

S655 SMITH, M.C. An effective right to strike?

MARTIN C. SMITH

**AN EFFECTIVE RIGHT TO STRIKE?
HISTORICAL AND INTERNATIONAL LAW
PERSPECTIVES ON THE DEVELOPMENT OF
THE RIGHT TO STRIKE IN NEW ZEALAND**

**LLB(HONS) RESEARCH PAPER
LAWS 532 – EMPLOYMENT LAW**

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON**

2002



Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



LIBRARY

TABLE OF CONTENTS

I	INTRODUCTION.....	1
II	BASIS OF THE RIGHT TO STRIKE IN PRINCIPLE.....	2
A	Freedom of Association.....	2
B	Three-Dimensional Freedom of Association?.....	7
III	BASIS OF THE RIGHT TO STRIKE IN NEW ZEALAND LAW	8
A	The Historical Position in the United Kingdom.....	9
	1 Historical General Statutes.....	9
	2 The Combination Acts.....	10
	3 Conspiracy.....	14
	4 Reform of Combination and Conspiracy.....	17
	5 Master and Servant.....	21
	6 Legislative reform and the development of the modern common law.....	23
B	The New Zealand Position.....	27
	1 1894-1973.....	27
	2 1973-2000.....	28
	3 Employment Relations Act 2000.....	30
IV	BASIS OF THE RIGHT TO STRIKE IN INTERNATIONAL LAW.....	32
A	The International Labour Organisation.....	33
	1 General.....	33
	2 Committee on Freedom of Association.....	34
	3 Committee of Experts.....	38
B	Freedom of Association and the Right to Strike.....	39
	1 Committee on Freedom of Association.....	39
	2 Committee of Experts.....	42
C	Criticism of the ILO Approach.....	43
V	AN EFFECTIVE RIGHT TO STRIKE?.....	45
A	What is an Effective Right to Strike?.....	45
	1 Occupational vs socio-economic interests.....	45
	2 Which interests may unions pursue?.....	46
	3 To which interests does the right to strike extend?.....	47

4	An alternative approach.....	49
B	Does New Zealand Have an Effective Right to Strike?.....	51
VI	CONCLUSION.....	51
	BIBLIOGRAPHY.....	53

ABSTRACT

This Paper addresses the historical development of the right to strike in New Zealand law and proposes a direction in which the right might properly develop in the future. The thesis of the paper is that, in New Zealand, an effective right to strike needs to safeguard workers' right to strike in support of their occupational interests, but not their social or economic interests. In practice, this right to strike would extend to strikes precipitated by issues arising out of workers' own employment and a limited right to strike in sympathy with other workers. Although this limitation is a departure from the ILO's position, upon an analysis of the right to strike from first principles, it is justified. In a functioning democracy, strike action taken on a broader basis is an abuse of the right to strike.

Word Length

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 13,983 words.

I INTRODUCTION

Recognition of the right to strike is part of New Zealand's obligations as a member of the International Labour Organisation ("ILO"), under the ILO's Declaration on Fundamental Principles and Rights at Work.¹ According to the ILO, this means that workers must be free to strike in support of their occupational, social and economic interests, and to strike in sympathy with other workers striking in support of these interests. New Zealand law currently allows only strikes in support of a certain class of workers' occupational interests.

This paper begins by analysing the right to strike from first principles, as it derives from the right to freedom of association. The paper explores the right to freedom of association, identifying the purpose of the right so as to explain its proper extent. From this exploration, the legitimacy of the right to strike is identified and developed.

However, it is impossible to understand the extent of the modern right to strike without understanding the historical position from which the right developed over the last 150 years. For this reason, Part III of this paper explores the development of the common law relating to strikes in the United Kingdom, from the era of combination and conspiracy through to the discovery by the House of Lords of the modern economic torts. This background should be borne in mind when considering the modern New Zealand position.

Part IV sets out the structure of the ILO and its specialist bodies in the area of freedom of association and explores the ILO's position on the right to strike in detail. Both the substance of the ILO's position and the rationale behind it are elucidated. Finally, in Part V, this paper argues that, notwithstanding that New Zealand does not conform to ILO guidelines, New Zealand might still have an effective right to strike.

¹ Declaration on Fundamental Principles and Rights at Work (ILO, Geneva, 1998) art 2.

This paper presents three themes: first, an explanation of the historical development of the right to strike and, in particular, to highlight how much the right has developed in the last 150 years; second, an encouragement of the realisation that the right to strike still has a long way to develop before the proper balance is found; and third, a suggestion of a direction in which the law might develop, so as to strike this difficult balance.

II BASIS OF THE RIGHT TO STRIKE IN PRINCIPLE

The right to strike is not an independent right, the existence of which can be justified in and of itself. Rather, the right to strike is inextricably linked with an effective right of freedom of association. In order to find a principled basis for the right to strike it is necessary to identify the principled basis for the right of freedom of association and then to analyse whether the right to strike can also be justified on this basis. The theoretical concepts discussed in this Part are also relevant in considering the proper extent of the right to strike, a question returned to later in this paper.²

A Freedom of Association

In the abstract, the concept of freedom of association is a fundamental human right guaranteed by both the International Covenant on Civil and Political Rights³ and the International Covenant on Economic, Social and Cultural Rights.⁴ In this context, its application is undoubted. However, separate from this general understanding, freedom of association has a distinct meaning when applied in the specialist field of industrial relations.

² See Part V, below.

³ International Covenant on Civil and Political Rights (16 December 1966) <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (last accessed 29 September 2002), art 22.

⁴ International Covenant on Economic, Social and Cultural Rights (16 December 1966) <http://www.unhchr.ch/html/menu3/b/a_ceschr.htm> (last accessed 29 September 2002), art 8.

From 1945 until the late 1980s, the application of this specialist concept of freedom of association was also undoubted in developed, Western countries. However, with the rise of the New Right, which espouses individualist ideals inspired by the Chicago School of Economics,⁵ the justification of this specialist application of freedom of association has become necessary.

The defining conflict that has always existed in this area of law is between the unitarist and the pluralist perspectives. The pluralist perspective is that employment is a relationship between the employer, supplying the capital resources, and the workers, supplying the human resources. Both parties to the relationship have a legitimate interest in seeing that their resources are utilised in a productive way within the venture. But because the parties have different underlying goals in entering into the venture – the employer to profit, the employee to earn – these legitimate interests will fundamentally differ.⁶

Pluralism recognises that although these interests may, at times, differ, this does not undermine the basis of the relationship as a whole. Pluralism recognises that it is necessary to a healthy employment relationship that workers have sufficient bargaining power to express their legitimate interests. On this basis, pluralism recognises the necessity of the specialist right of freedom of association.

By contrast, the traditional unitarist perspective evolved out of the relationship envisaged in the Master and Servant Acts⁷ whereby a domestic servant essentially became subject to the complete control of the master. This level of control was largely imported into the contract of employment, as it evolved to apply to factory workers, through the implied terms of the employment contract. Thus the traditional unitarist

⁵ See for example Richard Epstein *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, Boston, 1992).

⁶ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977) 48-52.

perspective focuses upon the right of employers to command their workers and to manage their capital as they see fit, while regarding the interests of workers as beginning and ending with the provision of labour under the contract of service. Phrased in this way, as denying workers' legitimate interests in the employment relationship, unitarism fell from favour with the rise of labour as a political force. However, with the intellectual support of the New Right, a new form of unitarism has emerged.⁸

New Right unitarism is based upon two pillars – first, principles of human resource management and second, the sanctity of the free market economy. The first pillar emphasises the convergence of interest between the employer and workers in the enterprise as a whole, much as in pluralism. However, the point of divergence is that this approach views management as satisfactorily representing the interests of both employer and employee. Therefore, collective organisation by the workers is seen as an unnecessary impediment to the management of the business.

The second pillar emphasises the value of a flexible labour market in reducing compliance costs for businesses and therefore facilitating the development of an internationally competitive economy. In this context, it is claimed that the presence of combinations of workers distorts the natural operation of the market, thereby causing inefficiencies and reducing competitiveness.⁹ International competitiveness in an economic model such as this is seen as the final measurement of the desirability of a particular system.

Much as classical unitarism appealed to the preoccupation of English law with the protection of property and the right of property owners to manage and dispose of it how they wished, New Right

⁷ See Part III(A)(5), below.

⁸ Robin Mackay (ed) *Employment Law Guide* (5th ed, Butterworths, Wellington, 2001) 17.

⁹ This analysis of New Right unitarism is drawn from Mackay, above, 17-18.

unitarism appeals to the current preoccupation with the market economy and eliminating regulatory barriers to its operation. Particularly in the general climate of deregulation prevalent in New Zealand in the late 1980s and the 1990s, the new unitarist approach appeared to be a common sense application of general economic principles to the specific case of employment.

Under both pluralism and New Right unitarism, employers and workers are seen as having legitimate interests in the enterprise. However, the two philosophies differ fundamentally in their approach to the proper representation of these interests.

In areas where the interests of the two groups converge, there is much to be said for adopting a unitary approach and thereby maximising economic efficiency and competitiveness. Where there is no genuine divergence in interests, the forced differentiation of the interests of the employer and of the workers caused by the presence of unions may be seen to be artificial and unnecessary. In these situations, where the only differences between the approaches are in terms of economic efficiency, unitarism may, in theory, be preferable. However, the number of situations in which the interests of employer and workers truly converge, is limited.

Particularly in the United States, efforts have been made to give truth to the New Right analysis, primarily by co-opting workers into the business.¹⁰ This process involves granting employees shares in the business so that in a legal sense the enterprise can be characterised as a joint venture between employer and workers – or more accurately, between shareholders. However, the reality of the situation remains that employers and workers retain divergent interests in the venture.

¹⁰ John Cline "The Worker Cooperative: A Vehicle for Economic Development" <<http://www.geonewsletter.org/cline1.htm>> (last accessed 30 September 2002).

This is only the beginning of the analysis - it is in the areas in which the legitimate interests of the employer and the workers diverge that the inherent inequality of the individual worker as against the employer is most keenly felt. It is in these situations that employers will naturally seek to subordinate workers' interests to their own. Pluralism recognises that these situations exist and that it is necessary that workers have an organisational framework through which they are able to express their interests. Thus, freedom of association is seen as a necessary means of ensuring that the interests of the workers, particularly where these interests diverge from those of the employer, receive full expression.

Despite the claims of the New Right that management can sufficiently balance the interests of the employer and the workers, in practice, such a balance seems unlikely to be achieved. As commentators point out, management has historically had more in common with the employer than with workers; in many cases, the two are coextensive.¹¹ While the ideal may be that management would act as a neutral party balancing the interest of the employer in their economic capital with the interest of the workers in their ongoing employment, in practice, given the historical context, this can rarely be so. Management is seldom neutral as between employers and workers and in cases where there is a genuine divergence in the legitimate interests of the two groups, this lack of neutrality will tend to disserve employees.

Therefore, once it is accepted that employer and worker will always have divergent interests, it becomes clear that pluralism is the only acceptable basis for the employment relationship. It is only through adopting a pluralist framework that the interests of the individual worker will not be outweighed and made insignificant by the weighting given to the employer's right to manage their capital.

¹¹ See Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan & T Cadell, London, 1776) for an analysis of the disparity in interest from first principles.

B *Three-Dimensional Freedom of Association?*

The justification of the recognition of the right to freedom of association does not automatically justify the recognition of the right to strike. In order to do this, it must be established that the right to strike is necessary to achieve the goals of freedom of association. The analysis carried out by Kahn-Freund justifies the right to strike by stating that:¹²

if the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by a corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack "credibility." There can be no equilibrium in industrial relations without a freedom to strike.

The purpose of freedom of association is to counterbalance the inherent inequality of the individual worker when confronted with the employer's capital and right to hire and fire. What is necessary to achieve this purpose? Freedom to form collective organisations is a necessity but, without more, does not effectively address the power imbalance between employer and worker. In order to act as a counterbalance to the power of the employer, collective organisations of workers must be given some power to act themselves.

On this basis, to the right to form collective organisations, the heart of the right to freedom of association, is added the right to bargain collectively. The addition of the right to bargain collectively gives power to collective organisations, as it allows them to act at the primary conflict point between the interests of employers and the interests of workers - bargaining for employment agreements. However, the right to bargain collectively, although necessary, is not sufficient to guarantee that the right of the employee to equality is not infringed. There must be a

¹² Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977) 225-6.

guarantee that the process is collective bargaining not collective begging.¹³

The power of workers in the bargaining process comes from their ability to withdraw their labour from the enterprise. However, when exercised on a piecemeal basis by individual workers, the withdrawal of labour has little effect upon the employer – the employer's power to dismiss the worker is a much greater sanction than the worker's power to withdraw labour from the enterprise. This is the root of the inherent inequality in bargaining power between the individual worker and the employer. In order to act as a counterbalance to the power of the employer to hire and fire, the power of workers to withdraw their labour must be exercised in an organised and collective manner – only then is the sanction of withdrawal of labour truly effective. To be more than an empty right, the right to freedom of association requires that workers have the right to strike.

This analysis is the heart of the rationale for the three-dimensional concept of freedom of association adopted by the ILO.¹⁴ This rationale states that the right to freedom of association is only effective if it is read as also including the right to bargain collectively and the right to strike – hence giving rise to a three-dimensional concept. If the inherent inequality between the employer and the individual worker is to be addressed, workers must be free to *act* collectively.

III *BASIS OF THE RIGHT TO STRIKE IN NEW ZEALAND LAW*

Although the arguments for the right to strike are sound in principle, the right has not always received legal recognition. Broadly speaking, English law historically regarded collective action of any kind,

¹³ David Westfall & Gregor Thusing "Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis" (1999) BC Int'l & Comp L Rev 29, 40-41.

¹⁴ Ruth Ben-Israel *International Labour Standards: The Case of Freedom to Strike* (Kluwer, 1988) 65.

by workers, as unlawful. This position therefore precluded the legal recognition of the right to strike. Similarly, the early New Zealand legislation¹⁵ made strike action by registered unions unlawful. It was not until the Industrial Relations Act 1973 that the modern structure, recognising the right to strike, was put in place.

In order to understand the significance of the modern position, in which the right to strike is recognised in one form or another throughout the Western world, it is necessary to explore the historical position in some detail. Through the evolution of the right to strike one can see the attempts of the English system of labour law to adapt from a feudal system of status-based law to a modern industrial system of contract-based law. In many jurisdictions, including New Zealand, the optimal balance between the right of the worker to strike and the right of the employer to manage their business is still being sought.

To that end, this Part of the paper will explain the evolution of the right to strike in the United Kingdom, define the common law economic torts underlying statutory labour law, and set out the modern NZ position.

A *The Historical Position in the United Kingdom*

1 *Historical General Statutes*

The first statute regulating labour in the United Kingdom was the Statute of Labourers 1349,¹⁶ passed in the aftermath of the Black Death's terrible winnowing of the labour force. The Statute endeavoured to prevent labourers exploiting their new found bargaining power by fixing wages at pre-1348 levels and requiring workers to work for whomever

¹⁵ Industrial Conciliation and Arbitration Act 1894.

¹⁶ Statute of Labourers (1349) 23 Edw 3.

needed their labour. The early attempt at legislative intervention was a miserable failure, ill received by landowners and labourers alike.¹⁷

The first statute potentially directly applicable to striking workers was the Statute of Artificers 1563.¹⁸ This Statute enacted an offence that would be repeated in the Combination Acts, that of 'leaving work unfinished.' This provision was relatively innocuous in the period in which it was enacted, however it was a provision that became troublesome for workers seeking to strike in later centuries.¹⁹ Up until the Industrial Revolution, the employment relationship was governed by status and wages were, at least in theory, centrally regulated. Workers were employed for the duration of a particular project – in this context, 'leaving work unfinished' referred to permanent abandonment of the project.

By contrast, following the Industrial Revolution, the employment relationship began to be governed by contract. In this environment, 'leaving work unfinished' was interpreted as including even a temporary cessation of work. In much the same way as, in later centuries, strike action would be seen as inherently involving a breach of contract,²⁰ in the 18th and 19th centuries strike action could be seen as inherently involving leaving work unfinished.

2 *The Combination Acts*

The Combination Acts were altogether more invidious than the general Statutes as they prohibited contracts, covenants or agreements aimed at procuring the raising of wages or the reduction of hours – in effect making collective action by workers criminal. As will be seen below, penalties for breaches of the Acts were harsh and, in some cases, procedural safeguards were few.

¹⁷ John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991) 3.

¹⁸ Statute of Artificers (1563) 5 Eliz 1, c.4.

¹⁹ Orth, above, 4.

²⁰ See for example *Rookes v Barnard* [1964] AC 1129 (HL).

In response to collective action taken by journeymen tailors in Cambridge, the first industry-specific Combination Act was passed in 1721 to regulate the organisation of the tailoring trade, although only within the bounds of the greater London area.²¹ The Tailors' Combination Act voided all existing covenants, contracts or agreements for raising wages or reducing hours and made any future agreements for that purpose punishable by two months imprisonment, with or without hard labour.²² This punishment also awaited tailors who departed from service before the end of their term of employment, left work unfinished, or refused work without good cause – all provisions that particularly inhibited the right to strike. Prosecution was by summary procedure before two justices of the peace, with conviction resting upon a confession or the sworn evidence of a sole witness.

This Act provided a basic template that would evolve and be applied to further industries throughout the 18th century. In 1726, in an effort to quell strikes and violence by workers in the trade, Parliament passed the Weavers' Combination Act.²³ In contrast to the 1721 Act, this Act applied to weavers throughout the country and extended to agreements to regulate trade and prices, not just the wage and hours agreements of the earlier Act. In addition, the period of imprisonment to which breaching workers were liable was increased from two months to three.

In 1749, the combination laws were generalised somewhat with the extension of the provisions of the 1726 Act, at a stroke of the drafter's pen, to dyers and hot-pressers, felt-makers and hatters, all persons employed in the manufacture of silk, mohair, fur, hemp, flax, linen,

²¹ Tailors' Combination Act (1721) 7 Geo 1, c.13.

²² Tailors' Combination Act (1721) 7 Geo 1, c.13, s 1.

²³ Weavers' Combination Act (1726) 12 Geo 1, c.34.

cotton, fustian, iron and leather and all persons employed “in or about any of the woollen manufactures.”²⁴

Further specific legislation was employed against the silk-weavers in Spitalfields in 1773, prohibiting workmen from combining to raise wages, intimidating others to quit work in order to raise wages or assembling in groups of ten or more to demand higher wages.²⁵ Breach of this prohibition was punishable by a 40s fine or, upon default, three months imprisonment with hard labour.²⁶ Similar legislation was enacted outlawing hatters’ combinations in 1777.²⁷

The final industry-specific measure was the most extensive – the Paper-Makers Combination Act 1796.²⁸ The 1796 Act made being party to a contract to raise wages, reduce hours of work, hinder the employment of other workmen or ‘in any way whatever’ affect masters in the conduct of their business, punishable by two months imprisonment with hard labour upon conviction, by way of summary proceeding, before a single justice of the peace.²⁹ The offence also applied to workers who endeavoured to prevent other workers from taking work, prevailed upon other workers to quit work, attempted to prevent masters from hiring other workers, refused to work with other workers, attended or solicited attendance at an illegal meeting, gave or collected money for an illegal purpose, or who used intimidation in order to induce other workers to quit work.³⁰

Finally, in 1799, after 78 years of piecemeal attempts to regulate particular industries, Parliament enacted a general Combination Act that applied across the country and across all industries, substantially based upon the provisions of the Paper-Makers Act 1796. The Combination

²⁴ Omnibus Combination Act (1749) 22 Geo 2, c.27, ss 1-5.

²⁵ Spitalfields Act (1773) 13 Geo 3, c.68, s 3.

²⁶ Spitalfields Act (1773) 13 Geo 3, c.68, s 3.

²⁷ Hatters’ Combination Act (1777) 17 Geo 3, c.55.

²⁸ Paper-Makers Combination Act (1796) 36 Geo 3, c.111.

²⁹ Paper-Makers Combination Act (1796) 36 Geo 3, c.111, ss 1-2.

³⁰ Paper-Makers Combination Act (1796) 36 Geo 3, c.111, ss 4-5.

Act 1799³¹ was passed in response to ongoing collective action, including strike action, by journeymen-millwrights:³²

...a dangerous combination has for some time existed amongst the journeymen millwrights... for enforcing a general increase of their wages, preventing the employment of such journeymen as refuse to join their confederacy, and for other illegal purposes... and that a demand of a further advance of wages has recently been made, which not being complied with, the men... have refused to work.

The 1799 Act made entering into an illegal contract, or combining for such a purpose, punishable by two months imprisonment, with hard labour, or three months imprisonment, without hard labour, upon summary conviction by a single justice of the peace.³³ An illegal contract was one entered into by workmen:³⁴

- [1.] for obtaining an advance of wages of them, or any of them, or any other journeymen manufacturers or workmen, or other persons in any manufacture, trade or business, or
- [2.] for lessening or altering their or any of their usual hours or time of working, or
- [3.] for decreasing the quantity of work, or
- [4.] for preventing or hindering any person or persons from employing whomsoever he, she, or they shall think proper to employ in his, her, or their manufacture, trade, or business, or
- [5.] for controlling or anyway affecting any person or persons carrying on any manufacture, trade, or business, in the conduct or management thereof.

In addition, the Act also prohibited, on the same penalties, all the other illegal activities referred to in the 1796 Act. Finally, the 1799 Act contained a potent strikebreaking provision, allowing a master to use

³¹ Combination Act (1799) 39 Geo 3, c.81.

³² (1798-9) 54 *Commons Journal* 405-6 as quoted in Orth, above, 43-4.

³³ Combination Act (1799) 39 Geo 3, c.81, ss 2-3.

³⁴ Combination Act (1799) 39 Geo 3, c.81, s 1.

otherwise illegal labour³⁵ when the regular workers “by refusing to work... or by misconducting themselves... impede or obstruct the ordinary course of... business,” upon the granting of a licence by a justice of the peace.³⁶ This provision effectively allowed the employer to bring in non-unionised labour for the duration of any strike activity – strike activity that was, in any event, illegal.

The 1799 Act was continued with some minor amendments by the Combination Act 1800,³⁷ an Act that would remain in force for another 25 years. The Combination Acts, both specific and general, radically curtailed the ability of workers to organise and made any overt form of collective organisation or action criminally punishable. The Acts also had a significant effect on the popular consciousness, with the word “combination” assuming powerful negative connotations - “[w]hen bad men *combine*, good must *associate*.”³⁸ As collective organisation strengthened, this residue in the popular consciousness led to the adoption of the new term ‘union,’ exemplified in the motto: “United to protect, not combined to injure.”³⁹

3 *Conspiracy*

The crime of conspiracy was the equally invidious common law companion to the Combination Acts. Although the offence was originally created in a 14th century statute restricting its import to a conspiracy to pervert the course of justice,⁴⁰ the offence was later adopted by the common law. As in many cases, the common law judges dismissed the original statute as “but in affirmance of the common law,”⁴¹ allowing the judges to expand the offence as the case required.

³⁵ That is, workers who had not been through the rigid apprenticeship scheme necessary to enter any of the trades.

³⁶ Combination Act (1799) 39 Geo 3, c.81, s 16.

³⁷ Combination Act (1800) 39 & 40 Geo 3, c.106.

³⁸ Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770) quoted in John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991), 5 (emphasis added).

³⁹ Attributed to the United Society of Brushmakers – Orth, above, 5.

⁴⁰ “Who be Conspirators” (1304) 33 Edw 1, st. 2.

⁴¹ Edward Coke *Second Institute* (1641) 562 quoted in Orth, above, 26.

By the early 18th century, the Courts had expanded the scope of conspiracy to include any combination for unlawful purposes but the extension that allowed its application to workers was yet to come. In 1721, in response to the same collective action by Cambridge tailors that led to the first Combination Act,⁴² this extension came, as the Court expanded the definition of conspiracy to include otherwise lawful activities:⁴³

it is not for the refusing to work, but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it.

This synchronicity of approach between the Courts and Parliament was common until the mid-19th century as is seen through the parallel histories of combination and conspiracy. At the very least “[j]udges and parliamentarians acted in concert, exchanging advice and encouragement;”⁴⁴ in some cases, the judges were the parliamentarians!⁴⁵

The courts consistently applied the reasoning of this decision with Lord Mansfield clarifying that “the offence does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means.”⁴⁶ This meant that it was not the end for which men combined, nor the means that they used as a combination, but the simple fact of combination that amounted to the offence of conspiracy. As stated by Lord Mansfield: “every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence.”⁴⁷

⁴² Tailors' Combination Act (1721) 7 Geo 1, c.13.

⁴³ *R v Journeymen-Tailors of Cambridge* (1721) 88 ER 9 (KB).

⁴⁴ Orth, above, 31.

⁴⁵ In particular, a similarity of membership between the judicial House of Lords and the legislative House of Lords was often apparent.

⁴⁶ *R v Eccles* (1783) 168 ER 240, 241 (KB).

⁴⁷ *R v Eccles* (1783) 168 ER 240, 241 (KB).

By 1819, the courts were willing to uphold an indictment that simply pled that the defendants had conspired to “prevent, hinder, and deter their said masters and employers from retaining and taking into their employment any person as an apprentice.”⁴⁸ In the employment context, there was no longer any need to plead malice or a specific detriment to the employer or to a third party – the fact of interference in employment decisions was enough.

One notable difference between the Combination Acts and common law conspiracy lay in the mode of trial, and the available penalties. As stated above,⁴⁹ the Combination Acts operated by way of summary procedure with a penalty of, generally, two to three months’ imprisonment. By contrast, a prosecution for conspiracy required all the solemnity of form of the common law, which generally imposed more procedural safeguards than a trial by summary procedure. However, the prosecution’s election of the common law procedure was not a two-edged sword for defendants as sentences for conspiracy were more variable, and potentially much harsher, than those imposed by the various Acts. Sentences for conspiracy in the late 18th and early 19th centuries varied from a suspended jail term,⁵⁰ to four months imprisonment,⁵¹ to an incredible two years’ imprisonment.⁵²

The common law offence of conspiracy, coupled with the various Combination Acts, precluded legal recognition of any form of collective action for over a century. The enforcement of these invidious devices, although difficult to gauge and arguably sporadic,⁵³ particularly targeted any attempt by workers to take effective collective action through collective bargaining or strike action. Between the actions of the courts and the legislature, there was no recognition of the right to strike.

⁴⁸ *R v Ferguson & Edge* (1819) 171 ER 714 (Nisi Prius).

⁴⁹ See Part III(A)(2), above.

⁵⁰ *R v Connell* (10 July 1819) *The Times* (KB).

⁵¹ *R v Eccles* (1783) 168 ER 240 (KB).

⁵² *Times’ Printers’ Case* (9 November 1810) *The Times* (Nisi Prius).

⁵³ John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991) 56-9.

4 *Reform of Combination and Conspiracy*

The passage of a reforming Act in 1824 radically altered the landscape of collective labour law in the United Kingdom.⁵⁴ This Act repealed all the Combination Acts⁵⁵ and exempted workers from liability at common law for conspiracy.⁵⁶ In a clear statement of the basis of this Act in a strongly held policy, all pending penal proceedings under the Combination Acts, or for common law conspiracy, were declared null and void, notwithstanding that they were lodged while these offences were still on the books.⁵⁷ The only limitations the 1824 Act put on the right of workers to act collectively were those necessary to “punish... workmen...who by threats, intimidation, or acts of violence... interfere with that perfect freedom which ought to be allowed to each party,”⁵⁸ such actions being punishable by two months imprisonment with or without hard labour.⁵⁹ “Interfering with perfect freedom” included: forcing a worker to leave, or preventing a worker from commencing, employment; forcing a worker to leave work incomplete; vandalising machinery; punishing a worker for not following union rules; and forcing an employer to alter their business practices.⁶⁰

The reforming Act passed somewhat stealthily through the House, upon a calculated silence by its supporters who were “quite certain that if the [B]ills came under discussion in the House they would be lost.”⁶¹ Although Marx would later trumpet that the Combination Acts fell “before the threatening bearing of the proletariat,”⁶² these supporters

⁵⁴ (1824) 5 Geo 4, c. 95.

⁵⁵ (1824) 5 Geo 4, c. 95, s 1.

⁵⁶ (1824) 5 Geo 4, c. 95, s 2.

⁵⁷ (1824) 5 Geo 4, c. 95, s 4.

⁵⁸ “Resolutions of the Select Committee on Artizans and Machinery” *Parliamentary Papers* (1824), 5, 589-91 quoted in John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991), 73-5.

⁵⁹ (1824) 5 Geo 4, c. 95, s 5.

⁶⁰ Paraphrased from (1824) 5 Geo 4, c. 95, s 5.

⁶¹ Graham Wallas *The Life of Francis Place, 1771-1854* (3rd ed, New York, 1919) 215 quoted in Orth, above, 75.

⁶² Karl Marx *Capital: A Critique of Political Economy* (1887).

were, in truth, proponents of laissez-faire economics who believed that, if wrongful, workers' combinations would "cure themselves".⁶³

Assuming... that the mass of workmen occasionally combine together, it appears absurd... to suppose that their combinations should ever enable them to obtain from their masters more than a due share of the produce of their labour... The laws to prevent combinations are either unnecessary, or unjust and injurious... It is impossible that anyone who will calmly consider the subject can resist coming to the conclusion, that a combination for an improper object, or to raise wages above their proper level, must *cure itself* – that it must necessarily bring its own chastisement along with it.

Unfortunately, the natural equilibrium of the market never had a chance to establish itself as the legalisation of collective action by workers, combined with an upturn in the business cycle, produced an explosion of strike activity.⁶⁴ Despite calls to workers for restraint by the proponents of the reform, the situation soon became grave enough that employers were able to persuade Parliament to appoint a second select committee to look into the combination and conspiracy laws.⁶⁵

This Committee's report resulted in the enactment of the 1825 statute rescinding the effect of most of the 1824 reform.⁶⁶ Although the repeal of the Combination Acts was confirmed,⁶⁷ the 1825 Act removed workers' general exemption from liability for common law conspiracy. In its place, the new Act provided a limited exemption from liability when the conspiracy was for the purpose of determining the rate of wages the workers would accept or the number of hours they would work.⁶⁸ The 1825 Act also extended the prohibition on the use of violence, threats and intimidation against workers or employers to also prohibit molestation or

⁶³ McCulloch *Edinburgh Review* 39 (1824) 320-3 quoted in John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991) 70 (emphasis in original).

⁶⁴ Orth, above, 82.

⁶⁵ Orth, above, 82.

⁶⁶ (1825) 6 Geo 4, c. 129.

⁶⁷ (1825) 6 Geo 4, c. 129, s 2.

⁶⁸ (1825) 6 Geo 4, c. 129, s 4.

obstruction for the listed purposes, which now included attempts to achieve these ends.⁶⁹ Finally, the Act increased the penalty on conviction to three months imprisonment.⁷⁰

Following 1825, collective action, including strike action, was legal in the United Kingdom as long as it directly related to the issues of wages or hours.⁷¹ However, the absence of any provision limiting the employment of replacement workers reduced the effective utilisation of the provisions to the skilled labour industries. For unskilled workers, the oversupply of such labour meant that replacement labour was freely available and strike action was likely to be ineffectual.⁷²

For those who were able to utilise the exempting provisions, an issue arose when considering the extent to which picketing of workplaces by striking workers was permissible under the 1825 Act. The initial judicial response was that picketing did not amount to a "threat" under section three of the Act as long as the attempts at persuasion by picketers remained peaceful.⁷³ Attempts to persuade workers that it was not in their economic interests to remain at work were acceptable, but threats that it was not in their physical interests to remain at work were not.

However, the Court soon reconsidered the issue on the basis of the prohibition on molestation or obstruction.⁷⁴ In two parallel cases arising out of the same incident it was held that first, picketing, but secondly, strike action of any sort, would infringe the prohibition on molestation or obstruction of the employer's business under the 1825 Act.⁷⁵ Further,

⁶⁹ (1825) 6 Geo 4, c. 129, s 3.

⁷⁰ (1825) 6 Geo 4, c. 129, s 3.

⁷¹ See for example *R v Bykerdike* (1832) 174 ER 61 (Nisi Prius) - a concerted refusal to work with other workers; and *R v Hewitt* (1851) 5 Cox CC 162 (QB) - a concerted action to enforce a union-imposed fine; these cases hold that concerted action not specifically exempted by the 1825 Act still amounts to conspiracy at common law.

⁷² John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991) 91-2.

⁷³ *R v Selsby* (1847) 5 Cox CC 495 (Nisi Prius).

⁷⁴ (1825) 6 Geo 4, c. 129, s 3.

⁷⁵ *R v Duffield* (1851) 5 Cox CC 404 (Nisi Prius); *R v Rowlands* (1851) 5 Cox CC 436 (Nisi Prius).

collective action for this purpose would amount to conspiracy at common law. The rationale for this judicial nullification of a large portion of the 1825 Act was that:⁷⁶

if a manufacturer has got a manufactory, and his capital embarked in it for the purpose of producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be an obstruction to him, that would necessarily be a molesting of him in his manufactory.

In response to this example of judicial innovation, after much debate, Parliament passed the Molestation of Workmen Act 1859.⁷⁷ This Act effectively reversed the position set out in the 1851 decisions, stating that no worker would be liable for molestation or obstruction merely for taking strike action related to wages or hours of work, or for peaceably endeavouring to persuade other workmen to strike for that purpose.⁷⁸ However, there was an important limitation on this legislative clarification of the right to strike – the Act stated “nothing herein contained shall authorise any workman to break or depart from any contract or authorise any attempt to induce any workman to break or depart from any contract.”⁷⁹

This legislative restriction was consistent with the approach taken by the Court in *Lumley v Gye*,⁸⁰ recognising the common law tort of inducing breach of contract. The result reached by the Court in *Hornby v Close*⁸¹ was less consistent with the overall statutory direction. In this case, the Court held that because unions controlled the actions of a body of workers, therefore interfering with the perfect freedom of each individual worker, unions were inherently acting in restraint of trade.⁸² The practical result of this decision for unions was that they could not

⁷⁶ *R v Duffield* (1851) 5 Cox CC 404, 432 (Nisi Prius) (emphasis added).

⁷⁷ Molestation of Workmen Act (1859) 22 Vict, c.34.

⁷⁸ Molestation of Workmen Act (1859) 22 Vict, c.34.

⁷⁹ Molestation of Workmen Act (1859) 22 Vict, c.34.

⁸⁰ *Lumley v Gye* (1853) 118 ER 749 (QB).

⁸¹ *Hornby v Close* (1867) 10 Cox CC 393 (QB).

⁸² *Hornby v Close* (1867) 10 Cox CC 393, 398 (QB).

register under the Friendly Societies Act 1855⁸³ and therefore could not bring proceedings to recover monies embezzled by dishonest members. The practical result for individual members was that they could be held liable for conspiracy at common law, on the basis of the restraint of trade.

Despite some areas of agreement, this initial period of legislative liberalisation was the beginning of the end of the close co-operation between Parliament and the Courts over the limitation of collective action by workers. With labour becoming a stronger political force, the days when legislators could afford to subordinate its interests to those of factory owners were fast passing. However, the hostility of the general Courts towards organised labour and, in particular, collective strike action, continued throughout the 20th century. The judicial attitude toward unions is most memorably summed up in the dictum of Lord Diplock that applying permissive statutes “tended to stick in the judicial gorge.”⁸⁴

In addition, by the middle of the 19th century, the role of contract in the employment relationship was well established. Parliament and the Courts were beginning to protect the sanctity of the contractual relationship – a trend that, particularly in the Courts, would also continue throughout the 20th century.

5 *Master and Servant*

Before going on to address the development of the modern economic torts, it is necessary to address one area that has thus far been neglected – the law of master and servant that underlay the employment relationship through until the late 19th century.

The law of master and servant can be traced back to the provisions of the Statute of Artificers.⁸⁵ As labour became more organised and

⁸³ Friendly Societies Act (1855) 18 & 19 Vict, c.63.

⁸⁴ *Express Newspapers Ltd v MacShane* [1980] 1 All ER 65.

⁸⁵ Statute of Artificers (1563) 5 Eliz 1, c.4.

began to attempt strike action in the 17th and early 18th centuries, the prohibition on leaving work unfinished contained in the Statute became of particular relevance. While the provision was conceived of in an era when a workman was employed to complete a particular project, and was intended to address permanent abandonment of that project, its terms were equally applicable to any temporary cessation of work. The provisions could therefore be utilised against workers, substantially on the basis of the master's word that the work remained unfinished.⁸⁶

The law was updated in 1823,⁸⁷ but, rather than liberalising the law in a manner consistent with the 1824 and 1825 Acts repealing the Combination Acts,⁸⁸ the 1823 Act simply restated the position under the Statute of Artificers. The only modifications were where it was felt appropriate to introduce a reference to contract and to extend the penalty for leaving work unfinished to three months imprisonment with or without hard labour.⁸⁹

The law of master and servant was again restated in 1867, but other than a simplification of the language used, the substantive law remained the same, allowing complaint by the employer to the Court:⁹⁰

wherever the... employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to commence his service according to the contract, or shall absent himself from his service, or wherever any question, difference or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanour, misconduct, ill-treatment, or injury to the person or property...

As the 19th century progressed, the restrictive provisions of the law of master and servant were seen as increasingly anachronistic and

⁸⁶ John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991) 108-9.

⁸⁷ Master and Servant Act (1823) 4 Geo 4, c.34.

⁸⁸ (1824) 5 Geo 4, c. 95; (1825) 6 Geo 4, c. 129.

⁸⁹ Master and Servant Act (1823) 4 Geo 4, c.34, s 3.

⁹⁰ Master and Servant Act (1867) 30 & 31 Vict, c.141, s 4.

outdated. In particular, with the passage of the 1824 & 1825 Acts, and the clarifying Molestation of Workmen Act 1859, the broad sanctions available to employers for any absence from service by employees were inconsistent with the specific statutory scheme relating to collective action by workers.

6 *Legislative reform and the development of the modern common law*

Partially in response to the incoherence of the laws of collective action and of master and servant, and partially in response to the increasing political power of trade unions, an attempt at legislative clarification was made in 1871. This attempt consisted of two Acts, the first addressing the legal status of trade unions,⁹¹ and the second addressing the law of strikes.⁹²

The Trade Union Act 1871 clarified that:⁹³

the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The Trade Union Act 1871 also provided for registration of trade unions in recognition of their new found legal status, however most contracts entered into by a union were still not enforceable by the union.⁹⁴

The Criminal Law Amendment Act 1871 repealed the 1825 Act and the Molestation of Workmen Act 1859 and codified the law of strikes. It provided that strikes were legal (under the Act) unless they combined an illegal action with an illegal intent. The illegal actions were familiarly defined as violence, threats, intimidation, molestation and obstruction.

⁹¹ Trade Union Act (1871) 34 & 35 Vict, c.31.

⁹² Criminal Law Amendment Act (1871) 34 & 35 Vict, c.32.

⁹³ Trade Union Act (1871) 34 & 35 Vict, c.31, s 2.

The illegal intent necessary to complete the offence was an intent to coerce a master: to dismiss a workman; not to offer a workman employment; to belong, or not to belong, to any association or combination; to pay any fine imposed by such an association or combination; or to alter their mode of carrying on business.⁹⁵ An intent to coerce a workman to quit employment or to return work incomplete, not to accept employment, to belong, or not to belong, to any association or combination, or to pay any fine imposed by such an association or combination was also illegal.⁹⁶

However, despite the best intentions of the legislature, this particular attempt at reform was ineffective. In a case shortly after the enactment of the Trade Union Act 1871, workmen were found guilty of criminal conspiracy for acting collectively, not because collective action was a conspiracy in restraint of trade, but because it was a conspiracy to interfere with the employer's free will.⁹⁷ This obstructive decision is symptomatic of the growing conflict between Parliament and the Courts over industrial relations policy in the late 19th century.

Parliament more successfully reformed the law of collective action with the Conspiracy and Protection of Property Act 1875.⁹⁸ This Act repealed the remnants of the Statute of Artificers,⁹⁹ the Master and Servant Act 1867,¹⁰⁰ the Criminal Law Amendment Act 1871,¹⁰¹ and any other provision making breach of contract a criminal offence.¹⁰² The 1875 Act made breach of contract a purely civil action, unless it led to injury to persons or property, or the interruption of gas or water

⁹⁴ Trade Union Act (1871) 34 & 35 Vict, c.31, s 4.

⁹⁵ Criminal Law Amendment Act (1871) 34 & 35 Vict, c.32, s 1.

⁹⁶ Criminal Law Amendment Act (1871) 34 & 35 Vict, c.32, s 1.

⁹⁷ *R v Bunn* (1872) 12 Cox CC 316.

⁹⁸ Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86.

⁹⁹ Statute of Artificers (1563) 5 Eliz 1, c.4.

¹⁰⁰ Master and Servant Act (1867) 30 & 31 Vict, c.141.

¹⁰¹ Criminal Law Amendment Act (1871) 34 & 35 Vict, c.32.

¹⁰² Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86, s 17.

supplies.¹⁰³ In addition the act definitively ousted the formulation of conspiracy laid down in the Cambridge Taylors case,¹⁰⁴ stating that:¹⁰⁵

an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

The 1875 Act retained the structural definition of a strike as lawful unless combining an illegal action with an illegal intention, however both limbs of the definition were reformulated. An illegal action took place when a person:¹⁰⁶

[1.] uses violence to or intimidates [an]other person or his wife and children, or injures his property; or,

[2.] persistently follows [an]other person about from place to place; or,

[3.] hides any tools, clothes, or other property owned or used by [an]other person, or deprives him of or hinders him in the use thereof; or,

[4.] watches or besets the house or other place where [an]other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

[5.] follows [an]other person with two or more other persons in a disorderly manner through any street or road.

The 1875 Act defined an illegal intention as simply an intention “to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing.”¹⁰⁷ The Act also contained an express exception to this rule, aimed at peaceful

¹⁰³ Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86, ss 5 & 30.

¹⁰⁴ *R v Journeymen-Taylors of Cambridge* (1721) 88 ER 9 (KB).

¹⁰⁵ Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86, s 3.

¹⁰⁶ Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86, s 7.

¹⁰⁷ Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86, s 3.

picketing, stating that attending a place “in order merely to obtain or communicate information”¹⁰⁸ did not amount to an illegal action.

Some judicial interpretations of this legislation were consistent with the legislature’s liberal policy, for example, holding that intimidation must involve creation of the fear of bodily injury.¹⁰⁹ However, in the early 20th century, the House of Lords mounted a frontal assault on workers’ ability to organise collectively, discovering the common law economic torts. These torts essentially amounted to translations of aspects of the crime of conspiracy, now excluded by statute, into the realm of civil law.

First, the House of Lords created the tort of conspiracy that, similarly to the crime of conspiracy, is committed when two or more persons combine to injure another’s trade or business, and some injury results.¹¹⁰ The conspirators commit the tort notwithstanding that their conduct may have been perfectly legal had they not combined to do it.

Secondly, the House of Lords affirmed the existence of the tort first recognised in *Lumley v Gye*¹¹¹ - inducement to breach of contract.¹¹² This tort imposes liability when the tortfeasor, with knowledge of a contract between two parties, persuades or induces one of the parties to the contract to breach it to the detriment of the third party. This tort may take the form of direct inducement, where the tortfeasor has direct contact with one of the parties to the contract, or indirect procurement, where the tortfeasor encourages another party to perform an action causing a party to the contract to breach their obligations. In the case of direct inducement, the legality of the inducing action is immaterial, however, in the case of indirect procurement, the procuring action must be unlawful in itself.

¹⁰⁸ Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86, s 7.

¹⁰⁹ *Gibson v Lawson* [1891] 2 QB 559.

¹¹⁰ *Quinn v Leathem* [1901] AC 495 (HL).

¹¹¹ *Lumley v Gye* (1853) 118 ER 749 (QB).

¹¹² *South Wales Miners’ Federation v Glamorgan Coal Co* [1905] AC 239 (HL).

The House of Lords also suggested, without immediate confirmation, that a tort of intimidation might also exist, separate from the tort of inducement to breach of contract.¹¹³ This suggestion lay dormant until 1964 when the tort was fully recognised.¹¹⁴ Intimidation occurs when a person threatens another with an illegal action and that person changes their actions as a result of the threat to their detriment or the detriment of a third party. When the damage occurs to the party threatened it is known as two-party intimidation; when the damage occurs to a third party it is known as three-party intimidation.

However, perhaps the most telling of the House of Lords' extensions of the common law was its decision that unions could be directly liable for the commission of these torts by their members.¹¹⁵ As a result of this decision, combined with the other extensions of the law of tort, the UK Parliament enacted the Trade Disputes Act 1906, stating that no tort liability would lie for any peaceful action taken in furtherance of a trade dispute.

B The New Zealand Position

1 1894-1973

Prior to the enactment of any specific legislation in New Zealand, the common law position applied, modified by the adoption of various statutes from the United Kingdom. However, while industrial turbulence and disharmony between Parliament and the House of Lords on industrial relations issues became more pronounced in the United Kingdom in the late 19th and early 20th centuries, the New Zealand Parliament intervened decisively before this unrest became rooted in New Zealand.

¹¹³ *Allen v Flood* [1898] AC 1, 97-8.

¹¹⁴ *Rookes v Barnard* [1964] AC 1129.

¹¹⁵ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL).

One of the primary purposes of the Industrial Conciliation & Arbitration Act 1894 ("I C & A Act") was "to put an end to the larger and more dangerous class of strikes and lockouts"¹¹⁶ and, to this end, the Act made strike action illegal for registered unions. In return, the I C & A Act granted registered unions monopoly bargaining rights within the relevant geographical area and industry and, latterly, enforced compulsory union membership.¹¹⁷ The lynchpin of the I C & A system was the system of national awards, granted by the Arbitration Court, covering all workers in a particular industry. As long as this award system retained the widespread support of workers and employers, the goal of the system to keep industrial conflict to a minimum was, by and large, achieved.¹¹⁸

However, as the New Zealand economy received several serious blows in the late 1960s and early 1970s, it was clear that the era of central regulation through the I C & A system was over.¹¹⁹ The Industrial Relations Act 1973 began a new era in New Zealand labour law with the recognition of a statutory right to strike. Under this statute, the right was related to the rights-interest distinction – broadly, a strike was lawful if it related to a matter of interest such as bargaining for a collective contract but unlawful if it related to an issue of rights that could be determined by a court. Following some politically embarrassing aborted prosecutions, the Industrial Relations Amendment Act 1978 made breach of the strike provisions a civil rather than a criminal matter.

2 1973-2000

The most significant change in this period, with respect to the right to strike, was the change in language implemented in 1987. The Labour Relations Act 1987 changed the language of the basic distinction

¹¹⁶ Reeves *State Experiments in Australia and New Zealand* quoted in Robyn Mackay (ed) *Employment Law Guide* (5th ed, Butterworths, Wellington, 2001) 340-1.

¹¹⁷ Industrial Conciliation and Arbitration Amendment Act 1936.

¹¹⁸ James Holt *Compulsory Arbitration in New Zealand: the first 40 years* (Auckland University Press, Auckland, 1986).

¹¹⁹ Anderson and others (ed) *Mazengarb's Employment Law* (LexisNexis Butterworths, Auckland, 2002) para Intro.7.

created in the Industrial Relations Act 1973 from rights-interests to lawful-unlawful. This change was a clear statement that the primary decision about the lawfulness of strike action would be made by the legislature, not the Courts.

Under the Labour Relations Act a strike was lawful if, similarly to under the Industrial Relations Act, it related to the negotiation of an award or agreement.¹²⁰ A significant point to note, in comparing this provision with later legislation, is that this provision did not explicitly exclude sympathy strikes.¹²¹ Another point of interest is that, at this stage, bargaining was still conducted at an industry level. This meant that, although, in theory, the right to strike was limited to the group in negotiation, in practice, this was a very broad group indeed.

The law of strikes was radically altered by the Employment Contracts Act 1991. The 1991 Act abolished the remnants of the IC & A system, including industry-level bargaining, and moved to a strongly individualistic system of employment law. Employment contracts were a matter for the employer and the employee, with unions playing no acknowledged role, and collective contracts amounted to aggregations of individual contracts, rather than truly collective documents. In this environment, even with little change to the wording of the provisions relating to strike action, the right to strike would have been considerably restricted. However, the 1991 Act also explicitly limited lawful strike action to those workers who would be covered by the collective employment contract in question.¹²²

Although the Employment Contracts Act maintained the lawful-unlawful distinction, because of the restrictive way in which bargaining was defined, the matters in respect of which lawful strike action could be

¹²⁰ Labour Relations Act 1987, s 233(a); Victoria University of Wellington Industrial Relations Centre *The New Zealand System of Industrial Relations* (Industrial Relations Centre – Victoria University of Wellington, 1989) 73-4.

¹²¹ Compare Labour Relations Act 1987, s 233(c)(ii) excluding sympathy action where the strike relates to negotiations for a redundancy agreement.

taken were similarly restricted. While under the Labour Relations Act bargaining had taken place at an industry level, therefore justifying industry-level and sympathy strikes, under the Employment Contracts Act, bargaining was statutorily limited to single-employer negotiations and often occurred on an individual employer-employee basis. This limited lawful strike action to employees on the same contract in the same enterprise, effectively making sympathy and industry-wide/multi-employer strikes unlawful.

A practical difficulty with this approach, which the drafters may or may not have foreseen, is that the focus of the Employment Contracts Act on the individualisation of employment contracts resulted in employers largely dictating the content of contracts. Thus, employers were free to manipulate the "strike potential" of their workforce by placing different groups of workers on different contracts, with different expiry dates, effectively ruling out the possibility of workers taking effective strike action.

3 *Employment Relations Act 2000*

The Employment Relations Act 2000 received much publicity during its passage through the House of Representatives, being alternately lavished with praise or lambasted, depending on the side of the House to which the Member belonged. In short, the 2000 Act maintains the basic structures of the 1991 Act while introducing a number of new provisions with respect to collective action. The three most significant changes are: the introduction of a general requirement of "good faith" binding all parties to the employment relationship;¹²³ the legalisation of multi-employer collective agreements and the restoration of the position of the union in collective bargaining;¹²⁴ and the introduction of a prohibition on the use of replacement labour outside essential industries.¹²⁵

¹²² Employment Contracts Act 1991, s 64.

¹²³ Employment Relations Act 2000, s 4.

¹²⁴ Employment Relations Act 2000, s 40.

In relation to strikes, the Employment Relations Act maintains the lawful-unlawful distinction of the previous statutes.¹²⁶ In addition, the strike must still relate to a bargaining issue in order to be lawful (subject to a narrow health and safety exception.) However, because of the expanded potential coverage of an employment agreement, the practical effect of the 2000 Act has been a liberalisation of the law of strikes.

In order to be lawful a strike must relate to bargaining “for a collective agreement that will bind each of the employees concerned” and not be unlawful under section 86.¹²⁷ A strike will be unlawful under section 86 if it:¹²⁸

- (a) occurs while a collective agreement binding the employees participating in the strike... is in force; or
- (b) occurs during bargaining for a proposed collective agreement that will bind the employees participating in the strike..., unless –
 - (i) at least 40 days have passed since the bargaining was initiated; and
 - (ii) if on the date bargaining was initiated the employees were bound by the same collective agreement, that collective agreement has expired; and
 - (iii) if on that date the employees were bound by different collective agreements, at least one of those collective agreements has expired; or
- (c) relates to a personal grievance; or
- (d) relates to a dispute; or
- (e) relates to any matter dealt with in Part 3 [Freedom of Association]; or
- (f) is in an essential service and the requirements as to notice... have not been complied with; or
- (g) takes place in contravention of an order of the Court.

¹²⁵ Employment Relations Act 2000, s 97.

¹²⁶ See Labour Relations Act 1987, Employment Contracts Act 1991.

¹²⁷ Employment Relations Act 2000, s 83.

¹²⁸ Employment Relations Act 2000, s 86(1).

In addition, a strike may be lawful if employees have reasonable grounds for believing it necessary on the grounds of safety or health.¹²⁹ If a strike is lawful under the ERA, no proceedings in tort, or for an injunction, or for a penalty or a compliance order under the ERA itself, can be brought.¹³⁰ In addition, the employer is prohibited from utilising replacement labour outside essential industries.¹³¹

The effect of these provisions is that only primary strike action¹³² related to bargaining for a new employment agreement, or to safety and health issues, is protected, subject to further restrictions in essential industries. However, where strike action is lawful, its effectiveness is safeguarded by the prohibition on replacement labour and statutory protection from Court proceedings.

IV BASIS OF THE RIGHT TO STRIKE IN INTERNATIONAL LAW

The right to strike is expressly recognised in the International Covenant on Economic, Social and Cultural Rights,¹³³ where it is stated that signatory States undertake to ensure "the right to strike, provided that it is exercised in conformity with the laws of the particular country."¹³⁴

This Part of the paper traces the development of the right to strike in international law through the jurisprudence of the ILO. The ILO regards the right to strike as being of fundamental importance, being one of the limbs of the three-dimensional concept of freedom of association.

First, the institutional structure and the mandate of the ILO and its various Committees are explained. Secondly, the ILO's view on the

¹²⁹ Employment Relations Act 2000, s 84.

¹³⁰ Employment Relations Act 2000, s85(1)(a)-(c).

¹³¹ Employment Relations Act 2000, s 97.

¹³² Primary strike action refers to strike action taken by the workers for whose direct benefit the strike action is taken; secondary strike action refers to strike action taken by other workers, who will receive no direct benefit, in support of the primary strike action.

¹³³ International Covenant on Economic, Social and Cultural Rights (16 December 1966) <http://www.unhchr.ch/html/menu3/b/a_ceschr.htm> (last accessed 29 September 2002).

¹³⁴ International Covenant on Economic, Social and Cultural Rights, above, art 8(1)(d).

proper ambit of freedom of association and the right to strike are set out and finally, some criticisms of the ILO's approach are put forward.

A *The International Labour Organisation*

I *General*

The ILO is the primary international organisation having jurisdiction over employment law, including issues such as the right to strike. The ILO is a tripartite organisation in which representatives of the Government, workers and employers of each Member State are given a separate voice. This tripartite structure is unique amongst international organisations in its inclusion of non-governmental organisations and reflects the pluralist base upon which the ILO's jurisprudence is built. New Zealand is a foundation member of the ILO and, as at 29 September 2002, 176 countries are members worldwide.¹³⁵

One of primary purposes of the ILO, as enshrined in its Constitution, is to promote lasting peace through social justice.¹³⁶ This is to be achieved through the promulgation of minimum labour standards designed to improve the conditions of labour internationally by eliminating injustice, hardship and privation.¹³⁷

The ILO has pursued this purpose with great vigour – indeed, some commentators have suggested that it has been guilty of an overproduction of these labour standards.¹³⁸ In addition, many of the standards are “very detailed and perhaps stress prescription and detail at the expense of underlying objectives and flexibility of application”¹³⁹ such that “ratification becomes extremely difficult even when a country

¹³⁵ International Labour Organisation – Official Relations Branch *Alphabetical List of ILO Member Countries* <<http://www.ilo.org/public/english/standards/relm/country.htm>> (last accessed 29 September 2002).

¹³⁶ International Labour Organisation Constitution (11 April 1919) Preamble.

¹³⁷ International Labour Organisation Constitution (11 April 1919) Preamble, art 10.

¹³⁸ See Gordon Anderson “Editorial: the Role of International Labour Standards” [2002] (2) ELB 21.

¹³⁹ Anderson, above, 21.

conforms to the core principles underlying the standard.”¹⁴⁰ In recent years, the ILO has returned to a focus upon these core principles with the Declaration on Fundamental Principles and Rights at Work¹⁴¹ encompassing: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

The key conventions promulgated by the ILO, for the purposes of this paper, are Conventions Nos 87 and 98 which, together with the injunction to ensure freedom of association contained in the ILO Constitution,¹⁴² provide the general principles governing freedom of association as seen by the ILO.

The ILO, as in any large international organisation, has set up specialist committees to deal with particular issues that may arise. The two that are of particular relevance to this paper are the Freedom of Association Committee of the Governing Body of the ILO (“CFA”) and the Committee of Experts on the Application of Conventions and Recommendations (“CoE”).

2 *Committee on Freedom of Association*

The CFA is the most significant of the quasi-judicial bodies of the ILO, hearing dozens of cases every year. The CFA has jurisdiction to investigate complaints of infringement of freedom of association submitted by governments or by organisations of workers or employers – the vast majority of complaints are made by workers’ organisations. The CFA, mirroring the ILO itself, is a tripartite body composing nine regular Members, and nine substitute Members drawn from the Governments’, Employers’ and Workers’ groups of the Governing Body of the ILO. This tripartite structure gives the decisions of the CFA broad validity

¹⁴⁰ Anderson, above, 21.

¹⁴¹ Declaration on Fundamental Principles and Rights at Work (ILO, Geneva, 1998).

¹⁴² International Labour Organisation Constitution (11 April 1919), Preamble.

among the Members of the Governing Body and facilitates their adoption, where appropriate, by the Governing Body.¹⁴³

The mechanism of complaint to the CFA evolved in the early 1950s as the ineffectiveness of the existing complaints mechanism became apparent. Initially, when the CFA was established at the 110th Session of the Governing Body of the ILO in January 1950, its function was intended to be merely preparatory. When a complaint relating to freedom of association was received, the CFA would conduct an initial investigation to determine if the complaint required the attention of the Governing Body. If such consideration were found to be necessary, the matter would be referred to the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) for a full investigation. However, the way the procedure was drafted, a full investigation by the FFCC could only be carried out with the domestic government's consent – as demonstrated by the Peruvian Government's refusal of consent in response to some of the very first complaints received, governments were not often willing to give that consent.¹⁴⁴

The reason for the initial framing of the procedure in this manner was the perceived necessity of obtaining a mandate for the FFCC's rulings. Because its jurisdiction was based on the specific consent of the parties, its jurisdiction was clearly bounded and no difficult issues of mandate arose. However, this legal nicety was soon set aside in the face of the overwhelming evidence that such a procedure simply did not work.

As a result of the failure of the FFCC due to the unwillingness of States to give consent, the investigation procedure evolved such that “[a]lthough the FFCC remained available, in substance all examinations began to be performed by the CFA.”¹⁴⁵ For all practical purposes, the preliminary examination by the CFA took the place of the formal FFCC

¹⁴³ Ruth Ben-Israel *International Labour Standards: The Case of Freedom to Strike* (Kluwer, 1988) 51.

¹⁴⁴ Ben-Israel, above, 51.

investigation. Over time, this jurisdiction has evolved to the extent that the CFA is able to give recommendations to member States on their compliance with their obligations to safeguard freedom of association.

The CFA takes a broad view of this jurisdiction, both in terms of the definition of freedom of association and the group of member countries who are bound by its principles. In respect to the breadth of the group bound by its jurisdiction the CFA has stated that:¹⁴⁶

the function of the ILO in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice; if the Organisation is to fulfil its responsibility in the matter it must... not hesitate to discuss in an international forum cases which are of such a character as to effect substantially the attainment of the purposes of the ILO as set out in the Constitution... and the various Conventions concerning freedom of association.

The CFA does not see its jurisdiction as limited to matters arising out of Conventions 87 and 98 and thus its recommendations are not limited to countries that have ratified these Conventions. Rather, the CFA sees its mandate as coming directly from the ILO Constitution,¹⁴⁷ bolstered in recent years by the Declaration on Fundamental Principles and Rights at Work, and therefore binding on all ILO members. Indeed, New Zealand has been the subject of complaint six times,¹⁴⁸ despite not having ratified either of the Conventions.

¹⁴⁵ Ben-Israel, above, 51.

¹⁴⁶ ILO: Committee on Freedom of Association, 1st Report, para 32 quoted in Ben-Israel, above, 54.

¹⁴⁷ In particular Article 10 on Freedom of Association and Article 19(5)(e) requiring ILO Members to report periodically to the Governing Body on the position of their law and practice in regard to matters dealt with in unratified Conventions.

¹⁴⁸ See ILO: Committee on Freedom of Association: Report No 324, Case No 2022; Report No 292, Case No 1698; Report No 295, Case No 1698; Report No 265, Case No 1385; Report No 259, Case No 1385; Report No 234, Case No 1334 <<http://www.ilo.org/ilolex/english/newcountryframeE.htm>> (last accessed 29 September 2002).

Although the point was not without controversy in the early years of the CFA,¹⁴⁹ ILO members now publicly accept this wide-ranging mandate. In addition the CFA has indicated that Conventions 87 and 98 provide a useful guide to the principles of freedom of association, meaning a State's conduct can be assessed against these Conventions even where the State's obligations arise from the Constitution, not the Conventions.¹⁵⁰ With the adoption of the Declaration on Fundamental Principles and Rights at Work, binding on all members, the CFA's mandate seems secure.

The subject matter of the CFA's mandate is equally fraught with political difficulties. It is only freedom of association that is explicitly recognised in the ILO Constitution and in Conventions Nos 87 and 98. The ILO takes the official stance that "since the whole concept of freedom of association was guaranteed, there was no specific need to secure the right to strike."¹⁵¹ The reasons for the ILO's attitude are unclear, as one would not think the matter so far beyond doubt as to not require further elaboration. Internal politicking provides, perhaps, a more plausible explanation:¹⁵²

...the main opposition to the inclusion of a right to strike within Conventions Nos. 87 and 98, came from the Workers' members... The reason behind such an objection rested upon the fears of the Workers' group that the safeguarding of the right to strike within the ILO Conventions would inevitably require setting its limitations. The tripartite structure of the ILO, which makes the adoption of a Convention dependent upon the consent of the Employers' group, would most likely have led to the safeguarding of a restricted right to strike. The Employers' group would have been willing to support the right to strike, but only if they could set limits on its use, which would have diluted its strength.

¹⁴⁹ See for example the stance taken by the Union of South Africa in ILO: Committee on Freedom of Association, 15th Report, Case No 102 (Union of South Africa) para 128-132.

¹⁵⁰ Union of South Africa in ILO: Committee on Freedom of Association, 15th Report, Case No 102 (Union of South Africa) para 130-131.

¹⁵¹ Ruth Ben-Israel *International Labour Standards: The Case of Freedom to Strike* (Kluwer, 1988) 45.

This analysis makes it clear that the ILO's official position has always been that freedom of association includes the right to strike, in a general sense. This is consistent with the position of the CFA that regards freedom of association as a three-dimensional concept encompassing freedom of association itself, the right to bargain collectively and the right to strike. The CFA therefore regards the exercise by trade unions of the right to strike as being impliedly guaranteed by Article 3 of Convention No 87,¹⁵³ which provides that "Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."¹⁵⁴

However, it is also apparent that the primary reason why the right to strike has not been expressly safeguarded is the conflict between workers' groups and employers' groups as to the content of the right. This conflict is something to be borne in mind when analysing the position of the CFA, having a mixed membership of both Workers' and Employers' representatives, on the substantive content of the right.

3 *Committee of Experts*

The CoE was established in 1926, and is composed of 20 independent members, meeting once a year. It is a legal body responsible for the examination of the compliance by ILO member States with Conventions and Recommendations. This examination takes place on the basis of reports sent by governments pursuant to questionnaires prepared by the ILO Governing Body.¹⁵⁵

¹⁵² Ben-Israel, above, 46.

¹⁵³ Ruth Ben-Israel *International Labour Standards: The Case of Freedom to Strike* (Kluwer, 1988) 65.

¹⁵⁴ ILO Convention No 87 – Freedom of Association and Protection of the Right to Organise (9 July 1948) <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (last accessed 29 September 2002), art 3(1).

¹⁵⁵ International Labour Organisation *ILOLEX Database on International Labour Standards – CEACR Observations* <<http://ilolex.ilo.ch:1567/english/ceacre.htm>> (last accessed 29 September 2002).

Upon the completion of its work, the CoE sends two reports to the International Labour Conference: the first contains its general report and observations concerning certain countries;¹⁵⁶ the second is a general survey on a particular subject, covered by one or more of the Conventions or Recommendations.¹⁵⁷ The CoE's most recent survey on freedom of association was published in 1994. In this Survey the CoE confirmed that it views the right to strike as being implicitly guaranteed within Convention No 87:¹⁵⁸

148. ...The promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met. In a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withdrawing their labour... thus inflicting a cost on the employer in order to gain concessions...

149. Under Article 3(1) of Convention No 87, the right to organise activities and to formulate programmes is recognised for workers' and employers' organisations. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organisations within the meaning of Article 3.

B Freedom of Association and the Right to Strike

I Committee on Freedom of Association

The CFA has always described the right to strike as a "fundamental right of workers and of their organisations"¹⁵⁹ and has been

¹⁵⁶ International Labour Office *Report of the Committee of Experts* Report III(Part 4A).

¹⁵⁷ International Labour Office *Report of the Committee of Experts* Report III(Part 4B).

¹⁵⁸ International Labour Office *Report of the Committee of Experts* (ILO, Geneva, 1994) Report III(Part 4B) Chapter V, para 148-9.

¹⁵⁹ International Labour Office *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th ed, ILO, Geneva, 1996) para 473.

zealous in according this right broad protection. The CFA has even stated that:¹⁶⁰

...a 24-hour general strike seeking an increase in the minimum wage, respect of collective agreements in force and a change of economic policy (to decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organisations.

However, despite wide statements such as this, the Committee has also recognised that the right to strike is not of unlimited scope. First, "implicit in the right to strike is the obligation to do so peaceably, with no attacks on persons or property, without degenerating into riots."¹⁶¹ Secondly, and equally importantly, the objective of the strike must be one legitimately related to the principles and objectives of freedom of association. The CFA has taken a liberal view of what these objectives are.¹⁶²

The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests.

This definition of activities within the legitimate scope of the right to strike is further broadened when the ambit of the phrase "affecting their members' interests" is clarified:¹⁶³

Organisations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their

¹⁶⁰ International Labour Office *Digest*, above, para 494.

¹⁶¹ See for example ILO: Committee on Freedom of Association, 199th Report, Case No 943 (Dominican Republic) para 170; 222nd Report, Case No 1131 (Upper Volta) para 95 quoted in Ben-Israel, above, 94.

¹⁶² International Labour Office *Digest*, above, para 484.

¹⁶³ International Labour Office *Digest*, above, para 480.

members and on workers in general, in particular as regards employment, social protection and standards of living.

The CFA regards the legitimate objectives of the right to strike as extending to anything relating to the socio-economic or occupational interests of workers. While a general right to strike for political purposes is not supported, the right to strike is seen to include the right to strike in opposition to Government policies affecting the socio-economic or occupational interests of workers.¹⁶⁴

While purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies.

Further, it is not just the primary disputants' right to strike that should be protected. The CFA believes that "a general prohibition on sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful."¹⁶⁵ More explicitly the CFA has stated that "a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association."¹⁶⁶

In any strike, the CFA supports a ban on the use of replacement labour outside essential industries as a natural corollary of the protection of the right to strike.¹⁶⁷ However, the CFA does not object to the exclusion of the right to strike in favour of adjudication by the Courts in limited circumstances, stating that "[t]he solution to a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts."¹⁶⁸

¹⁶⁴ International Labour Office *Digest*, above, para 482.

¹⁶⁵ International Labour Office *Digest*, above, para 486.

¹⁶⁶ International Labour Office *Digest*, above, para 489.

¹⁶⁷ International Labour Office *Digest*, above, para 570.

¹⁶⁸ International Labour Office *Digest*, above, para 485.

2 *Committee of Experts*

The CoE has identified the right to strike as one of the "essential means"¹⁶⁹ of promoting and protecting workers' interests. The CoE's basic position is that:¹⁷⁰

... the right to strike is an intrinsic corollary of the right to organise protected by Convention No 87. That being said, the Committee emphasises that the right to strike cannot be considered an absolute right: not only may it be subject to a general prohibition in exceptional circumstances, but it may be governed by provisions laying down conditions for, or restrictions on, the exercise of this fundamental right.

Although the CoE states that the right to strike is not an absolute right, the restrictions it envisages are either procedural¹⁷¹ or relate to the public sector¹⁷² or essential industries.¹⁷³ The CoE takes a broad view, similar to that of the CFA, of the legitimate objectives of the right to strike of the general worker:¹⁷⁴

The Committee has always considered that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or

¹⁶⁹ International Labour Office *Report of the Committee of Experts* (ILO, Geneva, 1994) Report III(Part 4B) Chapter V, para 147.

¹⁷⁰ International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 151.

¹⁷¹ See for example International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 158 stating that the requirement of a strike ballot will not infringe freedom of association, provided the quorum and the majority required are not unreasonable; International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 171 stating that a requirement that parties exhaust mediation and conciliation procedures before taking strike action will not infringe freedom of association provided the machinery does not cause undue delay.

¹⁷² See for example International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 158 stating that the prohibition of the right to strike in the public service will not infringe freedom of association where it is limited to public servants exercising authority in the name of the State.

¹⁷³ See for example International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 159 stating that the limitation of the right to strike in essential industries will not infringe freedom of association provided essential services are narrowly defined as those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

¹⁷⁴ International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 165.

employers... In the view of the Committee, organisations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living.

In relation to secondary action the CoE takes an identical stance to the CFA, stating that "a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful."¹⁷⁵ The CoE also agrees with the CFA that the use of replacement labour "seriously impairs the right to strike and affects the free exercise of trade union rights."¹⁷⁶

C Criticism of the ILO Approach

In summary, the ILO, through both the CFA and the CoE, considers that primary strike action is lawful provided it is directed to the occupational, social or economic interests of the workers concerned, and is not purely political in nature. Secondary strike action is lawful provided it is in support of a lawful primary strike.

On this basis, New Zealand law, in allowing primary strikes only for matters directly relating to bargaining or health and safety, and outlawing secondary action completely, is not compliant with the ILO's position on the right to strike. Indeed, the ILO has stated in the context of New Zealand's current prohibition on sympathy and protest strikes that:¹⁷⁷

¹⁷⁵ International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 168.

¹⁷⁶ International Labour Office *Report*, above, Report III(Part 4B) Chapter V, para 175.

¹⁷⁷ Director of the ILO International Labour Standards Department, Letter to the NZ Minister of Labour (31 January 2001) quoted in Paul Roth "ILO Conventions 87 and 98 and the Employment Relations Act" (2001) 26 NZJIR 145.

...such action must be otherwise permissible and not subject to penalty (provided that in the case of a sympathy strike, the initial strike being supported is itself legal) for there to be conformity with the principles of freedom of association...

However, some commentators have suggested that the ILO position is unduly rigid and detailed and that the focus of the inquiry should be on whether workers in a State enjoy an effective right to strike.¹⁷⁸ Under this analysis, the role of the ILO should not be to provide a strict formulation of the content of the right to strike, with no departure permitted, but rather to ask whether, in the circumstances as they exist in a particular country, workers have an effective right to strike.

In this author's opinion, this criticism of the ILO is valid. As stated above,¹⁷⁹ the detailed approach the ILO currently takes results in very few industrialised nations being able to comply with the standards laid down in the ILO Conventions. This is not to say that non-compliance, in and of itself, is a reason to avoid standard setting, or to set standards at a lower level. However, in this case, the majority of developed nations seem to be in agreement on the general principles – the ILO's current approach is causing unnecessary discord.

In this area, the primary role of the ILO should be to set basic standards that those countries supporting the principles underlying the right to strike can comply with. The more advanced role of the ILO in this area should not be to set ever more complex and detailed standards but simply to ensure that every member country is safeguarding an effective right to strike.

¹⁷⁸ Gordon Anderson "Editorial: the Role of International Labour Standards" [2002] (2) ELB 21.

¹⁷⁹ See Part IV(A)(1), above.

V *AN EFFECTIVE RIGHT TO STRIKE?*

Therefore, the relevant question is not whether New Zealand complies with the broad definition of the right to strike given by the CFA and the CoE, but whether New Zealand safeguards an effective right to strike. In order to answer that question this Part discusses, first, the nature of an effective right to strike and, secondly, whether New Zealand has such a right.

A *What is an Effective Right to Strike?*

The ILO's definition of the legitimate objectives of the right to strike is dependent upon two points: first, that a union may legitimately pursue both the occupational and the socio-economic interests of its members; secondly, that the right to strike may legitimately be exercised in respect of both occupational and socio-economic interests. In order to address these points it will be necessary to identify the occupational and socio-economic interests of workers before returning to the issues identified above.

1 Occupational vs socio-economic interests

The occupational interests of workers and the socio-economic interests of workers are, of course, interrelated. The issue of pay, for example, is, in a narrow sense, an occupational interest but in a broader sense, impacts to a large extent upon the socio-economic interests of the worker. Similarly, wide governmental policies affecting the socio-economic interests of workers may be manifested through a specific change in employment conditions, affecting the occupational interests of an individual worker.

However, as a generalisation, occupational interests are confined to interests arising around and out of a particular employment relationship. The occupational interests begin with the negotiation of an employment agreement, including, primarily, the terms and conditions of

work; these interests also cover the conditions prevalent during the working relationship and the circumstances in which the relationship is terminated. In short, a worker's occupational interests are those interests related to their specific employment, and thus are only held in common by a limited group of identified workers. Finally, the occupational interests of workers are most likely to be directly affected by the actions of their particular employer.

By contrast, workers' socio-economic interests have a broader base. While these interests are related to employment in the sense that the fact of employment causes these issues to be of particular interest, socio-economic interests do not arise out of a specific employment relationship. Rather these interests, as the name suggests, arise out of the state of society and the economy in general and are therefore common to all workers, or at least all workers of a particular class. These again may range from the specific, such as legal regulation, to the general, such as the management of the economy. Socio-economic interests, by their nature, are most likely to be directly affected by the actions of the Government.

2 *Which interests may unions pursue?*

The question as to whether it is legitimate for unions to pursue the occupational and socio-economic interests of workers must be answered with reference to the principle of freedom of association. This is the principle under which unions are formed and therefore any of their objects must fall within its broad ambit.

Freedom of association allows the formation of organisations for the promotion of any ideals, provided the ideals themselves are not illegal or against public policy.¹⁸⁰ Unions are formed to promote the interests of

¹⁸⁰ New Zealand Bill of Rights Act 1990, s 17.

workers.¹⁸¹ The pursuit of the occupational and socio-economic interests of workers is not illegal, nor, in the modern era, is it contrary to public policy. Therefore, the pursuit by unions of these interests is entirely legitimate.

3 *To which interests does the right to strike extend?*

The remaining, and more problematic, question is whether it is legitimate for unions to resort to strike action in support of the occupational and socio-economic interests of workers. As stated above,¹⁸² the ILO's position is that anything short of a purely political strike is legal – in fact, while workers may not strike for political purposes, workers may strike against Government policies, in certain circumstances. This seems a very difficult distinction to maintain in practice.

The ILO's position seems to be based upon the rationale that the right to strike is a legitimate right of workers and therefore it can be exercised in support of any of the legitimate interests of workers. The problem with this simplistic analysis is that it does not take into account the general rationale for the existence of the right to strike, and the specific rationale for regarding it as an intrinsic corollary to the right of freedom of association. In order to justify resort to the right to strike one must show that it is necessary to counterbalance the inherent inequality of the individual worker when weighed against the power of the employer.¹⁸³ This is the purpose for which the right to strike is extended; to go beyond this purpose is an abuse of the right.

A strike in support of occupational interests falls squarely within the purpose of the right to strike. Where the occupational interests of workers are infringed it is generally by the actions of their employer –

¹⁸¹ ILO Convention No 87 – Freedom of Association and Protection of the Right to Organise Convention, <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (last accessed 29 September 2002), art 10.

¹⁸² See Part IV(C), above.

workers must have the power to resist these actions where they disserve their legitimate interests. This would encompass a strike taken in support of bargaining for a collective agreement, a strike taken on the grounds of safety and health and any other strike taken in response to the terms and conditions of employment, where the matter is outside the competence of the courts.

By contrast, the right to strike in support of socio-economic interests falls squarely outside this identified purpose. A strike purely on socio-economic grounds is most likely to be a protest strike against government policy. In a functioning democracy such as New Zealand, strike action taken against Government policy is a clear abuse of the right to strike. In the case of a protest strike, the strike is taken as a balance to the power of government, not to the power of the employer – as with every citizen, the worker's remedy is at the ballot box, not on the picket line.

However, this is an example of an area in which the proper limits of the right to strike depend upon the social and economic conditions of the country concerned. For example, it might be appropriate for workers to take strike action against Government policies if normal democratic processes had proven to be ineffective. It is in areas such as this that the ILO's rigid policy becomes particularly problematic.

The final area is that of secondary and sympathy strikes, where workers strike in support of the primary dispute of other workers. To this author's mind, the question must always be whether there is such a connection between the two groups of workers that the occupational interests of the secondary group are affected. In New Zealand's present political climate, strike action must be linked to workers' occupational interests before it will fall within the right to strike. As stated above, the position may differ in an altered social or political climate.

¹⁸³ See Part II(B), above; Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons,

No bright line can be drawn, however strikes in support of workers within the same corporate group would usually be permissible. Strikes in support of workers in a different industry would usually not be permissible. In the case of workers in the same industry it would be a matter of fact and degree whether the occupational interests of the secondary workers were sufficiently affected in a particular case. If the workers were also in the same geographical region then the connection between the workers would clearly be stronger. Equally, if the workers could show an established correlation between changes in pay-rates in their workplace and changes in pay-rates in another, a sufficient connection might be established notwithstanding the absence of any other connecting factors.

This requirement that strike action be linked to the occupational interests of workers, in addition to being principled, is also justified on the grounds of policy. Allowing workers to exercise their right to strike inflicts a significant cost upon the particular employer affected. Where the strike action was taken in response to a threat to the occupational interests of the workers concerned, most likely traceable to their particular employer, the cost to the employer can be justified. However, where the strike action is taken in response to a threat to the socio-economic interests of the workers concerned, most likely beyond the particular employer's control, it is much more difficult to justify the employer having to bear this cost.¹⁸⁴

4 *An alternative approach*

A possible alternative approach would be to extend Kahn-Freund's formulation of the purpose of the right to strike to encompass strikes in pursuit of socio-economic interests. This alternative approach would be based on the inequality of the individual worker when measured

London, 1977) 225-6.

against the power of the Government to set social and economic policy. The effect that the individual worker's withdrawal of labour has on society and the economy, and through these, on the Government, is negligible when compared with the effect the Government's setting of social and economic policy has on the individual worker. For this reason it might be stated that it is necessary for workers to be able to strike collectively in support of their social and economic interests, so as to counterbalance the power of the Government.

In this context, a possible solution to the policy problem of imposing an economic cost on individual employers would be for the Government to provide monetary compensation to the employer concerned, upon satisfactory proof of actual pecuniary loss, where a strike was genuinely in response to a Governmental policy rather than the particular employer's actions. Although this would be hard to implement in practice, particularly in view of the temptation for employers to attempt to shift the costs of strikes in support of occupational interests onto the Government, it would, if implemented, allow such strikes to proceed.

However, it seems that, notwithstanding that this policy problem might be overcome, extending the right to strike to include the right to strike in support of workers' socio-economic interests is not necessary or desirable. New Zealand is a functioning democracy in which the right of recourse to the ballot box is an effective one. In this situation the additional right to take strike action is unnecessary. In addition, extending the right to strike would put a greater power in the hands of workers to influence the Government's policy directly, than that which resides in the hands of non-working electors. For this reason extending the right to strike, in addition to being unnecessary, is also undesirable.

¹⁸⁴ This is a policy concern shared by the New Zealand Government – see NZ Government Response to the ILO Report on the ERA quoted in Anderson and others (ed) *Mazengarb's Employment Law* (LexisNexis Butterworths, Auckland, 2002) para ER86.18A.

B Does New Zealand Have an Effective Right to Strike?

An effective right to strike allows workers to strike in support of their occupational interests. This means that workers should be free to strike both in relation to their own collective agreement and occupational safety and health, and in support of such action by other workers whose interests are sufficiently directly connected to their own.

In order to effectively safeguard the right to strike New Zealand need not enact the full range of protections advocated by the ILO. However, New Zealand should, in addition to the current protections, protect a limited class of sympathy and secondary strikes, where the occupational interests of the secondary workers are directly affected.

VI CONCLUSION

This paper has explored the history of the right of freedom of association and the right to strike, with a view to showing both how far these rights have developed and how these rights have yet to achieve the necessary balance between workers' and employers' interests.

Upon a return to the first principles underlying freedom of association, it is clear that an effective right to strike should allow workers to strike in support of their occupational, but not their socio-economic interests. In a functioning democracy such as New Zealand, to allow strikes to be taken on a broader basis would be an abuse of the right to strike - both unnecessary and undesirable.

Therefore, protest strikes should properly be unlawful, as should the category of sympathy strikes where the striking workers' interests are not sufficiently connected to the interests of the workers in the primary dispute. Lawful strike action should cover only those strikes relating to the striking workers' particular employment and a limited class of

sympathy action where the interests in dispute are sufficiently connected to the interests of the secondary workers.

New Zealand does not yet have an effective right to strike, in the absence of a limited right of secondary or sympathy strike action. However, NZ may safeguard an effective right to strike without fulfilling all the criteria laid down by the ILO.

VI CONCLUSION

In order to effectively safeguard the right to strike New Zealand must ensure that the full range of principles advocated by the ILO. However, New Zealand should, in addition to the current provisions, enact a limited class of sympathy and secondary strikes which the occupational interests of the secondary workers are directly affected. It must further introduce a system of independent arbitration to resolve industrial disputes. Although workers' representatives should be empowered to negotiate and to work in industrial relations in this regard, the power has expired the expiry of the right of freedom of association and the right to strike with a view to ensuring that in these rights have developed and how these rights have yet to achieve the necessary balance between workers' and employers' interests.

Method used in this paper is the first principle, workers' freedom of association. It is clear that an effective date to strike should allow workers to strike in support of their occupational interests and to support their economic interests. In a democracy democracy such as New Zealand to ensure strikes to be taken on a democratic basis would be a right of the right to strike. It is not necessary and appropriate to limit the right to strike to occupational interests or to limit the right to strike to occupational interests.

which has been stated in the preamble of the ILO. Therefore, workers' strikes should normally be unlawful, as should the extent of sympathy strikes which the striking workers' interests are not sufficiently connected to the interests of the workers in the primary dispute. Lawful strike action should cover only those strikes relating to the striking workers' particular employment and a limited class of sympathy strikes.

(b) The ILO ERA is the only ILO instrument which provides for the right to strike. (ILO, *International Labour Office*, Geneva, 1951, p. 154.)

BIBLIOGRAPHY

Legislation

- (1824) 5 Geo 4, c. 95 (UK);
- (1825) 6 Geo 4, c. 129 (UK);
- Combination Act (1799) 39 Geo 3, c.81 (UK);
- Combination Act (1800) 39 & 40 Geo 3, c.106 (UK);
- Conspiracy and Protection of Property Act (1875) 38 & 39 Vict, c.86 (UK);
- Criminal Law Amendment Act (1871) 34 & 35 Vict, c.32 (UK);
- Employment Contracts Act 1991;
- Employment Relations Act 2000;
- Friendly Societies Act (1855) 18 & 19 Vict, c.63 (UK);
- Hatters' Combination Act (1777) 17 Geo 3, c.55 (UK);
- Industrial Conciliation and Arbitration Act 1894;
- Industrial Conciliation and Arbitration Amendment Act 1936;
- Industrial Relations Act 1973;
- Labour Relations Act 1987;
- Master and Servant Act (1823) 4 Geo 4, c.34 (UK);
- Master and Servant Act (1867) 30 & 31 Vict, c.141 (UK);
- Molestation of Workmen Act (1859) 22 Vict, c.34 (UK);
- New Zealand Bill of Rights Act 1990;
- Omnibus Combination Act (1749) 22 Geo 2, c.27 (UK);
- Paper-Makers Combination Act (1796) 36 Geo 3, c.111 (UK);
- Spitalfields Act (1773) 13 Geo 3, c.68 (UK);
- Statute of Artificers (1563) 5 Eliz 1, c.4 (UK);
- Statute of Labourers (1349) 23 Edw 3 (UK);
- Tailors' Combination Act (1721) 7 Geo 1, c.13 (UK);
- Trade Union Act (1871) 34 & 35 Vict, c.31 (UK);
- Weavers' Combination Act (1726) 12 Geo 1, c.34 (UK);
- "Who be Conspirators" (1304) 33 Edw 1, st. 2 (UK);

Case Law

- *Allen v Flood* [1898] AC 1;
- *Express Newspapers Ltd v MacShane* [1980] 1 All ER 65;
- *Gibson v Lawson* [1891] 2 QB 559;
- *Hornby v Close* (1867) 10 Cox CC 393 (QB);
- ILO: Committee on Freedom of Association, 15th Report, Case No 102 (Union of South Africa);
- ILO: Committee on Freedom of Association: Report No 324, Case No 2022; Report No 292, Case No 1698; Report No 295, Case No 1698; Report No 265, Case No 1385; Report No 259, Case No 1385; Report No 234, Case No 1334 <<http://www.ilo.org/ilolex/english/newcountryframeE.htm>> (last accessed 29 September 2002).
- *Lumley v Gye* (1853) 118 ER 749 (QB);
- *Quinn v Leathem* [1901] AC 495 (HL);
- *R v Bunn* (1872) 12 Cox CC 316;
- *R v Bykerdike* (1832) 174 ER 61 (Nisi Prius);
- *R v Connell* (10 July 1819) *The Times* (KB);
- *R v Duffield* (1851) 5 Cox CC 404 (Nisi Prius);
- *R v Eccles* (1783) 168 ER 240, 241 (KB);
- *R v Ferguson & Edge* (1819) 171 ER 714 (Nisi Prius);
- *R v Hewitt* (1851) 5 Cox CC 162 (QB);
- *R v Journeymen-Tailors of Cambridge* (1721) 88 ER 9 (KB);
- *R v Rowlands* (1851) 5 Cox CC 436 (Nisi Prius);
- *R v Selsby* (1847) 5 Cox CC 495 (Nisi Prius);
- *Rookes v Barnard* [1964] AC 1129 (HL);
- *South Wales Miners' Federation v Glamorgan Coal Co* [1905] AC 239 (HL);
- *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL);
- *Times' Printers' Case* (9 November 1810) *The Times* (Nisi Prius);

International Agreements

- Declaration on Fundamental Principles and Rights at Work (ILO, Geneva, 1998);
- International Covenant on Civil and Political Rights (16 December 1966) <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (last accessed 29 September 2002);
- International Covenant on Economic, Social and Cultural Rights (16 December 1966) <http://www.unhchr.ch/html/menu3/b/a_ceschr.htm> (last accessed 29 September 2002);
- International Labour Organisation Constitution (11 April 1919);
- ILO Convention No 87 – Freedom of Association and Protection of the Right to Organise (9 July 1948) <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (last accessed 29 September 2002);

Secondary Materials

- Gordon Anderson “Editorial: the Role of International Labour Standards” [2002] (2) ELB 21;
- Anderson and others (ed) *Mazengarb’s Employment Law* (LexisNexis Butterworths, Auckland, 2002);
- Ruth Ben-Israel *International Labour Standards: The Case of Freedom to Strike* (Kluwer, 1988);
- John Cline “The Worker Cooperative: A Vehicle for Economic Development” <<http://www.geonewsletter.org/cline1.htm>> (last accessed 30 September 2002);
- Richard Epstein *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, Boston, 1992);
- K D Ewing *The Right to Strike* (Clarendon Press, Oxford, 1991);
- A L Haslam *The Law Relating to Trade Combinations* (Allen & Unwin, London, 1931).
- James Holt *Compulsory Arbitration in New Zealand: the first 40 years* (Auckland University Press, Auckland, 1986);

- International Labour Office *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th ed, ILO, Geneva, 1996);
- International Labour Organisation *ILOLEX Database on International Labour Standards – CEACR Observations* <<http://ilolex.ilo.ch:1567/english/ceacre.htm>> (last accessed 29 September 2002).
- International Labour Organisation – Official Relations Branch *Alphabetical List of ILO Member Countries* <<http://www.ilo.org/public/english/standards/relm/country.htm>> (last accessed 29 September 2002);
- International Labour Office *Report of the Committee of Experts* (ILO, Geneva, 1994) Report III(Part 4B) Chapter V;
- Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977);
- Robin Mackay (ed) *Employment Law Guide* (5th ed, Butterworths, Wellington, 2001);
- Karl Marx *Capital: A Critique of Political Economy* (1887);
- John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991);
- Ferdinand von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell Publishing Limited, New York, 1987);
- Paul Roth “ILO Conventions 87 and 98 and the Employment Relations Act” (2001) 26 NZJIR 145;
- Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan & T Cadell, London, 1776);
- Victoria University of Wellington Industrial Relations Centre *The New Zealand System of Industrial Relations* (Industrial Relations Centre – Victoria University of Wellington, 1989);
- David Westfall & Gregor Thusing “Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis” (1999) BC Int’l & Comp L Rev 29;

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00692907 7

AS7
VU
A66
M6
200

LAW LIBRARY

A Fine According to Library Regulations is charged on Overdue Books.

VICTORIA UNIVERSITY OF WELLINGTON

LIBRARY

Association: *Digest of Association Committee of Geneva, 1996*;
Database on International Labour Standards - CEACR Observations (<http://ilolex.ilo.ch:1567/> (last accessed 29 September 2002)).
Official Relations Branch (<http://www.ilo.org/> (last accessed 29 September 2002)).
Committee of Experts (ILO, Geneva, 1994) Report III (Part 4) Chapter V.
O'Donoghue *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977).
Robin Mackay *Employment Law Guide* (5th ed, Butterworths,

Wellington, 2001);

- Karl Marx *Capital: A Critique of Political Economy* (1887);
- John V Orth *Combination and Conspiracy: A Legal History of Trade Unionism 1721-1906* (Clarendon Press, Oxford, 1991);
- Ferdinand von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell Publishing Limited, New York, 1987);
- Paul Roth "ILO Conventions 87 and 98 and the Employment Relations Act" (2001) 26 NZJIR 145;
- Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan & T Cadell, London, 1776);
- Victoria University of Wellington Industrial Relations Centre *The New Zealand System of Industrial Relations* (Industrial Relations Centre - Victoria University of Wellington, 1989);
- David Westfall & Gregor Thusing "Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis" (1999) BC Int'l & Comp L Rev 29;

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00692907 7

AS741
VUW
A66
M655
2002

