In the Supreme Court

The Full Court

Before Smith, C.J., Wolfe and Downer, JJ.

Suit No. M. 29 of 1983

R. v. The Industrial Disputes Tribunal and The Hotel Four Seasons Ltd.

Exparte the National Workers Union.

R. Carl Rattray, Q.C., and Brenda Warren for Applicant

Emil George, Q.C., and Edward Ashenheim for Respondent, The Hotel Four Seasons Ltd.

R.G. Langrin watching for Respondent, The Industrial Disputes Tribunal.

1983 - 27, 28 and 29 June and 8 December.

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SMITH, C.J.:

This is an application, by leave of Orr, J. granted on 16 May, 1983, for an order of certiorari to quash the award of the Industrial Disputes Tribunal ("the Tribunal") made on 28 March 1983 in respect of an industrial dispute between the Hotel Four Seasons Ltd. ("the Company") and the National Workers Union ("the Union"), which held bargaining rights for workers at the Company's hotel. The terms of reference to the Tribunal stated the dispute to be "over (the) termination of employment" of fourteen workers named in the reference.

The dispute arose out of the suspension of the chief delegate of the Union at the hotel, Miss Delores Reid, for ten days from 5 June 1982 by the Manager of the hotel, Mrs. Helga Stoeckert. Miss Reid went to the hotel on the morning of 15 June, 1982 and spoke with Mrs. Stoeckert with a view to resuming her duties but was not allowed to do so. Thereupon, there was a stoppage of work by nine workers. Three others arrived later but did not assume their duties for that day. This stoppage of work was without the prior approval of the Union. On the following day, on the instruction and direction of the Union, the strike of the previous day continued. On 17 June letters were written to the twelve workers stating that they were told on 15 June that if they did not return to work or start their work, as the case may be, they would be considered

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as having abandoned their jobs; since they did not comply, they had abandoned their jobs (in the case of those who did not return to work) or were considered to have abandoned their jobs (in the case of those who did not start working) and their employment with the hotel ceased. A thirteenth worker, Colleen Lattibeaudiere, was on vacation leave on 15 June and was due to resume on or about 23 June but did not do so.

A dispute between the Company and the Union arising out of the suspension of Miss Reid was reported to the Ministry of Labour and conciliation meetings were held on 24 and 28 June 1982. On 21 July 1982 the Minister referred the dispute relating to the "termination of employment" of the fourteen workers (including Miss Reid) to the Tribunal for settlement. On 28 March 1983 the Tribunal awarded that (i) twelve workers (apart from Lattibeaudiere and Reid) "were dismissed by the Hotel and their dismissals were justifiable", (ii) Colleen Lattibeaudiere abandoned her job and (iii) the services of Delores Reid "have not been terminated."

The ground upon which the application before us was based was that the Tribunal was wrong in law in making certain of the findings upon which its award was based and in making the award that it did in respect of the twelve workers and Colleen Lattibeaudiere. The submissions in respect of these findings and the award will be examined hereafter, but a fundamental submission was made on behalf of the Union which will entitle the Union to succeed in its application, if the submission is valid. The submission was that there is a right to strike which is accepted both in this Country and in England and that when this right is exercised the contracts of employment of the workers involved are suspended during the strike and revived when it is over.

The contention is that the "right to strike", which it is said exists, is a <u>legal</u> right which affects the common law rights of parties to a contract of employment by annulling the right of the employer to terminate the contract for breach during a strike on the refusal of the employee to perform his duties under the contract. The nature of this "right" is put this way by Sir Otto Kahn-Freund

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in Labour and the Law (2nd edn.) (1977) p. 240 :

> " If the worker has a 'right' to strike, he has more that a mere 'freedom' from criminal or civil liability or administrative intervention. He has a positive right which he cannot bargain away, especially not by the contract of employment. The exercise of the right has priority over any contractual obligations he may have incurred ..... "

The submission that the "right to strike" is accepted in England is, apparently, based on statements made by Lord Denning, M.R. in Morgan v. Fry and Others (1968) 3 W.L.R. 506. The learned Master of the Rolls said, at p. 513 :

> " It has been held for over 60 years that workmen have a right to strike (including therein a right to say that they will not work with non-unionists) provided that they give sufficient notice beforehand ....."

Later in his judgment he said, at pp. 515, 516, in reference to a "strike notice" :

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

The authorities show that until this latter statement by Lord Denning no English case had decided, nor had any authoritative pronouncement been made, that workers during an industrial dispute had a legal right to strike in the sense which I have stated above. Kahn-Freund referred to "this dictum" by Lord Denning as "an isolated event" and said that "the problem of the effect of the strike on the contract of employment remains obscure, and it is likely that the 'right to strike' remains - despite Lord Denning's dictum - a political rather than a legal concept, just like the 'right to work.'" (Ibid p. 269).

The "right to strike" must be distinguished from a "freedom to strike." The authorities establish that in England since 1906 workers involved in industrial disputes have had the freedom to strike because by enactment of the Conspiracy and Protection of Property Act, 1875

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it was no longer a criminal offence for them to take part in a strike and by enactment of the Trade Disputes Act, 1906 they were no longer subject to civil liability for doing so. (Kahn-Freund op. cit. p. 232). Sir Otto Kahn-Freund says (ibid p. 233) :

> " There is no rule proclaiming this freedom; there is merely a series of exceptions from rules of the common law, as it was held by the courts to exist. "

So, obviously, there was no common law "right to strike". The question whether or not there was such a right at common law arose for decision in Collymore and anor. v The Attorney General (1967) 12 W.I.R. 5 before a very strong bench of the Court of Appeal of Trinidad and Tobago consisting of Wooding, C.J., Phillips and Fraser, JJ.A. Wooding, C.J. did not decide the question directly, apparently not finding it necessary to do so in order to decide the constitutional issue which the action raised. However, after reviewing the authorities and the local statutes, he said (at p. 15) that he had done so "to show why I prefer to regard the so-called right or freedom to strike as what in essence it is, a statutory immunity." Phillips, J.A. did not think it necessary for determination of the appeal to explore "the true juristic nature" of the alleged right; he was content to agree with the trial judge's opinion that no "positive right" to strike existed "in the sense of a right which is legally enforceable or the infringement of which gives rise to legal sanctions" (see p. 32). Fraser, J.A. met the question head-on. After a very detailed and exhaustive examination of the relevant authorities and statutes he said, at p. 45 :

> " ..... every right is a legally protected interest, regardless of the source of the right whether by statute, common law or equity, and is enforceable in a court of law. The right which the appellants claim is an individual and personal right to strike or more accurately, to take part in a strike. Careful examination of the English cases will disclose that there has never been a right to strike recognised by the common law nor has it been so declared by statute. The exceptions or immunities which individuals have enjoyed singly and collectively in their freedom to associate in trade unions are not enforceable rights exigible against the world. There is no

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> case decided in Great Britain which comes near to recognising such a right. On the contrary there is a great deal of learning supporting a contrary view. "

The learned judge said later, at p. 47 :

> " I have said enough I think to indicate that in my judgment the common law has never recognised a right to strike nor has such a right ever been declared by statute.
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> In many countries of the world, principally in the Latin-American republics, the right to strike is expressly recognised by law. On the other hand in this country as in many other countries sharing the heritage of the common law there has never been an enforceable right to strike by anybody, anywhere at any time. It would seem that the belief that such a right exists stems from the proposition that any act which the law does not prohibit may lawfully be done and thereby a legal right to do the act, protected and enforceable, comes into being as a natural consequence. That proposition is juristically not sound. "

Still later, he said, at p. 48 :

> " The right to indulge in a concerted stoppage of work which alone can constitute a strike is no more than a statutorily implied exemption from criminal and civil consequences limited in scope to action taken in furtherance or contemplation of a trade dispute. "

For the reasons stated by Fraser, J.A. in his judgment, which I respectfully adopt, I hold that there is no common law "right to strike" in this Country. There is "freedom to strike" by virtue of the provisions of the Protection of Property Act (enacted in 1905) and the Trade Unions Act (enacted in 1919), which re-enacted the provisions in the United Kingdom Acts of 1875 and 1906, respectively, which created the "freedom to strike" in England.

Returning to Morgan v Fry and Others (supra), I have not been able to find any case over 60 years before that case in which, as Lord Denning said, it was held that workmen had a right to strike, if they gave sufficient notice. The Master of the Rolls did not identify the case or other authority. Three years before, when he gave his judgment in J.T. Stratford and Son. Ltd. v. Lindley and Others, (1964) 2 W.L.R. 1002, he certainly did not think that a right to strike, to which he referred in that case, had the effect upon the contract of employment which he held that it had in the Morgan v Fry case. If a right to strike with this effect existed from 1908, or thereabouts, it is

strange that the learned Master of the Rolls was not aware of it until 1968 and no one else before or since has spoken or written of it. I rather think that it was the "freedom to strike", established 62 years before Morgan v Fry to which reference was being made. Davies, L.J., while agreeing with the Master of the Rolls in Morgan v Fry that the giving of the strike notice was not an unlawful act, did not appear to be as confident, and certainly was not as positive, regarding the effect on the rights of the parties if a strike takes place. These are his words (at p. 520) :

> " The notice given by Mr. Fry was not an illegal notice nor did it amount to a threat of illegal action. It was a statement that in default of action by the Port of London Authority which it might lawfully take the men would withdraw their labour, which in effect I suppose would mean that the obligations under the contract would be mutually suspended. "

Russell, L.J. did not agree that the obligations under the contract would be suspended. He said (at p. 525) :

> " On the more general question of a 'right to strike' I would not go so far as to say that a strike notice, provided the length is not less than that required to determine the contracts, cannot involve a breach of those contracts, even when the true view is that it is intended while not determining the contract not to comply with the terms or some of the terms of it during its continuance. "

In Simmons v. Hoover Ltd. (1976) 3 W.L.R. 901, the Employment Appeal Tribunal found it impossible to think that Morgan v. Fry was intended to revolutionise the law relating to the rights of parties under a contract of employment and did not feel that they were bound by that case to hold that the effect of a strike is to prevent an employer from exercising the remedy which in their judgment he formerly enjoyed at common law to dismiss an employee for refusing to work. For the Union, it was submitted, correctly, that the Simmons v. Hoover Ltd. case did not, and could not, overrule Morgan v. Fry. The decision in the former case was, however, based on convincing reasoning and is amply supported by authority. It is plain that the "right to strike" to which Lord Denning referred in Morgan v Fry is a common law and not a statutory right. As to the existence or not of this right at common law, I should like to end by citing a passage from the judgment of the

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Privy Council in Collymore v. Attorney General, (1970) A.C. 538, on app eal from the Court of Appeal of Trinidad & Tobago. Their Lordships said, at pp. 546, 547 :

> ' " It was agreed before their Lordships that trade union law in Trinidad and Tobago was the same as trade union law in Great Britain as at the date when the Trade Disputes Act, 1906, took effect. Neither before that date nor since has there been in Great Britain any express enactment by statute of any right to strike, although in certain quarters such an enactment is still advocated. At common law before the enactment of the Trade Union Act, 1871, the Conspiracy and Protection of Property Act, 1875, and the amendment to section 3 thereof effected by section 1 of the Trade Disputes Act, 1906, combinations of workmen to improve their wages and conditions were certainly in peril if in combination they withheld their labour or threatened to do so: but .... it is now well recognised that by reason of the statutes cited, as well as by decisions such as Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch (1942) A.C. 435 employees may lawfully withhold their labour in combination free from the restrictions and penalties which the common law formerly imposed. In this sense there is 'freedom to strike. ' "

This judgment was delivered almost a year after the judgments in Morgan v Fry. If there was a right at common law to strike in 1968 it is remarkable that the Privy Council made no mention of it in 1969.

In Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch (supra) Lord Wright said, at p. 463 :

> " The right of workmen to strike is an essential element in the principle of collective bargaining. "

It seems clear, from the passage from the judgment in Collymore v. Attorney General cited above, that Lord Wright's reference to the "right" of workmen to strike must be understood in the sense of the "freedom" to strike and no more (see also Kahn-Freund op. cit. p. 269); and it seems that similar references to this "right" in other United Kingdom cases over the years must also be understood in that sense.

Though the freedom to strike was widely recognized "as an essential element in the principle of collective bargaining" the cases show that it was equally well recognized that employees who went on strike almost always broke their contracts of employment and risked termination of their contracts by their employers. It did not matter

that by striking the workers were not acting illegally. This legal right of employers to terminate contracts with their employees was, however, seldom exercised because most employers were committed to the process of collective bargaining to settle differences with their employees and a strike was regarded by them "as the ultimate sanction available to the workers" in the process (see Kahn-Freund op. cit. p. 239). It is for this reason that statements in the cases refer to the fact that workers do not intend by striking to terminate their contracts and employers do not regard them as so intending. Donovan. L.J. stated the matter comprehensively in the Court of Appeal in Rookes v. Barnard and Others, (1962) 3 W.L.R. 260, as follows (at p. 287) :

> " There can be few strikes which do not involve a breach of contract by strikers. Until a proper notice is given to terminate their contract of service and the notice has expired, they remain liable under its terms to perform their bargain. It would, however, be affectation not to recognize that in the majority of strikes, no such notice to terminate the contract is either given or expected. The strikers do not want to give up their job; they simply want to be paid more for it or to secure some other advantage in connection with it. The employer does not want to lose his labour force; he simply wants to resist the claim. Not till the strike has lasted some time, and no settlement is in sight, does one usually read that the employers have given notice that unless the men return to work their contracts will be terminated, and they will be dismissed. "

For his contention that the "right to strike" exists in this Country, learned counsel for the Union relied on statute law as well as the common law. He submitted that the right exists (in Jamaica) because: (a) of provisions of the Constitution giving specific right to belong to trade unions; (b) industrial action is lawful and permitted by the Labour Relations and Industrial Disputes Act; (c) s. 4 of the Act recognises the right of a worker to be a member of a trade union etc.; and (d) "it is well recognised and hallowed by history and practice and referred to as 'a right' in the cases and a legitimate weapon in the armoury of the worker." In support of the submission at (b), reference was made to ss. 9, 10 and 13 of the Act and to the definition of "industrial action" in s. 2. Reference was also made to ss. 32 and 33 of the Trade Unions Act and to s. 3 of the Employment (Termination and Redundancy Payments) Act.

I have endeavoured to show that a legal right to strike does not exist at common law. Reliance on the common law cannot, therefore, assist counsel's contention here. In my judgment, the statutory provisions relied on do not establish the existence of the right. The constitutional and statutory right of workers to join trade unions cannot help because, in my opinion, it is of purely negative significance where the establishment of a right to strike is concerned. The right to belong to trade unions arises from the constitutional right of freedom of association (see s. 23 of the Constitution) and the decision in Collymore v Attorney-General (supra) shows that a right to strike is not a necessary element of the right of freedom of association. The provisions of the Trade Unions Act (prohibiting intimidation and annoyance and allowing peaceful picketing in contemplation or furtherance of a trade dispute) and of the Employment (Termination and Redundancy Payments) Act (fixing minimum periods of notice to terminate contracts of employment) also do not help the Union's contention.

In the Labour Relations and Industrial Disputes Act, the definition of "industrial action" includes a strike and "strike" itself is defined as a concerted stoppage of work by a group of workers in contemplation or furtherance of an industrial dispute (see s. 2). Section 6 makes provisions for a procedure for settling industrial disputes "without stoppage of work." By s. 9(5) industrial action taken in contemplation or furtherance of an industrial dispute in an undertaking providing an essential service is unlawful unless the dispute was reported to the Minister and he has failed to comply with provisions contained in the section or the dispute was referred to the Tribunal and it has failed to make an award within the specified period. Industrial action in undertakings providing non-essential service may become unlawful in the circumstances set out in s. 10(8). Section 13 makes provisions for offences in connection with unlawful industrial action.

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It was submitted for the Union that the legislature having put the law with respect to industrial relations in a statutory framework and having identified what is unlawful industrial action, there is no room for the argument that anything else is unlawful industrial action; that the Act recognizes the lawfulness of industrial action except in the areas proscribed. It was said that such action is lawful and permissible once it arises out of an industrial dispute as defined and does not fall within the prohibited areas; that the fact that the prohibited areas also attract criminal penalties does not create the basis for a valid argument that the Act was only identifying unlawful industrial action which was criminal.

The historical development of the law relating to trade unions, to which reference has been made, shows that the freedom to strike arose because the criminal and civil sanctions to which workers on strike were exposed were removed by statute. It is in this sense that the lawfulness of strike action is to be understood - in a negative rather than a positive sense. The statutes did not make strike action lawful. To repeat a statement of Fraser, J.A., quoted above, in Collymore v Attorney-General it is juristically unsound to propose that an act which the law does not prohibit may lawfully be done and "thereby a legal right to do the act, protected and enforceable, comes into being as a natural consequence."

In my opinion, the Labour Relations and Industrial Disputes Act does no more than give recognition to the lawfulness of strike action in the sense I have just stated. In other words, the provisions of the Act to which reference has been made merely recognise the existence of the freedom to strike. They do not, in my judgment, go further and explicitly or implicitly create a positive right to strike capable of affecting contractual rights under a contract of employment. In the construction of statutes, express and unambiguous language is required before existing legal rights can be held to be taken away (see Craies on Statute Law

(7th edn.) pp. 112, 118). More to the point: "It has often been laid down that plain words are necessary to establish an intention to interfere with common law or contractual rights" (per Somervell, L.J. in Deeble v. Robinson, (1954) 1 Q.B. 77, 81).

The Tribunal found "that the work stoppage and the failure to take up duties .... 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." Counsel for the Company's interpretation of this finding is that the Tribunal is here saying that there was no "genuine" industrial dispute; and he submitted that if the workers think they have a grievance which does not exist, or is an imagined grievance, or is based on an untruth, then it is not a genuine industrial dispute. The Union contends that the Tribunal was wrong in law in making this finding.

It seems obvious that in making this finding the Tribunal had in mind the following statement of Parnell, J. in R. v. Industrial Disputes Tribunal, Exparte Serv-Wel of Jamaica Ltd. (20 May 1982 - unreported) :

> " Where workers withdraw their services in furtherance of a genuine industrial dispute, they are exercising a privilege which is permissible in law. In such a case, it cannot be said that they have 'abandoned' their jobs. A man who by himself or in concert with his fellow workers honestly withdraws his services for a sustainable cause is not dismissing himself from his job". (See p. 25 of the judgment).

This statement was made against the background of a decision by the learned judge that in the case before him there was no "industrial dispute" as defined in the Labour Relations and Industrial Disputes Act ("the Act"). He said (at p. 24 of the judgment): "..... the evidence shows that the real and effective cause of the industrial action did not flow from any 'industrial dispute' within the meaning of the Act." The statement, therefore, means no more than that workers who withdraw their services in furtherance of an "industrial dispute" as defined in the Act do not dismiss themselves from their jobs. The words "genuine" and/or "a sustainable cause" add nothing to the definition.

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In s. 2 of the Act, "industrial dispute" is defined as (so far as is relevant) :

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

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.

The Tribunal found that the nine workers who stopped working on 15 June and the three who did not assume their duties for that day "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 15th June, 1982 they would be regarded as having abandoned their jobs." The letters of 17 June which the Company wrote to the two sets of workers were, respectively, in the following terms :

> " 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. "

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In respect of Colleen Lattibeaudiere, the finding was that her testimony "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." It is upon the evidence stated in this paragraph, mainly, that the Tribunal awarded that the twelve workers were "dismissed by the Hotel" and that Miss Lattibeaudiere had abandoned her job.

It is plain from the finding of what the workers were told on 15 June, confirmed by the letters of 17 June, that insofar as the Company was concerned the employments of the twelve workers were terminated because of their own acts in abandoning their jobs and not by any act on the part of the Company. The letters said so in terms. The Tribunal, however, after stating the obvious, that the letters "were intended to convey the fact that the hotel regarded the named individuals as having ceased to be hotel employees", found that the "letters and their contents are accordingly deemed to constitute notice of dismissal even though there is no specific reference to dismissal therein." They found, further, "that the deemed dismissals were effective on 15th June, 1982." These findings were made in the face of the Company's contention before the Tribunal (p. 2 of the Award) that none of the workers was dismissed "by the Hotel".

In the Serv-Wel case (supra) a division of this Court held unanimously that workers who withdraw their services in furtherance of an industrial dispute cannot be said to have abandoned their jobs. For reasons which will presently appear, I respectfully agree. 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 jobs, but it is well recognized in the cases and in the field of industrial relations that workers who strike do not intend to give up their jobs. Intention apart, however, it is settled law that a contract cannot be terminated unilaterally. As Lord Simon said in Heyman v Darwins, Ltd. (1942) A.C. 356 at 361, "..... termination by one party standing alone does

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not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other;" and contracts of employment are no exception to this rule (see Thomas Marshall (Exports) Ltd. v. Guinle (1979) 1 Ch. 227 and London Transport Executive v. Clarke (1981) IRLR 166). So, if one party is guilty of a repudiatory breach of his contract, his conduct does not terminate the contract. The other, innocent, party may elect to accept the breach as discharging the contract. Then, it is the acceptance of the repudiation that terminates the contract, from the moment of acceptance and not earlier (see Boston Deep Sea Fishing and Ice Co. v. Ansell, (1888) 39 Ch. D. 339 per Bowen. L.J. at p. 365).

Any finding or contention, therefore, that the workers at the hotel Four Seasons had abandoned their jobs, thus terminating their employment, would be wrong in law. As I have indicated, this was the stand taken by the Company in its letters of 17 June and at the hearings before the Tribunal. In the case of Colleen Lattibeaudiere, as stated earlier, it was expressly awarded that she had abandoned her job. In the case of the workers who were on strike on 15 June, the finding that the letters of 17 June and their contents were "deemed to constitute notice of dismissal" seemed to have arisen from a passage quoted from the judgment in Simmons v Hoover Ltd. (supra). As quoted, the passage reads :

> " 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. "

This accurate statement of law does not justify the finding when there is nothing in the letters to indicate the exercise by the Company of its right of dismissal and where the Company expressly denied that it exercised that right. The "deemed dismissals" were found to have been effective on 15 June, the day the Company said the workers' employment ceased because of abandonment of their jobs.

In the judgment in Simmons v Hoover Ltd. (supra at p. 912) it was stated, as the view of the Employment Appeal Tribunal, that though not all strikes are necessarily repudiatory of contracts of

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employment, "what may be called a 'real' strike" always will be. This statement, on the face of it, supports a contention that the workers who took part in the strike at the hotel repudiated their contracts; in which event, the letters of 17 June, the contents of which, the Tribunal found, were communicated to the workers though they did not receive the letters, would be an indication of the acceptance of the repudiations by the Company. In that event, the contracts would be terminated on 17 June and not on 15 June. Whether or not there has been repudiation is, however, a question of fact or of mixed law and fact; so that each case has to be decided on its own special facts.

A basic rule relating to repudiation of contracts was stated by Lord Coleridge, C.J. in Freeth v. Burr (1874) L.R. 9 C.P.208 at p. 213 as follows :

> " ..... in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz. that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. "

This statement of the rule was approved by the Earl of Selbourne, L.C. in Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 App. Cas. 434 at 438 and by the Earl of Halsbury and Lord Collins in General Billposting Co., Ltd. v. Atkinson (1909) A.C. 118. This latter case was one of master and servant where the question was whether the employee was entitled to treat his wrongful dismissal by his employers as a repudiation of the contract of service so that he was no longer bound by it. Lord Collins said, at p. 122 :

> " 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 Company v. Naylor in the House of Lords, 'that the true question is whether the act and conduct of the party evince an intention no longer to be bound by the contract. ' "

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The rule in Freeth v. Burr was followed in the Court of Appeal in James Shaffer Ltd. v. Findley Durham and Brodie (1953) 1 W.L.R. 106 where (at p. 116) Singleton, L.J. said that the passage from Lord Coleridge's judgment quoted above "is recognized as a true statement of the law."

In the case of the workers who the Tribunal held were justifiably dismissed on 15 June, their cases were not dealt with by the Tribunal on the basis that they had repudiated their contracts. In the light of the rule just stated, a finding that they had would have been perverse as it is clear from the evidence that they did not "evince an intention no longer to be bound" by their contracts. As held in the Serv-Wel case, workers in that situation cannot be said to have abandoned their jobs and, thus, to have repudiated their contracts. In Ross T. Smyth & Co. Ltd. v. T.D. Bailey, Sons & Co., (1940) 3 All E.R. 60, Lord Wright said (at p. 71) that "repudiation of a contract is a serious matter, not to be lightly found or inferred."

In the case of Colleen Lattibeaudiere, the finding that "there was a settled, confirmed and continued intention on her part" "not to do any of the work which she had been employed to do" are in words taken verbatim from Simmons v. Hoover Ltd. (supra at p. 912). It was found that Miss Lattibeaudiere's failure to return to work at the expiration of her leave was due to her taking part in the strike - a strike which, it was found, was "sanctioned by the Union" and in respect of which, the evidence shows, a dispute had already been reported to the Ministry of Labour when Miss Lattibeaudiere was due to resume duties from her leave. The finding, in those circumstances, that she had repudiated her contract violates the rule in Freeth v. Burr and, in my opinion, is not justifiable. In any event, there is a total absence of evidence that the repudiation by Miss Lattibeaudiere, assuming the finding can be justified, was accepted by the Company. This no doubt accounted for the award, in her case, that she had abandoned her job.

Unquestionably, the Company had the right to dismiss summarily those workers who on 15 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. Termination of a contract of employment in this way is, of course, distinct from termination by acceptance of the repudiation of the contract, though acceptance may in some cases be expressed by giving notice of dismissal. Workers who take part in a strike in furtherance of an "industrial dispute" within the meaning of the Act may reasonably expect that if their dispute is not resolved in the collective bargaining process it will eventually be settled by the Tribunal. Since they 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 Miss Lattibeaudiere's case, the question of summary dismissal did not seem to arise as it was not found that she was guilty of wilful disobedience of a reasonable order or of wilful neglect of her duties.

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 and that Colleen Lattibeaudiere had abandoned her job. I would, therefore, grant the application and order that the award be quashed.

Wolfe J:

The Hotel Four Seasons as the name implies is a hotel operating at Ruthven Road in the parish of Saint Andrew. The hotel at the time the dispute arose employed forty-nine (49) persons, of these fifteen were in a non-union category. The National Workers Union, a registered Trade Union, represented seventeen (17) of the remaining thirty-four workers. Nine workers were not eligible to be represented by a trade union as they were trainees participating in a training programme. Eight other workers although eligible to be members of a Union did not choose to be so involved.

On the 5th June 1982 Miss Delores Reid a unionized worker and chief delegate ceased working at 4.05. At 5.45 p.m. she was seen in the laundry area of the hotel with approximately two pounds of rice in her handbag. Upon being questioned by Miss Stoeckert, the Manageress of the hotel, about the presence of the rice in her handbag Miss Reid informed her that she had asked a co-worker Miss Willocks Grant to purchase it and that Miss Grant had bought and delivered it to her.

Miss Grant in the presence of the Manageress corroborated the explanation given by Miss Reid. Notwithstanding the corroborative evidence of Miss Grant the Manageress was unmoved in her suspicion that the rice was the property of the hotel and had been stolen by Miss Reid. A notice of suspension was issued to Miss Reid, the notice is set out hereunder:

> "Dear Miss Reid:
>
> On June 5th, 1982, your punch card shows that you punched out at 4.05 p.m. At 5.40 p.m. you were seen in the laundry area with your handbag.
>
> The undersigned asked you to open your handbag which you willingly did and a bag of rice, approximately two pounds, was seen there.

> You have been advised verbally and in writing that you are not allowed to bring in foodstuff and if you do, to bring same to the office. The conditions of employment and the rules and regulations of Hotel Four Seasons spell this matter out very clearly.
>
> Since a great amount of stealing is taking place at present at Hotel Four Seasons, all staff members were informed by a written memo which was placed during the month of May in the pay envelopes that no foodstuffs, etc. can be brought into the Hotel.
>
> Since the undersigned has to leave the Island on Monday, June 7, 1982, and since it is not possible to discuss it before with the union, you are herewith suspended until the return of the undersigned to the Island on June 15, 1982 when the matter will be taken up with the Union and the penalties for this offence will be exercised." (emphasis mine)

By way of comment I observe that the suspension of Miss Reid evoked no response from the other unionised workers.

On the 15th June at the stroke of 8.00 o'clock the suspended worker arrived at the hotel for the resolution of the issue pending, obviously anxious to know her fate. She was informed by Miss Stoeckert that she could not resume working until a meeting had been convened with the union for the purpose of resolving the issue. At this stage colleagues of Miss Reid intervened and moved Miss Stoeckert to deal with the issue of Miss Reid's suspension immediately. Miss Stoeckert insisted that the matter could not be dealt with until a meeting had been convened with the Union and advised the workers to return to their jobs, whereupon the workers refused by withdrawing their labour to relax under the shade of a nearby tree. Entreaties on the part of the Manageress inviting the workers to resume working met with no success. The workers were resolute in their demand.

At eleven o'clock thirteen unionized workers had withdrawn their labour and following their refusal to resume working Miss Stoeckert informed them that they had abandoned their jobs. The workers were undaunted by this pronouncement.

The day ended with the matter unresolved.

On the 16th June the thirteen workers returned to the premises but did not undertake any work. The National Workers Union declared an official strike on the 16th June 1983. The owners of the Hotel responded by addressing to the workers a letter in the terms set out hereunder:

> "Dear Miss Grant,
>
> Please find enclosed your pay up to 9.00 a.m. on the 15th June, 1982.
>
> We confirm what we verbally told you on the 15th 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 had abandoned your job and employment ceased at 11.00 a.m. on the 15th June 1982."
>
> "Your accrued vacation payment and gratuity at ten percent will be calculated and you may collect this any time after June 23, 1982.
>
> Any advance pay or purchase from the company will, of course, be deducted from any entitlement which you may have."

Copies of the letter set out above were sent to Mr. Foote of the National Workers Union and to Mr. Skinner the hotel's adviser on Industrial Relationship. As a matter of completeness it should be noted that the letter referred to earlier was never addressed to Miss Reid for reasons which are patently obvious.

Miss Colleen Lattibeaudiere one of the workers represented by the National Workers Union had been on Vacation Leave when the workers withdrew their labour on the 15th June 1982. Although not reporting back to work formally she was seen amongst the workers who were involved in picketing the premises.

The Conciliatory machinery of the Ministry of Labour failed to resolve the issues between the parties and the Honourable Minister of Labour exercising the powers vested in him under Section

11A(1)(a) of the Labour Relations and Industrial Disputes Act, on the 21st day of July 1982, referred the matter to Industrial Disputes Tribunal for settlement.

The Industrial Disputes Tribunal after numerous sittings extending over a period from the 14th September 1982 and the 3rd February 1983 made the following findings and Award on the 28th March 1983.

"Findings -

The Tribunal finds -

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 Foote, 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 on the Hotel premises at or after 9.00 A.M. on the 15th June, 1982, but did not take 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 letters were communicated to all of them. Copies of the letters were sent to 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 Simmonds v Hoover Ltd., 1 AER (1977) at page 73 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.

Award:

The Tribunal awards -

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.

The Member of the Division appointed pursuant to Section 8(2)(c)(ii) of the Act is not in agreement with the finding at (p) above and the award at paragraph (iii) above.

Dated this 28th day of March, 1983.

.....
H. K. Walters,
Chairman

.....
M.E. Scott

.....
J.E. McPherson
Member

Witness -

.....
L. Downey,
Secretary to the
Division of the Tribunal."

Based on the following grounds the National Workers Union prays this Court for an Order of Certiorari to quash the Award of the Industrial Disputes Tribunal.

GROUNDS

"The grounds upon which the said Leave is sought are:-

(a) That the evidence before the Tribunal failed to disclose any or any sufficient ground upon which the Tribunal could have come to its determination.

(b) That the Industrial Disputes Tribunal was wrong in law in making the following findings:

(i) That the stoppage of work and failure to take up duties on the 15th June, 1982 were not for a substantial cause.

(ii) That the letters dated 17th June 1982 addressed to the workers were deemed to constitute Notice of Dismissal.

(iii) That such dismissals are supported in law by the decision in Simmonds vs Hoover Limited.

(iv) That the conduct of Colleen Latibeaudiere when a strike was in existence constituted abandonment of her job.

(v) That the dismissals of Patsy Grant, Velma Henry, Colleen Latibeaudiere, Gertilyn Morgan, Merdell Morgan, Delores Reid, Clement Robinson, Gloria Scott, Esmin Willox, Pansy Waugh, Ivanhoe Whyte, Cecil Anderson, Ronald Carty and Daphney Salmon were justifiable.

(vi) That the said Award is contrary to law, invalid, null and void."

This case brings into sharp focus the following questions:

1. Is there a right to strike?

2. If such a right exists is it necessary to give notice prior to resorting to strike action.

3. Can a worker be said to have abandoned his job while pursuing industrial action.

Before dealing with the questions posed let me make this observation. Ever since the Full Court of the Supreme Court of Jamaica delivered its Judgment on the 20th May, 1982 in Reg. ats Industrial Disputes Tribunal Ex Parte Serv-Wel of Jamaica Ltd. there has been a tendency by a sector of the industrial system to cry abandonment when ever workers withdraw their services. As one of the judges in that case I wish to state categorically that the Serv-Wel case is not and was never intended to be authority for that view point. In the Serv-Wel case each of the judges made it absolutely clear that a worker cannot be held to have abandon his job where he pursues industrial action arising out of a dispute. At page 25 of the Judgment Parnell J. said:

> "Where workers withdraw their services in furtherance of a genuine industrial dispute, they are exercising a privilege which is permissible in law. In such a case it cannot be said that they have "abandoned" their jobs. A man who by himself or in concert with his fellow workers honestly withdraw his services for a sustainable cause is not dismissing himself from his job."

Malcolm J. at page 28 said:

> "I for my part agree with the view expressed by my brother Parnell that where workers withdraw their services in furtherance of a genuine industrial dispute it cannot be said that they have abandoned their jobs."

At page 41 I concurred with the views expressed by my Learned brothers. I can only hope that having set out the views of Judges in the Serv-Wel case it will lay to rest any misconceptions which existed concerning what Serv-Wel decided.

The workers in the Serv-Wel case withdrew their services following the arrest of a fellow worker who had been caught "flagrante delicto" stealing the company's property. There was no dispute within the meaning of the Labour Relations and Industrial Disputes Act between

the workers and the company. Such industrial action was in my view a breach of the contract of employment.

RIGHT TO STRIKE

Section 2 of the Labour Relations and Industrial Disputes Act recognises Strike as a form of Industrial Action. The section defines "industrial action" as meaning:

(a) any lock out; or

(b) any strike; or

(c) any course of conduct (other than a lock out or strike) which, in contemplation or furtherance of an industrial dispute, is carried on by one or more employers or by one or more groups of workers whether they are parties to the dispute or not, with the intention of preventing or reducing the production of goods or the provision of services.

"Strike" is defined as meaning a concerted stoppage of work by a group of workers in contemplation or furtherance of an industrial dispute whether those workers are parties to the dispute or not, and whether it is carried out during, or on the termination of, their employment. "Industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, where such dispute relates wholly or partly to

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work; or

(b) engagement or non engagement, or termination or suspension of employment, of one or more workers; or

(c) allocation of work as between workers or group of workers; or

(d) any matter affecting the privileges, rights and duties of any employer or organization representing employers or of any worker or organization representing workers:

Websters Third New International Dictionary defines "a right"

as follows:

> "Something to which one has a just claim; as (a); the power or privilege to which one is justly entitled (as upon principles of morality, religion, law or custom).
>
> (b) a power, privilege, or condition of existence to which one has a natural claim of enjoyment or possession.
>
> (c) a power, privilege or immunity vested in one (as by authority or social custom).
>
> (d) a power or privilege vested in a person by the law to demand action or forebearance at the hands of another; a legally enforceable claim against another that the other will do or will not do a given act; a capacity or privilege the enjoyment of which is secured to person by law; a claim recognized and delimited by law for the purpose of securing it."

I approach the task of answering this question, whether there is a right to strike ever mindful of the serious implications which may arise from any answer to such a question. Notwithstanding the implications the task requires a bold approach. A mere examination of cases decided in the English Courts cannot by itself properly answer the question. To attempt to answer the question on the principles of the inflexible contractual law is contrary to the Spirit of industrial relations.

It is clear from the decided cases that at Common Law there is no right to strike. In Collymore and Abraham v. The Attorney General (1967) 12 W.I.R. p. 5 a judgment of the Court of Appeal of Trinidad and Tobago, Fraser J.A. confronted the question of a right to strike head on. In his very lucid and illuminating judgment he examined the position at Common Law reviewing extensively the decided cases historically as well as the writings of scholars on the subject and concluded, at page 48 of the judgment:

> "The course the common law has run commenced with the case of Mitchell v. Reynolds and has reached, perhaps not yet full circle, to the case of Rookes v. Barnard while the strictures and later the variations and ameliorative changes wrought by statute law started with the unlawful combination of Workmens Acts 1799 - 1800

> and culminated with the Trade Union and Trade Disputes Act 1871 - 1906 from which the Trade from which the Trade Unions Ordinance Cap. 22 No. 9 and the Trade Disputes and Protection of Property Ordinance Cap. 22. No. 11 are drafted. In neither of these sources can I find recognised or declared a collective right to strike nor a personal right to take part in a strike. Consequently I must hold that there is no Common Law right to strike."

In so far as the observations of Fraser J.A. relate to the Common Law situation I entirely agree with them. To ascertain the statutory position within the jurisdiction of Jamaica one must now examine the provisions of the Labour Relations and Industrial Disputes Act.

It cannot be doubted that the Labour Relations and Industrial Disputes Act permits workers to take industrial action. I have come to this conclusion because the Act makes a distinction between lawful and unlawful Industrial Action and imposes a penalty upon persons who participate in Unlawful Industrial Actions. Section 13(1).

> "Any employer who takes any unlawful industrial action shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two hundred dollars in respect of every worker who was employed to him immediately before such unlawful industrial action.
>
> (2) Any worker who, during the period of any unlawful industrial action which is taken in the undertaking in which he is employed. -
>
> (a) ceases or abstains from or refuses to continue, any work which it is his duty, under his contract of employment to do or
>
> (b) carries on any other course of conduct which prevents or reduces the production of goods or the provision of services in that undertaking or which is intended to have that effect, shall unless he proves that he did so in any of the circumstances specified in subsection (3) be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two hundred dollars."

This view is further reinforced by Section 9 of the Act which permits the taking of industrial action in undertakings which

which provide essential services, subject to certain conditions being satisfied prior to the taking of such industrial action. Section 9(5).

> "Any industrial action taken in contemplation or furtherance of an industrial dispute in any undertaking which provides an essential service is an unlawful industrial action unless -
>
> (a) that dispute was reported to the Minister in accordance with subsection (1) and he failed to comply with subsection (3) or subsection (4) or subsection (7), or
>
> (b) that dispute was referred to the Tribunal for settlement and the Tribunal failed to make an award within the period specified in section 12."

It is worthy of note that no where else in the Act is it stated that such preconditions relate to industrial action taken in undertakings other than those supplying essential services.

The question which must now be resolved is whether a person who is doing an act which is exempted by statute from penal sanctions can be said to have acquired a right to do the act.

The Dictionary of English Law Vol 2 by Earl Jowitt defines a right as follows:

> "That which the law directs, that which is so directed for the protection and advantage of an individual is said to be his right. It has been described as a liberty of doing or possessing something consistently with law or more strictly the liberty of doing or possessing something for the infringement of which there is a legal sanction. A right in its most general sense is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to do or to abstain from doing a particular thing. A legal right is a capacity residing in one man of controlling with the assent and assistance of the state, the action of others. It follows that every right involves a person invested with the right or entitled; a person or persons on whom that right imposes a correlative duty or obligation an act or forbearance which is the subject matter of the right, and in some cases an object, that is, a person or thing to which the right has reference, as in the case of ownership."

It is instructive to examine at this stage Section 6 of The Protection of Property Act.

Section 6.

> "..... An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless this act, if done without any such agreement or combination would be actionable."

The word act in this section in my view includes the act of the with holding of labour which the section protects against any action at law when done in furtherance of a trade dispute. It follows in my view therefore that the with holding of labour is not an unlawful act since it is protected by law. It is an act which may be described as a liberty of doing something consistently with law and therefore falls within the definition of "right" quoted above.

The United Kingdom Industrial Relations Act 1971 is the model from which the Jamaican counterpart springs and it is helpful in resolving the question to compare the definition of strike in both pieces of legislation.

In Section 167(1) United Kingdom Industrial Relations Act 1971.

> "Strike" means a concerted stoppage of work by a group of workers in contemplation or furtherance of an industrial dispute whether they are parties to the dispute or not, whether (in the case of all or any of those workers) the stoppage is or is not in breach of their terms and conditions of employment and whether it is carried out during, or on the termination of, their employment."

The underlined words do not appear in the definition of strike as stated in the Jamaican legislation. These words were included in the English legislation because that Act contemplated certain strikes as breaking the contract of employment i.e. those which took place without notice etc. vide United Kingdom Contracts of Employment Act.

The Jamaican Parliament, it is clear, omitted the underlined words from the definition of strike because in the history of industrial relations in this country it was never the view that a

strike had the effect of breaking the contract of employment. I hold that once a dispute, as defined in the Labour Relations and Industrial Disputes Act, exists between employer and employee, the employee has the right and is empowered by the law to take industrial action which includes strike action thereby suspending the contract.

This view is fortified by the inclusion of Section 12 (5) notwithstanding anything to the contrary where any industrial dispute has been referred to the Tribunal -

(a) it may at anytime after such reference order that any industrial action which has begun in contemplation or furtherance of that dispute shall cease from such time as the Tribunal may specify.

Sub section 9 imposes a sanction against any person who disobeys an order under Section 12(5).

Had the legislature viewed industrial action as being a breach of the contract of employment then its certainty could not have vested the Tribunal with the power set out in Section 12(5). Such a power could only have been given where there is no breach entitling dismissal but a mere suspension of the contract.

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 and industrial dispute within the meaning of the Act.

The Tribunal held "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".

The phrase underlined above is no doubt borrowed by the Tribunal from the Judgment of Parnell J. in R. v. Industrial Disputes Tribunal Ex Parte Serv-Wel of Jamaica Limited at p. 25.

"Sustainable cause" as used by Parnell J. can have one meaning and one meaning only, namely a dispute within the meaning of the Labour Relations and Industrial Disputes Act.

Whether or not an Industrial Dispute exists is a matter of law and the Tribunal in holding that the cessation of work and the failure to take up duties was not for a "sustainable cause" erred in law.

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.

This view is supported by the stance of the company before the Tribunal as at all material times the company contended that it had not dismissed any of the workers.

Mr. Ashenhiem who represented the company before the Tribunal in his closing submissions said:

> "..... And I submit that your findings should be as follows:
>
> 1. That none of the persons terminated in the Terms of Reference, being former employees of Hotel Four Seasons were dismissed by Hotel Four Seasons and consequently, no question of re-instatement or compensation can arise.
>
> 2. The employment of all persons named in terms of Reference was terminated by their own act or default.

3. In the alternative, 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 dismissal were justified."

It is clear from these submissions 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.

Was there a repudiation? Repudiation exists where a party to a contract demonstrates an intention not to be any longer bound by the terms of the contract. Common sense and authority reject any argument which would suggest that workers who take strike action are of that intent. On the contrary strike action is usually taken to improve the terms and condition of work or as in the instant case to redress what the workers consider an injustice at the work place. See Simmons v. Hoover Ltd. 1977 1 A.E.R. 775 at p. 785.

Where there is repudiation of a contract by one party the other party must show unequivocally that he accepts the repudiation if he intends to act upon it. The innocent party cannot sit tight and enjoy the best of both worlds shouting on the one hand abandonment i.e. self dismissal and on the other hand, if there is no self dismissal then you have repudiated and by your conduct I am entitled to dismiss you. The innocent party must make his election clear.

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. None of the parties before the Tribunal contended that the workers had been dismissed certainly not the company. There was no evidence to support dismissal. The Tribunal erred in this respect also.

An award of the Tribunal is impeachable on a point of

law where it is evident that but for the error committed the award made would not have been so formulated. Once it appears that the decision arrived at was influenced by an erroneous conception of the law the award is vulnerable and will quashed on the complaint of a party aggrieved. The error may appear on the face of the award if reasons are given or it may be deduced from the finding and circumstances as outlined.

Certoriari must therefore go to quash that portion of the award.

Re Colleen Lattibeaudiere

The Tribunal found "that Colleen Lattibeaudiere abandon her job."

This worker was a member of the National Workers Union. At the time when the workers resorted to industrial action she was enjoying the benefits of her vacation leave. On the scheduled day of her resumption industrial action was still continuing. She was seen amongst the picketing workers outside the gate of the hotel. She did not actually go to management and formally report back to work saying I am prepared to return to work but my union has ordered industrial action and I intend to participate therein. However her presence amongst the picketing workers at a time when she should have properly resumed work but for the industrial action which was in progress and which as a member of the union she was entitled to participate in is action which contradicts the finding of abandonment. Her presence amongst the picketing workers is a display that she was still interested in her job. Before a worker can be said to have abandoned his job the worker must have taken steps which unequivocally demonstrate that the worker has ceased to regard himself as being employed by the company or from which it can reasonably be inferred that the worker has no intention of returning to his employment, in other words there must be evidence of repudiation and acceptance of that repudiation.

There was no such evidence upon which the Tribunal could properly have found that this worker had abandoned her job.

Finally I would just like to say something about this use of the word abandonment. To my mind abandonment is conduct which evidences an intention to repudiate. One party cannot repudiate a contract and thereby terminate it. Such repudiation requires acceptance by the other party before the contract can be said to be effectively terminated bearing in mind that the innocent party notwithstanding the repudiatory conduct of the other party may treat the contract as still subsisting and sue for specific performance or damages for Breach of Contract.

I would therefore order Certiorari to go to quash this part of the award also.

Downer J.

Introduction

In these proceedings, Mr. Rattray moves this court, for an order of certiorari to quash that portion of the award of the Industrial Disputes Tribunal (Mr. K. K. Walters (Chairman), Mr. M. B. Scott, Mr. J. E. McPherson) which found the dismissals of Patsy Grant, Velma Henry, Gertilyn Morgan, Merdell Morgan, Clement Robinson, Gloria Scott, Esmin Willox, Pansy Waugh, Ivanhoe Whyte, Cecil Anderson, Ronald Carty and Daphney Salmon, from Four Seasons Hotel, were justifiable and further found that Colleen Lattibeaudiere had abandoned her job.

The matter was referred to the Tribunal on the initiative of the Minister, pursuant to section 11A (1) (a) of the Labour Relations and Industrial Disputes Act, hereafter referred to as The Act, and the terms of reference read thus:

> "To determine and settle the dispute between Hotel Four Seasons on the one hand, and certain workers listed above, formerly employed by the company and represented by the National Workers Union on the other hand over their termination of employment".

Against this background, this court on judicial review, must determine firstly, whether an employer is entitled to dismiss his employees, instantly, for wilfully failing to obey lawful orders to resume work, even though these employees have resorted to industrial action as defined by the act and secondly, whether a worker who takes industrial action as defined, instead of returning to work, after the completion of her vacation leave, has abandoned her job and thereby terminated her contract of employment. So considered, the legal issues are of importance not only to this dispute, but they have important implications for the Law of Contract, the effect of the Act on other relevant labour legislation, and above all, the legal framework which governs industrial relations. But to pursue the issues raised, one must first examine the facts in this case.

The Facts

The history of these proceedings, is helpfully summarised in the award. Four Seasons is a small, well-known hotel on Ruthven Road, with about twenty-two rooms and in addition, it does an extensive catering and lunch time trade. The workers are represented by the National Workers Union. The issues which were raised in this case have their origin in the suspension of Miss Delores Reid, Chief Delegate of the Union, by Miss Helga Stoeckert, the manageress of the hotel. The grounds on which Miss Reid was suspended were that she was found on 5th June, 1982 with a plastic bag of rice in her handbag, which was alleged to be in contravention of one of the hotel rules. After the suspension, Miss Stoeckert had to attend a hotel convention in the Bahamas and on her return on the 15th June, 1982 Miss Ried returned to work. Miss Stoeckert had pressing business in hand, she had a full house and a large and fashionable wedding of two members of Parliament to cater for at Vale Royal. Because Miss Reid was the Union delegate, the matter of her suspension had to be discussed with union officials instead of with a worker delegate and management. Miss Stoeckert retained the services of Mr. Skinner as her man of business for the sensitive area of labour relations and it was he who was deputed to get in touch with his opposite member at the union. It was in those circumstances that she requested that Miss Reid's resumption be delayed until a early meeting could be arranged with the union, and at that point, all the workers involved save Colleen Lattibeaudiere, who is a special case, insisted that Miss Reid's matter be dealt with forthwith. Miss Stoeckert stood her ground and refused to allow Miss Reid to resume. Whereupon, the workers concerned camped under the shade of a mango tree and refused to resume working, despite the repeated entreaties of Miss Stoeckert. It was on the basis of this failure to persuade the workers to return that Miss Stoeckert dismissed them by word of mouth, and subsequently confirmed it in writing, and it will be up to this court to determine whether these dismissals were justified as the tribunal found. The following day, the workers on the advice of their union, attempted to resume, but Miss Stoeckert refused

to entertain them. As a consequence of all this, the strike sanctioned by the union ensued. In Miss Stoeckert's picturesque language, she refused to entertain the workers, because they had missed the boat on the previous day.

The case of Colleen Lattibeaudiere is somewhat different. She was due to resume work on the 23rd of June, but made no effort to resume work on that day or even a reasonable time thereafter. She joined the strike. It would be for this court to determine therefore, whether her conduct had the effect of terminating her contract of employment or in a more elegant language of the tribunal, she had abandoned her job and in effect permitted Miss Stoeckert on her part to ignore the breach of contract or to affirm the repudiation and thus in effect terminate the contract.

The Submissions of Counsel

Before us the gist of Mr. Rattray's bold submission was that the workers contract of employment was suspended not terminated during the strike and the purported dismissals were unjustified. If that were not so, he contended, modern labour legislation particularly the Act and the Employment (Termination and Redundancy Payments) Act, would be a dead letter and the right to strike would be illusory. Consequently he urged that this court should quash the decision of the tribunal.

Mr. George on the other hand, submitted that a contract of employment was governed by the general principles of Contract Law. Any alterations of these contractural rights must be expressly made, as deeply entrenched rights were not to be altered by a mere sidewind. He contended that the employer's right to dismiss for deliberate failure to carry out the fundamental terms of the contract of employment has survived modern labour legislation and was equally important as the common law right to strike. He emphasised that it was not practical policy for an employer to exercise those rights in most instances as there was a need to maintain his labour force intact. Additionally, the employer's responsibility to meet schedules, to provide goods and services, and

to meet his heavy fixed costs for utilities and salaries for administrative staff, made employers think twice before exercising their contractural right to dismiss. Therefore in many instances, the employer elects to regard the contract of employment as suspended rather than terminated and it is in the marginal case that the right was exercised. The exercise in this case was justified and the tribunal's decision should be upheld even if there were an industrial dispute.

The Position at Common Law

In order to appreciate the law to be applied, it is best to begin with the position at common law as regards the employer's right to dismiss a worker summarily for deliberately failing to work and then to ascertain whether modern labour legislation has altered or modified that right if industrial action is taken by the workers concerned. The following passage from Lord Evershad's judgment in Laws v. London Chronicle (Indicator Newspaper) Ltd. (1959) 1 W.L.R. 688 at 700 sets out the law with clarity and precision. It reads thus:

> "To my mind, the proper conclusion to be drawn from the passage I have cited and the case to which we have referred is that since a contract of service is but an example of contracts in general, so that the general law of Contracts will be applicable, it follows that the question must be - if summary dismissal is claimed justifiable - whether the conduct complained of is such as to show the servant to have disregarded the essential condition of his contract of service. It is no doubt, therefore, generally true that wilful disobedience of an order would justify summary dismissal, since willful disobedience of a lawful and reasonable order shows disregard - a complete disregard - of a dondition essential to the contract of service, namely, the condition that the servant must obey a proper order of the master and that unless he does so, the relationship is so to speak, struck at fundamentally".

In this case, the tribunal had before it evidence from Miss Stoeckert that she pleaded with the workers to return to work, and it is prudent to ask what was the nature of their work. They were cooks, pot washers, launderers, room mates, and a yard man, for a small hotel which had a full house. It is best to give Miss Stoeckert's own words as to their importance to the continued success of Four Seasons. She told the tribunal:

> "In this particular kind of hotel or business like Hotel Four Seasons, which is, I would say, a unique business, not only in Jamaica but maybe in the Caribbean, we only can survive if we give service and if we look after our guests, but service and commitment to the hotel business are the very basic things. But how this business operate, let me give you an example. We operate our Hotel from about a 96% occupancy rate which is a very good rate for any hotel. We have no swimming pool, we have no telephones in the rooms, we have no room service, we have not even an intercom, our chairs in the dining room are garden chairs but still people like to come to us because they know they are being looked after, that we take care of them and they know they can depend on us, which is very, very important in the catering business.
>
> If anyone has a function in the Hotel or outside, no matter what function, the whole key of this, if it is for ten people or if it is for a thousand people, there is one thing you must be on time, you must bring the food in good things, it must look attractive, it has to be properly served. We are not a factory, we are not a business hotel, where maybe things can be different. We solely depend on service. We must have service and service cannot be given only by management, it has to be with the staff. If the staff isn't any more committed to give the service, there is no business".

Also on the 16th, there was a wedding reception for the Webleys, where a thousand guests had to be catered for. It is important to note that a notice was posted in the kitchen indicating the date for the wedding and that preparations were expected to take at least two days. Against these facts, it is fair to say that the employees had shown a wilful disregard of the essentials of the contract of service which amounts to a repudiation of the contract and entitled Four Seasons either to elect to ignore the repudiation or to dismiss them.

What is the common law position as regards the strike? A notice was necessary to terminate a contract of employment lawfully and if this notice was given, there was nothing unlawful about the strike action pursuant to the law of contract. If, on the other hand, a strike was sudden, i.e. without notice as say a wild cat strike, then the employer could sue for breach of contract and recover damages. (See National Coal Board v. Galley 1958 1 W.L.R. 16, 28). That the right to strike is governed by the law of contract is well put by Lord Denning M.R. in Morgan v. Fry (1968) 3 All E.R. 452 at 456. He says:

> "It has been held for over sixty years that workmen have a right to strike (including therein a right to say that they will not work with non-unionists) provided that they give sufficient notice beforehand, and a notice is sufficient if it is at least as long as the notice required to terminate the contract".

Then later he cites Lord Macnaghten in Allen v. Flood (1898) A.C. 1 at 148 who puts it this way:

> "There was nothing wrong in his (the trade union official) telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned, the iron men were perfectly free to leave their work for any reason, or for no reason or even for a bad reason ....."

Summarising the position, one may say that the right to strike hinges on the power of each individual employee to terminate his employment at any time by giving management and employers the due period of notice. On this basis, therefore, the strike action by the workers at Four Seasons without the giving of a week's notice was unlawful. But the term 'unlawful' here simply means that they were in breach of their contracts and the breach in this case entitled the employer to treat the contract as at an end. In my opinion the common law does not support the principle that contractural rights are suspended during a strike unless both parties find it expedient so to do. It is true to say that in many instances there has been a convention to treat these rights as suspended but the employer also has an option to accept the employees repudiation as terminating the contract.

The Effect of the Act and Recent Authorities

Did the Act and other modern labour legislation alter this position when industrial action as defined was taken, as Mr. Rattray contended? In order to ascertain this, one must examine the relevant provisions to determine whether either expressly or impliedly contractural rights under the contract of employment were suspended. It is best to begin with the definitions in Section 2. "A 'contract of employment' means a contract of service or apprenticeship whether it is express or implied. If it is express whether it is oral or in writing".

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As these workers were paid weekly, be it noted that the parties at common law were obliged to give a week's notice and either side could lawfully have terminated the contract. By virtue of Section 3(2) of The Employment (Termination and Redundancy Payments) Act, an employee should give two weeks notice. "'Industrial dispute' means a dispute between one or more organisation representing workers where such a dispute relates wholly or partly to -

a -

b - engagement or non-engagement or termination or suspension of employment of one or more workers.

c -

d - ".

It is clear that the answer to the question when is a dispute an industrial dispute as defined, admits of an easy answer in this case. Miss Reid's employment was suspended and this was the origin of the first phase of the strike action on the 15th 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. Then again, Miss Stoeckert treated the withdrawal of work as entitling her to terminate the employment of the other workers who had assembled under the mango tree and against this background, it is clear that an industrial dispute existed. Then we go to "'strike which means a concerted stoppage of work by a group of workers in contemplation or furtherance of an industrial dispute whether these workers are parties to the dispute or not and whether it is carried out during or on the termination of their employment". There can be little doubt that there was a strike within the intendment of this definition when the workers withdrew under the mango tree on the 15th and furthermore, when they continued the strike again under the union's sanction on the following day. Moreover this definition contemplates a strike when there has been a termination of employment and is consistent with the relevant definition of 'industrial dispute'. "'Worker' means

an individual who has entered into or works or normally works under a contract of employment". The pertinent question on examining this Act is whether there are any express terms or necessary implications for a contract of employment which would oblige the court to say that the contract was suspended rather than terminated during a strike. Sec. 6 implies certain terms in a collective agreement and it is noteworthy that the terms to be implied obliged the parties to first endeavour to settle the dispute by negotiation and thereafter to resort to the ministry for either conciliation or settlement by Industrial Disputes Tribunal. There is no help here for the suspension doctrine. Sec. 12(6) also has implied terms to be employed in a contract of employment about rights and services and of the terms and conditions of employment observed as a consequence of an award. The award here speaks of justifiable dismissals so the applicants can find little comfort from this provision. What is to be observed is that the whole tenor of the act is to attempt to bring order into industrial relations either by the grievance procedure in collective agreement, the conciliation machinery at the ministry or the adjudicating machinery of the tribunals. Strikes are regarded as an unforfunate occurence like war and there are no rewards for unjustifiable strike action.

Part 3 of the Act sets up Industrial Disputes Tribunals and makes a specific provision for the settlement of disputes in essential services. Furthermore, Sec. 10 sets up machinery to deal with disputes in industries and services where the minister decides it is in the public interest to settle a dispute. Sec. 11 deals with reference to the tribunal at the request of the parties and 11(A) under which this dispute was referred applies to disputes which the minister on his own initiative refers to the tribunal. Sec. 12 deals in detail with the awards of industrial tribunals and the legal consequence which flows from these awards. I have examined these sections because of Mr. Rattray's submissions on the effect of Sec. 13 which deals with the criminal sanctions for unlawful industrial action. He contended that those were the only sanctions for unlawful industrial action. To my mind, the sanctions here referred to the unlawful industrial action

specified in section 9(5) where the industrial dispute involves the essential services and in 10(8) refers to unlawful industrial action taken in industrial disputes in industries where the minister feels obliged to act in the public interest to settle a dispute. It follows, therefore, that section 13 on this reading, leaves untouched the employer's right to terminate the contract for wilful failure to return to work after a lawful order or the employer's right to sue for breach of contract where contractural rights are breached by the workers. There are other criminal sanctions stipulated in section 12(9) which pertain to the failure of a person to comply with the order or requirement of the tribunal, and even if it were contended that the tribunal could suspend a contract in those circumstances, one would have to examine the common law and the provisions of the Act to see if such power is entrusted to the tribunal whose jurisdiction is limited. If it exceeds its jurisdiction, this court in the exercise of its superintendence would keep the tribunal within its limits.

Turning to the recent authorities in deciding which is applicable, it must be recalled that Morgan v. Fry was a case which had to decide whether the tort of intimidation as developed in Rookes v. Barnard 1964 A.C. 1129 governed the facts of that case. The court decided unanimously that a notice given by the defendants to the plaintiffs' employers that they would not work alongside members of the plaintiffs breakaway union being a notice longer than was necassary to terminate the contract, was not unlawful for the purpose of founding the tort of intimidation and that the action should have been dismissed. This was in contrast to the decision in Rookes v. Barnard (1964) A.C. 1129 where the basis of the unlawful action which founded the tort was the breach of a 'no strike' clause in the contract of employment. In arriving at their decision, all three judges made observation on effect of the notice as to whether there was termination or suspension of the terms of the contract. These observations must be read against the background of the decision to keep the tort of intimidation within a narrow confine and were not meant to cover a case where the employer elects to treat the contract as at an end.

A close reading of the text highlights this position. In Morgan v. Fry 452 at page 458, Lord Denning M.R. put the matter thus:

> "What then is the legal basis on which a 'strike notice' of proper length is held to be lawful? I think it is this - the men can leave their employment all together by giving a week's notice to terminate it. That would be a strike that would be perfectly lawful. If a notice to terminate is lawful, surely a lesser notice is lawful such as a notice that we will not work alongside a non-unionist. After all, if the employer should retort to the men "We will not accept this notice as lawful", the men can once say "Then we will give notice to terminate".

Then the important words dealing with suspension follow.

> "The truth is that neither employer or worker wish to take positive action of termination if it can be avoided. The men do not wish to leave their work forever. The employees do not wish to scatter their labour force to the four winds. Each side is therefore content to accept the strike notice at proper length as lawful. It is an implication read into the contract of the modern laws of trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike and revives again when the strike is over".

It is important to note that Lord Denning is referring to a situation where both employers and workmen wished to avoid drastic action and it is in these circumstances that the contractural terms were suspended as both sides so willed it. Davies L.J. is of like mind, for at page 461 he states that:

> "It will be seen therefore, that on this main part of the case, I am in respectful agreement with the judgment of Lord Denning M.R. The notice given by the defendant Mr. Fray, was not an illegal notice nor did it amount to the threat of an illegal action. It was a statement that in default of action by the Port of London Authority which it might lawfully take, the men would withdraw their labour, which in effect I suppose would mean that the obligations under the contract would be mutually suspended".

Russell L.J. is also of like mind. At page 464 he said -

> "Further viewing the question of wrongful or unlawful conduct as between the employer and the lockmen, while it is perfectly true that abstention from work without determining their contracts is clearly the preferable course for the strikers; it is also the preferable course for the employer, who retains his labour force on his books and has the continued existence of the

> contracts as the background for negotiation unless and until he wishes to accept a repudiatory breach".

What if the employer wishes to take the drastic action of termination? What if the mutuality which generally exists is absent? What if the employer wishes to accept the repudiating breach? To these questions Morgan v. Fry provides no answer and we must now turn to Simmonds v. Hoover Ltd. (1976) 3 W.L.R. 901 on which the tribunal founded its award. Simmonds v. Hoover had to decide whether an employer was entitled to terminate his employees' contract without notice while the employee who was dismissed for redundancy subsequently went on a strike. It was held that the effect of a strike was not to prevent the employers from exercising their common law remedy to dismiss the employee from refusing to work and that the contract of employment was not suspended, but that the employers had an option of either disregarding the breach of contract in the hope that the employees would return to work, or for accepting the refusal to work as a fundamental breach, repudiating the contract of employment. In putting forward this doctrine of suspension of the terms of a contract during a strike, one is entitled to ask whether it would apply to all strikes whether lawful or unlawful, whether the workers would be entitled to be paid during the strike, whether the employers would still be entitled to dismiss the worker for misconduct - these are some of the questions posed by the U.K. Donovan Commission Report 1965/68 (Cmd. 3623) which considered the doctrine of suspension. If such a doctrine should be incorporated into our legal system, then it would require study by an official committee who would assess these implications on the law of contract, on industrial relations, and on employers' rights, and on legislation dealing with investment. Under our constitutional system this is for parliament to decide and not for the courts.

The Position of Colleen Lattibeaudiere

Miss Lattibeaudiere was on leave on the 15th and the 16th when the strike commenced. She was due to return to work on the 23rd June. When she arrived she saw a picket line. She supported her colleagues and she admitted under cross-examination up to the time of

hearing before the tribunal, she had not reported to Four Seasons for work. In the light of this the tribunal found, to quote the words of Phillip J. in the Simmonds case that in her 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 that she had been employed to do. As a result, the tribunal found that that amounted to a repudiation of her employment. In the award, the tribunal declared that Lattibeaudiere had abandoned her job. The word 'abandoned' has become very fashionable since the important unreported case of R v. Industrial Disputes Tribunal ex parte Serv-well of Ja. Ltd. M6 of 1982. 'Abandoned' is not a term of art and what is to be considered in this case is whether the conduct of Colleen Lattibeaudiere permitted her employer if she so elected to accept her repudiation of their contract and so regard it as terminated. The issue of abandonment was discussed by all three judges, in the Serv-well case but the decision of that case turned on whether it was permissible for the tribunal to reinstate the workers, and the court held unanimously that since there was no dismissal, the reinstatement was not permitted by the act and in exceeding its jurisdiction or erring on the face of the record certiorari would go to quash the decision of the tribunal. The Company in that case had alleged that the workers had abandoned their jobs and the tribunal made a finding 'That the workers did not abandon their jobs, they took strike action under the instructions of their union in furtherance of a dispute'. Because of this, all the judges were bound to address their minds as to whether the finding of the tribunal concerning abandonment was appropriate. Parnell J. at page 25 puts it thus:

> "Where workers withdrew their services in furtherance of a genuine trade dispute, they are exercising a privilege which is permissible in law. In such a case they cannot be said to have abandoned their jobs. A man who by himself or in concert with his fellow workers honestly withdraws his services for a sustainable cause is not dismissing himself from his job".

Malcolm J. at page 28 expressly agrees with Parnell J. on this point as did Wolfe J. at page 41 who said -

> "I too am of the view that where workers take strike action in furtherance of a genuine industrial dispute, it cannot be said that they have abandoned their jobs".

I would add my concurrence to these views because during a strike neither employers or workers generally intend to terminate their contracts. It is suspended but the employers have a residual common law right to treat the withdrawal of labour as a repudiation of the contract of employment and this is justifiable in law as in the instant case. In Simmonds v. Hoover Phillips J. after quoting from the authoritative Donovan Commission at page 909 of his judgment summarises the position as follows:-

> "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 exercises his right to dismiss the employee".

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 the 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.

Conclusion

The Industrial Disputes Tribunal had difficult points of law to decide in this case. In my opinion, they decided correctly. There is a school of thought which resents the intrusion of law into industrial relations. But this is short-sighted as under our system

of government, law is an important system in social control and must provide a frame work for industrial relations just as in many other areas of life say, international relations or business dealings. In fact, there are marked similarities between commercial and industrial relations law. Men of business settle their dealings daily by bargainings, conciliations, arbitration, and the law intervenes in exceptional cases. The position is similar in labour relations, in fact, the Ministry of Labour under the act provides conciliation services. The tribunal handles the bulk of industrial disputes, of which a few reach the Supreme Court. But those which reach the Supreme Court involve difficult points of law which need to be clarified as in the instant case where Mr. Rattray stated the general law accurately while Mr. George dealt with the exception to that general law. This court had to decide whether this was a general case or an exceptional one and my ruling is that it falls within the exception. In this case there was a clash between two formidable women, Miss Stoeckert the manageress who understands how to manage her hotel efficiently, and Miss Reid the worker delegate who had great influence over her co-workers. Because I find that the hotel was in the right and the tribunal's decision correct, I would with some regret as this incident was unfortunate, dismiss the motion and refuse to issue the order for certiorari. The union must pay the agreed or taxed costs of Hotel Four Seasons.