order for costs against the organisation. The view was also expressed obiter that it was doubtful whether an organisation of this kind came within the category of organisations which by the Act were empowered to make such applications.

The legislative measures enacted in the last two years in New Zealand represent

⁵—Secretary of State for Employment v ASLEF (1972) 2 QB 443.

⁶—Secretary of State for Employment v ASLEF (No. 2) (1972) 2 QB 455.

deliberate Government policy that industrial disputes and claims should be dealt with totally within the industrial framework provided by law and that uncontrolled direct bargaining or industrial action should be restricted so far as possible. The employers associations have not been slow to react to this development and have extended considerably the advocacy services which they provide for their members. There has thus quickly grown up a large body of full time paid employer advocates (not necessarily lawyers) who assume representation of employers in disputes and claims heard by the Arbitration Court and before Conciliation Councils in the great majority of such cases. This development has not been without its difficulties, not the least of which has been the emergence in some instances of an incipient conflict of interest between the interests of the individual employer and the collective interests of the employers' federation or association as a whole.

There has been no comparable development on the union side to the increase in judicial determination of disputes and claims. New Zealand unions by and large are not wealthy and union secretaries traditionally have been paid very small salaries and been largely unassisted by qualified staff. With one or two exceptions, the standard of union advocacy has therefore tended to be low. This has given employers an edge in the tightened legal system that now exists. It is of interest that the present Government in another context has recently suggested that there may be a need for State advocacy services to represent workers who are not unionised or adequately represented otherwise. This suggestion has naturally met strong opposition from the unions who of course see it as an alternative to their own existence.

THE EROSION OF MANAGERIAL PREROGATIVE

Historically employers have claimed certain basic and inalienable rights, including the right to hire and fire at will, the right to determine and organise systems of work, the right to direct production, the right to determine company policies relating to production, marketing, investment and so forth and the right to maintain confidential knowledge on financial and

accounting matters relating to the company's performance. In North America such rights have often been specifically preserved by provisions to that effect written into labour contracts. These rights are however currently under challenge by unions and workers in many countries around the world.

In New Zealand the right to hire and fire at will has already been subjected to legislative control. At common law the worker who was dismissed had no remedy provided that he was given due notice or paid in lieu of notice as required by law. The period of such notice was generally small and an employer was under no obligation to provide reasons for the dismissal. An amendment to the New Zealand Industrial Conciliation and Arbitration Act in 1970 however introduced a standard personal grievance procedure which was required to be inserted into all awards and registered collective agreements. The procedure could be invoked by a worker who had been unjustifiably dismissed or otherwise treated in a way to his detriment by action that was not common to other workers. The worker in the first instance had the right to take the matter up with his immediate supervisor with the intention that the dispute or grievance should be settled as quickly and as near to its origin as possible. In the event that the matter was not settled in that way, the worker was required to report it to his union which could if it chose take it up with the employer. If no settlement was reached at that stage, then the union could require the establishment of a grievance committee consisting of an equal number of representatives from each side chaired by an independent conciliator (normally in practice a full time paid official employed through the Labour Department). Failing settlement, the matter could then be referred to the Arbitration Court which had power to order reinstatement of the employee and/or compensation, including the loss of any wages that may have been suffered.

In practice this procedure has served to remove dismissal disputes from the area of strike action so that again legal procedures, institutions and precedents are increasingly playing a dominant part in the conduct of a particular area of industrial relations.

Employer or managerial prerogative in

the other areas referred to currently remains intact in New Zealand although murmurings from the unions are rising. In particular, overseas trends towards greater worker participation in company decision-making and the recent Bullock Report in the United Kingdom on **Industrial Democracy**, including as it does recommendations for the appointment of worker representatives on directors boards, is forcing unions in New Zealand to reassess their traditional stance in these areas.

It should not necessarily be assumed however that the unions will wholeheartedly welcome such movements towards worker participation. Overseas experience of union or worker representatives appointed to the boards of companies has sometimes highlighted a conflict of loyalty and duty that can hamper such representatives. Many of the more militant unions perhaps feel that they stand to do better out of an arms length or adversary situation than they do from one where the exhortation is to work together towards a so-called common goal. Further, authority of the union over the workers in a particular plant or enterprise may be undermined if the workers themselves are integrated into the company structure and take an active part in the decision making within that company. When productivity bargaining became popular in the United Kingdom and elsewhere in the 1960's union reaction ultimately became hostile because of this very factor.

The prognosis for gains in this area through union action may therefore not be wholly optimistic. It can consequently be predicted that in the long run there is likely to be greater change through legislation than by union agitation or bargaining. A lead already exists in this respect in certain western countries, notably those of Central and Northern Europe. The German systems of worker co-determination and the effect that they have had on company structures and managerial processes are well known and need not be traversed here. In a less drastic form a recently enacted Norwegian statute may provide a guide to what could occur in New Zealand and in other countries such as Australia and the United Kingdom.

The Worker Protection and Working Environment Act of 1977 imposes certain positive obligations on Norwegian employers to organise systems of work which will

aid the employees' opportunities for self-determination and professional responsibility and which will avoid exposure of employees to undesirable physical or mental strain. Undiversified repetitive work and work that is governed by machine or conveyor belt in a manner in which the employees themselves are prevented from varying the speed of the work is also specifically prohibited.

If in time comprehensive legislation is enacted providing institutional or structural change to companies and requiring a degree of worker participation and integration into the policy or decision making areas of a company's activities, it would seem almost inevitable that the industrial role of trade unions as it now exists will be threatened. As indicated above and without necessarily claiming that unions are inherently antagonistic or unco-operative in their dealings with employers, their traditional stance nevertheless has been one of negotiation from an arms length position. Inevitably this has meant there has been an in-built element of conflict in employer/union relationships. The concept of joint decision making runs against this trait. Similarly, trade union officials have been the representatives of the worker members of their unions. While of course they derive their authority to act from the membership, nevertheless the conduct of negotiations and the decisions as to tactics and other matters of strategy have been taken by the union officials. This is the job of course that they are employed to do. Worker participation however involves the workers themselves in the particular factory or enterprise taking a part with the managers in the decisions that are to be taken for the common good. The roles of the outside union officials are clearly limited in such circumstances, as was the case in company productivity bargaining and implementation.

What then would be the place of trade unions if systems of worker participation became widespread and indeed mandatory as a result of legislation? I suggest that the role of trade unions (and their counterpart employers' organisations) in the field of industrial relations would largely cease to exist and would be replaced by enterprise or factory based representative committees or groups which might or might not have some allegiance to industry councils consisting of representatives from

different factories and formed more for the purpose of the exchange of information rather than for the purpose of representation as it presently exists. Unions as such may well survive but with more restricted functions of a social or co-operative kind. Certainly, in my view, their industrial role and strength will be dissipated as worker rights and benefits are increasingly settled by legislation and through enterprise systems of joint worker-employer decision-making.

The rights and entitlements of workers will therefore become the product of the State, exercising powers of patronage,

which might be extended or withheld at will. This is not necessarily to say that any such development, with the attendant benefits that might result, should not be encouraged in the absence of effective union action. However any decline in trade union industrial power will have a corresponding effect on the considerable political strength of the unions as one of the counterbalancing forces that offset Governmental or State power. Any resultant increase in the political ability of the State to pass new laws to achieve its policy objectives will accordingly have significance from the wider perspective of the rule of law as it operates in a Parliamentary democracy. ©