IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. M 53 OF 1979

IN THE MATTER of an Application by REYNOLDS JAMAICA MINES LIMITED for Leave to Apply for Orders of Certiorari and Mandamus

A N D

IN THE MATTER of an Award dated the 21st day of August, 1979 made by the Industrial Disputes Tribunal under the Labour Relations and Industrial Disputes Act, 1975.

This is an application for Certiorari to remove into this Court and quash, an Award made by the Industrial Disputes Tribunal on the 21st August, 1979, and for Mandamus directing the Tribunal to re-hear and determine the matter according to law.

The background to the application is as follows.

On the 21st February, 1979 the Respondent Union (The Bustamante Industrial Trade Union) made a claim on the Applicant Company (Reynolds Jamaica Mines Limited) for Bargaining Rights in respect of a number of workers employed by the Applicant Company. In due course, the matter was referred to the Ministry of Labour for a ballot to be taken, but a dispute arose between the parties as to the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot. The Applicant Company contended that although it accepted in broad terms the claim of the Union for Bargaining Rights it was, nevertheless, objecting to the inclusion in that claim of certain personnel, who were regarded as "arms of management" and who, for that reason, ought not to be included in the list of persons eligible to vote.

The then /.......

The then Minister of Labour and Employment attempted to settle the dispute but failed to do so. Accordingly and pursuant to Section 5(3) of the Labour Relations and Industrial Disputes Act of 1975, he referred the dispute to the Tribunal for determination. In the proceedings before the Tribunal the Applicant was represented by Mr. J. Leo Rhynie and Mr. Peter Mais, Attorneys-at-Law; and the Respondent Union by the Rt. Hon. Mr. Hugh Shearer, President of the Union and one of Jamaica's leading Trade Unionists.

The terms of reference to the Tribunal were as follows:

> "To determine and settle the dispute between Reynolds Jamaica Mines Limited on the one hand, and the Bustamante Industrial Trade Union on the other hand, as respects the categories of workers of whom the ballot should be taken, or the persons who should be eligible to vote in the ballot to determine the Union's claim for Bargaining Rights."

Before the Tribunal the Applicant's contention was that there is a settled practice in industrial relations in Jamaica, under which manegerial, supervisory and confidential personnel were not eligible for trade union membership, on the ground that their functions as representatives of management would place them in a position of conflict if they were ever called upon to negotiate on behalf of management, with a trade union in which they also enjoyed membership. Accordingly, so the argument ran - such employees (arms of management ) have been traditionally excluded from trade union membership and do not fall within the purview of Section 4(1) of the Labour Relations and Industrial Disputes Act. It was also contended on behalf of the Applicant that, in any event, such categories of employees, all of whom came within the rubric "arms of management", were not workers in respect of whom collective bargaining could appropriately be carried on, if grouped with the other employees included in the Union's claim. In support of

this /.........

this contention, reliance was placed on Regulation 4 of the Labour Relations and Industrial Disputes Regulations 1975, issued under Section 27 of the Labour Relations and Industrial Disputes Act.

The Tribunal met on five separate occasions during which the issues were fully debated. Finally, the Award was made on the 21st August, 1979; and reads, in part, as follows:

> "After an exhaustive review of the briefs, submissions and the tendered exhibits of the parties, the Tribunal awards that the categories of workers of whom the ballot should be taken and/or the persons who should be eligible to vote in the ballot to determine the Union's claim for Bargaining Rights are set out hereunder:
>
> . . . . . . . . . . . ."

There then followed a long list of different categories of employees and the names of each employee falling within each category. The list included <u>all</u> the workers, the subject of the Union's claim, including those in respect of whom the Applicant had raised objection.

The matter now comes before us by way of Certiorari for an Order to quash the Award as being contrary to law and for Mandamus directing the Tribunal to re-hear and determine the matter according to law.

Although the hearing of this case has taken several days, I am quite satisfied, having considered the matter, that its resolution turns upon two basic and relatively simple propositions, and these are:

(1) Is the expression "worker", as defined in the Labour Relations and Industrial Disputes Act, wide enough to include manegerial, supervisory and confidential

personnel /........

personnel; that is to say workers who fall within the broad category referred to as - "arms of management"? and,

(2) Did the Tribunal fail to have regard to Regulation 4 in its determination of the issue as to the list of workers eligible to vote?

As regards the first, Counsel for the Applicant made a lenghty submission before us to the following effect:

(1) The practice of excluding supervisory and confidential personnel from trade union membership was well established in Jamaica prior to the introduction of the Labour Relations and Industrial Disputes Act, 1975.

(2) The Jamaican practice in this regard was identical to that existing in other jurisdictions in the Western Hemisphere. (Under this heading, our attention was invited to the "Textron" case, a decision of the Supreme Court of the United States of America in which supervisory personnel were held to have been properly excluded from the protection of parallel trade union legislation in the United States of America; we were also referred to parallel legislation from Canada and the Commonwealth Caribbean, in which the expressions "worker" or "employee" were defined so

as to /........

as to expressly exclude such personnel; we were also referred to a Report, dated 12th October, 1965, of a Board of Enquiry headed by a former Chief Justice of this Court, in respect of an industrial dispute at Jamaica Sugar Estates Limited at Duckenfield in the parish of St. Thomas. At page 118 of that Report, the following is stated:

> "(f) it is an accepted principle that management cannot function properly if its employees who are 'arms of management' are unionized. Those 'arms of management' are, in my opinion, the employees who are managerial, administrative, supervisory or confidential."

Reference was also made to the case of Banton et al v. Alcoa Minerals Limited (1971) 17 W.I.R. 275.)

(3) Finally, it was submitted that the practice of excluding "arms of management" personnel from union membership was so deeply entrenched in Jamaica, as to amount to a Rule of the Common Law, which rule had not been abrogated by the 1975 legislation.

It was therefore contended that the Tribunal, in deciding that such employees were "workers" who were eligible to vote in a claim for Bargaining Rights, had acted contrary to law and in excess of its jurisdiction.

I have examined the authorities, reports and legislation to which we were referred by Counsel. However, I am satisfied that of all of these, the Duckenfield Report is all that need

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detain us here, in any consideration of industrial relations practice in Jamaica prior to 1975.

I accept that the Report of the Duckenfield Board of Enquiry does lend support to the view canvassed on behalf of the Applicant that the Jamaican practice prior to 1975 was to exclude "arms of management" personnel from trade union membership, at any rate,within the Sugar Industry. Accordingly, the question remaining is whether any fundamental change has been made in that practice by the Labour Relations and Industrial Disputes Act of 1975; and the answer to that question must, as I indicated earlier, turn upon the further question of whether or not the expression "worker", as used in Section 4(1) of the Act, is wide enough to include employees who fall within the broad category - "arms of management".

Section 4(1) of the Act states as follows:

> "(1) Every worker shall, as between himself and his employer, have the right -
>
> (a) to be a member of such trade union as he may choose;
>
> (b) to take part at any appropriate time, in the activities of any trade union of which he is a member."

These words speak for themselves and, prima facie, would seem to confer upon every Jamaican "worker" the clear right to belong to a trade union of his choice and to take part in trade union activities. Unless, therefore, there is some indication elsewhere in the Statute that the expression "worker", where it occurs in the aforesaid subsection, excludes employees who may properly be classified as "arms of management", then the Applicant's contention on this aspect of the case must fail, since the subsection, in the absence of any such qualification, would not, in my judgment, exclude that category of worker.

Section 2 /.........

Section 2 of the Act is the definition section, and the expression "worker" is there defined in the following terms:

> "In this Act unless the context otherwise requires ——
>
> 'worker' means an individual who has entered into or works, or normally works, under a contract of employment."

In the same section the expression "contract of employment" is defined thus:

> " 'contract of employment' means a contract of service or of apprenticeship, whether it is expressed or implied, and (if it is expressed) whether it is oral or in writing."

In the light of these statutory definitions, the case for the Applicant seems in danger of collapsing of its own weight —— since, in my judgment, their cumulative effect is to establish that all workers (from the Managing Director down to and including the Messenger) who work with the Applicant under a contract of employment, is a "worker" within the meaning of Section 4(1). Counsel for the Applicant, recognising the danger, sought to argue that the definition of "worker", supra, was intended merely to distinguish between persons working under a contract of service, from those working under a contract <u>for</u> services. I can find no legal basis for this view, and, in any event, none was supplied; and I accordingly reject it. As I indicated earlier, we were referred to similar legislation from Canada, Antigua and Trinidad and Tobago, and it is, in my opinion, not without significance, that in every instance to which we were referred, the relevant legislature adopted a formula of words which expressly excluded from the definition of "worker" or "employee", persons of the category now in dispute. See, for example, the Canadian Legislation at page 131 of the Record; which reads as follows:

> " 'employee' means a person employed to do skilled or unskilled manual, clerical or technical work, <u>but does not include</u>
>
> (i) a manager or superintendent, or

any other /.......

any other person who, in the opinion of the Board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations, or

(ii) a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of a province and employed in that capacity."

It is therefore my opinion, that there is nothing in the Act or in the Regulations made thereunder, to support the view canvassed by Counsel for the Applicant to the effect that senior management or supervisory personnel are excluded from the Statute. I have come to the conclusion, and I so hold, that in Jamaica every worker, including those falling within the rubric "arms of management", is within the purview of Section 4(1) of the Labour Relations and Industrial Disputes Act of 1975; and, that each such person, in accordance with the provisions of that section, is entitled, as between himself and his employer, to have the right to be a member of such trade union as he may choose and to take part at any appropriate time in the activities of any such trade union of which he is a member.

For these reasons, the case for the Applicant on this point fails. I would, however, like to make one observation before proceeding further. We were told at the Bar that great inconvenience in the field of industrial relations in Jamaica would result if the foregoing was the proper view to be taken of the Statute. If these fears are well grounded and the ensuing results will be as predicted, then, that is a fact to be regretted, but, with the greatest respect, it is not a matter which, in my judgment, this or any other Court can properly take into account in interpreting

a Statute /......

a Statute; if the statutory language is clear and unambigious, then effect must be given to it. If Parliament intended management personnel to be exempted from the compulsory provisions of the Act, then language appropriate to such an intention should have been used. The fact that Parliament has not chosen to do so means, and can only mean, that it never intended any such category of worker to be excluded. If the fears expressed to this Court, do in fact bear fruit, then, it is Parliament and Parliament alone that can remedy the matter. The point really is impatient of debate.

I turn now to a consideration of the second proposition upon which the case for the Applicant rests, namely that in arriving at its award, the Tribunal failed to have regard to Regulation 4 of the Labour Relations and Industrial Disputes Regulations, 1975.

Where the appropriate Minister refers a dispute as to Bargaining Rights to a Tribunal, pursuant to Section 5(3) of the Act, the Tribunal is required by that subsection to have regard to the provisions of any Regulations for the time being existing under the Act in relation to the ballot. Regulation 4 is such a Regulation; and it reads as follows:

> "4. If there is a dispute as respects the category of workers of whom a ballot should be taken or the persons who should be eligible to vote, the matters which shall be taken into consideration for the purpose of settling the dispute include -
>
> (a) the community of interest of the workers in that category, and in particular, whether the duties and responsibilities and work place are identical for all of those workers;
>
> (b) the history of collective bargaining in relation to the workers in the employment of the employer concerned,

or in /.........

> or in relation to workers employed by other employers in the trade or business in which that employer is engaged;
>
> (c) that interchangeability of the workers in respect of whom the dispute arises;
>
> (d) the wishes of the workers in respect of whom the dispute arises."

As appears from its wording, this Regulation requires the Tribunal when settling disputes in connection with ballots, to take into consideration the several matters set out at paragraphs (a) to (d) supra. The whole burden of the Regulation is to ensure that workers in each category possess appropriate qualities for collective bargaining. The Applicant contends that by grouping "arms of management" personnel with others, not so classified, the Tribunal must be deemed to have failed to have regard to the Regulation, since any such grouping would clearly be in contravention thereof. A failure which, it was submitted, was fatal to the award because the provisions of section 5(3) in relation to the Regulations, are mandatory.

Section 5(3) reads as follows:

> "(3) Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot, the Minister shall refer the dispute to the Tribunal for determination. The Tribunal <u>shall</u>, in determining any dispute referred to it under this subsection, <u>have regard to the provisions of any regulations</u> made under this Act and for the time being in force in relation to ballots."

I accept that on the above wording reference by the Tribunal to the Regulations is mandatory. Since, therefore, I have already accepted that Regulation 4 relates to the taking of ballots, then it must follow, that if the Applicant's

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contention is correct the Award cannot stand, as there would then be a clear failure on the part of the Tribunal to comply with the subsection. The question therefore is —— did the Tribunal in making its Award fail to take into consideration the matters delineated in Regulation 4?

At the hearing before the Tribunal, evidence was given by a Mr. Jobson, who was described as the Manager of the Employee and Community Relations Department of the Applicant Company. That evidence sought to establish -

(1) that the employees, to whose inclusion in the claim the Applicant was objecting, were properly classifiable in terms of job content, duties and responsibilities as "arms of management" personnel;

(2) that there was no "community of interests" between such employees and the others, the subject of the Union's claim; and

(3) that their functions and duties were not "interchangeable" with the others, the subject of the Union's claim.

Documentary evidence was also placed before the Tribunal with a view to establishing that there was no history in the Bauxite and Alumina Industry in Jamaica of "arms of management" personnel ever having been included in any claim for Bargaining Rights or in a bargaining unit.

Basing himself of this evidence, Counsel for the Applicant made a number of submissions to the Tribunal

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as to the nature and relevance of that evidence against the background of the Regulation. See, for example, pages 229 to 230 of the Record. It is clear from the Transcript that Mr. Leo Rhynie was seeking to satisfy the Tribunal that any grouping of "arms of management" personnel, with others not so classified, would be in breach of the Regulation. Consequently, there can be no question but that the attention of the Tribunal had been drawn to the dangers of compiling a list of persons eligible to vote in the ballot which failed to take into account the requirements of the Regulation.

The Record also discloses that, in his final address to the Tribunal, Mr. Shearer also dealt, in some detail, with Regulation 4 as it applied to the evidence. Some of his response to Mr. Leo Rhynie's submissions are particularly illuminating; and it may be useful to refer thereto briefly.

For example, in dealing with Regulation 4(a), which is the paragraph which refers to the need for the Tribunal to take into consideration "community of interests" of the workers, the matter was dealt with thus, at pages 255 to 256 of the Record:

> "With respect to the Regulations . . . .
> . . . . . . . . . . . . . . . . . . . .
> I think that dealing with the Regulations, particularly 4(a), my friend attempted to make comparisons, contrary to the provisions of the Regulations, when he sought to establish the Company's case on a comparison of guards with stenographers or any other category because that is not what the Regulation says. The Regulation says you should take into consideration the community of interest of the workers <u>in that category</u>, not in the plant. 'In that category' - that is the language here. . . . . . . . . . . . .
> It is our submission that you are to look at the duties and responsibilities <u>in the category</u> of stenographers, <u>the category</u> of guards because your terms of reference are to determine and settle <u>the categories</u> of

workers /........

> workers who are eligible - are they doing the same duties? The answer is yes, in the categories . . . . . . . . . . . . . . . . . . Their duties are the same; the community of interest of such is there and the Tribunal should have no difficulty in so finding in respect to the categories, <u>not by comparing the general foreman with the chauffeur</u> that they have agreed to; or with the guards, the guard duty as a category among the guards is similar. They work at the same place, on the same property, in St. Ann." (My emphasis)

There is no difficulty whatever in following this. The Union's Representative in rebuttal of the view canvassed for the Applicant, was inviting the Tribunal to say that the requirement of "community of interests" was related to each particular category of workers; that is to say, the "community of interests" must exist among the workers in each category and not as between one category and another. This, if I may say so with respect, is a perfectly sound approach to the wording of the Regulation and one which accords not only with its wording but with logic and common sense. If, therefore, the Tribunal accepted the Respondent's approach to the Regulation rather than that of the Applicant, then I fail to see how that fact could of itself amount to a failure to have regard to the Regulation.

Similar considerations apply to Regulation 4(b) which relates to the history of collective bargaining within the particular industry. At page 256 of the Record, it was submitted, on behalf of the Union, that the absence of any history of collective bargaining within the Bauxite and Alumina Industry in Jamaica, was due to the "sufficient reason" that the present occasion was the first on which any union had ever claimed Bargaining Rights in respect of "arms of management" personnel. In so stating, Mr. Shearer was not attempting to give evidence but was simply reminding the Tribunal of a fact of which it was already

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seized. If, therefore, the Tribunal accepted his approach, again as seems likely, then I find it impossible to say that it failed to have regard to Regulation 4(b).

And so it goes on. Regulation 4(c) which touches upon "interchangeability", was dealt with at page 257, in the following manner:

> ". . . . . . . . . . . Interchangeability, the answer to that is yes. From time to time workers in one category have to act for workers in the same category. I use again a stenographer acting for a secretary, somebody must act for the general foreman when he goes off and it is not the superintendent who comes down to the foreman level."

Later, on the same page, Regulation 4(d) relating to "the wishes of the workers in respect of whom the dispute arises;" was dealt with thus:

> "I invite the Tribunal to take into account that there is no contract covering terms of employment for these employees, no contract. And, that if the Tribunal were to exclude even one person listed in List B or A you would be leaving such worker or workers at the mercy of the management in a situation where there is no contract or organization for their protection because they can't get into the hourly paid, that excludes . . . . I would like to submit to the Tribunal that membership in the Union would not affect the ability of the employees, . . . . . . . . membership in the Union will not affect productivity at the plant, membership in the Union will not affect efficiency at the plant . . . . . . . . . . . ."

It is beyond question that these points were being made in rebuttal of the contention of the Applicant as to the approach to be adopted by the Tribunal to the evidence and to the Regulations.

In seeking to vitiate the Award on the basis that the Tribunal failed to have regard to the requirements of

Regulation 4, /......

Regulation 4, the Applicant has, in my view, assumed a heavy burden. All the Regulation requires is for the Tribunal to take "into consideration" the several factors delineated therein. The Record shows that the point was fully argued before it and that two competing approaches were canvassed. The fact therefore that the Award is structured so as to advance one approach rather than the other cannot, in my view, amount to, or be described as, a failure to have regard to the Regulation.

I think it is important in dealing with this point to stress that this matter does not come before us by way of appeal, but as an application for Certiorari. In such circumstances, we are merely exercising a supervisory function in relation to the proceedings before the Tribunal. See, for example, the decision of this Court in Ex parte Jamaica Playboy Club Inc. Suit No. M 21 of 1976 dated 9th July, 1976. We are not, as I understand the law, entitled to substitute our judgment for that of the Tribunal. Our task is to examine the transcript of the proceedings (paying, of course, due regard to the fact that the Tribunal is constituted of laymen) but with a view to satisfying ourselves whether there has been any breach of natural justice, or whether the Tribunal has acted in excess of its jurisdiction or in any other way, contrary to law. Basing myself, therefore, on that approach, I have no hesitation in rejecting the Applicant's contention that the Tribunal failed to have regard to Regulation 4, contrary to and in breach of, section 5(3). It is, as I said, abundantly clear from the transcript as well as from the very wording of the Award itself, that all the relevant issues had been fully debated before the Tribunal; and that its conclusion thereon was not only arrived at after exhaustive analysis of the evidence and the

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various submissions, but was consistent with a proper appreciation of its duty to have regard to the provisions of the Regulation.

The case for the Applicant betrays a confusion between the preparation of a list of persons eligible to vote in a claim for Bargaining Rights, with the creation of a bargaining unit. Throughout the hearing before us, Counsel for the Applicant emphasized the lack of homogeneity between the "arms of management" personnel and the remainder of workers included in the Award. If the Tribunal had been determining a bargaining unit, then such a point might have been relevant, but the Tribunal was merely determining the list of persons eligible to participate in the ballot. Indeed, even if the workers objected to were removed from the Award, those remaining would still lack the ingredient of homogeneity, said to be so essential to the existence of a bargaining unit. To that extent, therefore, the view canvassed on behalf of the Applicant contains within it the seeds of its own destruction.

By way of conclusion therefore, having considered the two basic issues raised in this Application, I find as follows:

(1) There is no basis in law for the proposition that personnel falling within the rubric "arms of management" are excluded from the provisions of Section 4(1) of the Labour Relations and Industrial Disputes Act, 1975. Accordingly, there is no basis for the Applicant's contention that such workers should have been excluded from the Award.

(2) There is equally no basis in law for

contending/..........

contending that the Tribunal's
Award constitutes a breach of
Section 5(3) of the Act, in that
it betrays a failure to have
regard to Regulation 4.

In the circumstances, I can find no legal basis for rejecting the award, and I would therefore dismiss the application.

Dermot Marsh
Puisne Judge

VANDERPUMP J:

"To determine and settle the dispute between Reynolds Jamaica Mines on the one hand and the Bustamante Industrial Trade Union on the other hand as respects the categories of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot to determine the Union's claim for bargaining rights.

Thus read the terms of reference to this tribunal.

The Chairman recited them on the first day and asked those present if they accurately reflected the dispute before the tribunal. In Mr. Leo Rhynie's absence Mr. Mais for the Company and Mr. Shearer for the Union agreed.

On the second day of hearing Mr. Leo Rhynie in his submissions referred to a bargaining unit and by the fourth day so was Mr. Shearer!

Notwithstanding that those appearing before it seemed to be ad idem as to the composition of a bargaining unit in the main, the tribunal made an award in keeping with their terms of reference. "After an exhaustive review of the briefs" it said "the submissions and the tendered exhibits of evidence of the parties the tribunal awards that the categories of workers of whom the ballot should be taken and/or the persons who should be eligible to vote in the ballot to determine the Union's claim for bargaining rights are set out hereunder". There followed a list of some 29 categories with names included under each category.

Before us for some days Mr. Leo Rhynie has contended that what the tribunal was purporting to do was to select a bargaining unit and that all 29 categories comprised that bargaining unit which was patently wrong as the arms of management principle and the criteria in Regulation 4 had been obviously desregarded. As it was mandatory for the tribunal to have regard to them or either of them it was in error of law and so Certiorari and Mandamus should lie.

These submissions must be examined in detail, especially as

Mr. Leo Rhynie has spent so much time in their preparation and subsequent presentation before us in such an able manner.

Arms of Management

His sole local authority for the proposition that arms of management are not to be unionized is the Duckenfield Report (1965) which he has sought to elevate into a Common Law custom, a particular custom he says. Jowitt in his Dictionary of English Law defines Common Law as consisting of inter alia, at P.426 the Customary Law "to make any particular custom good" the learned editor says at page 556 "it must be reasonable and must have been peacably and continually observed from time immemorial, it is not necessary to prove that it has existed from time immemorial for proof of its existence for say twenty years is often sufficient evidence of its immemorial existence".

In summarising their findings the Board in the Duckenfield Report in 1965 referred to the division of labour in the Sugar Industry into

(i) Management and its extension called staff and (ii) the rank and file workers.

They went to say that it was an accepted principle that Management cannot function properly if its employees viz Managerial, Administrative, Supervisory and Confidential are unionized. What their authority for saying that it was an accepted principle was not stated neither was it stated whether its acceptance was confined to the Sugar Industry or was general. To my mind they were thinking solely about the Sugar Industry.

In their report they say (P.65 of main bundle) "We are of the opinion that members of staff who come within the terms, Managerial, Administrative, Supervisory and Confidential are all part of management and should not be unionized", no mention here of its being an accepted principle.

Assuming that it was general and applied to all industries, assuming that it was a particular custom so to do, there is no evidence for how long the custom was observed and by whom before or

after 1965. So that its existance for say 20 years up to the Act of 1975 has not been proved. It is interesting to read what the learned editor goes on to say at the same page 556. "The principal, if not the only custom having the force of law and affecting a particular class of persons is that known as the custom of merchants or the law merchant". Such a particular custom as urged by Mr. Leo Rhynie, if made out, would be exceptional, it seems.

I hold that the arms of management principle has not been proven to be a particular custom in this country. Authorities of foreign jurisdictions have but persuasive authority and do not affect the legal position here.

1975 Act

By definition in the 1975 Act a worker "unless the context otherwise requires ........... means an individual who has entered into or works or normally works under a contract of employment" which is wide enough to embrace any so called arms of management I would say. I can find nothing in the context of this Act against this interpretation (Re Evans 1891 1QB 143, 146) nor indeed in the Code or Regulations made thereunder. Section 4 (1)(a) gives every worker "the right to be a member of such trade union as he may choose". Assuming that the arms of management principle was part of the Common Law it has now been swept away by the combined effect of this definition and section 4 (1)(a) and I so hold. "It is a sound rule to construe a Statute in conformity with the common law rather than against it except where or so far as the statute is plainly intended to alter the course of the Common Law" as here, Byles J in R v Morris 1867 LR CCR 90, 95 cited with approval by the Court of Appeal in Eldon v. Hedley 1935 2KB 1, 24. In passing it is interesting to quote from the Prime Minister's budget speech on 27th May, 1975 referred to by Mr. Edwards who appeared as amicus representing the Attorney General.

"........... workers must become involved in the management decisions. This must operate at the shop floor level, at the farm

level, at the departmental level and at the full management level" in other words that workers as such should become arms of management or at least be involved intimately with them thus abolishing any real distinction between them inter sese.

The marginal note to section 5 reads "Ballots to determine bargaining rights". "While a marginal vote to a section cannot control the language used in the section, it is at least permissable to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind" Stephens v. Duckfield RDC 1962 2QB 373, 383; the general purpose here being the determination of bargaining rights by the use of ballots.

Section 5(3) is to this wise:

> "Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot, the Minister shall refer the dispute to the Tribunal for determination. The Tribunal shall, in determining any dispute referred to it under this subsection, have regard to the provisions of any regulations made under this Act and for the time being in force in relation to ballots".

This is the subsection under which this dispute was referred to the Tribunal.

It is significent that the phrase "as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot" as appears in this subsection appears not only in the terms of reference to the Tribunal but also in regulations 4 and 5 which are in the regulations referred to therein i.e. in this subsection 3 above.

It should not be hard to conclude that we are dealing with the compilation by the Tribunal of a voters list to determine bargaining rights which is the subject matter or general purpose of section 5.

Mr. Leo Rhynie seems wedded to the idea that this voters list must comprise a bargaining unit but surely nothing as sophisticated as a bargaining unit is needed to enable workers merely to vote for a Union to have bargaining rights on their behalf, as a bargaining unit

of necessity must entail a consideration of collective bargaining which is certainly not contemplated by regulation 5 which sets out what is to be done when there is no dispute, subsection (1) of which says:-

> "If there is no dispute as respects the category of workers of whom a ballot should be taken or the workers who should be eligible to vote in the ballot, .......... the Minister may require the employer to prepare and certify a list of those workers from his pay bills, and to furnish the Minister", ........ and that certified list mutatis mutandis "shall be the list of the worker who are eligible to vote in the ballot", Regulation 5(5). That is clear.

The fact that there is a dispute and that dispute has been referred to the Tribunal simply means that the compilation of the list is to be done by the Tribunal instead of the employer. In so doing the Tribunal is to have regard inter alia to the factors in regulation 4. Because these factors are the same as for a bargaining unit determination (which seems to lie in the gift of the Minister of Labour) does not of course mean that the Tribunal in so doing is determining a bargaining unit. The common sense of both regulations 4 and 5 would seem to be against this. I accordingly am constrained to hold and do hold that in this exercise it was not imcumbent on the Tribunal to have regard to the composition of a bargaining unit.

Regulation 4 reads:

> "If there is a dispute as respects the category of workers of whom a ballot should be taken or the persons who should be eligible to vote, the matters which be taken into consideration for the purpose of settling the dispute include -
>
> (a) the community of interest of the workers in that category, and in particular, whether the duties and responsibilities and work place are identical for all of those workers;
>
> (b) the history of collective bargaining in relation to the workers in the employment of the employer concerned, or in relation to workers employed by other employers in the trade or business in which that employer is engaged;
>
> (c) the interchangeability of the workers in respect of whom the dispute arises;
>
> (d) the wishes of the workers in respect of whom the dispute arises".

181

The underlinings are mine.

So that here where there is a dispute the Tribunal must perforce have regard to these criteria inter alia whilst perusing the categories on the list supplied by the Union when it claimed bargaining rights on their behalf. This dispute arose in respect of the employees in these categories who performed managerial and/or confidential functions either because they were arms of management and so not unionizable or failing that because inter alia they had no community of interest or interchangeability with the others and so were employees for whom collective bargaining could not appropriately be carried on.

All the Tribunal had to do was to go through the workers in a particular "category of workers" and see what their duties, responsibilities, qualifications, skills, salaries and conditions of employment were and then ascertain inter alia whether there was a Community of interest and an interchangeability between them and so with each different category. Those workers that did not qualify would be ommitted from that category on the list. The viva voce evidence of Mr. Jobson dealt with these duties, responsibilities etc.

There is overwhelming evidence that regulation 4 was brought to their attention and nothing to indicate that they did not have regard to it in their deliberations.

Bargaining Unit

A bargaining unit comes later on after the machinery of section 5 has been carried out and a particular Union recognized as having bargaining rights in relation to certain workers and is relevant vis-a-vis collective bargaining, the major aim of which is to arrive at terms and conditions acceptable to both employer and worker which are usually enshrined in collective agreements. Section 17 of the Code seems to say that in the event of a dispute in relation to workers who should comprise the bargaining unit recourse is to be had to regulation 4 factors as well as to the practice of having separate bargaining units for management and supervisory personnel

and excluding them from other bargaining units.

Section 17 (ii) of the Code is significent, it reads:

> "Where a dispute exists over any matter concerning the bargaining unit the parties should endeavour to settle the matter by direct negotiation. Failing agreement, the parties should utilize the conciliation services of the Ministry of Labour".

So it appears that the Tribunal would not come into the picture at all in re a bargaining unit dispute.

I agree that the Application be refused.

GEO. M. VANDERPUMP

J.

CAMPBELL J:

On or about the 21st day of February, 1979, the Bustamante Industrial Trade Union (hereinafter referred to as the B.I.T.U.) delivered to Reynolds Jamaica Mines Limited (hereinafter called the company) a claim in appropriate form, seeking recognition as the bargaining agent in respect to certain employees and categories of employees scheduled to the claim.

The company on or about the 9th day of March, 1979, communicated to the B.I.T.U. its willingness for the B.I.T.U. to establish through the process of ballot as prescribed under Section 5 of the Labour Relations and Industrial Disputes Act (hereafter called the Act) a claim to recognition in respect to the employees and categories of employees scheduled to the claim other than Foremen and higher classifications, Secretaries, Accountants, Data Processing Supervisor, Chemist, Engineers, Security Officers and Chief Nurse on the ground that the employees in these latter categories perform managerial and or confidential functions and are therefore employees for whom collective bargaining cannot appropriately be carried out. A representational rights dispute in consequence developed.

The conciliatory procedure involving the intervention by the Minister of Labour and Employment was invoked but failed to resolve this dispute.

The Minister accordingly referred the matter for determination and settlement to the Industrial Disputes Tribunal (hereafter called the Tribunal) under Section 5(3) of the Act.

The terms of reference was as hereunder:

"To determining and settle the dispute between Reynolds Jamaica Mines Limited on the one hand, and the Bustamante Industrial Trade Union on the other hand, as respects the categories of workers of whom the ballot should be taken, or the persons who should be eligible to vote in the ballot to determine the Union's claim for bargaining rights".

The Tribunal had before it a written submission in the form of a 'brief' by the company together with persuasive authorities and statutes in support of its legal stance. Equally the Tribunal had a

memorandum from the Union setting out its claim and its reasons for rejecting the company's claim for the exclusion of the categories of employees detailed by the company.

The pith of the company's case before the Tribunal was that certain categories of employees in respect to whom the Union sought bargaining rights comprised "arms of management" and were not unionisable in the sense that they were outside the compulsory recognition provisions of the Act. Secondly, in respect to the other categories of employees, even though they did not comprise "arms of management" and in consequence were admittedly unionisable, they constituted such disparate and or discordant interests that they were not appropriate to be constituted in one bargaining unit having regard to the criteria laid down in Regulation 4 of the Labour Relations and Industrial Disputes Regulations to which criteria the Tribunal is mandatorily required to have regard by virtue of Section 5(3) of the Act.

The Union's memorandum crystallised its position in the dispute and was to the effect that:-

(1) The membership of the union by the employees in the categories to which the company has taken objections, will in no way affect the performance, obligations or responsibilities of the said employees in the jobs in which they are engaged.

(2) The employees in the respective categories in dispute, are members of the B.I.T.U. and have joined the B.I.T.U. in exercise of a right enshrined in section (4) of the Labour Relations and Industrial Disputes Act 1975.

In effect the stand of the Union was that unionisation of the employees in the categories objected to by the company would not create any conflict of interest with their job responsibility and in any case, even if such a conflict could arise, and even if the employees in fact constituted "arms of management", they were unionisable in exercise of a right conferred on them under Section 4 of the Act. This two pronged approach of the Union was highlighted by Mr. Shearer in his final address which is summarised with excerpts from the said address as hereunder namely:-

(i) Section 4 of the Act confers a positive right on workers to join a Union, and Section 5 prescribes the procedure which these workers may invoke to secure compulsory recognition of their Union as their bargaining agent. The actual words of Mr. Shearer in this respect were:-

> "So sir, we submit that the Tribunal in determining the categories to be included as proposed by the Union should take into account the provisions of Section 4 of the law which gives the right to all workers to join the Union of their choice".

(ii) The submission on confidentiality made by the company to exclude certain categories of workers is untenable since the Union is not interested in any confidential business of any employer. To quote Mr. Shearer he said:-

> "We are not seeking to secure confidential information, we are not seeking to sit with management in their special chambers and board rooms".

(iii) The categories of workers objected to by the company as being arms of management are not, on the evidence, established to be arms of management because:-

(a) The Tribunal has not been given any details of duties to justify that these persons perform any duties of arms of management;

(b) The general foreman is on the evidence under an assistant superintendent in some cases and under a superintendent for whom no bargaining rights are claimed. The general foreman does not run the company, he is not a person in top management;

(c) Superintendents and assistant superintendents are not included in the proposed bargaining unit nor are senior secretaries; On this aspect of the matter I again quote from the recorded address of Mr. Shearer:-

> "The general foreman have joined the Union they have exercised their right under sub-section 4, and 4(d) of the Regulations which the law calls on you to take into account Mr. chairman and members, but separate and apart from that, the general foreman is under an assistant superintendent in some cases and under a superintendent for whom we have not claimed bargaining right. We are not talking about general foreman running the company, it is not run down there, it is run from where that gentleman comes, it is run from Richmond, Virginia. He has come down here to watch proceedings, that is where policies are determined as Mr. Jobson says. The phrase, general foreman is not the right one in the context of our situation it is more supervisory and I agree. But sir, the impression given you is that we are dealing with somebody in top managment.

"Sir, on list (b) there are eighteen superintendents and an assistant superintendent not included in the bargaining unit out of a total of One Hundred and Fifty Seven (157) people excluding trainees. There are senior secretaries who are not included in the unit before you. The submission of the company gives the impression that we are seeking to get into top management and to sit in the sanctum sanctorum, these categories have no access there sir".

(iv) The submission that the categories of workers cannot in any case constitute a bargaining unit having regard to the criteria laid down in Regulation 4 is untenable and is based on an erroneous interpretation of the Regulation in that all that it requires is that in any particular category of workers comprised in a bargaining unit there should be substantial community of interest of the workers. It does not require that there should be community of interest between workers in different categories of workers comprised in a bargaining unit.

The award of the Tribunal favoured the Union's claim in its totality. In so far as the award is germane to these proceedings it is as hereunder:-

"After an exhaustive review of the briefs, the submissions and the tendered exhibits of evidence of the parties, the Tribunal awards that the categories of workers of whom the ballot should be taken and/or the persons who should be eligible to vote in the ballot to determine the Union's claim for bargaining rights are set out hereunder".

The submission on behalf of the company before us in its application for an order of certiorari and mandamus are basically the same as were pressed before the Tribunal. They proceed on two alternative limbs.

The first limb encompasses ground 1, ground 2 paragraph (a) and ground 3 paragraphs (a) and (b) of the application and are stated as hereunder:-

Ground 1.

The Industrial Disputes Tribunal gave itself jurisdiction by a wrong decision on an issue preliminary or collateral to the main question which it had to decide and upon which the limit to its jurisdiction depended:

(a) That which the terms of reference required the Tribunal to determine was the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot to determine the Union's claim for bargaining rights. In other words the Tribunal was required to determine the bargaining unit.

(b) Section 2 of the Labour Relations and Industrial Disputes Act states:-

> "Bargaining unit means those workers or categories of workers of an employer in relation to whom collective bargaining could appropriately be carried on".

(c) The Tribunal's jurisdiction to determine who should constitute the bargaining unit was accordingly limited to those workers in relation to whom collective bargaining could appropriately be carried on.

(d) The limit to the Tribunal's jurisdiction was accordingly dependent on and determinable by the correct resolution of the preliminary or collateral issue as to which if any workers the subject of the Union's claim are workers in relation to whom collective bargaining could appropriately be carried on.

(e) The essence of the preliminary or collateral issue was contained in the company's submission that the Labour Relations and Industrial Disputes Act preperly construed, did not change the legal position which obtained prior to its enactment, namely, that employees who are classified as managerial, supervisory and/or confidential ("arms of management") are not employees in relation to whom collective bargaining could appropriately be carried on and are accordingly precluded from inclusion in any bargaining unit.

(f) Included in the list of employees for whom the Union has claimed bargaining rights, in the instant case, are employees who are classifiable as managerial supervisory and/or confidential ("arms of management") and as such are not persons in relation to whom collective bargaining could appropriately be carried on and are accordingly precluded from inclusion in any bargaining unit.

The Tribunal, in the instant case, had jurisdiction only in relation to the employees who were not so classifiable. It had no jurisdiction in relation to those employees for whom the Union claimed bargaining rights who are properly classifiable as managerial, supervisory and/or confidential.

(g) By erroneously deciding this collateral issue upon which the limit of its jurisdiction was dependent the Industrial Disputes Tribunal gave itself a more extensive jurisdiction than Parliament intended. Alternatively, the Industrial Disputes Tribunal included among the employees of whom the ballot should be taken or the persons who should be eligible to vote employees who were managerial, supervisory, and/or confidential and to that extent acted without or in excess of jurisdiction.

Ground 2.

The Industrial Dsiputes Tribunal failed to hear and determine the dispute "according to law" by basing its decision on

a wrong legal principle and/or on irrelevant grounds and/or through failing to have regard to relevant considerations:-

(a) By including among the persons of whom the ballot should be taken or the person who should be able to vote in the ballot, employees who are classifiable as managerial, supervisory and/or confidential, the Tribunal disregarded or failed to apply the legal principle that employees so classifiable are not workers in relation to whom collective bargaining could appropriately be carried on and are accordingly ineligible for inclusion in any bargaining unit.

Ground 3.

The principle is well established that no court or Tribunal has any jurisdiction to make an error of law on which the decision of the case depends and if it makes such an error it goes outside its jurisdiction. The Tribunal committed errors of law on which the decision of the case depended and by so doing acted without or in excess of jurisdiction.

(a) By including among the workers of whom the ballot should be taken employees who were managerial, supervisory and/or confidential ("arms of management") the Tribunal committed an error of law by regarding such persons as being workers in relation to whom collective bargaining could appropriately be carried on.

(b) The Tribunal erred as a matter of law in making the said award having regard to the proper interpretation of "bargaining unit" as defined by Section 2 of the Labour Relations and Industrial Disputes Act.

Shorn of all embellishments and elegant turn of phraseology, what the company is saying is that the Tribunal has no jurisdiction to settle and determine any dispute in relation to employees who constitute "arms of management" because they are not workers within the definition of "workers" in Section 2 of the Act. Alternatively even if they could be considered as "workers" they are, by reference to their functional relationship to management inappropriate for collective bargaining and consequently cannot be constituted in any bargaining unit. The Tribunal is statutorily required to determine the bargaining unit in any reference to it under Section 5(3), as such it has jurisdiction only over persons who can be constituted into a bargaining unit as defined in the Act. The Tribunal accordingly

was in error because it exercised a jurisdiction over arms of management which it did not have. It fell into error due to:-

(a) either a failure to construe the Act at all thereby disabling itself from recognising in limine that "arms of management" should be excluded from the determination and settlement of its reference; or

(b) by construing the Act and putting a wrong construction thereon, thereby concluding though not expressly that arms of management could be constituted into a bargaining unit.

I have been greatly impressed by the carefully developed and reasoned arguments of Mr. Leo Rhynie, equally am I impressed by the extent of his research on the matter which has been wide ranging. The words of Mr. Justice Douglas in his dissenting judgment in Packard Motor Company v. Labor Board 330 U.S. 485, 15 L.R.R.M. 2387 (1947) quoted in N.L.R.B. v. Textron Incorporated 85 L.R.R.M. (1957) keeps tolling in my ear as to the phenomenon of "management and labour becoming more of a solid phalanx than separate factions in warring camps" if the definition of worker is construed expansively to include managerial, supervisory and/or confidential employees who are commonly described as "arms of management". Yet I must forever keep in the forefront of my thinking the hallowed and accepted rule of construction of statutes and documents namely that if the language is clear and explicit a court must give effect to it. The word "worker" is defined as meaning "an individual who has entered into or works or normally works under a contract of employment. There is in my view no ambiguity whatsoever in this definition. On a literal interpretation it means any persons who does work for an employer under a contract of service express or implied oral or in writing. This is made manifest when regard is had to the definition of "contract of employment" and "employer" respectively. Whatever may have been the accepted and established industrial practice prior to the enactment of the Act in regard to the ineligibility of "arms of management" to be unionised, whatever may have been the rationale or philosophy on which this practice was buttressed, in my view such

practice cannot now be asserted and or vindictated by an employer as having any recognition in law. This is so because of the clear words of Section 4 of the Act which confers on all "workers" defined as individuals who work for an employer, the right to join a Trade Union and to secure recognition of their Union by invoking the provision of Section 5 of the Act in the event of a dispute arising between them and their employers consequent on the latter failing and or neglecting to recognise their right to unionisation. Any pre-existing practice recognising the ineligibility of arms of management to be unionised must now be regarded as subsisting only on expendiency in any particular situation but not grounded as a legal right enforceable by an employer. No doubt this interpretation of the word "worker" to comprehend all persons in the employment of an employer can well lead to an impasse at least in the case of a corporation. If all workers in the top management level of a corporation exercised their right to be unionised, the corporation could well find itself bereft of any impartial and/or objective personnel to negotiate on its behalf with its unionised workers. Such a situation could well have a disturbing and disquieting effect on industrial peace and could well stultify the objective of the act which ostensibly is to promote the orderly and peaceful settlement of industrial disputes.

Whatever may be the dire consequence, the definition of "worker" being clear, unequivocal and unambiguous, I must interpret it as covering persons who prior to the enactment of the Act would or could be described as "arms of managment". To this extent and for this reason, any alleged failure and or neglect by the Tribunal to consider the preliminary issue whether "arms of management" were non-unionisable and outside the compulsory recognition provisions of the Act and were thus excluded from its jurisdiction does not vitiate the award if otherwise valid.

The alternative submission of Mr. Leo Rhynie relative to these same grounds of the company's application, is that if the Tribunal did construe the Act, it wrongly concluded, notwithstanding

the definition of "bargaining unit" that arms of management could be constituted in a bargaining unit. His submission is that the Tribunal did constitute them into a bargaining unit even though they are appropriate for collective bargaining. In so far as this submission is based on the concept of "arms of management" not being workers and therefore excluded from the persons contemplated in the definition of bargaining unit, I have already construed the word "worker" to include such persons. To the extent that the submission is premised on a particular interpretation of what the Tribunal was called upon by its reference to determine namely that it was to determine the bargaining unit in the determination and settlement of the dispute, the submission is not well founded because Section 5(3) under which the reference was made, does not require the Tribunal to do any such thing even though both the company and the Union wrongly submitted to the Tribunal that it was required to determine the bargaining unit. As it is not manifest that the Tribunal did hearken to such solicitations and since it did not depart in its award from its terms of reference, its award cannot be faulted on this alternative basis namely that it failed to consider the inappropriateness of arms of management to be constituted into a bargaining unit.

For the reasons given, the grounds of application mentioned above fail as being without substance.

Separate and distinct from the reasons already given, it appears to me that the said grounds would in any case fail because on a fair view of the record of proceedings of the Tribunal, a reasonable inference can be drawn that the Tribunal approached the matter from the stand-point of the concession impliedly made by the Union, rightly or wrongly, that top management was not unionisable and that it was not seeking to unionise such top management. This concession fairly arises from excerpts of the final address of Mr. Shearer previously mentioned. In consequence of this concession the Tribunal may well be taken to have decided the preliminary issue as to the eligibility of arms of management to be

unionised in favour of the company and having done so, gone on to find as a fact that the evidence before it was insufficient to justify the claim of the company that the persons in respect to whom it registered its objection constituted arms of management. On this view of the matter we would not be justified, even if we were exercising appellate jurisdiction to set aside the award, unless we could say affirmatively, which we cannot, that it was not open to the Tribunal to find that the evidence was insufficient to establish the company's claim. There was evidence that the general foreman worked under an assistant superintendent or under superintendents in relation to whom no claim for bargaining rights was being sought. Also the documents before the Tribunal showed that there were senior secretaries who were not included in the claim. We cannot substitute our view that the evidence should not have been accepted as insufficient to support the company's claim.

The second alternative limb of the submission made on behalf of the company before us relates to the scope of the alleged bargaining unit and the relevance thereto of Regulation 4 of the Labour Relations and Industrial Disputes Regulation (hereinafter referred to as the Regulation).

The grounds of the application in relation to this aspect of the matter is that Section 5(3) of the Act mandatorily requires and/obliges the Tribunal to apply the criteria laid down in Regulation 4 in the determination and settlement of any dispute referred to it. The Tribunal either failed to have due regard to the application of the said criteria or applied the said criteria in an incorrect manner by considering irrelevant factors, asking the wrong questions and or by applying the wrong legal test, thereby arriving at an award which is palpably inconsistent with a proper application of the prescription contained in the said Regulation.

Section 5(1) and (3) of the Act and Regulation 4 of the Regulations are as hereunder:-

Section 5(1) if there is any doubt or dispute -

(a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which trade union to have bargaining rights in relation to them; or

(b) ..............................................
The Minister may cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter

(3) Where the Minister decides to cause a ballot to be taken and there is a dispute, which he has failed to settle, as respects the category of workers of whom the ballot should be taken or the persons who should be eligible to vote in the ballot, the Minister shall refer the dispute to the Tribunal for determination. The Tribunal shall, in determining any dispute referred to it under this sub-section, have regard to the provisions of any regulations made under this Act for the time being in force in relation to ballot.

Regulation 4.

If there is a dispute as respects the category of workers of whom a ballot should be taken or the persons who should be eligible to vote. The matters which shall be taken into consideration for the purpose of settling the dispute include -

(a) The community of interest of the workers in that category and in particular, whether the duties and responsibilities and the work place are indentical for all of those workers;

(b) The history of collective bargaining in relation to the workers in the employment of the employer concerned or in relation to workers employed by other employers in the trade or business in which that employer is engaged;

(c) The interchangeability of the workers in respect of whom the dispute arises;

(d) The wishes of the workers in respect of whom the dispute arises.

Central to the submission of Mr. Leo Rhynie is that what the Tribunal was required to determine was the bargaining unit. The expression "category of workers" appearing in Regulation 4, he says, is synonymous with "bargaining unit". It follows therefore that the workers comprised in this bargaining unit must be a homogeneous group. Regulation 4 is mandatorily required to be taken into consideration by the Tribunal to ensure this homogeneity. The inclusion in the award of such heterogeneous groups and persons like general foreman, guards, chief nurse and engineers devoid of any community of interest, and

exhibiting such total absence of the criteria of identity of duties and responsibilities is explicable only on the basis that Regulation 4 was never considered and the Tribunal therefore failed to determine the dispute according to law.

On the other hand Mr. Phipps for the Union contended that Mr. Leo Rhynie's submission is erroneous and his error derives from a failure to distinguish between "bargaining rights" and "bargaining unit". He contended that all that the Tribunal was statutorily authorised to do in the case of a dispute referred to it under Section 5(3) was to determine and settle who of the total work force are to be regarded as comprising the particular category of the workers in respect to whom a claim for bargaining rights is made by the Union. It is concerned with a procedural step leading to the acquisition of bargaining rights by the Union. Regulation 4 he contends would be relevant to the determination of a bargaining unit but totally irrelevant to the settling of the constituents of the said category of workers.

In any case, he submits that all that the Tribunal was required to do was to give due consideration to the criteria laid down in the Regulation and that since on the face of the award the Tribunal expressly mentions that it had exhaustively reviewed the submissions made to it (which submissions included the applicability of Regulation 4 and the manner in which it was to be interpreted) it is not open to us to upset the award on the ground that we perhaps would not have arrived at the same award had we applied Regulation 4 to the factual situation.

In my view Mr. Phipps is right in his contention that Section 5(3) is dealing with bargaining rights and not with bargaining unit. This follows necessarily from a consideration of Section 5(1). What the section says simply is that if there is a doubt or dispute whether all the workers of an employer, or a particular category of those workers want a certain trade union to have bargaining rights in relation to them a ballot should be taken. Where the doubt or

dispute relates to all the various categories of the workers in the employment of an employer it is a simple matter to adopt the democratic expedient of balloting. Where however it is not all the categories of workers who are involved but only a particular category or class of such worker, an initial but vitally necessary issue which has to be resolved before a ballot can be taken is that of ascertaining who of the workers should be considered as reasonably falling into the particular category or class in respect to which the claim by the Trade Union is made. If the Minister by himself cannot resolve this initial issue on which the employer and the Trade Union may have locked horns, the matter is referred to the Tribunal as a dispute under Section 5(3). Mr. Phipps in my view is however wrong in his contention that Regulation 4 would be irrelevant and inapplicable in the determination by the Tribunal of this dispute. In fact the said Regulation expressly states that it is to be brought into play whenever there is a dispute as to who should be taken as comprised in the particular category of workers referred to in Section 5(1). It is the dispute in relation to this selfsame category of workers which is referred to the Tribunal for determination and settlement as to its constituents, th t is to say its scope or parameter.

Regulation 4 lays down certain criteria to be considered as aids to the Tribunal in determining who should be eligible to ballot on the basis of being comprised in the particular category of workers in respect to which a Trade Union has made a claim. It follows necessarily that where the Trade Union has made a claim for bargaining rights in relation to two or more categories of workers, Regulation 4 has to be considered not with a view of securing a community of interest among all the workers comprised in all the categories - but rather to ensure that each category fairly reflects homogeneity.

In my view, when each of the categories of workers in relation to which a claim for bargaining rights is made, has been properly adjusted by having applied thereto Regulation 4, the

adjusted categories of these workers are submitted to the Minister and the statutory duty of the Tribunal is discharged. Regulation 5 provides that thereafter the Minister may require the employer to certify from its pay bills a list of those workers comprised in the adjusted category or categories. When this is prepared there may still be a dispute between the employer and the Trade Union based on objection being taken to the inclusion or exclusion of any name on or from the list submitted by the employer. This dispute is settled by the Minister and the certified list of workers as altered or amended under Regulation 5(3) and (4) becomes the list of voters on the basis of which the ballot will take place. Bargaining rights is obtained in favour of all the workers on the voters list if a majority of the said workers vote in favour of the Union. It is in my view theoretically possible for the Tribunal to mould a bargaining unit in discharging its duty in relation to the mechanics of a Trade Union securing bargaining rights. It is however a different matter to state that it is statutorily mandated to concern itself with the formation of any bargaining unit. As Mr. Edwards Acting Solicitor General on behalf of the Tribunal has rightly pointed out, neither in the Act nor in the Regulations are there provided any criteria for the formation of bargaining units as such. The voters list in a claim for bargaining rights in relation to two or more categories of workers may well comprise categories of workers who cannot be constituted into a single bargaining unit. Such workers certainly could not be denied their right to vote merely because they are disparate souls provided that they come within the rubric of one or other of the categories of workers in respect to which a claim for bargaining rights is made.

If Mr. Leo Rhynie's contention is correct namely that the expression "category of workers" in Regulation 4 does not mean the same thing as "the particular category of the workers" mentioned in Section 5(1), but rather means the "bargaining unit" as defined in the Act, and that it is the "bargaining unit" that the Tribunal has

to determine antecedently and as a condition precedent to the Union securing bargaining rights, it would logically follow that bargaining rights are exclusively related to a bargaining unit. This would however lead to an absurdity in the interpretation of the words of Section 5(5) of the Act which when interpolated with Mr. Leo Rhynie's submission would reads as follows:-

> "If the result of the ballot shows that the majority of the workers who are eligible to vote (i.e. of the bargaining unit) indicated that they wish a particular Trade Union to have bargaining rights in relation to them, their employer shall so soon as he receives the certificate referred to in sub-section (4) recognise that Trade Union as having bargaining rights in relation to the workers who were eligible to vote (i.e. the bargaining unit) and in relation to my bargaining unit in which they may for the time being be included". For the said Section 5(5) to be intelligibly interpreted the words "and in relation to any bargaining unit in which they may for the time being be included" would have to be construed as meaning "the bargaining unit so constituted by the Tribunal" since the workers would have already been effectively constituted in a bargaining unit so soon as the Tribunal has settled the dispute referred to it.

Again if Mr. Leo Rhynie's submission is correct namely that the "category of workers" referred to in Regulation 4 is no more and no less than the bargaining unit, it is difficult to understand why the definition of "bargaining unit" should expressly mention "categories of workers" and not "category of workers".

Under Section 7 of the U.S.A. Labor Management Relations Act, 1947, as amended by Public Laws 86-257, 1959 and 93-360, 1974, employees are given the right "to self-organisation, to form, join or assist labor organisations, to bargain collectively through representatives of their own choosing"..............

Under Section 8(a)(5) of the said Act it is provided that it shall be an unfair labor practice for an employer - "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 9(a) of the Act reads as follows:-

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such

"purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or sub-division thereof".

It is thus clear that the rights statutorily conferred on an employee under the U.S.A. legislation is to have the labor organisation of his choice represent him for purposes of collective bargaining provided, he comes within an appropriate bargaining unit and that a majority of that bargaining unit desires that labor organisation to represent them. It is equally clear that the power and authority to determine the appropriateness of a bargaining unit is expressly conferred on the Labor Relations Board constituted under the Act.

Under our Act, there is no statutory power or authority conferred on the Tribunal to determine a bargaining unit or the appropriateness of one or more categories of workers being c constituted into a bargaining unit. Its power and authority under Section 5(3) is limited to determining by reference to the application of the criteria laid down in Regulation 4 of the Regulations who are the workers who come fairly within each of the categories in respect to whom a claim for bargaining rights is made by a Trade Union.

The fact that the award may show that the categories of workers listed in respect to whom the ballot should be taken do not reflect an across the board homogeneity is not evidence on the face of the record or at all that the Tribunal failed to have regard to the criteria laid down in Regulation 4 in settling the dispute.

For these reasons I am of the opinion that the grounds of the application of the company relative to the apparent disregard