JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 1984

COR: THE HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

BETWEEN	HOTEL FOUR SEASONS LIMITED	APPELLANT
AND	THE NATIONAL WORKERS UNION	RESPONDENT

Emil George, Q.C. and E. Ashenheim for Hotel Four Seasons.
R.C. Rattray, Q.C. and Miss B. Warren for National Workers Union.

December 17 & 18, 1984; March 29, 1985

ZACCA, P.:

I have had an opportunity of reading the judgment of Carey, J.A.. I agree with his reasoning and conclusions that the appeal should be allowed and the order of the Tribunal restored. The appellant is to have the costs of the appeal and of the hearing in the Court below.

CAREY, J.A.:

The appeal is taken against a decision of the Full Court (Smith, C.J., and Wolfe J., Downer J. dissenting) which quashed an award of the Industrial Disputes Tribunal dated 28th March, 1983. That award was in the following terms:

> "i) that Patsy Grant, Velma Henry, Gertilyn Morgan, Merdell Morgan, Clement Robinson, Pansy Waugh, Ivanhoe Whyte, Cecil Anderson, Ronald Carty, Esmin Willox, Daphney Salmon and Gloria Scott were dismissed by the Hotel and their dismissals were justifiable;
>
> ii) that Colleen Lattibeaudiere abandoned her job;
>
> iii) that the services of Delores Reid have not been terminated".

It is plain from the judgments of the majority in the court below that paragraphs (i) and (ii) only of the award were quashed, notwithstanding the explicit terms of the formal order filed in the

record. I pause to mention this to set the record right.

The award was based on certain findings which the Tribunal properly and courageously set out in its award, and which it will be necessary to recite, as, although the Full Court found some not supportable in law, I am of opinion that in the final analysis the Tribunal was right in its award and the Full Court erred when it quashed that award. These then were the findings of the Industrial Disputes Tribunal:

"a) that during the evening of 5th June, 1982, a plastic bag containing rice was seen in the handbag of Delores Reid, then an employee of, and Union Chief delegate at the Hotel. Thereupon Mrs. H. Stoeckert, the Manager of the Hotel who made the discovery, suspended Miss Reid forthwith;

b) that the suspension, notified by way of a letter to Miss Reid dated 5th June, 1982, was until the 15th June, 1982, when the matter would have been 'taken up with the Union'. The Union through a negotiating officer, Mr. Elwin Foot, concurred with this arrangement;

c) that Miss Reid returned to the Hotel on the morning of 15th June, 1982, and had a conversation with the said Mrs. Stoeckert at or about 8:00 A.M. Miss Reid did not take up duties;

d) that following that conversation there was a stoppage of work by Patsy Grant, Velma Henry, Gertilyn Morgan, Merdell Morgan, Clement Robinson, Pansy Waugh, Ivanhoe Whyte, Cecil Anderson and Ronald Carty and these persons did not thereafter resume their duties during that day;

e) that Esmin Willox, Daphney Salmon and Gloria Scott arrived in the Hotel premises at or after 9:00 A.M. on the 15th June, 1982, but did not take up their normal duties nor perform any duties at their work stations during that day;

f) that the work stoppage and the failure to take up duties (see (d) and (e) above) which occurred because the Manager did not deal with Miss Reid's case immediately on the morning of 15th June, 1982, without the Union Officer being present, were not for a sustainable cause;

g) that the Union had advised Miss Reid on 15th June, 1982, that the workers who had ceased working on that day should go back to work;

"h) that on the 16th June, 1982, a number of the persons named at (c), (d) and (e) above took industrial action on the instruction and direction of the Union;

i) that letters dated 17th June, 1982, and addressed to each of the persons at (c), (d) and (e) above were not delivered to the addressees, but the contents of the letter were communicated to all of them. Copies of the letters were sent to the Union;

j) that the Ministry of Labour was notified of a dispute between the Hotel and the Union arising out of the suspension of Miss Reid and held conciliation meetings with the parties on the 24th and 28th June, 1982;

k) that the sole issue raised by the Union during these conciliation meetings, was the suspension and dismissal of Miss Reid and no allegation of dismissal by the Hotel of the other workers was then made;

l) that Colleen Lattibeaudiere who was on vacation leave on the 15th June, 1982, the day of the work stoppage was expected to resume duties on or about the 23rd June, 1982, but has not so far done so;

m) that the individuals named at (d) and (e) above were notified orally by the said Mrs. Stoeckert to the effect that if they did not return to work or start working (as the case may be) on 15th June, 1982, they would be regarded as having abandoned their jobs;

n) that the letters dated 17th June, 1982 and addressed to the individuals named at (d) and (e) above state, inter alia -

> 'We confirm what we verbally told you on the fifteen of June that if you did not return to your work by 9:00 A.M. (later extended to 11:00 A.M.), you would be considered as having abandoned your job. You did not return to work as requested, and accordingly, you have abandoned your job and your employment with Hotel Four Seasons ceased at 11:00 A.M. on the Fifteen of June, 1982.'

> 'We confirm what we verbally told you on the Fifteen of June when you came on your shift for 9:30 A.M. that if you did not start your work by 1:00 P.M. you would be considered as having abandoned your job. Since you did not report by 1:00 P.M. you are considered to have abandoned your job and your employment with Hotel Four Seasons ceased'

and were intended to convey the fact that the Hotel regarded the named individuals as having ceased to be hotel employees. These letters and their contents are accordingly deemed to constitute notice of dismissal even though there is no specific reference to dismissal therein;

"o) that the deemed dismissals were effective on 15th June, 1982, which the Hotel appeared to have been entitled to effect (see case of Simmond v. Hoover Ltd., 1AER (1977) at page 78 quoted below) -

> 'We are satisfied that at common law an employer is entitled to dismiss summarily an employee who refuses to do any of the work which he has engaged to do';

p) that the Hotel has not lifted the suspension imposed on Delores Reid. The letter to her dated 17th June, 1982 - at which date industrial action sanctioned by the Union on the 16th June, 1982, was in progress - seeks to the holding of a joint meeting with her, the Union's representative and the Hotel;

q) that the testimony of Colleen Lattibeaudiere shows that there was a settled, confirmed and continued intention on her part, by taking part in the strike sanctioned by the Union, not to do any of the work which she had been employed to do. Her failure to return to work at the expiration of her vacation leave amounted to a repudiation of her employment."

I would begin by reminding myself that the proceedings before the Full Court were pursued by the present respondent under section 12 (4) (c) of the Labour Relations and Industrial Disputes Act which recites:

> "(4) An award in respect of any industrial dispute referred to the Tribunal for settlement -
>
> (c) shall be final and conclusive and no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law."

The procedure is not by way of appeal but by certiorari, for that is the process invoked to bring up before the Supreme Court orders of inferior tribunals so that they may be quashed. Questions of fact are thus for the Tribunal, and the Full Court is constrained to accept those findings of fact unless there is no basis for them. It is right then to emphasize the limited functions of the Full Court and to observe parenthetically that the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal. It is with this caveat in mind that I propose to approach a consideration of the proceedings before the court below.

no one at the level of the Tribunal proceedings appeared to have entertained the slightest misapprehension whatsoever that this was not the footing on which the matter stood. At the end of the hearing and submissions, the position had not become altered in any way; both parties remained "ad idem" in saying that the workers were dismissed. That question would hardly be a live issue before the Tribunal which in those circumstances, would be obliged to consider the justification for that dismissal and the question of reinstatement. Ex facie, the Tribunal by its award carried out its function consistently with its terms of reference.

Mr. George argued as one of his grounds of appeal before us, that there was ample evidence before the Industrial Disputes Tribunal upon which the Tribunal could have come to its determination that the workers involved had been justifiably dismissed.

It is right to point out that the learned Chief Justice was plainly of the view, which he expressed and I have quoted above, that the circumstances which would warrant a cause for dismissal, clearly existed. No one has sought to contend that he was not eminently right in that opinion. At this juncture, despite the concession of learned counsel for the respondent, it would be helpful if the circumstances surrounding the issue of dismissal were examined.

On the 15th June, when the workers came on duty, they demanded to know from the manager the position regarding their colleague, Miss Reid, who was under suspension. They were advised that nothing could be done without the union representative. Whereupon they delivered an ultimatum that the matter should be resolved immediately. Since their demands were refused, they retired to a convenient mango tree where they lounged about. It was now the time for the manager to issue her ultimatum, viz., that the workers should return to their jobs by 9:30 a.m. otherwise they would be regarded as having abandoned their jobs. The deadline came and passed but the workers remained immobile. Again the manager repeated her request that they return to their duties. When they declined to do as they were bid, she told them -

"they had abandoned their jobs."

Indeed the manager doggedly returned with the same request subsequently and again the request was disobeyed. The manager explained their reaction in this way:

> "Q. What was their attitude to all your requests?
>
> A. It was just totally --- They ignored me totally. It was like ...
>
> Q. What was the attitude with regard to resuming work?
>
> A. There was no way, like their minds were settled apparently, that they had no intention to come back to work and they had no willingness to do their part which they agreed to do, the cooking and all these things and everybody, their actions were totally irresponsible and ..."

On the 16th June, it was clear that the workers were no longer employed by the appellant. The following colloquy during the cross-examination of the manager of the appellant company, Mrs. Stoockert, speaks for itself:

> "Q. And on the day of the 16th, did you have any conversation with any of the workers? Did you talk to any of the workers on the 16th?
>
> A. Yes, on the morning of the 16th.
>
> Q. What was the nature of that conversation?
>
> A. That they had abandoned their jobs.
>
> Q. Anything else?
>
> A. I don't know. We might have said some other conversation but the nature of the conversation was that they abandoned their jobs, that they were not working anymore there."
>
> [Emphasis mine.]

The understanding of the workers themselves that they had been dismissed is made manifest in the following question put by Mr. Perry to Mrs. Stockert:

> "Q. What we want to find out, Mr. Chairman, is what point in time, she positively claimed she would have taken them back and then once we establish this, we are going to ask why she would not take them back at other times because that must be fundamental to abandonment as she claimed. It is our contention that they were dismissed. They would not be taken back at any point in time on the 15th. From the earliest conversation with the workers, they were dismissed from that point in time?"

Then there were the letters confirming that the workers were no longer employees of the Company. A sample of the relevant paragraph from the letter will suffice:

> "We confirm what we verbally told you on the fifteen of June that if you did not return to work by ..... you would be considered as having abandoned your job. You did not return to work as requested, and accordingly you have abandoned your job and your employment with Hotel Four Seasons ceased at .... on the fifteen of June 1982."

The effect of the evidence rehearsed above, I would suggest, is that the employer had told the employees that if they did not return to their respective tasks which they had refused to carry out, by a stipulated time, they would no longer be considered employees of that employer. When the time stipulated had passed it, is difficult to conceive what was the workers' status, other than ex-employees. They had been dismissed and they had been dismissed for cause: they had refused to fulfill their contractual obligations despite requests to do so.

It would, I think, be convenient at this stage to express my views on the use of the term "abandon" in the context of this appeal. This term has featured fairly frequently in the proceedings not only before the Tribunal but in the judgments of their Lordships in the court below. More generally in the area of industrial relations, it has become of topical interest.

In so far as the facts of the present case are concerned, the manager of the appellant company, told the workers that if they did not return to work, then they had abandoned their jobs. By abandon, she explained, they lose their jobs. "When you abandon your job you lose your job." It is as well to see how she applied her definition to the workers whom she told that they had "abandoned" their jobs. She had explained to Mr. Perry that on the day she had given the deadline she was prepared to await the whole day for a "positive answer" from the workers with respect to her request to return to work. And she was asked the following question:

> "Q. How about 8 o'clock on the morning of the 16th, if they had claimed they wanted to return to work, would you have allowed them?

"A. No."

Seeing that the term "abandon" is not a term of art, and more importantly, is defined by the user thereof, I must with respect differ from the views expressed by the learned Chief Justice that "to 'abandon' their jobs in the sense stated in the "Company's letters and in the Tribunal's findings means to give up "or surrender the job...."

In resorting to the dictionary meaning of "abandonment" in the face of the user's explicit definition and in the face of the respondent's stated understanding, the learned Chief Justice, in my respectful judgment, fell into error, Wolfe, J., who also found that the workers had not been dismissed, founded his conclusion on his mistaken view that "none of the parties before the Tribunal "contended that the workers had been dismissed, certainly not the company." In the course of his judgment he had referred to submissions of Mr. Ashenheim who represented the company before the Tribunal and pointed out correctly the alternative submission, viz., "if contrary to the foregoing, any of the persons named in the "Terms of Reference were dismissed, either expressly or constructively "by Hotel Four Seasons, such dismissals were justified." [See p. 622 of the Record.] On that erroneous basis, he found the company had not dismissed the workers and he did not regard the letters as confirmatory of prior dismissals. He found that the "company did "not accept what they contended was a repudiation of the contract "by the workers refusing to work." As I propose hereafter to deal with the term "abandon a job" more generally, it is sufficient to say that the basic premise of Wolfe J., being a fallacy, his conclusion must necessarily be illogical and incorrect.

The full effect of all this is that there was ample evidence that the workers had been dismissed by the appellant, and had been dismissed for a just cause: the workers had refused to carry out orders to return to carry out their duties in breach of contract.

I can now turn to consider the phrase "abandon a job." It is not a term of art but is often used to express elliptically

that an employee has withdrawn his services or has refused to carry out his contractual duties and accordingly dismissed himself. A great many people would doubtlessly assert that the contract of employment is thus terminated. Indeed there is a current of judicial thought that this ought to be the position in law. Illustrative of this approach is the view of Shaw L.J. in Gunton v. London Borough of Richmond upon Thames (1980) 3 All E.R. 577 at p. 582 where he shrewdly observed:

> "... but I cannot see how the undertaking to employ on the one hand, and the undertaking to serve on the other, can survive an out-and-out dismissal by the employer or a complete withdrawal of his service by the employee .... Therefore, as it seems to me there can be no logical justification for the proposition that a contract of service survives a total repudiation by one side or the other."

In the field of industrial relations it may be that common law principles may have to be abrogated and a more practical and realistic regime introduced. But until that time, it remains, in my view, a well established principle in the law of contract that the wrongful repudiation of a contract does not put an end to the contract. The innocent party has an option whether he will treat the contract as at an end and claim damages, or, on the other hand, whether he will treat the contract as still subsisting and demand performance in accordance with the terms of the contract. If there is repudiatory conduct on the side of one party to a contract, then that contract is not at an end until the repudiation has been accepted. Heyman v. Darwins Ltd. [1942] 1 All E.R. 337 at p. 341. There can be no unilateral termination of a contract. The abandonment of the job has no significance except as repudiatory conduct entitling the employer to accept the repudiation, either by dismissing the employee or by some other act manifesting his acceptance of the repudiation.

The repudiatory conduct must be such, if it is to be capable of acceptance and so terminate the contract, as to demonstrate this intention of refusing to carry out that party's side of the bargain or refusing to perform. The conduct must go to the root of the contract: the raison d'etre of the contract must be destroyed. In Freeth & Anor. v. Burr & Anor. [1874-80] All E.R.

(Rep.) 751 Lord Coleridge, C.J., used the word "abandonment" to describe the situation here suggested and at p. 753, he stated the principle in these words -

> "In cases of this kind, where the question is whether one party to a contract is set free from performance of it by the cause of action of the other, the real point to be looked at is under all the circumstances, the act or conduct of the party which is relied on as setting the other party free does or does not amount to an abandonment, or intention of abandonment, and altogether to a refusal to perform his part of the contract."

The principle here stated was approved in Mersey Steel Co. v. Naylor [1884] 9 App. Cas. 434 and applied by the House of Lords in General Billposting Co. Ltd. v. Atkinson [1909] A.C. 118 at p. 122. The latter case, it should be noted, was one of master and servant and therefore relevant to the circumstances of the present appeal. Lord Collins at p. 122 expressed himself thus:

> "I think the true test applicable to the facts of this case is that which was laid down by Lord Coleridge, C.J. in Freeth v. Burr and approved in Mersey Steel Co. v. Naylor in the House of Lords, that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

I think Keating, J., in Freeth v. Burr also made the matter crystal clear when he observed at p. 754:

> "It is not the mere omission or even refusal of one party to do something which under the contract he was bound to do, which absolves the other party, but it must have been an absolute refusal to perform his part of the contract."

In the light of this principle it would seem that where an employee walks off his job and refuses to carry out his appointed tasks, then since he is absolutely refusing to perform his part of the contract, this is such conduct as sets the employer free from his side of the bargain, viz., to continue to employ that worker.

What I suspect will entail some difficulty, is to recognize when the contract has been terminated. Plainly, there can be no difficulty if the employer formally dismisses the employee, whether in writing or otherwise. If the employer replaces the worker by

another, abolishes the post, or advertises for another worker, or so organises the job that the former duties are spread around, I incline to think that it would be agreed that the contract of employment has been terminated. At the same time, since it is not always that the employer can advise the worker of his altered status, it may be that after the lapse of a reasonable time acceptance could be inferred. But, of course, if the employer announced to the employee's Union that he no longer considered the employee on his establishment, that would demonstrate the acceptance of the repudiatory conduct.

Where workers withdraw their services in pursuance of an industrial dispute, the question arises whether they have abandoned their jobs so as to free the employer from the performance of his side of the contract. Workers who go on strike, whether for good or bad reasons, do not, it is accepted, desire or expect to lose their jobs: they are not dismissing themselves. They wish to secure, quite frequently, improved working conditions for themselves. In R. v. Industrial Disputes Tribunal, Ex parte Serv-Wel of Jamaica Ltd. (unreported 20th May, 1983) the Full Court of the Supreme Court held that workers who withdrew their services in furtherance of an industrial dispute cannot be said to have abandoned their jobs. If by that is meant that workers on strike cannot be guilty of such repudiatory conduct as would permit the employer to dismiss them or otherwise accept their repudiatory conduct and terminate the contract, then that conclusion is not supportable by reasoning or authority.

There is no such concept known as a "right to strike." The judgment of Smith C.J. in this very appeal makes this abundantly clear: it has not been challenged. I respectfully agree with it. A worker is entitled, if he wishes, to withdraw his services and that withdrawal cannot be punished by any criminal sanction, as once it could be. That it is not an illegal act does not per se preclude it being in breach of contract. The motive for the worker's refusal to perform his part of the contract does not make his conduct any the less a breach unless the contract permits it.

I put forward therefore no new heresy when I say this. The question arose in Simmons v. Hoover Ltd. [1977] 1 All E.R. 775, where Phillips, J., put the question in this way:

> "... when an employee refuses to do the work, or any of it, which under his contract of employment he has engaged to do, is the employer entitled to dismiss him without notice? And, if so, does it make any difference that the refusal occurred during, and in the course of, a strike in which the employee was taking part?"

The facts in the case illustrate the matter under review and are as follows:

> "The appellant, Mr. W. Simmons was engaged by the respondents, Hoover Ltd. as a prototype engineer in their craft services department at Perivale on 19th August, 1964. On 26th September, 1974 the appellant suffered an industrial injury and in consequence was absent from work for medical reasons from that date until early November. Meanwhile, on 10th October, all employees of the craft services department, numbering some 150 to 160 people, had come out on strike and were still on strike when the appellant became fit to return to work. As a loyal union member he was not prepared to return to work whilst the strike continued. Accordingly he notified the respondents that he was fit to return to work but he did not in fact do so because of the continuing strike. On 27th December the respondents sent notices of dismissal to 26 of the employees on strike, terminating their contracts of employment from 3rd January, 1975. One such notice was sent to the appellant. In consequence the appellant found alternative employment. The appellant applied to an industrial tribunal for a redundancy payment. On 15th May 1975 the tribunal dismissed his application and the appellant appealed against that decision."

The argument so far as is relevant for the purpose of this appeal were (1) that the respondents were not entitled to dismiss him summarily for taking part in the strike because (a) participation in a strike did not have the effect of breaking a contract of employment but merely suspended it, or (b) if it did constitute a breach of contract it was not a breach of such a fundamental kind as would entitle an employer to dismiss an employee without notice.

In answering the question posed, Phillips, J., speaking for the Tribunal, concurred with a view held by the Donovan

Commission on Trade Unions and Employer's Association 1965 - 1968, viz., that "at common law a contract cannot be terminated unilaterally and that if an employee refuses to carry on working under his contract of employment, his employer had the option either to ignore the breach of contract and to insist on performance of it or alternatively to accept such a fundamental breach as a repudiation of the contract and to treat himself as no longer bound by it" and then he gave the opinion of the Appeal Tribunal in these words:

> "In our judgment this view was in accordance with general principle and supported by authority. In short, refusal to work during a strike did not involve 'self-dismissal' by the strikers, but left the parties to the contract hoping that the strike would one day be settled, and the contract be alive, unless and until the employer exercised his right to dismiss the employees."

Although this case is a decision from an Employment Appeal Tribunal, it is of persuasive value; its president is a Puisne Judge of a Commonwealth jurisdiction. Its view certainly accords with basic common law principles and I am unaware of any authority to the contrary.

Smith, C.J., in the court below thought that the passage from the judgment -

> "We are satisfied that at common law an employer is entitled to dismiss summarily an employee who refuses to do any of the work which he has engaged to do "

was an accurate statement of the law. I did not understand Mr. Rattray to be suggesting at any time that this principle was not well founded. His complaint was that proof of dismissal was essential and it was his contention that there was no clear evidence of dismissal before the Tribunal.

As I understand the law, workers who go on strike, although they do not expect to lose their jobs, may nevertheless have their jobs terminated because their withdrawal of service is repudiatory conduct. They may therefore be dismissed or the employer may otherwise terminate the contract by accepting their repudiatory conduct. It would be a grave misconception to hold that the Labour

Relations and Industrial Disputes Act has altered the common law principles of contract. The Act, it may be observed, has conferred on the Industrial Disputes Tribunal the power to order reinstatement of an employee where it finds dismissal unjustified. But such a power has not been extended to the courts which can only apply well known principles of the common law. It is as well to add that the occasions will not be many when an employer would wish to dismiss his entire work force because they went on strike. He may wish to retain experienced and skilled workers as to retrain perhaps large numbers of workers would not only be costly and time wasting, but would hardly be regarded as good industrial relations.

The case of Colleen Lattibeaudiere has, I confess, caused me some concern. This worker did not resume work after her return from leave but joined the rest of her colleagues in withdrawing their services. She was therefore guilty of repudiatory conduct, which if accepted by her employer, terminated her employment. The Tribunal awarded that Colleen Lattibeaudiere abandoned her job. If by that, the Tribunal meant that she had dismissed herself, then that award would in point of law be erroneous. The finding at (q) of the award, viz.,

> "that the testimony of Colleen Lattibeaudiere shows that there was a settled, confirmed and continued intention on her part by taking part in a strike sanctioned by the Union, not to do any work which she had been employed to do. Her failure to return to work at the expiration of her vacation leave amounted to a repudiation of her employment"

is a basis for saying that the worker was guilty of conduct which entitled the employer to dismiss her. I am quite unable to find any evidence where this was done. So far as the evidence goes, she was never threatened with dismissal which she ignored. But on the other hand, there is evidence from which it is fair to infer that the employer accepted this repudiatory conduct as a breach. At the least, when the Tribunal began its hearings, and the worker had not returned to her job, albeit on strike, it was at least clear that she had not and did not intend to carry out her contractual duties. The employer accepted this failure to return to carry out her duties as putting an end to the contract of

service. There was a termination of the contract not by a summary dismissal of the worker by the employer but a termination by acceptance of the repudiation of the contract. Seeing then that there was evidence to support that result, the proper award should be that the contract between the parties had been terminated by acceptance of the repudiation. The Tribunal had not gone all the way to so state but had found correctly the repudiatory conduct.

In my judgment, the opinion of Downer, J., in the court below is understandable when he said at p. 637 in relation to this worker:

> "In my opinion, Miss Lattibeaudiere treated her contract as at an end. The question whether in fact her participating in a strike suspended or terminated her contract, must be decided on the same principles as were applicable to the other workers. She terminated her contract without proper notice, an unlawful act by common law and statute and no provisions in the Act or in the common law precluded Four Seasons from accepting that repudiation. The fact that the company went to the tribunal, whose terms of reference was to settle a dispute concerning the termination of Lattibeaudiere's employment showed that both parties recognised that there was a termination. The question in issue was, was this justified in law? The answer to that question is yes. Despite that fact that the tribunal used the word 'abandoned', in matters such as this, one must look at the substance not the form, the content, not the label."

In summary therefore, there was ample evidence that the workers except Colleen Lattibeaudiere had been dismissed and there was cause for their dismissal. Specifically so far as Colleen Lattibeaudiere was concerned, her conduct amounted to a repudiation which was accepted by the appellants.

Before passing from this matter, there are two matters I should like to mention, First, I found it difficult to accept that in certiorari proceedings, a party should be allowed to argue contrary to the position he had taken before the inferior tribunal. Proceedings before the Full Court are conducted on the basis that there is an error on the face of the record and accordingly the matters should be heard bearing in mind the limited jurisdiction of that court to which I have already adverted. The respondents indeed, as did the appellants were at one in accepting

that the workers had been dismissed. But the respondents were permitted to argue on the footing that they had not been dismissed because employees have a right to strike. With respect, that debate is a matter for appeal.

The second matter relates to a finding of the Tribunal that the strike was not for a sustainable cause, in other words, that there was not an industrial dispute within the meaning of the Labour Relations and Industrial Disputes Act. All members of the court below agree that the Tribunal in that regard, had erred. With respect, I cannot agree. The reason for the work stoppage when the workers retired to the mango tree, was not the suspension or dismissal of the Union representative, Miss Reid, but because the manager refused to deal with her suspension when requested to do so by the workers. The Labour Relations and Industrial Disputes Act in sec. 2 defines "industrial disputes." For our purposes sec. 2 (a) and (b) are relevant. They provide as follows:

> "A dispute between one or more employers .... and one or more workers .... where such dispute relates wholly or partly to:-
>
> (a) terms and conditions of employment ...
>
> (b) engagement or management, or termination or suspension of employment, of one or more workers; or
>
> (c) ....
>
> (d) ....."

A refusal by an employer to carry out the wishes of his employees which are not permissible, does not, in my judgment, come within any of the categories set out in these provisions. In my view, the Tribunal was correct in its conclusion at (f) of its award, viz., that the stoppage was not for a sustainable cause. Howsoever that may be, the appellants did not choose to challenge it and presumably accepted it as soundly based. In these circumstances, we must perforce act upon that finding as valid. I do not think, however, it affects the ultimate result as I have endeavoured to demonstrate.

For my part therefore, I would allow the appeal, set aside the order of the court below and restore the award of the Tribunal.

CAMPBELL J.A.

By a reference dated July 21, 1982 the Honourable Minister of Labour submitted to the Industrial Disputes Tribunal (the Tribunal) for its determination and settlement, a dispute between Hotel Four Seasons and certain workers formerly employed by it over "their termination of employment." The workers were represented by the National Workers Union (the Union).

The tribunal on 28 March, 1983 made the undermentioned relevant findings and award:

1. Delores Reid a Union delegate was suspended by Mrs. Stoeckert the manageress of Four Seasons Hotel by letter dated June 5, 1982. The suspension was to be until June 15, 1982 when the matter would be taken up with the Union. The Union through a negotiating officer, Mr. Elwin Foote concurred in this arrangement.

2. On the morning of June 15, 1982 about 8 a.m. Miss Reid returned to the Hotel and had a conversation with Mrs. Stoeckert. Following on the conversation, nine workers who had already assumed duties stopped working and three others did not assume duties, though they clocked in for work at or after 9. a.m. These 12 persons did not thereafter resume duties or assume duties as the case may be for the rest of the day.

3. The work stoppage was because the manageress Mrs. Stoeckert did not deal with Miss Reid's case immediately on the morning of the said June 15, 1982, without the Union officer being present. The conduct of the workers was not for a sustainable cause.

4. The Union had advised Miss Reid on June 15, 1982 that the workers who had ceased working should go back to their work.

5. The workers involved in the work stoppage including those who had failed to assume duties were notified orally by Mrs. Stoeckert to the effect that if they did not return to work or start working (as the case may be) on 15 June, they would be regarded as having abandoned their jobs.

6. On June 16, 1982 a number of persons including those involved in the previous day's work stoppage took industrial action on the instruction and direction of the Union.

7. Letters dated June 17, 1982 were addressed to each of the persons involved in the work stoppage. Though these letters were not delivered to the addressees the contents thereof were communicated to them and copies of the said letters were sent to the Union.

8. These letters were intended to convey the fact that the Hotel regarded the named individuals as having ceased to be hotel employees. Their contents were accordingly deemed to constitute notices of dismissal albeit no specific mention of dismissal was contained in the said letters.

9. The deemed dismissals were effective on June 15, 1982 and the hotel appeared to have been entitled to dismiss the workers based on the principles stated in <u>Simmons v. Hoover Ltd</u> (1977) 1 All E.R. 775 at page 781 quoted below namely:

   'We were satisfied that at Common Law an employer is entitled to dismiss summarily an employee who refuses to do any of the work which he has engaged to do.'

10. Delores Reid still remains suspended. The letter to her dated June 17, 1982 on which date, the industrial action sanctioned by the Union on June 16, 1982, was still in progress, sought the holding of a joint meeting with her, the Union's representative at the hotel.

11. Colleen Lattibeauderie's testimony showed that there was a settled, confirmed and continued intention on her part, by taking part in the strike sanctioned by the Union, not to do any of the work which she had been employed to do. Her failure to return to work at the expiration of her vacation leave amounted to a repudiation of her employment.

<u>Award</u>

(i) Patsy Grant, Velma Henry, Gertilyn Morgan, Merdell Morgan, Clement Robinson, Pansy Waugh, Ivanhoe Whyte, Cecil Anderson, Ronald Carty, Esmin Willox, Daphney Salmon

The terms of reference which governed the Tribunal's enquiry into the dispute were these:

> "To determine and settle the dispute between Hotel Four Seasons on the one hand, and certain workers listed below, formerly employed by the Company and represented by the National Workers Union on the other hand, over their termination of employment; Patsy Grant, Velma Henry, Colleen Lattibeaudiere, Gertilyn Morgan, Merdell Morgan, Delores Reid, Clement Robinson, Gloria Scott, Esmin Willox, Pansy Waugh, Ivanhoe Whyte, Cecil Anderson, Ronald Carty and Daphney Salmon."

The Tribunal by its findings at (n) and (o) (supra), found that the workers had been dismissed by the appellant effectively from 15th June, 1982. The majority of the Full Court however found explicitly that the appellant had not dismissed the workers. The Chief Justice found that although -

> ".... the [appellant] had the right to dismiss summarily those workers who on 15th June committed breaches of their contract by refusing either to continue or to commence (as the case may be) doing the work for which they were employed, if that right was being exercised, it should in my opinion, be unequivocally communicated to them preferably in writing. As stated earlier in this case the Company expressly denied exercising this right and there is no evidence to support a finding that they did."

Wolfe, J., expressed himself thus:

> "For the Tribunal to have found that the letters of June 17, 'constituted notice of dismissal even though there was no specific reference therein,' was completely to disregard the evidence. None of the parties before the Tribunal contended that the workers had been dismissed, certainly not the company. There was no evidence to suggest dismissal."

With respect, I cannot agree with these conclusions. The respondent, and this was candidly conceded before us by Mr. Rattray, had contended before the Tribunal that the workers had been dismissed by the appellants, that the dismissals were unjustified and those persons dismissed should be reinstated. The appellants for their part contended that none of the workers were dismissed by the hotel but their employment was terminated by their own act of default, alternatively, if they were dismissed by the hotel whether expressly or by implication, then their dismissals were justified. The briefs which the protagonists placed before the Tribunal, we were advised, clearly set out this position, and

and Gloria Scott were dismissed by the hotel and their dismissals were justifiable.

(ii) Colleen Lattibeauderie abandoned her job;

(iii) The services of Delores Reid have not been terminated

The Union moved the Full Court of the Supreme Court for an order of certiorari to quash the award on the grounds that:

"1. The evidence before the tribunal failed to disclose any or any sufficient grounds upon which the tribunal could have come to its determination.

2. The tribunal was wrong in law in making the following findings:

(a) that the stoppage of work and failure to take up duties on the 15th June, 1982 were not for a sustainable cause;

(b) that the letters dated 17th June, 1982 addressed to the workers were deemed to constitute notices of dismissal;

(c) that such dismissals are supported in law by the decision in Simmons v. Hoover Limited

(d) that the conduct of Colleen Lattibeauderie when a strike was in existence constituted abandonment of her job;

(e) that the dismissal of Patsy Grant (and the others named in the award) were justifiable.

3. The award is contrary to law, invalid, null and void.

The Full Court by a majority, Downer J. dissenting, quashed the tribunal's award. In doing so, it first disposed of a fundamental preliminary submission made on behalf of the Union that in this country there is a right to strike the effect of which was that during a strike a worker's contract of employment is suspended and therefore is legally incapable of being terminated either by dismissal of the worker, or by the worker repudiating his contract. The Full Court by a majority concluded, correctly in my view, that neither at common law nor by statute is there any right to strike in the sense of a legally protected right. What

exists and is legally recognized is a freedom to strike the exercise of which by a worker in conjunction with other workers is statutorily declared immune from civil or criminal liability. But the exercise of such freedom, often unforensically referred to as a right, has no legal effect on the continuing force and efficacy of the contract of employment and the relationship of employer and employee created thereby. This determination by the Full Court is however not on appeal before us.

Next the Full Court considered the complaint of the Union that the tribunal was wrong in law in finding that the stoppage of work and the failure to take up duties on 15 June, 1982 were not for a sustainable cause. The Full Court unanimously held that since sustainable cause necessarily meant "industrial dispute" the tribunal misconstrued the elements necessary to establish the existence of an "industrial dispute" and thereby, erred in finding that there was in effect, no such dispute and that the work stoppage and failure to take up duties as the case may be, was not therefore in furtherance of this dispute.

The Full Court's conclusion was based on the premise that the work stoppage and failure to take up duties on 15 June, 1982 as the case may be, was occasioned by the suspension and/or continuing suspension of Delores Reid which suspension under section 2 of the Labour relations and Industrial Disputes Act is a constituent element in the definition of industrial dispute. Smith C.J., in his contribution said:

> "It is clear beyond doubt that there was a dispute between Mrs. Stoeckert and the workers on 15 June and that that dispute related to the suspension of employment of Miss Reid, the chief delegate of the Union. There was therefore an 'industrial dispute' as defined in the Act. There was a concerted stoppage of work by the workers in furtherance of the industrial dispute. There was therefore a 'strike' as defined in s. 2 of the Act. In my judgment, the Tribunal misconstrued the elements necessary to establish the existence of an 'industrial dispute' and therefore erred in finding that there was, in effect, no such dispute."

Wolfe J. in his contribution, by way of comment on the suspension of Delores Reid on 5 June, 1982, said initially "the suspension of Miss Reid evoked no response from the other unionised workers." This on the evidence was factually correct. He however thereafter said:

> "Assuming I am wrong about the right to strike it is unassailable that when the workers withdrew their labour on the 15th June, 1982 there was a dispute existing between management and workers. The dispute was concerned with the suspension of the worker Delores Reid and the failure of management to effectively deal with the question of suspension on the 15th June, 1982 as the letter of suspension had indicated. The dispute identified was undoubtedly an industrial dispute within the meaning of the Act."

Downer J. said:

> "Miss Reid's employment was suspended and this was the origin of the first phase of the strike action on the 15th June when Miss Stoeckert refused to deal with the matter there and then. The tribunal found that this action was not for a sustainable cause, but what was important was to determine whether there was an industrial dispute within the meaning of the Act. There can be little doubt that there was a strike within the intendment of this definition (of a strike) when the workers withdrew under the mango tree on the 15th."

With respect to the learned Chief Justice and judges of the Full Court, their conclusion that the tribunal was in error in its finding that the work stoppage was not for a sustainable cause is

based on a premise which was neither asserted by the Union nor factually established on the evidence. The tribunal was specific in its finding that the work stoppage was because the manageress Mrs. Stoeckert did not deal with Miss Reid's case immediately on the morning of the said June 15, 1982 "without the Union officer being present." In so finding, the tribunal was accepting the evidence of Mrs. Stoeckert as to the events of the morning of June 15 and rejecting the contention of the Union as to the cause of the work stoppage. Neither side had complained nor submitted that the work stoppage was occasioned by the suspension of Delores Reid. As Wolfe J. rightly commented, the suspension had evoked no response from the unionised workers between 5 and 15 June, 1982. The Union in its detailed and exhaustive cross-examination of Mrs. Stoeckert sought desperately to elicit from her that the relatively tranquil industrial situation which existed between 5 and 15 June, notwithstanding the continuing suspension of Miss Reid, had been violently disturbed on the morning of June 15 when Mrs. Stoeckert instead of arranging the contemplated meeting with the Union to consider the alleged charge against Miss Reid, had instead high-handedly dismissed her. The suspension of Miss Reid as the cause of the work stoppage, was further expressly and specifically disavowed by the Union both in its opening address to the tribunal and in the evidence which it led. The evidence revealed that the suspension of Miss Reid had been communicated to the Union and there was mutual agreement between Mrs. Stoeckert and the Union represented by Mr. Foote that the matter of Miss Reid's suspension would be dealt with by them on the return to the Island of Mrs. Stoeckert. The acquiescence in this arrangement by the Union was found as a fact by the tribunal. Miss Reid herself in her evidence stated that after consulting with Mr. Foote her Union representative, she was no longer worried or aggrieved by her suspension as she was advised that the matter would be dealt with on the return to the Island of Mrs. Stoeckert.

The Union's case before the tribunal was that the cause of the work stoppage on June 15, 1982 was the unwarranted dismissal on that day of Miss Reid. The tribunal, having by its award, declared that the services of Miss Reid had not been terminated, must necessarily have found that the work stoppage on 15 June was not occasioned by the dismissal of Miss Reid as alleged by the Union. Equally the tribunal would have been palpably wrong had it found that the work stoppage was occasioned by the suspension of Miss Reid as this was expressly disavowed by the Union and not supported by any evidence before it. An abstract from the opening of Mr. Perry for the Union before the tribunal is revealing and is as follows:

> "Mr. Chairman and members of the Tribunal when Miss Stoeckert returned on the 15th and Miss Reid returned to work as the letter she received on the 5th indicated Miss Reid was told in the presence of the witness that the hotel is making arrangement for Mr. Skinner to come and pay her off. No question of a meeting was raised to redress the situation in the letter of the 15th.
>
> It is ironic that the workers took no action between 5th June and the 15th, even though it was a violation of the conditions of employment. They took action on the 15th after it was clear that Miss Reid would not receive due process and fair treatment; that the mind of the company had been made up to dismiss Miss Reid and in her words to pay her off. That was what caused the dispute and the dislocation. Subsequent to the incident on the morning of the 15th, by 9 o'clock that morning all the workers were dismissed."

In the context of the above, the affidavit of Mr. Lascelles Perry in support of the certiorari proceedings represented a "volte-face" when he deponed that "on the 15th of June, 1982, the workers at Hotel Four Seasons took industrial action as a result of the suspension by the management of Union Delegate "Delores Reid."

The finding by the tribunal as to the cause of the work stoppage was thus inescapable. On this finding of fact the tribunal could not be said to be in error in concluding that the work stoppage was not for a "sustainable cause." "Sustainable cause" as meaning an industrial dispute within the definition of that term in the Labour Relation and industrial disputes Act would certainly in my view not cover a situation as found by the tribunal where workers were demanding an immediate meeting with management in circumstances which manifestly violated the grievance procedure laid down in Rule 23 of the conditions of employment incorporated in their contracts of employment, in addition to being inconsistent with a salutary convention between management and the Union that charges against a worker delegate should only be dealt with by management at a meeting where a union representative is present. Doubtless it was because the Union perceived that the work stoppage on 15 June, 1982 was not in furtherance of an industrial dispute why it directed the workers back to work, and rested its case before the tribunal on the alleged dismissal of Miss Reid.

Though the conclusion by the Full Court that the tribunal was in error in holding that the work stoppage was not for a "sustainable cause" does not constitute a ground of appeal before us, I have adverted to it and expressed my view thereon, because in my opinion had not the Court proceeded on the premise that the work stoppage on 15 June was caused by the suspension of Miss Reid and was thus a strike, which the evidence does not support, the award logically flowing as it does from the finding by the tribunal that the work stoppage was not for a sustainable cause that is to say it was not in furtherance of an industrial dispute would undoubtedly have been confirmed instead of being quashed by the Court.

The Full Court next considered the other findings of the Tribunal in relation to which the Union argued that the tribunal erred in law. In considering these findings Smith C.J. and Wolfe J. in setting aside the tribunal's award reasoned thus:

(1) There was no abandonment by the workers of their jobs on June 15 in the sense that they intended to and did give up or surrender their said jobs. They were on strike and during a strike no such inference can or ought to be drawn. The tribunal did not find that they had abandoned their jobs which was the case put forward by the company. It would have been palpably wrong had it so found.

(2) There was no abandonment by the workers in the sense of repudiation by them of their jobs, because during a strike it is not to be inferred that workers are demonstrating an intention not to be any longer bound by the terms of their contract; alternatively if there was such repudiation as the company may have implied, in asserting 'abandonment of work,' such repudiation had not been unequivocally accepted by the company.

(3) Furthermore, though under the principle laid down in Simmons v. Hoover Ltd the contention could be made that the workers who took strike action at the hotel on June 15, repudiated their contracts, if such was the case, the acceptance of the repudiation which terminated the contracts would have been on June 17, when the same was communicated to the workers and not on June 15. The tribunal however did not and could not have based its finding on repudiation since it found the deemed dismissal effective on June 15, per Smith C.J.

(4) The company had the right to dismiss summarily those workers who on 15 June committed breaches of their contracts by refusing either to continue or to commence, as the case may be, doing the work for which they were employed. But if such a right was being exercised as distinct from treating the workers as having repudiated their contracts then because of the existence of the strike, and the reasonable expectation of workers engaged therein that they will not be dismissed during the strike, such right of dismissal should be unequivocally communicated to the workers preferably in writing. But the company had expressly denied exercising this right and there is no evidence to support a finding that they did, per Smith C.J.

The company appeals against the reversal of the tribunal's award on the following grounds paraphrased where appropriate for convenience:

1. There was ample evidence before the tribunal upon which it could have come to its determination that the workers involved had been justifiably dismissed because not only were the workers dismissed orally but those dismissals were subsequently confirmed in writing by the appellant on June 17, 1982.

2. The appellant, vide Mrs. Stoeckert, by telling the workers that if they did not return to work on 15 June, 1982 they would be regarded as having abandoned their jobs was in effect telling them that she intended to treat their refusal to work as a repudiation of their contract of employment. By refusing to allow them to resume duties on the following day the 16th June, 1982 she showed clearly that she accepted in law their repudiation of the contract on the previous day.

3. Since the appellant's case before the tribunal was put in the alternative namely that the workers had abandoned their jobs or alternatively that they had been justifiably dismissed either expressly or constructively, the tribunal was entitled to award that they had been justifiably dismissed if there was supporting evidence or there was abundant evidence in support of the award

4. That as regards Colleen Lattibeauderie the tribunal's award was correct since her conduct amounted to a repudiation of her contract of employment which said repudiation was accepted by the appellant.

Before us Mr. Emil George for the appellant submitted that since the Full Court had found that, notwithstanding the existence of a strike, an employer had a right to dismiss a worker for refusing to comply with a reasonable order to perform his duties, the only issue on appeal was whether the appellant had, contrary to the conclusion of the majority of the Full Court, exercised that right on June 15, 1982 as would be implicit in the tribunal's finding that the workers had been dismissed.

He submitted that certain salient facts in evidence, in particular the evidence of the refusal of Mrs. Stoeckert to take back the workers on 16 June, had either eluded the majority of the

Full Court or alternatively they had in error considered such evidence as not worthy of mention. Also, since the exercise or non-exercise of the right of dismissal was a question of fact, the Full Court ought not to have reversed the finding of fact by the tribunal that the workers had been dismissed which implied that the right of dismissal had been exercised.

Further, Mr. George submitted, even on the appellant's assertion that the workers had abandoned their jobs there was ample evidence of acceptance by Mrs. Stoeckert of what she conceived, even, if erroneously, as abandonment by the workers of their jobs. This is so, he says because on a careful scrutiny of her evidence of the events of 15 June, what emerges is that she was saying that though they had abandoned their jobs by not complying with her order to return to work or to resume duties as the case may be within the time stipulated by her, she was prepared to take them back any time on 15 June but come 16 June she would not. This was ample evidence says Mr. George of acceptance by Mrs. Stoeckert of what she conceived to be repudiation by the workers of their contracts of employment. Her acceptance took the form of dismissals when she, on 16 June refused to accept their proferred services. The reason given by her that they had abandoned their jobs was thus irrelevant once the evidence established that the workers were in fact dismissed.

Mr. Rattray for the respondent submitted that since the dismissal of a worker was a question of law it was open to the Full Court to analyse the facts found by the tribunal to determine whether on those facts a conclusion in law of a dismissal had been correctly drawn.

He submitted that only on the basis of the letters of 17 June could the tribunal have concluded that there was a dismissal because it made no findings of fact that the workers were orally dismissed. If then the letters could not in law be construed as letters of dismissal, the tribunal would have erred in law and did so err in finding that the workers were dismissed.

Dealing with the finding of the tribunal that Mrs. Stoeckert had orally notified the workers that if they did not return to work or start working on 15 June, 1982 they would be regarded as having abandoned their jobs, Mr. Rattray submitted that the evidence on which this finding was made did not amount to evidence of dismissal. Further, since the tribunal made no finding of fact with regard to what Mrs. Stoeckert said on 16 June, the Full Court could not make any finding thereon and thereafter make use of any such finding in support of a conclusion that the workers were dismissed. Thus, he says, the Full Court in arriving at its conclusion that the workers had not been dismissed has properly based its conclusion exclusively on the findings of the tribunal.

Pausing here, I do not agree with Mr. Rattray that the conclusion of the Full Court was based exclusively on the findings of the tribunal and that in consequence we cannot look beyond such findings to determine whether the Full Court was in error. The learned Chief Justice in dealing with the issue of dismissal based his conclusion on the absence of evidence to support such a finding. He said:

> "Since they (workers) do not, therefore expect to be dismissed before the dispute is settled, if the right of dismissal is being exercised, it should in my opinion, be unequivocally communicated to them, preferably in writing. As stated earlier, in this case the company expressly denied exercising this right and there is no evidence to support a finding that they did. In my judgment, for the reasons I have endeavoured to give, the tribunal was wrong in law in awarding that the workers named in paragraph (i) of the award were dismissed by the company."

Wolfe J. dealing with the issue of dismissal also stated that there was no evidence to support the same. He said:

> "For the tribunal to have found that the letters of June 17th 'constituted notice of dismissal even though there was no specific reference to dismissal therein' was completely to disregard the evidence. There was no evidence to support dismissal. The tribunal erred in this respect also."

Thus it is open to us to consider the record and not merely the findings of primary facts by the tribunal to determine whether the conclusion of law that there was a dismissal is well-founded.

The finding of the Full Court that there was a strike in furtherance of an industrial dispute largely influenced the conclusions of Smith C.J. and Wolfe J. with regard to the absence of any intention by the workers either to abandon their jobs in the sense of voluntarily giving up or surrendering the same, or in the alternative sense of repudiating their contracts of employment. Smith C.J. at the same time recognized the significance of the common law principle enunciated in Simmons v. Hoover Ltd which case he found, and I respectfully agree with him, was based on "convincing reasoning and amply supported by authority." This principle is that since the freedom to strike of workers has no effect on the contract between them and their employer, the latter, even during the existence of an industrial dispute may exercise his common law right of dismissing an employee for refusing to work. It was however the opinion of Smith C.J. and Wolfe J. that the tribunal was in error in awarding that the workers listed in paragraph (i) had been dismissed because not only had Mrs. Stoeckert strenuously denied dismissing the workers, but there was no evidence on record to establish that, contrary to her denial, she had in fact done so.

In considering the stand of Mrs. Stoeckert before the tribunal it must be borne in mind the background against which she was asserting that she had not dismissed the workers but rather that they had abandoned their jobs. It must also be borne in mind what she meant by saying that the workers had abandoned their jobs.

With regard to her denial that she had dismissed the workers she was saying no more than that she had not unilaterally nor high-handedly dismissed them at about 9 O'clock on the morning of 15 June, 1982 , or at any other time in the manner being asserted by the Union. To the contrary she was saying that since the workers had repudiated their contract she had decided not to have them back which in fact, independent of her view constituted a dismissal.

Since the tribunal was mandated by its reference to determine the circumstances surrounding the termination of the employment of the workers it had necessarily and inevitably to determine whether the workers were dismissed at the time and in the manner asserted by the Union. If not dismissed in such manner then in what circumstances was the termination of employment effected because the parties at the least impliedly admitted that there was in fact a termination of employment.

With regard to Mrs. Stoeckert's assertion that the workers had abandoned their job the Full Court per Smith C.J. stated thus in his judgment:

> "To 'abandon' their jobs in the sense stated in the company's letters and in the Tribunal's findings means to give up or surrender the job."

Wolfe J. said:

> "The contention that the workers abandoned their jobs is wholly untenable. It is clear that the letters of the 17th of June, 1982 were only confirmatory of the stand taken by the company on the 15th when the workers withdrew their labour, namely that they had abandoned their jobs. It is clear .... that the company did not regard the letters of June 17th as letters of dismissal. In other words they did not accept what they contended was a repudiation of the contract by the workers refusing to work."

With respect to the learned Chief Justice, Mrs. Stoeckert's use of the word "abandon" and the tribunal's use of the word "abandon" in its finding that she told the workers that "they would be regarded as having abandoned their jobs" cannot be construed as meaning that she was saying, and that the tribunal understood her as saying that the workers had given up or surrendered their jobs. The view of Wolfe J. that she meant that they had repudiated their jobs by refusing to work is the preferable one.

In my view Mrs. Stoeckert was telling the workers in substance that they were in repudiation of their contracts. She was therefore issuing a warning to them that they should get back to work <u>or</u> they lose their job meaning that she would not have them back after the expiration of the time she had given for them to return. Excerpts from her evidence under cross-examination showing clearly that by abandonment she meant repudiation, run thus (p. 234 to p. 239):

> "Q. Did you have any conversation with any other worker, did you speak to them?
>
> A. I spoke to everyone when Miss Morgan walked out with the rest of them I said go back to work, do your work, you have to work and don't stay out from work. This was shortly after 8.15 a.m.
>
> Q. What are you saying about 9 o'clock now?
>
> A. I told the people if they don't come back to work they abandon their jobs. I went out more than once.
>
> Q. What, is the same thing you spoke to them about nine o'clock?
>
> A. If they don't come back to work they abandon their jobs, <u>they are not anymore employed.</u>
>
> Q. What can you tell us exactly, the conversation or the time?
>
> A. The time.
>
> Q. But are you precise about the conversation?
>
> A. I am not precise with words. I am precise about the content of the conversation, the content - <u>that the people should get back to work or they lose their job.</u>

"Q. What did you say to Miss Salmon?

A. To come back to work or she will lose her job.

Q. That is how Miss Salmon was going to lose it?

A. If she did not come back she is going to abandon her job.

Q. And that is what you told them at ten o'clock?

A. Sure, when you abandon your job you lose your job."

In further support of the view that by abandonment Mrs. Stoeckert meant "repudiation" of the contract she answered thus to Mr. McPherson a member of the tribunal at p. 108:

"Mr. McPherson - There was a strike on your hand and:

A. Let me say one thing, the people abandoned their jobs and there was no way, because they have shown sufficient disregard about the functioning of the hotel. This decision I took in the night that I would not take these people back."

Again at p. 250 she said:

"Mr. McPherson - suppose at nine o'clock that night the workers on the night of the 15th, the workers had come to you and said well, we would like to resume work in the morning, would you have said yes?

Miss Stoeckert - Mr. McPherson I would have to consider at that time because the last shift finished at six o'clock and by this time I could not believe it, because nobody made an effort to save the whole situation. I would have considered up until I reach home, then at this point I sat down and took stock of the situation. The future of Four Seasons .... In the night I made the decision that I cannot work with people who don't care about my business."

The evidence clearly revealed that Mrs. Stoeckert acted in accordance with her warning to the workers and with the decision which she had taken in the night of 15 June as disclosed in her answer to Mr. McPherson. On June 16, when the workers turned up for work, they were told that they were not working there anymore.

"Mr. McPherson:

Q. What time did you arrive at the hotel on the 16th, the next day?

A. My usual working hour.

Mr. McPherson - 9.30?

A. Yes, I suppose so.

Mr. McPherson - So you came in at 9.30. What did you say on arrival?

A. When I came in I saw the other workers like myself under the mango tree and I passed them and I went over to the laundry. They had on their uniform so I went over to the laundry and put on my uniform. I went over there and I took down my uniform and I put it on and just as I was going to button it up Miss Elga came over and saw me and she says Miss Esmie, you have no business in here because you are fired from yesterday and you can go and join the others over there."

In my view there was ample evidence before the tribunal on which it could have found as it did that the workers had been dismissed. The evidence disclosed that the employees were told they no longer had any business at their former work place and they were not allowed to work. Such acts of their employer constituted dismissal of the employees which in the circumstances was justifiable.

The Full Court by its majority was therefore in error in setting aside the award on the ground that there was no evidence on which the said award could have been made.

In this regard, Downer J. was in my view correct in his conclusion on the evidence when he said:

"It was on the basis of this failure to persuade the workers to return that Mrs. Stoeckert dismissed them by word of mouth and subsequently confirmed it in writing."

With regard to Colleen Lattibeauderie the tribunal found that she had abandoned her job in the sense that she had repudiated the same. In so finding, the tribunal used the exact words which were used in Simmons v. Hoover Ltd (supra) namely that "there was a settled, confirmed and continued intention on her part not to do any

They were not allowed to perform their respective duties. Under cross-examination Mrs. Stoeckert said at p. 276:

> "Q. And on that day of the 16th did you have any conversation with any of the workers? Did you talk to any of the workers on the 16th?
>
> A. Yes, on the morning of the 16th.
>
> Q. What was the nature of the conversation?
>
> A. That they abandoned their jobs.
>
> Q. Anything else?
>
> A. I don't know, we might have said (sic) some other conversation but the nature of the conversation was that they abandoned their jobs, that they are not working anymore there."

The evidence led by the Union went further in establishing that not only were the workers told in substance that they were no longer working with the company but that they were not allowed to work when they turned up for work on 16 June. Miss Patsy Grant for the Union said this at p. 464:

> "Mr. Perry: Q. On the morning of the 16th did you go back to work?
>
> Miss Grant: A. Yes.
>
> Q. What happened that morning?
>
> A. When I went in, I went and put on my uniform, Miss Young always signs us on a piece of paper. So when I went inside to Miss Young, She Miss Stoeckert gave out and said 'business is business Miss Grant, give me my keys you have no business here. ......'
>
> Q. Did she allow any of those workers to go to work that morning?
>
> A. No."

With regard to the evidence of Mrs. Willox-Grant her answer to Mr. McPherson at p. 521 was:

of the work which she had been employed to do."

The evidence of Miss Lattibeauderie was that on the day on which she should have returned to work she did not enter the hotel premises. She did not in any way communicate with Mrs. Stoeckert that she was reporting back for duties. Her explanation was that she did not report back for work because there was a strike and she participated therein. She has not since returned to work.

In Simmons v. Hoover Ltd (supra) the Employment Appeals Tribunal had to deal with a substantially similar situation. Mr. Simmons was away from work suffering from an industrial injury. While he was away there was a strike by his fellow employees in the craft services department. This strike commenced on October 10, 1974. Mr. Simmons returned to his workplace in early November 1974. The strike was still on. Although Mr. Simmons was fit to work he did not in fact do any work. He joined in the continuing strike.

It was in such circumstances that Phillip J. delivering the judgment of the tribunal said at p. 785:

> "We do not accept counsel for the appellant's submission that if the contract of employment was not suspended, nonetheless the action of the appellant in going on strike was not repudiatory of the contract. It seems to us to be plain that it was, for here there was 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 engaged to do; which was the whole purpose of the contract. Judged by the usual standards, such conduct by the employee appears to us to be repudiatory of the contract of employment. We should not be taken to be saying that all strikes are necessarily repudiatory though usually they will be, for example it could hardly be said that a strike of employees in opposition to demands by an employer in breach of contract by him would be repudiatory. But what may be called a 'real strike' in our judgment always will be."

Thus Simmons v. Hoover Ltd (supra) laid down the principle that the existence of a strike does not affect the intrinsic quality of an act or conduct in determining objectively whether such act or conduct of a party to a contract is repudiatory of the contract. In my view this principle is a sound one. Conduct of an employee which at common law would justify his dismissal must not merely amount to a breach of his contract it must also amount to a fundamental breach thereof. If the conduct amounts to a fundamental breach then ex hypothesi it amounts to a repudiation of the contract. Once it is accepted as good law, and rightly so, that notwithstanding the existence of a strike, an employer has the right to dismiss an employee for a fundamental breach of contract then it follows inevitably that the existence of a strike cannot influence the determination, whether the conduct for which the right to dismiss exists, is repudiatory. The Full Court per Smith C.J. concluded that the tribunal's finding that Miss Lattibeaudierie had repudiated her contract was not justifiable as it violated the rule in Freeth v. Burr (1874) All E.R. (Reprint 1874 - 1880) p. 751. This rule relative to repudiation of contracts for the sale of goods was stated thus by Lord Coleridge C.J. at p. 755:

> "In cases of this kind, where the question is whether one party to a contract is set free from performance of it by the course of action of the other, the real point to be looked at is whether under all the circumstances, the act or conduct of the party which is relied on as setting the other party free, does or does not amount to an abandonment or intention of an abandonment, and altogether to a refusal to perform his part of the contract."

This rule was stated in the context of a contract of sale of 250 tons of iron to be delivered to the purchaser in two instalments. There was delay in the delivery of the first instalment which after pressure on the part of the purchaser was delivered piecemeal. He did not respond to the demand for payment made by the vendor two weeks after the last of the piecemeal delivery; instead the purchaser requested delivery of the second instalment. The vendor

refused to deliver alleging repudiation by the purchaser of the contract by non-payment for the first instalment prior to his request for delivery of the second instalment.

It was held that non-payment by the purchaser for the first instalment was not such an abandonment or refusal to perform his part of the contract as to free the vendor from his liability to deliver the rest of the iron.

The rule as stated by Lord Coleridge C.J. was approved in Mersey Steel and Iron Co. v. Naylor, Benzon & Co. (1884) All E.R. (Reprint 1881-1885) p. 365 which was also a case involving the sale of goods where delivery was to be by instalment. The purchaser under a mistaken view of the law, refused to make payment for an instalment of goods received, because of winding-up proceedings having been commenced against the company.

The rule has been declared to be equally applicable to contracts of employment in General Billposting Co. Ltd v. Atkinson (1908) All E.R. (Reprint 1908 - 1910) p. 619. This was a case in which a contract of employment contained a covenant restraining the employee's right to trade after termination of his employment. The employee was wrongfully dismissed and he began trading in the prohibited area. In an action brought against him by his employer for an injunction and damages it was held they could not succeed because by their conduct in wrongfully dismissing their employee they had repudiated the contract, the employee was entitled to accept the repudiation as absolving him from further performance of any part of the contract.

In this case Lord Collins at p. 624 said:

> "I think that the true test applicable to the facts of this case is that which was laid down by Lord Coleridge C.J. in Freeth v. Burr and approved in Mersey Steel and Iron Co. v. Naylor Benson & Co., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract, I think that the Court of Appeal had ample ground for drawing the inference

> "from the conduct of the employers here in dismissing the defendant in deliberate disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part."

The rule as applied to the contract of employment in the above mentioned case was in a "non-strike" situation. The question then is whether the intrinsic quality of the acts and or conduct changes as a result of a strike such that while they are repudiatory of a contract of employment in a "non-strike" situation they are denuded of this quality in a strike situation. In my view, acts and or conduct if intrinsically repudiatory of the contract of employment remain so notwithstanding the existence of a strike. A strike exemplifies a situation where undoubtedly there is evinced an intention on the part of employees not to continue to perform their contracts according to their terms or consistent with the obligations thereunder but only generally after securing concessions which have not been bargained for. The motive in totally refusing to continue working may be praiseworthy but this cannot affect the fact that the withdrawal of services which had been bargained for can and does constitute a repudiation of the contract of employment, if persisted in long enough.

Lord Wright's perspicacity in envisaging such a situation was revealed in Ross T. Symth & Co. Ltd. v. T.D. Bailey Sons & Co. (1940) 3 All E.R. 60. After emphasising that repudiation of a contract is a serious matter not to be lightly found or inferred, and that the conduct of the party who is said to have repudiated the contract must be examined so as to determine whether it amounts to a renunciation, to an absolute refusal to perform the contract, emphasized however that there can be repudiation consistent with an intention in fact to fulfil the contract. Thus he said at p. 72:

> "I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations and not in any other way."

In my view, the conduct of Miss Lattibeauderie being substantially similar to that of Mr. Simmons in Simmons v. Hoover Ltd (supra) the tribunal was similarly justified in finding that her conduct was repudiatory of her contract and that she had abandoned her contract in the sense of repudiating the same.

In this regard the statement of Parnell J. in R. v. Industrial Disputes Tribunal ExParte Serv-Wel of Jamaica Ltd with which the other members of that Full Court approved, namely that workers who withdraw their services in furtherance of a genuine industrial dispute cannot be said to have abandoned their jobs must be viewed as obiter and as not being a correct statement of the law. It was not made after a full submission on what effect if any, a strike has on the contract of employment as was done in this case. Such submission was unnecessary for the purposes of that case. As I have earlier endeavoured to demonstrate, once it is accepted that a strike has no effect in law on the continuing vitality of a contract of employment, then repudiation of such a contract which arises when there is a fundamental breach thereof is totally unaffected by the existence of a strike. It is true that economic considerations inter alia may restrain and usually do restrain an employer from acting on a repudiation of the contract of employment during a strike but this does not mean that if an employer accepted the repudiation he would have acted illegally and be himself in breach of his contract with his employee.

The majority of the Full Court concluded in the alternative that even if Miss Lattibeauderie had repudiated her contract there was no evidence of acceptance of the repudiation. Acceptance it is said was necessary as established in Heyman v. Darwins Ltd (1942)

A.C. 356 which states that:

> "repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation on the other."

There is however, wide divergence of views on whether contracts of employment provide an exception to the rule that acceptance of the repudiation is necessary to bring the contract to an end.

In Sanders and Others v. Ernest A. Neale Ltd (1974) 3 All E.R. 327 the National Industrial Relations Court (NIRC) in England had before it an appeal by employees who had taken industrial action by refusing inter alia to work overtime. They had been given an ultimatum by their employer on May 8, 1974 that unless they gave an express undertaking to resume normal work by May 11, their contracts of employment would be terminated. The employees refused to give the undertaking. On May 12 when they presented themselves for work, they were refused admission. An industrial tribunal found that the employees had been dismissed on May 11. The employees appealed to the "NIRC" on the ground that the industrial tribunal erred in law in finding that they had been dismissed on May 11. To the contrary they contended that the ultimatum issued to them amounted to a repudiation by the employer of its contract of employment with them. This repudiation they had not accepted as evidenced by their presenting themselves for work on May 12. The NIRC accepted for the sake of argument and for purposes of the appeal, the industrial tribunal's finding that the employer's conduct on May 11 was repudiatory and amounted to a breach of contract.

Sir John Donaldson P., in delivering the judgment of the NIRC capsuled counsel for the appellant's argument thus at p. 331:

> "In essence, counsel for the appellant's argument is that repudiation of a contract of employment has precisely the same legal effects as the repudiation of any other kind of contract."

He thereafter considered the divergent views as expressed in different cases on whether a contract of employment was subject to the same inflexible rule, like other contracts, that repudiation of the contract requires acceptence before the contract is terminated. He cited as supporting the view that acceptance was not necessary, the dicta in the judgment of Jenkins L.J. in Vine v. National Dock Labour Board (1956) 1 All E.R. p. 1 of which judgment Viscount Kilmuir L.C., in the House of Lords expressed his entire agreement. He referred also to the apparent approval of Jenkins L.J.'s dicta by the Privy Council in Francis v. Kuala Lumpur Councillors (1962) 3 All E.R. 633. He adverted to the established and indisputable rule that an employee who has been wrongfully dismissed by his employer by being excluded from his employment cannot sue for his wages but only for damages. This he contrasted with the principle established in Mackay v. Dick (1881) 6 App. Cases 251 which was that the seller of a digging machine who was entitled to receive the price thereof only on demonstration by him of a specific standard of achievement of the machine, could, by proving that the purchaser prevented or disabled him from carrying out the demonstration, recover the price of the machine and not merely damages for breach of contract.

Having thus considered the above views Sir John Donaldson P concluded thus at p. 333:

> "Applying the Mackay v. Dick principle to a contract of employment it seems to us that the fact that the servant has not rendered the service would be no obstacle in suing for wages if it was the employer's act which produced this state of affair. It being admitted that a wrongful dismissal does prevent a servant from so suing, there must be some other explanation. The obvious and indeed the only explanation is that the repudiation of a contract of employment is an exception to the general rule. It terminates the contract without the necessity for acceptance by the injured party."

The dicta of Jenkins L.J. in Vine v. National Dock Labour Board (supra) cited by Sir John Donaldson P. is at page 8 and is that:

> "In the ordinary case of master and servant, however, the repudiation or the wrongful dismissal puts an end to the contract and a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more."

and in the House of Lords Viscount Kilmuir L.C. in the said case reported in (1956) 3 All E.R. 939 said at page 944:

> "I should on this point be content to leave the matter as stated by Jenkins L.J. with whose judgment I am in entire agreement....
> ....
> This is an entirely different situation from the ordianry master and servant case. There, if the master wrongfully dismiss the servant either summarily or by giving insufficient notice the employment is effectively terminated, albeit in breach of contract."

The view that repudiation by an employee, or wrongful dismissal by the employer which is itself repudiation by him of the contract of employment, effects a termination of the contract without the necessity for acceptance by the injured party was recently expressed in the powerful and closely reasoned judgment of Shaw L.J. in Gunton v. London Borough of Richmond upon Thames (1980) 3 All E.R. 577.

I am persuaded by the dicta of Jenkins L.J. in Vine v. National Dock Labour Board (supra) which as stated, appears to have found favour both in the House of Lords and with the Privy Council. The dicta accords with the practical reality of the employer and employee situation in which it would be a barren legal formality to require an employee or employer as the case may be to formally accept the repudiation by the other of a contract of employment. A repudiation though not accepted nonetheless leaves the injured party completely without redress either judicially or extra judicially in restoring the employer and employee relation which had been created by the contract. There is thus considerable merit in the view that a

de facto severing of the employer and employee relation works an immediate severing of the contractual relation. I would with respect adopt the words of Shaw L.J. in the <u>Gunton case</u> (supra) where at page 582 he said:

> "I cannot see how the undertaking to employ on the one hand, and the undertaking to serve on the other, can survive an out-and-out dismissal by the employer or a complete and intended withdrawal of his service by the employee. It has long been recognized that an order for specific performance will not be made in relation to a contract of service. Therefore as it seems to me, there can be no logical justification for the proposition that a contract of service survives a total repudiation by one side or the other, ... to preserve the bare contractual relationship is an empty formality."

Even if acceptance of the repudiatory conduct was necessary to terminate a contract of employment, in the particular case before us there was evidence of acceptance which could be inferred from the circumstances. Miss Lattibeauderie was seen by Mrs. Stoeckert picketing the work place. She did not evince any intention to return to work. Mrs. Stoeckert refrained from inviting her or otherwise persuading her to return to work. She was in my view accepting the reality of the situation namely that Miss Lattibeauderie was determined not to fulfil her obligations under the contract. Acceptance as is well known can be by words or conduct. Acceptance by conduct ought readily to be inferred in the case of a repudiation consisting in the employee leaving the employment since it is in such case doubtful if in law such an employee could or would expect some oral or written communication of acceptance of his repudiation.

For the reasons given I would allow the appeal, set aside the majority decision of the Full Court and confirm the award of the tribunal.