REMEDIAL ASPECTS CONCERNING LABOUR MANAGEMENT WITH SPECIAL REFERENCE TO UNFAIR LABOUR PRACTICE IN INDIA

(An analytical study of statutes and judicial pronouncements there of)

A THESIS

Submitted for the award of
Ph.D. Degree
In the Faculty of Law
to the

University of Kota, Kota (Rajasthan)

Submitted by:
Mahendra Singh Meena
Lecturer in Law
Government Law College,
Kota (Raj.)

Supervised by:
Dr. Kailash Chandra Sharma
Principal (Retd.)
Government Law College,
Jhalawar (Raj.)

2015

Dr. K.C. Sharma
Dean & Principal (Retd.)
University of Kota, Kota (Raj.)
Government Law College, Jhalawar (Raj.)

CERTIFICATE FROM THE SUPERVISOR

It is certified that the

(i) Thesis "**Remedial Aspects Concerning Labour Management With Special Reference to Unfair Labour Practice in India (An analytical study of statutes and judicial pronouncements there of)**" Submitted by **Mahendra Singh Meena**, Lecturer in Law, Government Law College, Kota (Rajasthan) is an original Copy of research work carried out by the candidate under my supervision.

(ii) His literary presentation is satisfactory and the thesis is in a form suitable for publication.

(iii) Work evinces the capacity of the candidate for critical examination and independent judgment. The thesis incorporates new facts and a fresh approach towards their interpretation and systematic presentation.

(iv) Mr. Mahendra Singh Meena has put in at least 200 days of attendance every year.

Date: 30.05.2015 **Dr. K.C. Sharma**

Place : Kota **Supervisor**

PREFACE

In this study the researcher has examined in detail the "**Remedial Aspects Concerning Labour Management With Special Reference to Unfair Labour Practice in India (An analytical study of statutes and judicial pronouncements there of)**" It is intended that such a study will help determine the parameters which any legislation for labourers must include.

The acknowledgement of the debt to other is always a pleasant task. The help given by those mentioned in this acknowledgement has been of paramount value. Despite best efforts, non-acknowledgement to some worthy patrons cannot be completely ruled out but their contribution has been equally valuable. My gratitude to them can never diminish.

I record my deep sense of gratitude and gratefulness to **Dr. K.C. Sharma,** Retired Dean, Faculty of Law, University of Kota, Kota (Raj.), who has kindly taught me the fundamentals of legal research. His scholarly academic support, guidance and training has been immensely sustained which could help me in viewing Unfair Labour Practice in India. His willing supervision and guidance has gone a long way in shedding light on many hitherto unknown areas. I am indebted to him not only for accepting me as his research scholar and giving me complete impact of Unfair Labour Practice in India. I have never missed an opportunity to take best possible advantage of **Dr. Sharma's** scholarly thoughts and learned discourses in the field of Labour Management relating to Unfair Labour Practice in India. I have hardly any work in my vocabulary to express my gratitude to him.

I shall be failing in my duty if I do not express my debt of gratitude's to Dr. A.K. Sharma, Dr. R.K. Sharma, Dr. B.K. Galchania, Dr. Mahattam, Dr. R.K. Upadhyay, Shri C.J. Singh, Professor in the Faculty of Law, University of Kota, Kota, for helping me and extending their co-operation in the completion of this work.

I am also grateful to Dr. Suresh Bhaira (Principal), Dr. Vivek Sharma (RJS), Mr. Sajnay Bhatnagar (RJS) and other well wishers who have helped me by giving necessary material relating to the study in question.

I wish to express my thanks to the staff of the libraries of the University, University of Kota, Kota (Raj.); University Studies in Law, University of Rajasthan, Jaipur; Indian Law Institute, New Delhi; Institute of Development Studies, Jaipur; The Harish Chandra Mathur State Institute of Public Administration, Jaipur;; Rajasthan Legislative Assembly, Secretariat; Information Centre, Government, Jaipur and Government Law College, Jhalawar for their cooperation.

I have suitable words to express my feeling of indebtness for my father Shri B.R. Meena, mother Smt. Sarvo Devi, my Elder Brother Shri R.S. Meena (R.Ac.S.), my Sister-in-Law Smt. Nalini Kathotia (R.A.S.) my wife Smt. Shashi (TGT), my Daughter Nitisha and my Son Utkarsh who allowed me to tread on their time and comforts during the course of this project.

I also acknowledge the help tendered by *Vintron Computers, Jaipur* for computering the printing of the thesis.

Place : Kota,

Dated : 30.05.2015 ***(Mahendra Singh Meena)***

Remedial Aspects Concerning Labour Management With Special Reference to Unfair Labour Practice in India

(An analytical study of statutes and judicial pronouncements there of)

GENERAL INDEX

Preliminary Detail

Detailed Scheme of the Thesis

LIST OF CASES

1. A.C. Mukheriee v. Union of India, 1972 Lab 1C 929.
2. A.P. Tiwari v. Allahabad Bank Ltd., 6 FJR 169.
3. Adarsh Gupta V/s State of Haryana, AIR 2010 (124) FLR 844
4. All India Bank Employers' Association v. National Industrial Tribunal (Bank Disputes), Bombay, AIR 1962 SC 171 : 1961 2 LLJ 385.
5. Anand Bazar Patrika (P) Ltd. v. Employees, 1965 I SCJ 146.
6. Apar (P) Ltd. v. S.R. Samani, (1980) 2 LLJ 344.
7. Apinath Wowan Waghchaure v. M.S.E.B., (1981) 42 FLR 100.
8. Arun T. Wankhede v. Executive Engineer, (1992) 1 LLN 480.
9. Ashok Vishnukate v. M.R. Bhope, (1992) 64 FLR 898.
10. Assam Oil Co. v. Its Workmen, 1960 SC 1264.
11. Automobile Products of India Ltd. v. Rukamii Bala & Others, AIR 1955 SC 258.
12. B.R. Singh and others V/s. Union of India and Others, AIR 1990 SC 1989
13. Bajaj Auto Limited V/s. Rajendra Kumar Jagannath Kathar and Others, (2013) 5 SCC 691
14. Balmer Lawne & Co. Ltd. v. S.M. Limaye, 1992 Lab IC 205.
15. Balwant Dynandeo Khadekar v. Secretary Shatkari Sehakari Sangh, 1992 Lab IC 655.
16. Batuk K. Vyas v. Surat Municipality, AIR 1953 Bom. 133.
17. Bengal Bhatdee Coal Co. v. R.P. Singh, AIR 1964 SC 486.
18. Benny Miranda v. Marikar Engineers Ltd., (1958) 2 LLJ 540.
19. BEST Undertaking v. BEST Kamgar Sena, 1986 Lab IC 672.
20. Bharat Bank Ltd. Delhi v. Bharat Bank Employees Union, 1950 SCR 459.
21. Bharat Bank Ltd. v. Employees of Bharat Bank 1950 LLJ 921.
22. Bharat Forge Co. Ltd. vs. Uttam Manohar Nakate, 2005 (2) SCC 489.
23. Bharat Iron Works v. Bhagubhai Balubhai Patel, (1976) 1 SCC 518.
24. Bhartiya Kamgar Sena v. Consolidated Pneumatic Tool Co. (India) Ltd., (1992) 1 LLJ 112.
25. Bhawani Kundal Cooperative Urban Bank Ltd. v. Venkatapathi Naidu, (1955) 1 LLJ 21.

26. Bhiku Ram v. Presiding Officer, Industrial Tribunal Rohtak, (1995) Lab IC 2448.
27. Bijoy Cotton Mills Ltd. v. State of Ajmer, AIR1955 SC 33.
28. Board of Trustees of the Port of Bombay v. Dilipkumar Raghavenranath Nadkerni, (1983) 1 SCC 124, 134.
29. Bombay High Court in B.E.S.T. Undertaking v. B.E.S.T. Kamgar Sena, (1986) Lab IC 672
30. Brooke Bond (India) Ltd. v. Their Workmen, 1966 (1) LLJ 407 (SC).
31. Bura Ram v. N.W. Rly., AIR 1954 4 Punjab 298.
32. Canara Banking Corporation Ltd. v. U. Vittal, (1963) 2 LLJ 354.
33. Caromandal Fertilizers Ltd. v. State of Andhra Pradesh, (1988) II LLJ 390 (391)
34. Cawnpore Textiles Ltd. Kanpur v. Their Workmen, AIR 1953 SC 241.
35. Ceat Ltd. vs. Anand Abasaheb Hawaldar & Ors., AIR 2006, 1172
36. Chief Officers, Sangli Municipal Council v. Daramsing Hiralal Nagarkar, 1991 Lab IC 1820.
37. Chipping and Painting Empowers Association v. A.T. Zambre, (1968) IILJ 193 (198).
38. Colour Chem Ltd. v. A.L. Alsapurkar, (1992) 1 LLN 95.
39. Commonwealth v. Pullis, (1806) as reported in Commons and Gilmore, Documentary History of American Industrial Society 59-236 (1810).
40. Commonwealth v. Carlisle, (1821) 4 Commons and Gilmore documentary, History of America, p. 99.
41. Commonwealth v. Hunt, 4 Mecalf (Mass. 1842).
42. Cosmos India Rubber Pvt. Ltd. v. Mumbai Mazdoor Sabha, (1989) 1 Cur LR 432.
43. Cox and Kings (Agents) v. Their Employees, (1949)1 LLJ 796.
44. D.C. Tonga v. Maharashtra State Transport Kamgar Sangathana, 1984 Lab IC 1686.
45. D.K. Yadav v. J.M.A. Industries, 1993 3 SCC 258
46. Dadu Nagu Upasha v. Warns Sahakari Sakhar Karkhana Ltd., (1991) 1 Cur LR 172.
47. Daii Muraroo Surve v. ITC Ltd., (1991) 1 LLN 466.
48. Dalal Engineering P.Ltd. v. Rama Rao Sawant and Others, (1992) II LLJ 384.

49. DGU Workers Union & Ors. v. Kishu Tekchandani & Ors., 2005 (1) Lab LJ 986 at pp 988-989 (Del).
50. Dhanajay Raghunath Malvadker v. Maharashtra State Road Transport Corporation, (1991) 2 Cur LR 724.
51. Director of Education v. Rawat Prakash Pandey, 1975 Lab IC 975.
52. District Transport Officer V/s. S. Kunchan, ILR 2009 (3) Kerala 808
53. Divakaran Nair v. State of Tray. Co. AIR 1958 Ker. 922.
54. Divisional Forest Officer Cadcbiroli v. Madhukar Ramji Underwade, 1995 Lab IC 2141.
55. Dombivli Nagari Sahakar Bank Ltd. V/s. Lahu Keshav Rewale , (2014) III LLJ 607 Bom
56. Eastern Plywood Manufacturing Co. Ltd. v. Their Workmen, (1951) I LLJ pp. 665-66.
57. Eastern Plywood Mfg. Co. Ltd. v. Workmen (1951), I LLJ 656 (IT).
58. Edward Keventer Ltd. v. S.C. Neogi, (1955)I LLJ p. 568.
59. Elgin Mills Co. Ltd. v. Suti Mill Maxdoor Union, (1951) ILLJ 184.
60. Empire Industries Ltd. V/s. State of Maharashtra and Others, AIR 2010 SC 1389.
61. Employers of East Religara Coal Co. v. Their Workmen, 1963 (7) FLR- 333 (IT).
62. Eveready Flash Light Co. v. Labour Court, Bareilly, (1961) II LLJ p. 2K.
63. Everready Flash Light Co. v. Labour Court, (1961) 2 LLJ 204.
64. Executive Engineer Electrical Division, Nagpur v. Prakash Devidas Kalasit, 1986 Lab IC 738.
65. Executive Engineer, Electrical Division v. Prakash Devidas Kalasit, 1983 Lab IC 1627.
66. Executive Engineer, Panam Irrigation Division, Godhra and another v. Dilipsinh C. Chavda and others, 2003 Lab I.C. 1707
67. Express News-Papers (P) Ltd. v. Presiding Officer Labour Court, AIR 1964 SC 806.
68. F.K. Menzlin v. B.P. Premakumar, (1991)I LLJ 55(58)(Kant.DB).
69. F.Rehman v. Basoa and Company, (1982)II LLJ 120.
70. FCW v/s Premium Brands Operating GP Inc., [2009] Alta.L.R.B.R. LD-004

71. Ferozpur Central Cooperative Bank Ltd. v. Labour Court , (1986) ILLN 204 (P & H).
72. Francis Carolie v. Union Territory of Delhi, 1981 1 SCC 746.
73. Frizer Ltd v. Mazdoor Congress and Others, (1996) 5 SCC 609.
74. G.E.C. (P) Ltd. v. Labour Court, AIR 1969 SC 235, 239.
75. Gangadhar Pillai v. Siemens Ltd., 2006 (8) Suppl. SCR 900.
76. General Labour Union v. B.V. Chavan, (1985) 1 SCC 312 : 1985 Lab IC 726.
77. General labour Union, Bombay v. Ahmadabad Mfg and Calico Printing Co. Ltd., 1995 Supp(1) SCC 175.
78. General Workers' Union v. Municipal Council, Sangoli , (1984) 84 FLR 411.
79. Gopalan v. State of Madras, 1950 SCR 88.
80. Govt. Of Tamil Nadu V/s. Tamil Nadu Race Course General, (1993) ILLJ 977 Mad
81. H.D. Singh v. Reserve Bank of India, 1985 Lab IC 1733.
82. Hawarah Municipality v. Mansa Das Dey, (1965) 2 LLJ 135.
83. Hind Construction & Engineering Co. Ltd. V/s. Their Workmen, AIR 1965 SC 917
84. Hind Construction and Engineering Company Ltd. v. Their Workmen, (1965) 1 LLJ 462 (SC).
85. Hindalko Industries Ltd. vs. Association of Engineering Worker, 2008 AIR 1867
86. Hindustan Lever Ltd. v. Ashok Vishnu Kate, AIR 1996 SC 285(296)
87. Hindustan Motors Ltd. v. Mahendra Singh Dhantwal ,1965 I LLJ 612 (Cal. HC)
88. Hitchman Coal and Coke Company v. Mitchell, 245 USP 229 (1917).
89. Hotel Kanishka v. Delhi Administration, 1995 Lab. I.C. 2381 (2386).
90. Ichalkaranii Cooperative Spinniq & Mills Ltd. v. Deccan Cooperative Soot Girani Kamgar Sangh, (1991) 1 LLJ 220.
91. Independent Labour Federation v. St. of U.P. , (1964) 9FLR 340 All.
92. India Machinery Mazdoor Union v. India Machinery Co. Ltd., (1956) II LLJ 408.
93. Indian Bank Ltd. v. Their Workmen, (1953) I LLJ, p. 230.
94. Indian Cycle Mfg Co. Ltd. v. Their Workmen, (1951) 1 LLJ 390.

95. Indian Iron and Steel Co. Ltd. v. Workmen, 1958 SCR 667.
96. Indian Tobacco Co. Ltd. v. Industrial Court, (1990) 1 Cur LR 88.
97. Industrial Tubes Mfg. Co. v. S.R. Samant, 1981 Lab IC 379.
98. J.K. Cotton Manufacturers Ltd. Kanpur v. J.M. Tiwari , AIR 1959 All. 39
99. J.K. Cotton Spg. & Wvg. Mills Co. Ltd, 1953 1 LLJ 257.
100. J.K. Eastern Industries Ltd., (1951) 1 LLJ 44
101. J.K. Jute Mill Co. Ltd. v. Rashtriya Mill Mazdoor Sabha, (1952) ILLJ 184.
102. J.T. Chanral Industries (P) Ltd. v. Naturam Tukaram Bhandale, (1990) 1 LLN 55.
103. Jai Engineering Works Ltd. v. State of West Bengal, ILR 343 of 1967.
104. Jai Vikram Shah & Gulf Air Co. v. R.P. Tripathi, (1983) Lab IC 605.
105. Kadar Nath Bahl v. State of Punjab, (1974) 3 SCC 21.
106. Kapurthala Co-operative Bank Ltd. v. P.O. Labour Court, 1984 Lab IC 974.
107. Kemp and Co. Ltd. v. Their Workmen, (1955) ILLJ 48 (53).
108. Kerela Rubber and Reclaims Ltd. v. P.A. Sunny, 1989 Lab IC 964.
109. Keso Ram Cottom Mills Ltd. v. Gangadhar, AIR 1964 SC 704.
110. Kirlosker Oil Engines Ltd. v. V.B. Bharwkar & Others, (1987)I LLJ 366 (Bom.)
111. Kohlapur Zilla Shetkari Sahakari Soot Girani Ltd. v. Ramchandra Shankar Shinde, (1992) 1 LLJ 435.
112. L.H. Sugar Factories and Oil Mills (Pvt) Ltd. v. State of U.P., (1961) I LLJ 868 (All H.C.).
113. Lakshmi Saraswati Motor Transport Co. v. Labour-courts, (1967) II LLJ 118.
114. Larsen Toubro v. Rajnikant Raghunath Belekar, (1991) 2 Cur LR 409.
115. M.L. Bose & Co. (Pvt) Ltd. Calcutta v. Its employees, (1961) 2 LLJ 107.
116. M/s Sasa Musa Sugar Works v. Shobrati Khan & Others, AIR 1959 SC 9-23.
117. M/s Trambak Rubber Industries Ltd. v. Nashik Workers Union and Others, 2003 Lab. I.C. 3483.
118. Madhaband Colliery v. Workmen, (1966) 1 LLJ 738.
119. Madhav Soiru Laad v. Chase Bright Steel Ltd., (1984) 1 LLN 324 (Bom).
120. Madhuman Colliery v. Their Workmen, 1966 (1) LLJ 738 (SC).
121. Mafatlal Engineering Industries Ltd. v. Employees Union, 1992 Lab IC 900.
122. Mahalaxmi Cotton Mills, (1951) I LLJ 498.

123. Maharashtra General Kamgar Union v. All India Handloom Fabrics Marketing Cooperative Society, (1992) ILLN 734.
124. Maharashtra SRTC v. Maharashtra Motor Kamgar Federation, 1986 Lab IC 253.
125. Maharashtra State Board Tpt Corpn. v. Maharashtra State Tpt. Kamgar Sangathan, 1984 Lab. I.C. 1721.
126. Maharashtra State Coop. Cotton Growers Marketing Federation Ltd. v. Shripati Pandurang Rhade, 1989 Supp. (1) SCC 226:(1989) 1 LLJ 57.
127. Maharashtra State Coop. Cotton Growers Marketing Federation Ltd. v. Their Employees Union, (1992) 62 FLR 870(Bom.).
128. Maharashtra State Road Transport Corporation v. Niranjan, 1985 Lab IC 194.
129. Mahatma Phule Agricultural University and Others v. Nashik Zilla Sheth Kamgar Union and others, 2001 Lab. I.C. 3275.
130. Mahendra B. Khimji v. State of Karnataka, 2005 LAB. I.C. 4169.
131. Mahindra and Mahindra Ltd. V/s. Avinash Dhaniram ji Kamble, (2010) 2 SCC 233
132. Management of Gauhati Tpt. Association v. Labour Court, 1969 Lab. I.C. 1568 (1573-74).
133. Martin Bum Ltd. v. R.N. Banarjee, (1958) I LLJ 247.
134. Mavji C Lakum v. Central Bank of India, 2008(5) SCR p. 1001
135. Mazdoor Congress v. S.A. Patil, 1991 Lab IC 1170.
136. Metal Box Co. of Indian Ltd. v. Their Workmen, (1952) ILLJ 822.
137. Michael Nolin v/s Wal-Mart, UFCW, Certain Employees et al., British Columbia LRB No. B123/2006 52968 and 53378
138. Mumbai Kamgar Union v. Industrial Tool Manufactures Ltd., (1981) 1 LLN 391.
139. Mumbai Mazdoor Sabha v. Bombay Dying and Mf.,(1982) Lab IC 1533.
140. Municipal Nokariyat Mandal v. Municipal Corporation of the City of Bhavnagar & Ors., 2005 (2) LLJ 737. at pp 741-742 (Guj.)
141. Munna Lal v. Calcutta Rangers Club, 6 FJR 471.
142. Muthe Steel (India) Ltd. v. Labour Court Hyderabad, 1979 Lab. I.C. 325 (332).
143. Narendra Deo Krishi Evam Proudyogic Vishwavidylaya Mazdoor Union v. Kulpati, (1990) 1 LLN 28 (All.).

144. National Labor Relations Board v/s United Steelworkers of America, CIO, 357 U.S. 357
145. National Tobacco Co of India Ltd. v. Fourth Industrial Tribunal and Others, (1960) 2 LLJ 175.
146. New Shorrock Mills v. Mahesh Bhai T. Rao, 1996(6) 6 SC 590.
147. New York People v. Melvin, 2, Wheeler's Criminal Case, p. 262 (1810) (N.Y.).
148. Northbrook Jute Co. Ltd. v. Their Workmen, (1960)1 LLJ 580 (583) SC.
149. Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 193.
150. P. Balkotaiah v. Union of India, AIR 1958 SC 232.
151. P. RaJeev v. Karanataka State Construction Corporation, (1992)1 LLJ 217.
152. P.P.S.Bommanna Chettier Sons v. Labour Court, 1973 Lab. I.C. 882 (883).
153. Paints Colour and Varnish Company Ltd. v. Their Workmen, (1952)1 LLJ 410.
154. Papusaheb Shripatroo Naik Nimbalkar v. Industrial Court, (1981) 43 FLR 231.
155. Petroleum Employees Union v. Bharat Petroleum Corpn. Ltd., 1983 MLJ 618.
156. Petroleum Employees' Union v. Industrial Court, (1980) 1 LLN 537.
157. Phulbari Tea Estate v. Its Workmen, 1959(2) LLJ 663.
158. Prahlad Atmaram Jadhav v. M.D. Kulkarni Black & Decker Ltd., 1995 II LLJ 886.
159. Prahlad Narayan Malwade v. Shriram Sahakari Sakhar Karkhana Ltd., (1991) 2 Cur LR 729.
160. Prem Chand v. State of H.P.,1988 Lab IC 1094.
161. Premier Automobiles Employees' Union v. Premier Automobiles Ltd., (1987) 2 LLN 746 (Bom).
162. Premier Automobiles Ltd. v. Engineering Mazdoor Sabha, 1982 Lab IC 1759 : 1982 2LLJ 73.
163. Pure Drinks (P) Ltd. v. Kirat Singh Maungatt, (1961) 2 LLJ 99.
164. Quinn v. Leatham, (1901) AC 495.
165. R.D. Surve v. Tata Iron and Steel Co. Ltd., (1989) 1 LLJ 384.
166. R.K. Panda and Others v. Steel Authority of India Ltd., (1994) 5 SCC 304.
167. R.v. Bunn, 12 Cox's Criminal Case, p. 316.
168. Raghubar Dayal Jai Prakash v. Union of India, AIR 1962 SC 263.

169. Raja Bahadur Motilal Poona Mills Ltd. v. Girni Kamgar Sangathana, 1986 Lab IC 1616.
170. Rajasthan Lalit Kala Academy v. Radhey Shyam, 2008(10) SCR p.820
171. Rajasthan State Road Transport Corporation and Anothers V/s. Satya Prakash, (2013) 9 SCC 232
172. Rajkrushna Bose v. Vinod Kango, AIR 1954 SC 202.
173. Ram Charan Sharma and Others v. State of Rajasthan and Others, 2000 III LLJ Suppl 779
174. Ram Naresh Tripathi v. S.D. Rone, (1991) 2 LLN 1122.
175. Rama Bala Kate v. Walchandenagar Industries Ltd., (1996) I LLJ 713.
176. Raymond Ltd. and Anothers. V/s. Tukaram Tanaji Mandhare and Anothers, (2011) 3 SCC 752
177. Regional Manager, Maharashtra S.R.T. Corpn. v. Regional Secretary Maharashtra State Transport Kamgar Sanghatana, 1984 Lab IC 1721.
178. Regional Manager, S.B.I v. Rakesh Kumar Tewari, 2006(1) SCC 530
179. Rohtas Industries Ltd. v. Ali Hasan, (1963) 1 LLJ 253, 255.
180. Rohtas Industries Ltd. v. Brinandan Pandey, AIR 1957 SC I.
181. Rookes v. Bernard, (1964) AC, p. 1129.
182. S. Palani v. Bajaraja Textiles, (1991) 1 LLN 838 (Mad).
183. S.C. Chemicals and Dyes Trading Employees' Union v. S.G. Chemicals and Dyes Trading Ltd., (1986) 2 SCC 624 : (1986) 1 LLJ 490.
184. S.N. Hada v. Binny Ltd. Staff Association, (1988) I LLJ 405.
185. S.N. Rai v. Vishwanath Lal, AIR1960 Patna 10.
186. Samyukta Khadan Mazdoor Sangh Rajnandgaon v. Hindustan Steel Ltd., 1973 JLJ 376.
187. Sanjiv P. Jathan v. Larsen and Toubro Ltd., (1989) 2 LLJ 194.
188. Saskatchewan LRB No. 181-04 & 227-04
189. Satish Ganesh Saphtanshi and Others v. M/s Kislosker Oil Engines Ltd., 1995 Lab IC 1681.
190. Satya Narayan v. Govt. of the State of U.P., 1965(10) F.L.R. 199.
191. Schechter Poultry Corp v. United States, 295 U.S. P. 494 (1935).
192. Secretary Meters Staff Association v. United Electrical Industrial Ltd., (1984) II LLJ 446.
193. Setlogelo V/s. Setlogelo, 1914 AD 221

194. Shramik Utakarsh Sabha v. Raymond Woolen Mills Ltd., (1995) II LLJ 321.
195. Shree Ganesh Ferro Castings v. R.A. Gadekar, 1992 Lab IC 111.
196. Siemens Ltd. and Anothers V/s. Siemens Employees Union and Anothers, AIR 2012 SC 175 and [2011(131) FLR 1100]
197. Sindhu Resettlement Corp. v. Industrial Tribunal (1965) II LLJ 268 (273) (Guj.DB)
198. Sindhu Resettlement Corp. v. Industrial Tribunal, (1968) I LLJ 834 (SC).
199. SKG Sugar Ltd. v. Ali Hasan, AIR 1959 SC 230.
200. South India Bank Ltd, v. A.R. Chacko, (1964) ILJ 19(21) (SC).
201. Southern Railway Mazdoor Union v. Southern Railway , (1970) 1 LLJ 83 (Mad).
202. Sridharan Motor Service v. Industrial Tribunal, Madras, (1959) 1 LLJ 380 (Mad).
203. St. of Madras v. V.G. Rao, AIR 1951 Mad. 147.
204. Subash Dhananjay Inamdar v. Raishri Pictures Pvt. Ltd., (1991) 2 Bom LR 297.
205. Swaika Vanaspati Products Ltd. v. Workmen, (1952) II LLJ 851.
206. Tamil Nadu N.G.O. v. Registrar of Trade Unions, (1962-63) LLJ 753 Mad.
207. Tata Iron and Steel Company Ltd. V/s. State of Jharkhand and Others, (2014) 1 SCC 536
208. Tata Memorial Hospital Workers Union v/s Tata Memorial Centre and Anothers, (2010) 8 SCC 480
209. Tata Oil Mills v. The Workmen, 1966 SC 1972.
210. Tatanagar Foundary Co. Ltd. v. Workmen, 1969 (3) JCR 464.
211. Textile Mills Coimbatore v. Workmen, (1952) I LLJ 133.
212. THE BRICK WAREHOUSE CORPORATION v/s OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 15, BCLRB No. B309/2002
213. The chartered Bank Company v. The Chartered Bank employees Union, AIR 1960 SC 919
214. The Chartered Bank, Bombay V/s. The Chartered Bank Employees, AIR 1960 SC 919
215. The Chief Executive Officer V/s. Vaijinath, The Chief General Manager, The Government of Maharashtra and The Chairman, (2013)III LLJ 266 Bom

216. The Executive Engineer, PWD, Pune and Anothers V/s. S.P. Rokade, (2013) I LLJ 171 Bom
217. THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG SIZWE MORGAN MAYABA V/s. COMMISSION FOR CONCILIATION, MEDIATION, J 2204 / 2014
218. The Management Hotel Imperial, New Delhi v. Hotel Workers Union AIR, 1959 SC 1342.
219. The Municipal Council Jintur V/s. Shri Sunder Namdeo Khillare, (2013) II LLJ 706 Bom
220. The Premier Automobiles Ltd. V/s. Kamlekar Shantaram Wadke of Bombay and Others, AIR 1975 SC 2238
221. Titagarh Jute Factory Co. Ltd. v. Third Industrial Tribunal and Others, (1962) 2 LLJ 328.
222. Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar, (1961) 1 LLJ 511.
223. Turner Morrison & Co. Ltd. v. Their Workmen, (1950) LLJ 122.
224. U.P.S.E. Board v. Hari Shankar, AIR 1979 SC 65.
225. Usha Breco Mazdoor Sangh v. Management of M/s. Usha Breco Ltd. & Anr, 2008(5) SCC p. 554.
226. V & A Waterfront Properties (Pvt) Ltd and Another V/s. Helicopter & Marine Services (Pvt) Ltd and Others, 2006 (1) SA 252 (SCA)
227. Valli Amatha v. The Kalyan Mills Ltd., 2 FJR 244.
228. Vishnu Sadav Bhattacharya v. Cycle Industries, 1973 Lab. I.C. 396 (397).
229. West Bengal Flour Mills Mazdoor Congress v. Hoogly Flour Mills Co. Ltd. 10 FJR 240.
230. Working Journalists of Hindu v. The Hindu, (1961) ILLJ 288.
231. Workmen v. Motors Industries Co. Ltd., AIR 1969 SC 1280.
232. Workmen v. Williamson Mager & Co. Ltd., (1982) 2 SCC 117.

INTRODUCTION

“The spirit moulds the body to conform" these words of a German poet are as true of social economics as they are of other things and apply to economic legislation, to economic action, and to economic situations. It is the spirit creating and applying such legislation and institutions which gives them life and meaning, which brings them to fruition and endows them with force, and determines their effects.[1]

The observation made by the author appears to be correct for the countries like India also. Since labour itself is a class all over the world, it is bound to have more or less same experiences and same sort of problems.

Author believe that in the long run - when, as Keynes reminded us, we will all be dead the most satisfying, productive, efficient and equitable societies will be those where public policy is formulated in a truly collaborative manner where governments engagement and labour sit down together and work through a policy agenda where the interests of stakeholders are, to the extent possible, balanced and reconciled in a lair and workable manner.[2]

As Armstrong suggests, labour law reform should proceed on the basis of tripartite participation and consensual decision-making that involves representatives of government, employers and workers.

Yet a commitment to true tripartism has been notably absent from some recent labour reform initiatives. In particular, we have seen politically motivated fluctuations, or "pendulum swings," in provincial labour laws, with little thought as to whether these reforms are workable in the long term. Experience suggests that highly partisan reform initiatives have generated short-sighted, disruptive changes which have provoked partisan responses by succeeding governments.[3] As Paul Weiler has explained, when the labour law pendulum swings to one side of the political spectrum, it has a tendency to swing back to the other side, creating an unstable labour relations atmosphere.[4]

---

1 Professor E. Francke: The New Spirit in German Labour Legislation: 4 Int'l Lab. Rev. 25 1921
2 T. Armstrong, "Contemporary Collective Bargaining: How Well Is It Working?"
3 Brian W. Burkett: Reflections on Tripartism and Labour Law Reform
4 PC. Weiler, "The Process of Reforming Labour Law in British Columbia," in J.M. Weiler & P.J..Gall, The Labour Code of British Columbia in the 1980s (Vancouver: Carswell, 1984).

"International labor standards have become the newest point of contention in trade disputes between industrial and developing countries".[5]

(I) Nature of Study:

The researcher has attempted, initially to define 'Unfair Labour Practice' and then has attempted to include the activities and dimensions of the term.

(A) What is Unfair Labour Practice:

It is the unfair treatment by an employer of an employee or job applicant. There are a limited number of unfair labour practices that the Labour Relations Act 1995 defines, the types of treatment, which may constitute an unfair labour practice are discussed hereunder. Section 185 of the Labour Relations Act 1995 states that "every employee has the right not to be subjected to an unfair labour practice."

An unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving.

The unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee; The unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee; The failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement ; An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000, on account of an employee having made a protected disclosure as defined in that Act.

This usually involves cases where the employer deviates from its own promotion or training policy or where the employee alleges that the promotion, demotion or training is in itself unfair. If it is alleged that the failure to promote is a result of discrimination, this dispute must be referred to the Employment Equity Commission as such a dispute. If all employees pass a test and all except one or a few are promoted, the employer may be guilty of unfair conduct against that or those employees.

---

[5] Stephen S. Golub : IMF guest Article

An example of unfair conduct based on benefits would be when all employees are given transport allowances, but one is discriminated against and not given this allowance. This may constitute an unfair labour practice. An example of unfair conduct relating to training would be if all employees were given training but for one or two, for no apparent or fair reason that is they already have the skills; this may constitute an unfair labour practice.

Usually an employee would refer a dispute relating to the unfairness of disciplinary measures taken, based on the merits of their innocence in the alleged wrongdoing.

Suspension as a disciplinary sanction is the only instance where suspension can be unpaid. Whilst on suspension pending a disciplinary enquiry, an employee must be paid. Non-payment must be referred to the Department of Labour as a non-payment of salary dispute. It is not regarded as an unfair labour practice dispute as this definition relates only to benefits and not salary.

A dispute regarding the unfair suspension may be referred as an unfair labour practice if the employee is on suspension for an unreasonably long period and where there is no plausible reason for the delay in finalising the enquiry. An example of unfair suspension would be where an employee and her supervisor argue and the employer suspends only the employee, even though it was the supervisor who was to blame.

This type of unfair labour practice requires an agreement to have been in existence either in verbal, written, individual or collective. Usually these disputes arise in retrenchments situations. If there is no agreement, then the dispute may be referred as an unfair dismissal based on operational requirements. An example will be when there was an agreement between the employer and a retrenched employee to the effect that the employee will be re-employed when a vacancy becomes available and the employer does not re-employ that employee, the conduct on the part of the employer may constitute an unfair labour practice.

If an employee makes a protected disclosure as set out in that Act, illustratively makes a disclosure regarding the conduct of an employer as he or she has reason to believe that the information shows that the employer is committing a

criminal offence, and is thereafter prejudiced for making such disclosure by being demoted, such conduct of the employer would constitute an unfair labour practice.

All the disputes about forms of unfair treatment may be referred firstly to conciliation conducted either by a bargaining council and if there is no council by the Commission for Conciliation, Mediation and Arbitration. If the dispute remains unresolved, it can be referred to arbitration.

Section 191 states that the employee has 90 days from the date of the act or omission which allegedly constitutes an unfair labour practice or, if it is a later date, within 90 days of the date which the employee became aware of the act occurrence.

Unfair discrimination is dealt with under the Employment Equity Act 1998. Examples of this are – race, gender, ethnic or social origin, colour, sexual orientation, age and disability, etc. Discrimination can be direct or indirect. These disputes go to the Labour Court and the Employment Equity Act applies. [6]

(B) Committee on Unfair Labour Practices

The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act was passed in 1971 after consideration of the Report of the Committee on Unfair Labour Practices, which was published in July 1969. However, though the Act was passed in 1971, it was not enforced till September 8, 1975, that is, after the imposition of the internal Emergency, when the working class movement was on the defensive. It is quite clearly a piece of anti-working class legislation and the working class should demand its repeal. The Committee on Unfair Labour Practices had made the following recommendations: (1) The committee felt that there was a need to locate the sole collective bargaining agent and bargaining rights should be given to the majority trade union. This would weed out small and weak unions and strengthen collective bargaining. However, the committee left the controversial issue of the method of locating the sole bargaining machinery - whether this was to be done by secret ballot or by verification of membership on the basis of evidence submitted by the applicant union (as provided in Bombay Industrial Relations Act) - to the legislature. But it felt that the pre-sent verification machinery, that is, the Labour

[6] Unfair Labour Practice: CCMA Info Sheet: Unfair dismissal - MAR 2002

Commissioner's office, should be replaced by an agency independent of the government. (2) The committee recommended that certain practices be declared unfair lab-our practices on the part of the employers and that the Industrial Court should have the power to make a re-straining order (injunction) in connection with unfair labour practices. The Recognition of Trade Unions and Prevention of Unfair Labour Practices Act may be dealt with in three parts: (1) recognition; (2) unfair labour practices; and (3) power of the labour and industrial courts.

(C) Recognition of Unions :

Section 11 of the Bombay Industrial Relations Act, 1946 provides for recognition of trade unions by the Industrial Court on an application by a trade union claiming to have at least 30) per cent of the total number of employees in an undertaking (as opposed to an industry, as in the Bombay Industrial Relations Act) for a period of six months preceding the application for recognition. The Bombay Industrial Relations Act provides for recognition by verification of trade union member-ship by the Labour Commissioner. This Act was passed to bolster up a non-militant trade union, the Rashtriya Mill Mazdoor Sangh, which was at that point not the real representative union of textile workers, as against the militant Girni Kamgar Union. Under the present Act, the recognised union is given certain rights, the main one being the right to bargain. It is, however, clear from the provisions of the Act quoted below that trade unions will get recognition or will continue to be recognised only provided they behave themselves. For example, section 12 (6) provides that the Industrial Court shall not recognise any union if at any time within six months immediately preceding the date of the application for recognition the union has instigated, aided or assisted the commencement or continuation of a strike, which is deemed to be illegal under the Act. Section 13(1)(v) provides that the Industrial Court shall cancel recognition of trade unions if they have instigated, aided or assisted the commencement or continuation of a strike which is deemed to be illegal under the Act. These two sections make it mandatory that in the above circumstances recognition shall not be given or, if given, shall be cancelled. The definition of an illegal strike is given in section 24-1(a) of the Act. Illegal strike means a strike which is commenced or continued (a) without giving to the employer notice of the strike in the prescribed form, or within fourteen days of the giving of such notice, (b) without

obtaining the vote of the majority of the members of the recognised union, where there is a recognised union in favour of the strike before -the notice of the strike is given; (c) during the pendency of conciliation proceedings under the Bombay Act, 1946 or the Central Act, 1947 and seven days after the conclusion of such proceedings in respect of matters covered by the notice of strike; or (d) where submission in respect of any of the matters covered by the notice of strike is registered under Section 66 of the Bombay Act, before such submission is lawfully revoked. The definition of an illegal strike seriously curtails the democratic right of the workers to withhold their labour for their just demands. This definition should be replaced. Whether a person is in breach of his contract of employment should be determined by that contract alone, i e, the workers should bargain for the contract of employment that they want. Under Section 13(2) of the Act the Industrial Court may cancel the recognition of the union if, after giving notice to such union to show cause why its recognition should not be cancelled, and after holding an inquiry, it is satisfied that it has indulged in any practice which is, or has been declared as, an unfair labour practice under the Act. Given the definition of unfair labour practices in schedule III of the Act, carrying on of the legitimate activities of trade unions may itself lead to derecognition. Recognition is thus extended to trade unions for the price of carrying on legitimate trade union activities. This can only lead to a weakening of the trade union movement. Trade unionists should, therefore, seriously consider whether it is worth paying the price. The question of recognition, the trade union movement can take one of two positions: (1) The trade union movement can take a position against de jure recognition and rely on its own organisational strength for recognition of trade unions by employers. (2) If, however, trade union activists feel that inter-union rivalry has reached such a point that has fragmented the trade union movement o such a degree that de jure recognition is needed to weed out the weaker unions, then the method for grant of recognition must seriously be considered. Recognition under this Act provides for recognition by the Industrial Court on the basis of evidence, such as records of membership. This procedure lends itself to abuse as the membership figures can be rigged. Therefore, recognition should be demanded on the basis of a secret ballot of all the workers of an undertaking. The trade union movement should demand the repeal of Chapter III dealing with recognition and ask for an amendment to the Industrial Disputes Act, 1971 providing for recognition on the basis of a secret ballot of all members of an undertaking (not industry) conducted by an independent

agency. Obviously sections such as 12(6), 13(1)(v) and 13(2) curtailing trade union activities can be tolerated in any amendments to the Industrial Dispute Act, 1971. Furthermore, application for recognition should be on a voluntary basis as pro-vided by this Act and not made compulsory as it is in the Bombay Industrial Relations Act, 1946.

(D) Unfair Labour Practice :

Certain practices have been declared unfair labour practices under the Act. Schedule II lists unfair labour practices on the part of employers. Schedule III lists unfair labour practices on the part of trade unions and Schedule IV lists general un-fair labour practices on the part of employers. Dealing with Schedule III, the following are the labour practices", listed as unfair:

(1) To advise or actively support or instigate any strike deemed to be illegal under this Act.

(2) To coerce employees in the exercise of their right to self-organisation or to join unions or refrain from joining any union, that is to say,

  (a) for a union or its members to do picketing in such a manner that non-striking employees are physically debarred from entering the work place; or

  (b) for a union or its members to indulge in acts of force or violence or hold out threats of intimidation in connection with a strike against non-striking employees or against managerial staff.

(3) For a recognised union to refuse to' bargain collectively in good faith with the employer.

(4) To indulge in coercive activities against certification of bargaining representative.

(5) To stage, encourage or instigate such forms of coercive action as willful 'go slow', squatting on the work premises after working hours or 'Gherao' of any of the members of the managerial staff.

(6) To stage demonstrations at the residences of the employers or the managerial staff members. It is abundantly clear from the above list

that the definition of un-fair labour practices severely curtails the legitimate activity of the workers.

This is the first time that certain labour practices by the workers have been declared unfair. In determining whether a labour practice was unfair, Justice Dhavan in **Everyday Flash Light Co v. Labour Court, Bareilly and Others,**[7] laid down a working principle "that any practice which vitiates Art 43. of the constitutional Law of India and other articles declaring decent wages and living conditions for the workmen and which if allowed to become normal would lead to industrial strike should be condemned as an unfair labour practice". In **Sugar Factories and Oil Mills Ltd v. State of Uttar Pradesh and Others**,[8] where Justice Dhavan makes certain observations regarding unfair labour practices, he refers to unfair labour practices on the part of the employers and not on the part of workers. Further, almost all the decided cases on unfair labour practices before the Act was passed deal with unfair labour practices on the part of the employers, e g, victimisation of workers for trade union activities, arbitrary transfer of workers, etc. The court has held go slow as a serious type of misconduct, that is, something that could amount to a breach of the contract of employment. There are certain specific principles laid down in determining whether misconduct amounts to breach of the contract of employment. Even gherao was not declared an unfair labour practice, though the offences committed in gherao made it unlawful. It has been decided that in such cases trade unions cannot use section 17 of the Trade Unions Act 1976 as a defence. Thus it is for the first time in Indian labour law that certain labour practices which if carried on by workers have been declared as unfair. This innovation is extremely harmful to the growth of a labour movement, as under this Act not only can unions be derecognised for taking part in practices considered un-fair but they can be restrained from carrying on such practices. Trade unionists should argue that the articles in the constitution ensuring decent wages and living conditions and the case law as it has developed is wide enough to ensure that unfair labour practices by employees or trade unions do not occur. Therefore Schedules II. III and IV should be repealed and case law should continue to develop on the basis of precedents laid down and on the basis of the articles in the constitution. powers of labour and industrial courts, The Industrial

---

7 (1961)II LLJ, p 209.
8 (1961)I LLJ pp 687-88

Dispute Act 1947 gives to the Labour Court power to try certain offences. Section 38 declares what are offences under the Act. Under section 40 a labour court is given the same powers to try offences under this Act as are given under the Code of Criminal Procedure, 1898 to a Presidency Magistrate in Greater Bombay and a Magistrate of the 1st Class. Section 41 of the Act states: "Not-withstanding anything contained in section 32 of the Code of Criminal Procedure 1898, it shall be lawful for any labour court to pass any sentence authorised under this Act in excess of its powers under Section 32 of said Code." Section 42 gives the Industrial Court power to hear appeals from Labour Courts. There is no reason why labour courts should be given power to try offences. This is and should remain the sole preserve of the criminal courts. The trade union movements must not accept the Industrial and Labour Courts exercising policing functions in the interests of expediency and speedy execution of the law. The criminal law must be allowed to take its own course and the trade union movement should not tolerate this encroachment on their fundamental democratic right to be tried before a criminal court. The whole of Chapter VIII dealing with powers of Labour Court and Industrial Court to try offences should, therefore, be repealed.[9]

To conclude this we can say that on the basis of the arguments presented above, the trade union movement should demand that the Act be repealed in its entirety and that amendments to Industrial Dispute Act, 1971 be made to provide for recognition on the basis of secret ballot by an agency independent of the government if de jure recognition is considered necessary and that the equitable remedy of injunction or restraining order be given to the Industrial and Labour Court where an unfair labour practice is taking place or has taken place. The Maharashtra Act is likely to be used as a precedent for the whole of India.[10]

(E) Historical Background:

The researcher has attempted to take study most of the nations where the labour laws are considered to be important and discussed at large in consonance with the academically important nations. The researcher has attempted to have a look on the historical background of the event and the problem taken. Since the history cannot

---

[9] Anti-Working Class Law Source: Economic and Political Weekly, Vol. 12, No. 23 (Jun. 4, 1977), pp. 904-906

[10] ibid at p. 907

lie in isolation, the researcher has tried to take account of historical events all over the world. In the same, initially the nations who claim to be frontiers such as China, Germany etc. have been discussed in historical background.

(1) China

The rise of the labour movement in China may be indicated by three social trends: the growth of class consciousness, the creation of labour organisations, and united efforts for economic and social improvement of the proletariat. The awakening of labour has in some ways aroused class feeling between capital and labour; the attempts at organising the workers along the lines of modern trade unionism have in a measure given them a superior weapon for collective bargaining; and by means of united efforts all parties interested in social welfare, such as the government, social service organisations, and the labour unions, are paying some attention to the well-being of the workers. The movement is yet young, but has in it the possibility of healthy growth under the intelligent guidance of labour leaders and with the sympathetic co-operation of social thinkers.[11]

Among the social forces which have materially aided the cause of labour should be mentioned the student movement, the literary renaissance, and the emancipation of women. These events have generally caused the disintegration of the antiquated traditional customs of China, compelled men to search for suitable modes of life, and created new social standards. In fact, prior to 1918 or 1919,most manual workers unquestioningly submitted to the traditional social hierarchy graded according to the rank and wealth of the old society, and rarely did they raise a voice of protest against the existing social order. But after Chinese students began to lecture to the masses on principles of citizenship and the equality of men, the workers gradually came to realise that they had obvious rights and privileges in society, which slowly became the basis of united demands. Then, too, the literary renaissance has popularised the written language to a certain extent, so that forward looking workmen can acquire the fundamentals of popular education by attending evening schools and taking lessons in simplified Chinese. Some of them are able to read newspapers printed in the vernacular and some are in a position to discuss current topics with

[11] T.A. Chen: Labour Movement in China

some intelligence. To some of them the language is no longer a hindrance to the acquisition of knowledge. This idea of the educational improvement of the workers had also met with the sympathetic support of liberal employers, and a number of industrial, commercial, and cultural institutions now provide facilities for educating their employees. The third social force hastening class consciousness is the emancipation of women. At the beginning of the Republican regime, militant women with a modern education were engaged in struggling for the political suffrage and civic equality with men. In recent years some leaders of their sex have demanded the privilege and opportunity of gainful employment in industries, trades, and commercial establishments. Thus the Canton-Kowloon Railway employs women as, ticket collectors, certain banks in Shanghai have women cashiers, 'certain department stores in Peking and Shanghai employ: saleswomen. The entry of women into industry has certainly liberalised the Chinese conception of morality, modified social conventionist widened the scope of women's activities, and paved the way for their economic independence.[12]

(2) Germany :

It will always stand as one of the great achievements of Germany that in the short, period between 1884 and 1887 a system of insurance against accidents, old age, and invalidity was created for the benefit of many millions of workers. Friendly societies, funeral clubs, the Liability Act 1875, and various charitable institutions possibly paved the way for this new and imposing organisation, but it was nevertheless a leap into the unknown. The new system wholly abandoned the principle of charitable assistance into which poor relief had lapsed, and substituted that of rights, guaranteed to insured persons and acquired by the payment of contributions. But the Government and Reichstag, who had been the authors of the Act, were too timid to carry their great idea to its logical conclusion. In the administration of accident insurance no voice at all was given to the persons insured, namely, the workers; such administration was placed solely in the hands of associations of employers. In the administration of invalidity insurance workers as well as employers were indeed represented on an advisory council; but here the real management was in the hands of a bureaucracy of officials. Finally, when the insured

[12] ibid

did succeed in acquiring control of the sickness insurance system, their activities were in practice restricted by the inspection and interference of the authorities. German insurance legislation may have conferred great benefits upon the population, but it forfeited its own moral effect by its distrust of the worker. Tins distrust and dislike of the workers' eager collaboration, such an unequal meting out of justice, characterised the whole of the social policy of the old Germany. Consider, for instance, the length of the interval which was allowed to elapse before that cautious and conscientious body of factory inspectors was reinforced by assistants drawn from the ranks of the workers themselves; or again, the extra ordinary weakness of the system of conciliation labour disputes, notwithstanding that imagination saw the 'hydraheaded monster of revolution' every strike. Consider the want of understanding and support accorded to the movement for collective bargaining, a movement where the parties to -the labour contract themselves enter into negotiation and agreement in order to settle their own affairs or the deep distrust which was felt and shown for trades unionism, at a time when employers' associations were being cordially received at government offices. In the old Prussian provinces, while all employers were freely entitled to enjoy the right of association, large masses of the workers in the transport industry and agriculture were denied that right for defending or improving their wage and labour conditions. The provisions of the Penal code were never invoked against employers who tyranmsed over other employers or their workers by means of threats or lock-outs, but there are only too many instances of sentences passed on trade moments guilty of a similar offence. There actually was in existence a persecution clause, Section 153 of the Industrial Code, against those who went on strike, while the trade unions alone, and not the employers' associations, were hampered by the law of association in its bearing on political bodies. The workers were second-grade citizens as much from the industrial as from the political point of view by reason of the Prussian Francinse with its three classes, which refused to the poor, merely because they were poor, those rights which it gave to the rich. No labour leader was called to Ministerial office, or to a position in averment Department, or to be a .local government official; their voice was heard in Parliament, but not on administrative bodies. The millions of manual and salaried workers never helped to make the laws which they obeyed; in the industrial field they were tools, and not collaborators. A change began even before the war was over. Political and army leaders came to realise that trade unions are indispensable mass organisations, without which people and state cannot breathe, least of all in times of great danger when issues of life and of

death are at stake. Their cooperation, their help, was demanded. They began to be treated with respect and confidence; justice and equality of rights were promised, and the chief restrictions on the right of association removed. The first step in this direction having been taken, the new spirit of social reform would certainly have won its way to triumph even had the Revolution of 9 November 1918 not taken place. When that day, however, saw the popular leaders seize the reins of government in the new Republic which was proclaimed from the steps of the Reichstag, the first act of those leaders was obviously to sweep away there maiming restrictions depriving the worker of equality of rights. The abolition of all restriction on rights of association and meeting, the termination of all obligations under the Industrial Conscription Act 1911**,** conciliation committees for industrial disputes, abrogation of all special legislation against the interests of agricultural workers and domestic servants, full protection for the worker, a maximum eight hour working day, an adequate employment exchange system, unemployment relief, together with equal, direct, secret, and universal suffrage to all public bodies for all men and women over twenty years of age. This proclamation of 12 November introduced a new epoch into the social history of Germany.[13]

(3) South Africa :

There are few guidelines in the South Africa for unfair and fair dismissal, which obviously is a part of fair and unfair labour practices.

(a) Dismissal :

Every worker has the right not to be unfairly dismissed.

(b) Definition :

"Dismissal" means that –

- an employer has ended a job contract with or without notice;
- an employer did not renew a job contract as agreed, or offered to renew it on less favourable terms;
- an employer does not allow a worker to return to work after she –
  - has taken legal maternity leave;

[13] Professor E. Francke: The New Spirit in German Labour Legislation: 4 Int'l Lab. Rev. 25, 1921

- has been absent up to 4 weeks before and up to 8 weeks after the birth;

- an employer, who has dismissed several workers for the same reason, re-employs only some of them;
- a worker ended a job contract with or without notice, because –
  - the employer made working circumstances unbearable; or
  - a new employer made working conditions less favourable than the old employer.

(c) Fair Dismissal :

Dismissal is fair if -

- the specific needs of a job are not being met;
- a worker has reached retirement age.

(d) Unfair dismissal

Dismissal is unfair if –

- a worker intended to or did take part in or supported a strike or protest; or
- a worker refused to do the work of a striking or locked out co-worker, unless his refusal will endanger life or health; or
- a worker is forced to accept a demand; or
- a worker intended to or did take action against an employer by –
  - exercising a right; or
  - taking part in proceedings; or
- a worker is pregnant or intends to be pregnant; or
- an employer discriminated against a worker because of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility; or
- an employer cannot prove -
  - a worker's misconduct or inability; or

- that the employer's operational needs are valid; or
- that the dismissal procedure was fair.

(e) Pre-Dismissal Arbitration :

With a worker's consent, an employer may ask a council, agency or the Commission for Conciliation, Mediation and Arbitration to arbitrate on a worker's conduct or ability.

An arbitrator may be appointed only after the employer has paid the prescribed fee and the worker has given his written consent.

A worker may represent himself, or be represented by:

- a co-worker;
- a director or worker (if a juristic person);
- any member of the worker's registered trade union; or
- a lawyer as agreed to by the parties.

(f) Unfair Labour Practice :

"Unfair labour practice" means any failure to act or unfair act of an employer towards a worker concerning-

- promotion, demotion, trial periods, training or benefits;
- suspending a worker or disciplinary action;
- refusing to re-employ a worker, as agreed; and
- an employer makes circumstances difficult for a worker who was forced to make a protected disclosure.

(g) Disputes Resolution Procedure :

Unfairly dismissed or treated workers may refer disputes for conciliation in writing to –

- a statutory or bargaining council; or
- the Commission for Conciliation, Mediation and Arbitration.

Referral must be made within –

- 30 days of a dismissal date or an employer's decision to dismiss;
- 90 days of the date of an unfair labour act; or
- 90 days of the date when a worker became aware of an unfair act.

A dispute may be referred after the above periods if a worker can show good cause.

The employer must receive a copy of the referral.

(h) Unresolved Disputes :

If a dispute remains unresolved –

- a council or the Commission for Conciliation, Mediation and Arbitration must arbitrate it, if a worker requests it, if –
  - a worker alleges that the dispute is about his conduct or capacity;
  - a worker alleges that his employer made working conditions intolerable or less favourable after a transfer;
  - a worker does not know why he was dismissed;
  - the dispute is about an unfair labour practice;
- a worker may refer a dispute to the Labour Court, if he says the reason is –
  - automatically unfair;
  - based on operational needs;
  - the worker refused to join a trade union;
  - the worker was refused trade union membership;
  - the worker was expelled from a trade union.

A council or the Commission for Conciliation, Mediation and Arbitration must arbitrate immediately if –

- the dismissal is linked to a worker's probation; or
- any other dispute where no-one objects to it being settled in terms of this subsection.

(4) Norway:

The fundamental Norwegian Act on conciliation and arbitration in labour disputes is still the Labour Disputes Act of 6 August 1915. Technically, it has been replaced by a new Act of 5 May 1927, but in reality this is the same as the 1915 Act, with certain amendments. Norwegian legislation has never placed obstacles in the way of the workers' and employers' right to organise freely, without need of State authorisation, for the protection of their economic and commercial interests. The right of association has always been recognised. The labour movement in Norway has thus been spared the struggle that the workers in many other countries have had to wage in order to obtain legal recognition of their right to organise. Similarly, the Norwegian workers have not had to fight for statutory recognition of their right to seek the improvement of their conditions of employment by means of stoppages of work. They have always had the right to strike.

The 1915 Act did not interfere with the right of organisation, nor did it depart from the principle that the law cannot forbid a stoppage of work as a weapon in a labour dispute unless it also points to judicial remedies making the stoppage superfluous. The underlying basic principle of the Act is that, in view of the great interest to the community of peaceful industrial relations, it becomes both the right and the duty of the State authorities to find serviceable means of preventing unnecessary strikes and lockouts. The Act makes a sharp distinction between the two types of labour disputes: on the one hand, disputes arising out of the trade unions' demands concerning the regulation of conditions of employment and wages in a trade or undertaking, which are described as "disputes about interests"; and on the other, disputes of trade unions with employers and their organizations concerning rights and obligations under existing collective agreements, which are known as "disputes about rights ". For the latter type of disputes, those about rights, the Act set up a special court with jurisdiction for the whole country-the Labour Court. It was believed that by thus affording a satisfactory means of rapidly settling any dispute about rights under a collective agreement, the Act would render recourse to a stoppage of work for the settlement of this kind of dispute superfluous. It accordingly prohibits unconditionally and absolutely all strikes and lockouts intended to settle a dispute concerning rights and obligations under a collective agreement. It makes it an obligation under public

law for the parties to a collective agreement to refer their disputes about rights to judicial proceedings. For disputes concerning the new regulation of conditions of employment, or disputes about interests, the Act imposes no such absolute prohibition of the attempt to settle them by a stoppage of work.

It requires, however, that neither party shall proceed to a stoppage as long as there is a possibility of settling the dispute by peaceful negotiation, and it therefore prescribes that any proposed stoppage shall be notified to the conciliation authorities, so that they may have an opportunity of trying to settle the matter by consent. These conciliation authorities have power to convene the parties to attend conciliation proceedings, and can prohibit a stoppage of work as long as the proceedings are in progress. But the Act limits the duration of this prohibition; that is to say, the parties are deprived during only a relatively short period of their right to engage in militant action. Once the time limit for conciliation fixed by the Act has expired, either party can demand the termination of the proceedings in order to embark on a stoppage of work.[14]

In Russia the Bolsheviks saw their revolution, not as merely Russian, but as the opening act in a great drama of international socialist revolution. This vision, dazzling in itself, mingled with Russian reality, evoked responses in the Australian and New Zealand labour movements. To these countries, the Russian revolution came as part accomplished fact, part world myth, an astonishing sublimation of the enforced and sordid internationalism of suffering on the battlefields of the world war. As such, it was peculiarly disturbing to labour movements which had been, in the main, traditionally cautious and self-sufficient, resistant to both dreams and doctrines. But even Australian and New Zealand labour could not live by bread alone. Was the Russian revolution relevant? This was the basic question, and, at first, it went to the core of local conflicts and indecisions. At first, this question seemed to mean were revolutionary concepts relevant to Australian and New Zealand conditions, in a situation of imminent world revolution. Was labour to pursue doctrinaire, militant and revolutionary socialism, or welfare-state reformism? This fundamental alternative was, of course, not absent before the Russian revolution, but that revolution posed it with a realism, bluntness and urgency never experienced before. Yet hardly had

[14] Paal Berg: Legislation on Labour Disputes in Norway: 28 Int'l Lab. Rev. 774 1933

Australian and New Zealand labour confronted with this imperative, when its terms began to change as circumstances narrowed the challenge represented by Russia.[15]

(5) INDIA

State intervention in the settlement of industrial disputes started with the Trade Disputes Act, 1929. The Act vested Government with powers which could be used whenever it considered fit to intervene in industrial disputes. It provided for only ad hoc conciliation boards and courts of enquiry. The amending Act of 1938 authorised the Central and Provincial Governments to appoint conciliation officers for mediating in or promoting the settlement of disputes. The Act, however, was not used extensively, as the Government policy at that time continued to be one of laissez faire and selective intervention at the most. Where Government intervened, the procedure consisted of appointing an authority, which would investigate into the dispute and make suggestions to the parties for settlement or allow the public to react on its merits on the basis of an independent assessment.[16]

While this was the position in the country as a whole, a more purposeful intervention in industrial disputes was attempted in one of the industrially advanced Provinces—the Bombay Presidency. The Bombay Trade Disputes (Conciliation) Act, 1934, introduced for the first time a standing machinery to enable the State to promote industrial peace. A permanent cadre of conciliators was envisaged for settling matters, which fell within their jurisdiction. The scope of the Act was limited to selected industries. The experience of the working of the Act, though in a limited sphere, led to the enactment of the Bombay Industrial Disputes Act, 1938. The important features of this new Act were the provisions for

(a) compulsory recognition of unions by the employer,

(b) giving the right to workers to get their case represented either through a representative union, or where no representative union in the industry or centre or in the unit existed through elected representatives of workers or through the Government Labour Officer,

---

[15] P. J. O'Farrell: The Russian Revolution and the Labour Movements of Australia and New Zealand, 1917–1922

[16] Royal Commission Report

(c) certification of standing orders which would define with sufficient precision the conditions of employment and make them known to workmen,

(d) the setting up of an Industrial Court, with original as well as appellate jurisdiction, to which parties could go for arbitration in case their attempts to settle matters between themselves or through conciliation did not bear fruit, and prohibition of strike or lock-out under certain conditions.

This law was made applicable only to some industries in the Province. Shortly thereafter, the Government of India promulgated the Defence of India Rules 1939 to meet the exigencies created by the Second World War. Rule 81A gave powers to the appropriate Governments to intervene in industrial disputes, appoint industrial tribunals, and enforce the award of the tribunals on both sides. The Bombay Industrial Disputes Act, 1938 was amended during the war years to provide for compulsory adjudication in unresolved disputes.

The Bombay Industrial Disputes Act, 1938 was replaced by a more comprehensive legislation, namely, the Bombay Industrial Relations Act, 1946, but with the basic structure of the Bombay Industrial Disputes Act, 1938 unchanged. At about the same time, the Government of India placed on the statute book the Industrial Employment (Standing Orders) Act, 1946, which provided for the framing and certification of Standing Orders covering various aspects of service conditions including the classification of employees, procedures for disciplinary actions and the like. In a way, this piece of legislation filled a void that existed in the Central industrial relations legislation.

The emergency war legislation was kept in operation pending the enactment of the Industrial Disputes Act, 1947 which replaced the Trade Disputes Act, 1929, from April 1, 1947, With subsequent amendments, the Industrial Disputes Act, 1947 still continues to be the main instrument for Government's intervention in labour disputes.

This was partly due to the recommendation of the Whitely Commission and partly the outcome of the experience gained in the working of the Bombay Trade Disputes (Conciliation) Act, 1934, ‘Labour' has been all along a subject on which

both the Centre and the Provinces or Presidencies have enjoyed powers to legislate since the Government of India Act, 1919.[17]

The Industrial Disputes Act, 1947 provides for settlement of industrial disputes through conciliation and adjudication. The Act empowers the appropriate Government to appoint conciliation officers and constitute Boards of Conciliation to mediate in, and promote settlement of, industrial disputes. It also empowers the appropriate Government to refer disputes for adjudication by an industrial tribunal. The Act makes a distinction between disputes arising in public utility services and those in other industries and provides for compulsory conciliation and adjudication to resolve the former. Besides, the appropriate Government could constitute a Court of Enquiry to enquire into matters pertaining to an industrial dispute. Restrictions are placed on strike and lock-out in public utility services, and during the pendency of conciliation and adjudication proceedings. The procedures and machinery provided under the The Industrial Disputes Act, 1947 have been modified from time to time in the light of the actual working of these provisions, the decisions of the judiciary and the influence of the bipartite and tripartite agreements.

The period 1947to 1950 witnessed some important developments having a hearing on industrial relations, apart from a basic change in the attitudes of employers and workers. The Central Government was made the appropriate Government for disputes in Banking and Insurance, as these industries extended over more than one State or Province. The Trade Unions Act, 1926 was amended to provide for compulsory recognition of unions. The Labour Appellate Tribunal was set up. The work of the tripartite bodies associated with the Labour Ministry started expanding. Comprehensive legislation was drawn up in the form of a bill for putting industrial relations on a sounder footing.

(F) Plan Policies :

The First Plan stressed the need for industrial peace for economic progress. While it wanted the State to arm itself with powers for intervention in labour disputes, the endeavour had to be to encourage mutual settlement, collective bargaining and voluntary arbitration to the utmost extent, and thereby to reduce to the minimum, occasions for its intervention in industrial disputes and exercise of the special

[17] ibid

powers2. The Indian Labour Conference which met as these recommendations were formulated, favoured the retention of powers by Government to refer matters to industrial tribunals rather than sole reliance on collective bargaining. The Industrial Disputes Act, 1947 was amended in 1953 to provide for compensation in case of lay-off and retrenchment. The working of the Labour Appellate Tribunal came up for criticism in tripartite meetings and a decision was taken in pursuance of the strong feelings expressed in these meetings, particularly by the labour representatives, that the Labour Appellate Tribunal should be abolished.

The Second Plan envisaged a marked shift in the industrial relations policy consequent on the acceptance of the socialist pattern of society as the goal of planning. It emphasised mutual negotiations as the effective mode of settling disputes. Among the other recommendations in the Plan were demarcation of functions between works committees and unions, and increased association of labour with management. The Industrial Disputes Act, 1947 was amended in 1956. The Labour Appellate Tribunal was abolished through this amendment and a three-tier system of original tribunals, namely, labour courts, industrial tribunals and national tribunals—was brought in force. While the labour court would deal with certain matters regarding the propriety and legality of an order passed by the employer under the standing orders, and discharge and dismissal of workmen including reinstatement, the industrial tribunal adjudicates on matters like wages, allowances, hours of work, leave and holidays and other conditions of service. The national tribunal, to which matters similar to those adjudicated upon by a tribunal are referred, is appointed by the Central Government to decide disputes which involve questions of national importance and those which affect industrial establishments situated in more than one State.[18]

The 15th Session of the Indian Labour Conference held on 11-12 July,1957 took note of these developments and the Second Plan recommendations and sought to evolve steps for their implementation. The Code of Discipline was drawn up and arrangements were made to educate workers through a scheme accepted by the tripartite. Complaints about non-implementation of agreements, settlements and awards were in the meanwhile disturbing the industrial scene. On the administrative

[18] ibid

side, provision was made to examine such complaints and place the conclusions thereof before a tripartite Evaluation and Implementation Committee. The foundations were thus laid for a policy of giving to the parties themselves a greater share in ensuring better enforcement of agreements, settlements and awards.

The Third Plan did not suggest any major change in policy. It emphasised the economic and social aspects of industrial peace and elaborated the concept that workers and management were partners in a joint endeavour to achieve common ends. The voluntary arrangements agreed to in the Second Plan were strengthened by the Industrial Truce Resolution, 1962, adopted in the wake of the Chinese aggression. The Industrial Disputes Act, 1947 was amended in 1965 with a view to giving an individual worker the right to raise a dispute connected with his discharge, dismissal, retrenchment or termination of service, even if the cause of the individual workman was not espoused by any union or group of workmen.

To sum up, the existing arrangements for the prevention and settlement of industrial disputes consist of (a) statutory procedures and (b) voluntary arrangements. The former are covered by the Industrial Disputes Act, 1947 and certain similar State enactments. In essential details, the machinery provided for under the various enactments consists of works or joint committee, conciliation, voluntary arbitration, and adjudication by tribunals or industrial courts. Voluntary arrangements provide inter alia for recognition of unions, where no statutory provisions for it exist, the framing of a grievance procedure, reference of disputes to voluntary arbitration, setting up of joint management councils, implementation of agreements, settlements and awards and the setting up of industry-wise wage boards.

(G) Industrial Relations Machinery :

As has been mentioned, the present machinery for the settlement of industrial disputes comprises: (i) conciliation, (ii) arbitration and (iii) adjudication machinery—tribunals, industrial courts, etc. We propose to discuss in what follows the salient features of some of these existing arrangements for the settlement of industrial disputes and assess their working during the last twenty years with a view to evolving recommendations for the future. The topics we have chosen for discussion are (i) collective agreements; (ii) conciliation; (iii) voluntary arbitration; and (iv)

adjudication. The relative merits and demerits of adjudication and collective bargaining as also issues connected with the right, to strike or lockout form part of the discussion.

(H) Collective Agreement :

Except for the industrial relations legislation in some States where arrangements for recognition of unions exist, there is no statutory recognition of unions for the country as a whole. Neither are there provisions which require employers and workers to bargain in 'good faith'. It is, therefore, no surprise that collective agreements have not made much headway in the country so far. Nonetheless, there have been more of such agreements than is popularly believed.

Some historical factors have also come in the way of collective agreements having a greater share in maintaining industrial harmony. The Whitley Commission in 1931 found that the only attempt made to set up machinery for regulating the relations between a group of employers and their work-people was at Ahmedabad. Though the assessment of the Whitley Commission was made soon after the Trade Unions Act, 1926 was enforced, the situation did not change significantly in the period from 1931 to 1947. Since Independence, however, trade unions have been growing and agreements with employers have become more common. The changing attitude of employers and the emergence of a new generation of employers and workers have also helped. Legal measures, in spite of their limitations, have lent as much support to collective agreements as joint consultations in bipartite and tripartite meetings at the national and industry levels. Even so, a sample study made by the Employers' Federation of India form the years 1956 to 1960 reveals that the number of disputes settled by collective agreements during the period in question varied between 32 per cent and 49 per cent in the units studied. Broadly, the agreements have been of three types: (i) agreements which have been drawn up after direct negotiations between the parties and are purely voluntary in character for purpose of their implementation; (ii) agreements which combine the elements of voluntariness and compulsion that is, those negotiated by the parties but registered before a conciliator as settlements; and (iii) agreements which acquire legal status because of successful discussion between the parties when the matters in dispute were under reference to industrial tribunals or

courts and could be considered sub-judice, the agreements reached being recorded by the tribunals or courts as consent awards.

Most of the collective agreements have been at the plant level, though in important textile centres like Bombay and Ahmedabad, industry level agreements have been common. These have a legal sanction under the State Acts and have to be distinguished from others where no statutory sanction prevails. Such agreements are also to be found in the plantation industry in the South and in Assam, and in the coal industry. Apart from these, in new industries like chemicals, petroleum, oil refining and distribution, aluminium, manufacture of electrical and other equipment, and automobile repairing, arrangements for settlement of disputes through voluntary agreements have become common in recent years. In ports and docks, collective agreements have been the rule at individual centres. On certain matters affecting all ports, all-India agreements have been reached. In the banking industry, after a series of awards, the employers and unions are in recent years coming closer to reach collective agreements. In the Life Insurance Corporation of India, except for the employers' decision to introduce automation which has upset industrial harmony in some centres, there has been a fair measure of discussion across the table by the parties for settling differences. On the whole, the record of reaching collective agreements has not been unsatisfactory, though its extension to a wider area is certainly desirable.

(I) Conciliation :

The aim of conciliation under the Industrial Disputes Act, 1947 and under similar State Acts is to bring about a settlement in disputes through third party intervention. The conciliation machinery can take note of a dispute or apprehended dispute either on its own or when approached by either party. Under the Industrial Disputes Act, 1947, conciliation is compulsory in all disputes in public utility services and optional in other industrial establishments. Over the years, the optional provisions appear to be acquiring compulsory status in non-public utilities also. With a view to expediting conciliation proceedings, time-limits have been prescribed—14 days in the case of conciliation officers and two months in the case of a board of conciliation. A settlement arrived at in the course of conciliation is binding for such period as may be agreed upon between the parties or for a period of six months and will continue to be

binding until revoked by either party. The Act prohibits a strike and lockout during the pendency of conciliation proceedings before a Board and for seven days after the conclusion of such proceedings. While the conciliation officer is given the powers of a civil court under the Code of Civil Procedure, 1908 only for the purposes of compelling the production of documents, a Conciliation Board, like a Labour Court or an Industrial Tribunal, is in addition given the powers of a civil court to enforce attendance of persons, examine them on oath and call witnesses.

The performance of the conciliation machinery as indicated by statistics does not appear to be unsatisfactory. During the years from 1959 to 1966, out of the total disputes handled by the Central Industrial Relations Machinery each year, the percentage of settlements has varied between 57 and 83. The remaining disputes, it is reported, were settled mutually, referred to voluntary arbitration or arbitration under the Industrial Disputes Act, 1947 or to adjudication, or were not pursued by the parties. While such has been the performance of the Central Industrial Relations Machinery, the success achieved in the States seems to be varied. In some it is impressive; in others disappointing. During the period from 1965 to1967, the percentage of settlements reached in Bihar ranged from 51% to 86%; in Orissa from 27.5% to 35.8% and in Assam from 65.5% to 92.3%. In U.P., Punjab and Delhi, in the year 1966, the percentage of disputes settled during conciliation was 60%, whereas in Rajasthan it was 40%. In the southern region, conciliation is reported to be more successful in Kerala, where the percentage of disputes settled ranged around 80.1%. Though statistics are not available for Maharashtra and Gujarat, the opinion evidence in these States shows that the machinery on the whole has given a fair measure of satisfaction. It suggests that in many cases the success attributed to conciliation is due merely to the legal requirement to register the agreement. Also, a section of employers' and workers' organizations feels that many settlements reached in conciliation are over minor issues.[19]

As against this mixed reaction to the working of the conciliation machinery, both employers and workers have expressed dissatisfaction over certain specific aspects of its functioning, such as the delays involved, the casual attitude of one or the other party to the procedure and lack of adequate background in the officer himself

[19] Royal Commission on Labour

for understanding major issues. Hence the research is for making an attempt to find out the ways to counter unfair trade practices.

(II) Objective of Study:

The main objective of this study is to understand the relationship between labour laws, unfair labour practices and their impact on development of an economy. This study will help us to identify the link between the efficiency of the legal system regulating the labour market, judicial control over the illegal practices and the different developmental facets. The researcher has attempted to analyse the relationship between them on the basis of the state-wise data available from secondary sources of the central government. For this study seventeen states in India have been considered and the other states have been excluded due to non-availability of data. The rationale for undergoing state wise analyses lies in the fact that in India there are several central as well as state labour legislations regulating the labour market and most of the state enacted laws tend to differ from other states.

For considering the effectiveness of labour laws and regulations governing the labour and employment markets in different states in India, Various reports have been considered. On the basis of the value of the various developmental parameters selected for the study the states have been ranked. Appropriate statistical tools and techniques have been used for drawing proper inferences. Spearman's rank correlation coefficient and Pearson's correlation coefficient have been used and these coefficients have also been tested to examine the statistical significance. The relationships between Labour Law Environmental Index and other indices highlighting development namely, human development index, economic freedom index, infrastructure index, and regulation of labour and business index , have also been analysed in this study.

The overall objective of this study then is to propose reform in the labour law for the promotion of decent work, reducing poverty and ensuring workers' protection.

(III) Review of Literature

Review of literature is a step for conducting research. To avoid duplication of research work and to broaden the understanding of the research problem review is must.

Economic and Political Weekly, Volume. 30, No. 25 Jun. 24, 1995, pages from 1467 to 1468. Mention must be made in this context of the growing use of contract labour by private employers as well as by Public Sector Units. Recognising contract labour as an unfair labour practice, the Supreme Court has urged the central and state governments to take steps for its abolition. A division bench of Sawant, P.B.Majumdar S.B. of the Supreme Court in Gujarat Electricity Board v. Hind Mazdoor Sabha & Others on 9 May, 1995 AIR 16893 was unanimous: "we cannot help expressing our dismay over the fact that even undertakings in the public sector have been indulging in unfair labour practices by engaging contract labour when workmen can be employed directly even according to the test laid down by section 10 (2) of the Contract Labour (Regulation and Abolition) Act, 1970." The latest annual report of the ministry of labour, however, is altogether nonchalant. It would rather take up "suggestions which have been mooted in the context of the programme of economic liberalisation launched to exempt certain categories of industries from the purview of the Act". When such is the government's attitude towards the labouring classes, in the organised and the informal sectors, more employment schemes may achieve little on balance. They are unlikely to offset the displacement of labourer and the slowdown of normal employment growth in agriculture and industry alike. That employment elasticity have been declining in the major sectors cannot be denied. The agencies implementing some of these special employment schemes take away with one hand what they give with the other. Take the example of commercial banks financing new employment schemes. Even as they try to fulfill their paper targets under the new programmes, their overall involvement in priority sector lending has been continuously dwindling.[20]

[20] Rule of Seven

(IV) Research Methodology:

Research is a logical and systematic search for new and useful information on a particular topic. It is an investigation of finding solutions to scientific and social problems through objective and systematic analysis. It is a search for knowledge, that is, a discovery of hidden truths. Here knowledge means information about matters. The information might be collected from different sources like experience, human beings, books, journals, nature, etc. A research can lead to new contributions to the existing knowledge. Only through research is it possible to make progress in a field. Research is indeed civilization and determines the economic, social and political development of a nation. The results of scientific research very often force a change in the philosophical view of problems, which extend far beyond the restricted domain of science itself.

Research is not confined to science and technology only. There are vast areas of research in other disciplines such as languages, literature, history and sociology. Whatever might be the subject, research has to be an active, diligent and systematic process of inquiry in order to discover, interpret or revise facts, events, behaviours and theories. Applying the outcome of research for the refinement of knowledge in other subjects, or in enhancing the quality of human life also becomes a kind of research and development.[21]

The researcher has attempted to find the precise problem and the solutions, if any, to remove the problem. The problem, taken, is essential and in the opinion of researcher can have an adverse effect, if not, treated seriously and expeditiously.

(V) Plan of the Study:

The researcher has divided the entire study in following chapters:-

Chapter 1:- Evolution and Conceptual Perception of Industrial Relations. In this chapter Historical background, evolution and development of labour management relations are studied and analysed.

[21] S. Rajasekar , P. Philominathan and V. Chinnathambi :Research Methodology

Chapter 2 :- Employers Unfair Discharge, Dismissal, Retrenchment and Terminations. In this chapter some specific provisions of grounds of discharge, rule for wrongful dismissal or discharge and the procedure when an employee refuges to accept the charge sheet.

Chapter 3:- Workmen and Trade Union Unfair Labour Practices. The central and state legislations relating to labour management relations and unfair labour practice are discussed in this chapter.

Chapter 4 :- Remedial Measures under the Industrial Disputes Act. In this chapter some specific provisions of Industrial Disputes Act, 1947 and curative measures under this Act.

Chapter 5:- Remedial Measures in U.S.A. and U.K. Remedial Measures relating to Unfair Labour Practices and Labour Management Relations Constitutional and Global Trends.

Chapter 6 :- Judicial Pronouncements. Judicial response on labour victimization is discussed in this chapter.

Chapter 7:- Conclusions and Suggestions. In this chapter the conclusion of the study is drawn, anomalies have been pointed out and some important suggestions are given.

CHAPTER - 1

EVOLUTION AND CONCEPTUAL PERCEPTION OF INDUSTRIAL RELATIONS

(I) Necessity of Historical Background :

The roots of the present day human institutions lie deeply buried in the past. The same is true of a country's law and legal institutions. The legal system of a country at a given time is not the creation of one man or of one day; it represents the cumulative fruit of the endeavor, experience, thoughtful planning and patient labour of a large number of people through generations. To comprehend, understand and appreciate the present legal system adequately it is necessary therefore, to acquire background knowledge of the course of its growth and development. To explain 'why it is so' one has to penetrate deep into past and take cognizance of the factors stresses and strains which have molded and shaped legal development. To understand 'how it is so' one must appreciate the problems and the pitfalls which the administrators had to face in the past and the manner in which they caught to deal with them.[1]

The process of development of legal institutions in India during the British h period started in the year 1600. India has known history of over 5000 years, and there were the Hindu and Muslim period before the British period and each of these early periods had a distinctive legal system of its own. One may therefore say that a comprehensive study of the Indian Legal History should comprise the historical process of development of legal institutions in the Hindu and Muslim periods also. That may be so, but there is pragmatic reason for concentrating mainly on the British period and that is that the present judicial system is what the British created, and hardly has any op-relation, continuity or integral relationship with the pre-British institutions[2].

Since India got independence from the British Rule on 15th August 1947 and the legal system and institutions inherited after independence were created during the British Rule, therefore in the field of .law and justice, as in many other fields, the

---

1 M.P Jain, Outlines of Indian Legal History, (1990) at p. 1.
2 Id at pp. 1-2

British period constituted a fundamental break from our traditions of the hoary past, The British period is nearest to us and our present is affected more intimately by the immediate rather than the remote past.[3]

What is true to the entire Indian Legal system, must be and is equally true to the law of industrial relations in India which also developed in India with the development of the law of industrial relations in British with the pace of the industrialization and particularly after the Industrial Revolution of 18th Century in Great Britain from where it was exported to other countries in the world including India. Therefore in order to understand and appreciate the present industrial relations in India properly, it is desirable and necessary to look into the historical background of industrial relations in the United Kingdom.

It was the United States of America in 1935 where the law on unfair labour practices has been codified for the first time in the world and thereby certain substantial rights have been granted to the labour certain obligations were created against the labour as well as employers and certain injustices perpetrated by the employers were removed by that law. While enacting the law on this subject in India, firstly by the Maharashtra State in 1971 on the basis of the Report of the Maharashtra Committee on Unfair Labour Practices which substantially followed the U.S. law on unfair labour practices; and lastly by the Indian Parliament in 1982, the U.S. law on unfair labour practices has substantially been followed for defining the unfair labour practices in Industrial Disputes Act 1947 by amendment in that regard. Therefore it is necessary to look into the conditions prevailing in U.S.A. and India which led the Governments for the enactment of the law on unfair labour practices in both the countries. So the comparative study of the prevailing conditions requires to look into the historical backgrounds of industrial relations in United Kingdom. United States of America and India for proper appreciation of the subject.

(II) Genesis and Expanding of Industrial Relations :

(A) Origin of Industrial Relations :

The concept of labour had its roots in the early Norman Conquest of England, and feudalism. From these seeds, successively nourished by the early doctrines of mercantilism, the later Industrial Revolution, and the recent concepts of social

[3] Id at p. 2

legislation there sprang various arrangements and relationships between the English employer and employed.[4]

Between the Norman Conquest in 1066 and the scourge of 1348, known as the Black Death or Plague, almost three hundred years elapsed.... During that period the subjugated people, however, likewise pressed for liberty, and repressive measures, from sword to Crown enactments, were required to hold them in bondage. Between 1348-1349 Domesday Book and the Black Death-in the fourteen months between 1348-1349, English society was transformed into three-fold divisions of nobles or warriors who fought, the clergy who prayed and the peasants who toiled with the free village communities becoming manorial ones in which the lord owned a legal estate and upon which dependent cultivators lived. These freemen-become-surfs were thus tied to the land unless there was a commutation of services and alienation or some analogous method. The national economy however was developing into a money one, i.e. in place of goods and services being exchanged for other goods and services, money was utilized solely to effectuate such transfer. This money economy provided to spur to the later emancipation of the conquered people, for until the middle of the fourteenth century the transition from slave to freeman occurred slowly. The Black Death decimated between one-third to one-half of the population and resulted in a grave shortage of workers. Thus the growing town and cilics needed workers, the developing money exchange resulted in wages for services and decrease in the supply of workers, due to the Black Death enhanced the value of a villein or a serf. To prevent the flight from the manor the emergency Ordinance of Labourers and the permanent Statute of Labourers[1] provided that villeins and serfs "shall be bounded to serve" their lords. To prevent the demands for increased wages, all men and women were required to "take only the wages, livery, need or salary, which were accustomed to be given" in 1346, three years before the Black Plague struck. These restrictions however, proved more onerous than the peasants could bear and the tensions engendered by such laws culminated the Great Peasants Revolt of 1381, the first important struggle between capital and labour. It is at this period that the emancipation of the feudal serf occurred and it is from this time henceforth that the worker becomes an individual who may contract and receive money wages for service

4 Morris D. Forkosch; A Treatise on Labour Law (1965) at pp. 8-9

and who is no longer connected with or tied to the land or a lord.[5] During the sixteenth and seventeenth centuries English interventionism in labour relations had reached its apogee. The 1562 Elizabethan Statute of Artificers and the 1601 Poor Laws were designed to maintain the status quo of a fixed and stable economy and legalized arrangements then in existence. These Statutes forced unemployed persons between twelve and sixty years of age to become servants in husbandry; only yeomen, or those higher in rank, could become apprentices; punishment was meted out to those who refused to work at ordinary wages; and a series of categories was enacted which subjected those mentioned to whipping and jail if a direction to labour was disobeyed. Following close upon the Poor Laws was the 1662 Law of Settlement which in practice permitted the ejection from a parish of any person earning less than a minimum standard of living and conveying him to his last legal parish. Parliamentary legislation in 1722 permitted parishes to establish workhouses in which beggars, runaway servants, vagabonds, the poor and others were detained.

The totality of the consequences of this governmental interjection between employer and employee were, and has been, incalculable. One method of ascertaining these consequences, through a logical extension of the premises, results in later Tudor legislation nationalising and unifying the nation, while another method, of later use in a legal evaluation, is to assume that the authority of the state had never entered the wage-cost English tug-of-war, and that employer and employee were free to contract upon any legal basis they desired.[6] The mercantilism of the sixteenth and seventeenth, and most of the eighteenth centuries was an outgrowth of the first method, with restrictive legislation bearing onerously upon Englishmen and colonists; the laissez faire' doctrines of the eighteenth and nineteenth centuries, based upon the philosophy of natural rights were an outgrowth of the second method, as well as being a reaction against the first.

---

5 Clapharn refers to the poll-taxes of 1377, 1379 and 1380 which were the immediate cause of the Peasants Revolts of 1381 (p!76) but points out that those whom the rebels murdered oftenest were men, who had enforced the Statute of Labourers (p. 120), See Clapham: Concise Economic History of Britain (1949) at pp. 120-176.

6 The first method is that of Mercantilism, which was a philosophy of economic protectionism and, nationalism, Smith reacted against and attacked this "commercial or mercantile system", devoting approximately, a fourth of his work to criticism and analysis. Adam Smith; Wealth of Nations (1776). Although based upon the same natural- law premises, the successor of the mercantile school nevertheless evolved a "laissez faire" economic and political philosophy, drawing from

(B) Origin of Trade Unionism :

By definition, the Webs limit their study of English trade unionism to the period subsequent to the latter part of the 17th century.[7] They likewise confine their researches to the United Kingdom and discount any connection between the craft gilds, and workers' groups. To them, the "fundamental purpose" motivating the birth and growth of these organizations" is the protection of the Standard of Life", i.e., a minimum living standard or wage. He defines this Standard of Life as "the organized resistance of any innovation likely, to tend to the degradation of the wage-earners as a class..." Webbs eschew controversial questions" as to the political validity either of the medieval theory of the compulsory maintenance of the Standard of Life, or of such analogous modern expedients as Collective Bargaining on the one hand or Factory Legislation on the others..[8]. Their conclusion is that a slight trace of the gild is found in modern trade unions in so far as the artisans of the new period attempted to perpetuate the regulations of their .trade which protected them and when these regulations fell into desuetude, combinations were organized to secure their enforcement. These facts and conclusions are still valid to this day and, for our present purposes acceptable. The question for us is not the "when" of the Webbs and others, but, rather the "how" and the "why" i.e., the political, social and economic 'mores' and conditions which spewed forth a conflict of interests out of which the law applied to labour unions of today eventually grew. It is primarily in England, not the continent," that the germs and sometimes the developed forms of the institutions which make up our present society have their roots.[9]

The medieval 'justum pretium' may be a key to their practices and this “just price” is basically an ethical not an economic concept, stemming from Aristotle and Aquinas finding lodgment in the Scholastic and medieval hierarchical division of' society, and manifesting itself in the English producers' gilds which strove to maintain customs, regulations, and prices. These entrepreneurial organizations thus fought "or

---

7 Webbs: History of Trade Unionism (1920) 1. They concede the existence of fragmentary evidence indicating the combinations of serving-men, journeymen etc. did perhaps strike against employers or revolted against the authority of the gild which places the date as about the 14th or 15th Century but no reliable evidence can be found (pp 3-4). Selley; Village Trade Unions in Two Centuries (1919) 11. claims that the first English Agricultural Labourers' Union was formed in 1833, and existed for only a few months, but the Webbs place the date for industrial not agricultural unionization as the later part of the 17th Century.

8 Ibid at pp. 5-7.

9 Simons; Class Struggles in America (1906) at p. 7.

economic status quo, and sought aid from additional sources i.e., from Crown with its prerogative who was most potent in this period. In theory the gild was a meeting place for the entrepreneur, the worker, and the consumer. All of whom were to receive their just due, and the control exercised by the towns was primarily in defence of tf.e consuming public. The master was not a manual labourer, for the journeymen and 1 le apprentice were there for that purpose; rather he was the capitalist-entrepreneur, who place, the work, and the wherewithal, and sought his due in the differential accruing to him i.e., the profits realized on the product. There was, in this gild age, no such outright economic and functional divorcement between the entrepreneur and the master as to enable the former to enter a trade without first having progressed through the early stages. Likewise did the apprentice and the journeyman have affinity with the master, for soon each would be one and join in enforcing and abiding by the rules of the trade. Apprentices lived with their masters as parts of the family. It was a common occurrence for the apprentice to marry his master's daughter, and enter into partnership with her father[10] so that a community of interests resulted not only legally and economically but also socially and psychologically. There is no parallel therefore, between the merchants and the craft gilds except that both were entrepreneurial organisations, as the former was completely divorced from productions and the means thereof, while the latter more and more tended in the direction of producing for the merchant-distributor rather than for the market.

During these centuries of gild domination no trace of a trade union is to be disclosed. But it is undeniable that sporadic groups of manual workers did combine against their superiors, whether called a strike or a conspiracy being immaterial London cordwainers rebelled against the "overseers of the trade". In 1396 the master saddlers charged that the object of the associations of their serving-men was to raise wages, and in 1417 the serving-men and journeymen of the master tailors in London were forbidden to dwell apart from their masters as they hold assemblies and have formed a kind of association. It was during 14th century that, with the Black Death and the consequent efforts of individual workers to obtain increased wages, repressive legislation was enacted, the Peasants' Revolt of 1381 occurred, and the basis was laid for the eventual use of the conspiracy doctrine against the future trade unions of workers.

---

[10] Trant; Trade Unions (1884) at p. 25.

A keen student of the period has written that no "classes" of employers and employees originally existed,[11] but "from the moment that to establish a given business, more capital is required than a journeyman can easily accumulate within a few years, guild master-ship - the mastership of the masterpiece - becomes little more than a name. The attempt to keep up the strictness of its conditions becomes only an additional weight on the poorer members of the trade; skill alone is value less, and is soon compelled to hire itself out to capitals. The (economic) revolution is now complete; the capitalist is the true master, whether he calls himself such or not; the labourer, skilled, or unskilled, be he called master or journeymen, is but the servant of the former. Now begins the opposition of interest between employers and the employed; now the latter begin to group themselves together; now rises the trade society.[12] The history of this "great social revolution", goes back at least five or six centuries, to the reign of Edward IE, and the Industrial Revolution mere confirmed and publicised what then existed.

The Industrial Revolution of the mid-eighteenth century did not change established economic and political forms overnight. It was built upon generations of civil and Parliamentary battles as well as the earlier economic revolution which permitted the industrial results of the preceding years to be accepted as part of the mores of the new era. This period exalted the rational economic man who sought only his own individual good and disregarded all others in the market's competition.[13] The Entrepreneur and his productive processes remained the focal point of continuing theoretical examination and legislative concern, for through production and exports only could gold importation have therefore been obtained, or in the new industrial age could the individual now reap a profit. This new concept therefore required a loosening of the tightened governmental shackles binding the entrepreneur, who was now to be guided solely by an invisible hand, i.e., self-interest,[14] so that trade and commerce, industry and banking, arid all like forms of wealth-seeking were freed of feudal and mercantilist restrictions. Laissez-faire became the slogan, profit determined processes of manufacture and factor-cost replaced other reasons for the

---

11 J. M. Ludlow, Trade Societies and the Social Science Association, Macmillan's Magazine, vol. Ill Feb. 1861, pp 313-325 and Mar. 1861, pp 362-372.

12 ibid at p. 318.

13 Adam Smith, Wealth of Nations, Modern Library ed. 1937, 1st. Published (1776)

14 ibid at p. 423

hiring and firing of workers. Two new classes sprang rapidly into existence the owners of the new factories and the workers in them, and the ancient struggle for entrepreneurial status and freedom in contracting gave way to the new struggle for a job and a wage without which life in a money economy was impossible. Modern capitalism, as a system of economic organization, marked by the stability in concepts of production, i.e., "a regular co-operation of two groups of the population, the owners of the means of production and the progeny less workers, now conditions, and brings into being those stable forms of organizations of employees."

(C) Development of Stable Workmen Trade Unions :

The manor and the gild arrayed themselves against society, as it were until the crisis between employer and employee furthered,[15] by the Industrial Revolution, sundered this community of interests. Until the government's change in policy, therefore, i.e., from intervention to non-intervention, "we have industrial society still divided vertically trade by trade, instead of horizontally between employers and wage-earners..." This eventual class division plus governmental non-interventionism, threw the employees permanently upon their own individual and collective resources, with group action as the better method having long since been adopted, albeit temporarily until now. The form which these early mid-eighteenth century associations utilised was imposed by the pressures of the law,[16] by the exigencies of the times, and by their close-knit ties of craftsmanship. Being illegal until the repeal of the Combination Laws in 1824, the immediate result was to permit crafts which had met surreptitiously to come into the open, and to continue to organize on a craft basis, the only one they knew. The wave of local strikes after 1824 presaged the possibility of greater worker cooperation and the political fears engendered by these demonstrations reacted in governmental attacks. The Christ Movement, supported by labour, successfully fought for the political Reform Act of 1832, which however, granted the suffrage primarily to the middle-class and not to the workers. These voteless individuals therefore turned to their unions, attempting to act through greater union, rather than political power, and in 1834 through the temporary Grand National Consolidated Trade Union, merged into one great industrial union of almost three quarters of a million workers. It was at this point that modem English trade unionism

---

15 I.Cole; The British Labour Movement (1922) at p. 5

16 Bell; Trade Unionism (1907) pp. 7-10; Appleton; Trade Unionism (1923) pp. 91-104.

may date its inception, for events thereafter resulted in the formation of many national trade unions, the legalization of all labour groups, the organization of the Trade Union Congress and representation in and capture of Parliament. With the possible exception of the miners unionization, through the first decade of the 20th Century, was organized on a craft basis. It is only with the First World War that separate unions, in England began to coalesce into amalgamations which thus tend to form larger and fewer units of many types of workers and crafts.

(III) Suppression of Early Workers' - Unions :

(A) United Kingdom :

We have just discussed in general, from social, economical and political point of view, how the concept of labour rooted from the Norman Conquest through the feudal system of society and how the unions emerged from the repressive measures after the Industrial Revolution. Here one more point is also necessary to be discussed and that is legal which will also clarify the true picture of the labour relations and how the legal measures were utilised to repress the early workers and their trade unions by the employers with the help of legislations and the judiciary. The manorial lord did not seek to rectify injustices but desired merely to utilise whatever means were at his disposal to retain and maintain his villeins and serfs, and if the law provided such means then it was utilised. But since the law evolved as a method of keeping peace between equals, it bore heavily upon those not so equal, and especially was the case when unequals plotted against their lord. This type of conspiracy[17], however, was political, seeking to over through an existing power, whereas the labourers who conspired to obtain more wages had no legal interest in replacing one master for another. By a bit of specious legal reasoning, however, the combinations of workers seeking higher wages were made criminal conspiracies, and by a further bit of speculative judicial ratiocination, these conspirators were held to be criminals merely because they joined together. This feudal approach, conditioned by those days of status, was finally utilised by the courts to denounce contract employees, in the modern era, for demanding higher wages. Thus in this fashion, the employer created by the Industrial Revolution reached back into the feudal period for a judicial weapon utilised by a master to nullify the efforts of servants. This English law, through the

[17] Forkosch, pp. 5 - 12

assimilation of common law by the colonies in America and India was likewise utilised here up to the middle of the 19th Century. The criminal and civil doctrines of conspiracy, both the jurisdictions are therefore examined here.

(1) Criminal Jurisdiction :

Three things however joined to make combination of workers and any thing like strike action totally illegal and criminal. These are as (a) Wage fixing system; (b) Combination Acts, and (c) The judges who enforced these Acts.

(a) Wage Fixing System :

In the Middle Ages, wages had been fixed by the state through just peace, and as a corollary, a whole series of Acts[18] of Parliament made it a of the criminal offence for workers in particular trades to combine in order to improve their wages and conditions. Occasionally combinations had emerged, but they tended to be spontaneous, local and temporary, though some of these were in fact legal since their objective was frequently to press the justices to exercise their power to fix wages, which was a lawful purpose. The wages in theory was to be fixed largely by Magistrates its Quarter Sessions; they were not to be bargained or even left to a free market. Acts passed regularly by Parliament from 1349 onwards establishing a system of wage regulation were not finally abolished until statutes of 1813 and 1824 although in fact the magistrates had long since ceased to fulfill their wage fixing functions. New methods of production and the new ideology of 'free competition', which had come with them, led directly to the view that these wage-regulating Acts had, as Lord Sidmouth put it "purnicious consequences".[19]

For a time, a few groups of workers agitated for them proper operation of the wage-fixing machinery in order to improve or more often to maintain their wages; but

---

[18] The Ordinance Of Labourers, 1349; The Statute of Labourers 1350; the Statute of Labourers 1361; 1368; the Statute of Labourers'Wages Etc. 1389; the Statute of Labourers 1402; 1405; The Statute of Wages 1414; The Statute of Labourers 1424; the Statute of Wages of Labourers etc. 1427 the Statute of Labourers 1429; the Statute of Artificers and Labourers, 1512;15I4; the Statute of Journeymen 1549; the Statute of London Tailors 1720; the Statute of Woollen Weavers 1725; the Statute of Regulation of Servants and Apprentices 1746; the Statute of Frauds by Workmen 1748; the Statute of Woollen Weavers' Combinations 1756; 1757; the Statute of Combination of London Tailors 1768; the Statute of Combination of Spit field Weavers 1772; the Statute of Combinations of Hat Trade 1776; the Statute of Combination of Silk Weavers 1792; the Statute of Unlawful Societies Act 1799; the Statutes of Combination of Workmen 1799 and 1300 etc.

[19] Patrick Ellas, Brian Napier and Peter Wallington, Labour Law Cases and Materials, London Buttenvortks (1980) 1-2.

in the early years of the nineteenth Century, as Hedges and Winter bottom say: "It is not surprising that the working-classes sought other means of redress. That other means was of course combination. Between the fourteenth Century and 1800 the statutes that had regularly been passed, also made workers' combinations illegal either generally or in various trades, if workmen do conspire, covenant or promise together...that they shall not make or do their works but at a certain price or rate or shall not enterprise or take upon them to finish that another hath begun...or shall not work but a certain hours and times. If wages were to be fixed, they must not be collectively bargained.

(b) Combination Acts :

Most writers begin their analysis of the court of equity injunction with the 1348 Black Death or Plague in England, which brought with it a scarcity of labourers and their corresponding request for higher wages. These demands were met by legislations[20] punishing severely those workers who heldout for more than the enumerated rates, thus seeking to prevent even individual bargaining for the individual's own labour and in part resulting in the Peasants' Revolt of 1381.[21] This singling out of the wage relation for special treatment continued beyond the 16th Century and even into 18th, when the 1720 Combination Act was passed even though the original conditions giving rise to such an approach had long since disappeared. As distinguished from the prior general statutes, the particular Combination Act of 1720 did not relate to conspiracies denounced by the 1548 legislation, or to the consolidating Statute of Apprentices of 1562 which regulated conditions of work and punished violators, but it nevertheless continued the practice of denouncing groups of workers who combined to advance wages and lessen hours and made this illegal.

Further encouraged by the French Revolution to see all organisations of workers as a potential source of Jacobin revolution, the government of the day passed the Combination Acts 1799 and 1800. The 1800 Act rendered criminal all agreements for advancing wages, altering hours, and the like, all attendance at or persuasion to attend meetings for such purposes, and all combinations of this kind. Many prosecutions occurred under these and later statutes especially those of 1819, The first

---

[20] 1349 Statute of Labourers; 1350 Statute of Labourers

[21] Trevelyn, England in the Age ofWycliffe (1899) 183-255

of twenty, years of the nineteenth century' wrote the Webbs, witnessed a legal persecution of trade Unionists as rebels and revolutionists.[83] However by Act of 1825 certain combinations had expressly been legalised. It dealt with combinations by masters and workmen, but the equality was merely formal since, though prosecutions against workers were frequent, there is no evidence of such actions against combining employers.

(c) Attitude of Judges :

The judges equally saw union organisation as a common law crime, na of conspiracy. "As in the case of Journeymen conspiring to raise their wages; insist on raising his wages if he can," said Mr Justice Grose in 1796, "but if se[1] for the same purpose it is illegal and the parties may be indicted for a conspiracy[22] prosecutions of the Journeymen Tailors of Cambridge had in 1721 as judge made liability, one probably independent of the various statutes (though never entirely clear) (The important point about common law conspiracy independent of any breach of statute is of course, that it aims at no act unlawful in itself, but is illegal because of the combination alone) Apart from the prosecution of trade unionists for oath taking or common law conspiracy, most of the legal battles between 1821 concerned the interpretation of crimes dubbed 'threats', 'intimidation', 'molestation' and 'obstruction'. A few judges put a fairly narrow meaning on the words such as Baron Rolfe in 1847 who thought they imported violence or the like. But the vast majority of judges were prepared to convict for any Intentional economic threat or intimidation' capable of having a deterring effect on the minds of ordinary persons capable of controlling the free agency of another. In 1832 a threat to strike was 'held to be molestation. In *R. v. Duffield, and R .v. Rowlands* in 1851 Wolver Hampton tinplate workers who were paid thirty percent less than average rates by a Mr. Perry and obliged to give him six months 'notice (compared to his one month's notice to them), were organized in strike by London Union. Convictions were upheld for conspiracy to molest and obstruct Mr. Perry. Mr. Justice Erie thought that it would be a molestation and obstruction when 'a manufacturer has got a manufactory and his capital embarked in it...' if persons conspire together to take away all his workmen' and he invited the jury to say this had interfered with Perry's lawful freedom of action.' Union officials could not therefore

[22] R.v., Mowbey (1796) 6 R.R. 619 at 636.

come and 'molest or intimidated or annoy' the workmen or even induce them not to enter the employers service. Mr. Justice Patterson made it clear there need be no express words of violence or the like before obstruction, intimidation or molestation were proved. The trade unions were, Mr Citerine observes, hamstrung'. While a strike to raise wages might be perfectly lawful, it was unlawful to threaten the employer that such a strike would take place or even peacefully to persuade persons to take part in it.

Law regards a contract as a set of voluntary but enforceable promise under the protection primarily of the civil law. Few breaches of contract are today criminal. Yet it is not often realized how modem this image is as far as employment is concerned. From the Statute of Laborers 1351, onwards various enactments subjected workmen who failed to fulfill their duties to the master employing them, to criminal penalties including imprisonment. Similar penalties did not attract to employers who broke their contracts and as the Webbs remarked, "it is difficult in these days when equality of treatment before the law had become an axiom to understand how flagrant injustice of the old Master and Servant Acts seemed justifiable even to a middle-class Parliament." An Act of 1823 gave jurisdiction to magistrates if any apprentice or 'any servant in husbandry, Artificer, Calico Printer, Handicraft-man Miner, Collier, Kallman, Pitman, Classman, Potter, Labourer or other person' under a contract to serve' a master, failed to enter the service, or absented himself neglected his duties or committed 'any other misconduct or misdemeanor. If convicted of this offence on a complaint by the employer, the servant could be imprisoned with hard labour for up to three months, his wages abated, and his services discharged. It is only one hundred years ago that a chain maker engaged to work at fixed rates for an indefinite period on fourteen days' notice was convicted and sentenced to two weeks' hard labour for absenting himself... Benches of justices scarcely favoured the worker; and in 1854 over 3000 workers were imprisoned for leaving or neglecting their work. In 1867 the Master and Servant Act revised the law and made it somewhat less harsh but retained the sanction of imprisonment for 'aggravated misconduct.' Prosecutions under the 1867 Act were used to the full against the increasingly militant trade union movement; in 1872 the figures reached 17100 prosecutions and 10400 convictions.

In 1875 all these laws were swept away under the mounting pressure of an organised labour movement. Since then criminal liability for breach of a contract of service as such has been rare.

Unions and their often syndicalist objectives, were met by employers with bitter opposition, and prosecutions helped to deter recruiting. Such prosecutions were not confined to the offences under common law and the 1825 Act. Old Acts that forbade 'unlawful oaths' were unearthed, such as the Act of 1797 (passed after the Nore Mutiny) pressed into service to convict the Tolpuddle Martyre', six unfortunate Darchester labourers, in 1834, to seven years' transportation for the mere administration at Tolpuddle of a union oath- in the Webbs' words,' a scandalous perversion of the law. In 1867, Baron Bramwell (perhaps the authentic voice of laissez faire) declared in a prosecution of certain tailors, who had carefully but peacefully picketed masters' shops in London, that such action as theirs was illegal as a conspiracy to 'molest' if it included 'abusive language and gestures or anything' calculated to have a deterring effect on the minds of ordinary persons by exposing them to have their motions watched and to encounter black looks'[23] Cyril Asquith (later lo be an eminent Law Lord) wrote in 1927 of this line of cases; "It affords an impressive illustration of judicial bias against industrial combination: a bias which has happily ceased to exist decades ago".[97] The express legalisation of picketing by 'peaceful persuasion', gained in 1S59, had been lost. Four years later a court held that if picketing involved a watching, which occasions a 'dread of loss' it would be still unlawful. In 1871 itself women were convicted for saying, 'Bahto black leg."

More important was prosecution for conspiracy in 1872 when workers in a gas works supplying a great part of what is called the west end of London; had threatened to strike Unless a colleague dismissed for union activity is reinstated. They were prosecuted and convicted for common law conspiracy. Part of the judgement raised the question of combination to call men out in breach of contract an act which, it will be remembered, was itself capable of being criminal under the Master and Servant Act for which reference of prosecutions and convictions has been made above." But Mr. Justice Brett went further and spoke of the combination itself as unlawful (even if no act to be done were otherwise unlawful) because it involved a molestation, that is

[23] R. v Druitt (1877) 10 Cox 572 at 601-602.

an unjustifiable annoyance and interference with the Masters in the conduct of their business... such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve'. The Times' of the day commented that the court had to maintain the rules of fair fighting, and with whatever reluctance they must be enforced.' [24]

"Almost any action" wrote the Webbs, "taken by Trade Unionists to induce a man not to accept employment at a struck shop resulted under the new Act, in imprisonment with hard labour. The intolerable injustice of this state of things was made more glaring by the freedom allowed to the employers to make all possible use of black lists' and 'character notes'... In short boycotting by the employers was freely permitted; boycotting by the men was put down by the police."

What is remarkable here, however, is the phenomenon that after the First World War many judges themselves seem to have reconsidered their position and their policy.

Employers in the post-war period and particularly after the General Strike became rather less eager to solve labour problems in the courts; they wanted in 1926, work not writs. And judges began to ask where interventionist policies had led them. Alter all, a court that intervenes in an industrial conflict cannot be 'neutral'; it will take ons side or the other. Intervention in economic conflict implies choice, for one side, against the other. In 1920 Lord Justice Scrutton, a great judge and no radical in social! attitude, expressed the new thoughtful concern when he said: -

> *"The habit you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgements as you would wish. This is one of the great difficulties of present with Labour. Labour says, 'where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?' It is very difficult sometimes to be sure that you have put yourself into a*

[24] Quoted by Pritt and Freemen, The Law Versus the Trade Unions (1950) 50.

thoroughly impartial position between two disputants, one of your own class and one not of your class."[25]

"His Lordship was, of course, making no accusation or admission of bias', a word which implies something like conscious frauds. He was recognising that judges are men and like other men their decisions are influenced by the social background they have known and the unconscious premises they acquire, self-awareness of this kind was rare among judges before 1920. Even today it is not always to be found. Judges who reviewed with such refreshing frankness the unhappy story of the battles between the courts and the unions, when these battles were fresh in the memory, were at any rate likely to abstain in future from interventions of quite the kind in which their brotheren had indulged in the earlier period."

(2) Civil Jurisdiction :

This judicial monstrosity of criminal conspiracy in England could be repealed by an Act of 1875.[26] An employer, who utilised the force of legal imprisonment to quell or overcome the collective demand of workers, may nevertheless suffer harm or injury until he succeeds. To obtain both redress and another method of defense the English judiciary, in the aftermath of the 1875 removal of criminal conspiracy doctrine, evolved that i)f civil conspiracy as applied to labour groups in doing this it committed an economic flip-flop, but not a legalistic about-face. In *Mogal S.S.* Co.[27] the House of Lords' decided that a group of steamship owners, utilising combined economic pressures to out a newcomer, need not respond to the bankrupted individual in damages for a civil conspiracy. A distinction was made between "a combination of capital for purposes of "trade and competition," and one of a "combination of several persons against one, with a view to harm him, as falls under the hand of an indictable conspiracy." The former was entirely justifiable, legally, whereas the latter was not.[110] If not justified then any harm resulting from the activities of such a conspiratorial combination might be made the basis of a suit for damages-at least, this followed logically.[28] In *Quinn v Leathern,*[29] the union officials had objected to Leathem's

[25] (1923) Cambridge Law Journal p.8, Quoted Weddernburn
[26] English Conspiracy and Protection of Property Act 1875.
[27] (1892) AC 25 40 42 43
[28] Allen v Flood1(1898) AC 1
[29] (1901) AC 495

employment of non-union workers in his fleshing business. A lengthy dispute ended in the officials demanding the men's dismissal, when Leathern refused, the union approached a butcher who was one of Leathem's customers and. under threats of a withdrawal of labour from his ship got him to stop dealing with Leathern. The latter sued for conspiracy, alleging a 'combination to injure', which was a civil wrong even though no unlawful act had been done. The defendant unionist argued that they were pursuing their legitimate interests, like trade competitors, and that in a remarkable case of ***Allen v Flood*** in the Law Lords had decided that a union official calling a strike to injure his employers' was not civilly liable, even if he was malicious, as he had done no act unlawful in itself. In upholding this suit the major opinion held that "a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy," but, may, with conspiracy, become dangerous and alarming. Another judge felt that while a combination to pursue "a trade object was lawful, although resulting in...injury to others," yet, where the combination is engaged In "in pursuit merely of a malicious purpose to injure another," an action would lie other words, even though the combination was no longer a criminal conspiracy yet, where its direct purpose was not to obtain immediate benefits from the individual-boycotted, but to use him as a club, a civil conspiracy was engaged in and a suit for damages would be upheld. The essence of this tort was that it was a civil wrong for workers to comb a view to damaging the employer. The civil conspiracy was developed from the established crime of conspiracy, but the statutory immunity extended only to the crime. The judges also adapted the tort of inducing a breach of contract to strikes in the case of *Temperten v Russell.* These decisions made it extremely difficult for union industrial action, especially since calling strike frequently involved inducing the to take strikers to break their contracts. However the seminal case in the history of trade unionism was the House of Lords' decision in *Taffvale Rly. Co. Ltd. v Amalgamated Society of Railway Servants,* wherein to the surprise of most legal commentators, the House of Lords held that a registered trade union could be sued in tort in its registered name for the acts of its officials and that unions and their funds were liable as an entity for the torts of their members. Until that time it had been thought that unions, being unincorporated bodies, were effectively immune from such liability. The combined effect of these legal developments was that virtually all industrial action involved the risk of torts being committed by union officials for which the union itself could be made liable for

damages. The dissatisfaction arising from this decision gave impetus; for the development of the Labour Party- stated to be created by Law Lords, MJ and the enactment of the Trade Disputes Act 1906, proved to be of fundamental importance in the trade union history. This Act provided immunity for individuals from the principal liabilities in tort which had been developed by the judges, provided they were committed in contemplation or furtherance of a trade dispute and it gave unions themselves virtually complete immunity from actions in tort thereby reversed Taffvale. The Trade Disputes Act therefore created the basis of the present liberty to strike to the trade unions.

Despite several amendments and enactment passed after 1906 Act from time to time for the regulation of labour relations, no comprehensive law on unfair labour practices could be enacted so far. It was the U.S.A. that led the world to enact that law in 1935, the background of which is also equally important for consideration in order to appreciate and understand the industrial relations in India where the law on that subject has been enacted by our Parliament in 1982.

(B) United States of America :

Under the conditions existing in the 18th Century, and even into the early years of the 19th, it is not astonishing that American employers favored, lawyers requested and judges permitted, to an extent, the adoption of the English doctrine of criminal conspiracy as applied to labour organisations. The first American labour union trial-the *Philadelphia Cordwainers' Case*[30] decided in 1806 in Philadelphia was based upon an indictment of conspiracy to raise wages. It charged the journeymen shoemakers with, combining and agreeing not to work except at certain prices and rates, and to prevent others from working except at like wages. The presiding Judge's charge to the jury contained an admirable exposition of the existing "laissez faire' economic concepts which denounced any "artificial regulation", then presented the common law upon the subject, and inter alia, concluded: "A combination of workmen to raise their wages may be considered in a two fold point of view; one is to benefit themselves ... the other is to injure those who do not join their society. The rule of law condemns them both ..." The jury, of course, with this principle of law impressed

[30] 3 Common & Gilmore, op. cit.

upon them, found the defendants guilty, and same result occurred elsewhere in some of the American States.

Judicial questioning and legal disagreement nevertheless occurred with an accompanying vociferous denunciation by labour which also took to politics, this influenced juries to find unionists not guilty, and unquestionably determined the opinion of Chief Justice in the famous, Massachusetts Case of *Commonwealth v Hunt,* decided in 1842. In this case seven unionists were indicted for criminal conspiracy, the charge being brought by a worker who had been fined by his union for accepting less pay than required by the society's rules; he refused to pay and was discharged by his employer upon demand therefore by the union. In dismissing the indictment, Shaw, discussed two main questions: was the union per see illegal, and if not were its methods illegal? The first question was answered in the negative so that, accepted by other American courts as an authoritative and binding exposition, this decision holds union per se lawful organizations. The second question was likewise answered in the negative, for no averment of "fraud, force, falsehood, or other criminal or unlawful means" was "set out in the indictment." But when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it to purposes of oppression and injustices, it will be criminal in those who thus misuse it or give consent thereto, but not in the other members of the association... In other words, unless the union as such authorises, consents, or ratifies illegalities in methods or ends, it cannot be held a criminal conspiracy, although those individuals who so act may be indicted.

However in this case, decided by the Supreme Court of Massachusetts in 1842. Chief Justice Shaw gave the doctrine of criminal conspiracy a serious setback *by* holding that all indictment really charged was an intent on the part of society to induce those who were not its members, to become its members and that was not an unlawful object. . Thus he helped to restrict cases by laying down that strike for closed shop was legal if conducted in a peaceful manner and that a union was indictable for conspiracy only if the goal or means for attaining it was unlawful.[31] Thus on the other hand it has presented the American civil-tort doctrine to be applied to labour unions, namely that a union is not per sc, unlawful, but if it acts through or

[31] K.N. Subramaniam: Labour Management Relations in India. (1967) 121

for illegal means or ends it may be prosecuted and sued, as may the individual actors[32]. What is illegal may be set forth by legislation or by judicial decisions, so that assuming a valid statute a union's efforts or purposes may be declared illegal even if higher wages only involved. For example, in 1863 Illinois by a statute declared it to be a misdemeanor for any person to threaten, intimidate or otherwise seek to prevent anyone from working upon such terms as he saw fit; the following year Connecticut made it unlawful to threaten or intimidate any workman with the intent to cause him to leave his employment; and two years later Minnesota passed similar legislation. By judicial decision New Jersey, in 1867, held that where, "the object of the combination...was to occasion a particular result which was mischievous and by means which were oppressive," a common-law indictment for criminal conspiracy would lie.[33] As Holmes has put it "the intentional infliction of temporal damage, is a cause of action which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape[34]. In other words the unions picketing brings harm, caused intentionally, thereby permitting recovery of the damages, unless the union proves a justification.

Employers also found a more effective means of dealing with unions by securing court injunctions. This tendency started in 1880s. The injunctions proved a great boon to employers as it could be secured quickly and before the employer had been put to a loss as a result of the strike. What the employer cared for most, was prevention of loss to himself and not belated vindication of his theoretical rights. Besides, an injunction was always preferable to the prosecution from the point of view of industrial relations. It made public feel that the strikers were on the wrong way of the law. Thus was loss averted, relations maintained and public sympathy gained. If an injunction was disobeyed an action for contempt of court followed with the dire consequences. A very large number of injunctions were issued by courts until 1932, when the Norris-La-Gurdia Act put severe restrictions on their issue. These restrictions made it ;almost impossible for an employer to obtain injunctions. But the injunction was a terror to the unions when the going was good.

---

32 Lindsay and company v. Montana Fed'n of labour 37 Mont, 264,273 96 Pac. 127(1908)
33 State v. Dpma;dspm, 32 N J L 151(1867)
34 Aikens v Wisconsin, 195 US 194,49 L. Ed. 154. 25 Sup. Ct. 3 (1904).

Another subtle way in which American employers sought to liquidate trade unionism was through the 'open shop' and 'yellow dog contracts,' Under these arrangements the employer reserved his right to employ only non-union labour and the worker undertook not to join any union as a condition of his contractual employment. Black list of union members were maintained and all such workers weeded out. Thus trade unions could be emasculated without their being declared illegal or held under injunctions. It was only in 1932 under the Norris La-Guardia Act, that 'yellow dog contracts' were declared illegal and heavy restrictions were placed on the rights of the courts to grant injunctions.

"Yet another effective, if pernicious method adopted by the employers in the 19th Century against trade unionism was to accuse trade unions of being agents of communism, out to bring about a political revolution. Even as the abolitionists had been enraged with conspiracy trial intentions to overthrow the government by force and violence, "for the benefit of our hereditary foreign enemy, the Great Britain. So the new theme of the employers was that the trade unions were emissaries of Coifimunist International bent upon changing the way of life of Americans. Employers skillfully and with the assistance of large well financed propaganda, played up the red score. Richard Boy and Herbert Marais say, "To the newspapers every striker was a foreigner, a Communist, Anarchist, Socialist or Nihilist. The press was naturally with the capitalists. The New York Tribune wrote in 1885 that, "these brutal creatures can understand no other reasoning than that of force and enough of it to be remembered among them for generations. That the propaganda was dishonest did not seem to worry any body least the journalist themselves. John Swinton, Chief Editorial Writer of the New York Times from 1860 to 1870 castigated himself in a moment of anguish and remorse: "What folly is this to be boasting an 'independent press'? We are the tools and vassals of rich men behind the scenes. We are the jumping jacks, they pull the strings and we dance."

Many employers used spies and strike-breakers to report on the activities of union leaders and to put down strikers by force. In this they were invariably helped by the state militia. The employers themselves maintained sizeable squad of private police, sometimes clothed with the authority of United States and called deputy

marshals.[35] As a result of the opposition of the employers which took the forms of lock-outs and black lists, the workers were compelled to meet secretly and to organise a type of organisation complete with ritual, sign grips, pass words, etc., so that "no spy of the boss can find his way into the lodge room to betray his fellows". Thus came into existence the Order of Knights of Labour exactly one hundred years ago. As reprisals unions often indulged in violence as in the case of secret miners organisation in the 1870 called "Molly Maguires."[151]

Thus in United States of America too the trade union movement had its trials and tabulations before it was accepted, first as a necessary evil and later on, as an essential element of the democratic system. In the early, stage employers used every weapon in their armoury, legal as well as illegal, to put down trade unionism. During the most part of the nineteenth century, employers took action against unions under the English Common law of conspiracy, which was held applicable in United States of America. The early antipathy to the movement owed its origin to the prevailing system of slavery. When the slave workers toiled for long hours in some states to assert themselves for gaining wage increases and better conditions of work. However full freedom of action for collective bargaining was not gained by the labour until the enactment of the National Labour Relations Act 1935, popularly known as the Wagner Act, which enacted the law on unfair labour practices, the background of which is the prime concern of the next Chapter.

(C) India :

Modern India owes its origin to contact with Europe, first through trade 'and later through conquest, which after the elimination of other contenders principally, France, made this country a part of British Empire, [36] which ended on 14th August 1947 Modern factory system began in India with a few cotton textile mills of which about a dozen had come into existence by 1861. By 1879 there were 56 mills which employed 43000 workers. The jute industry did not start till about 1854 but by 1882 there were 20 mills employing 20000 workers. Whereas three quarters of cotton mills were located at or near Bombay, the jute industry was wholly concentrated near Calcutta. The third largest employer of labour was the coal mining industry. The

---

35 National Commission on Labour, Report (1969) p. 54-55

36 Dr. C.K. Johri: International Encyclopaedia far Labour Law and Industrial Relations, vol. 6 (India 1980) p. 13.

biggest impetus to coal mining was provided by the, development of railways which starting in 1854, grew steadily thereafter for more than a half century. By 1880 a small core of modern factory system supported by railways and communications had come into existence.

The first impact of colonial rule upon the domestic industry was any thing but benign. Unhelpful foreign government remained a mute observer to the gradual destruction of a number of small scale and cottage industries as factory-made-goods, made deeper inroads into the economy and wiped out local competitors and their products. The net result was that pressure on land increased, and conditions were created for people to look for employment in the new urban centres and new 'industries.' A predominantly rural society was inevitably characterised by small and marginal economic units, India through its medieval period, was not exception. Increasing pressure on land led to fragmentation of holdings Growing families had to look beyond personal cultivation for subsistence. A class of landless labourers came into existence, often bonded to the large landowners. The system of slavery and economic bondages were in vogue during ancient and medieval periods. Modern period is also not exception as the bonded labour is still prevalent as found by the Supreme Court in 1984.[37]

The industrial and systematic relationship of employers and employees originated in India only in the later half of the 19th Century. The first economic activity developed in British India was plantation, where workers from far off places and surrounding villages were dragged by the intermediaries to work on meagre remuneration. The working conditions were-unduly long hours on a starvation wage and being unsuitable environment, place of residence, 'working life and culture to their health and physique, there were heavy rate of absenteeism and high percentage labour turnover. To restrict the absenteeism and leaving of job the government of the time enacted the 1863 and 1901 Act; which provided for licensing of recruiters, the registration of immigrants and duration of labour contracts from three to five years. It was provided by these Acts that plarter will have powers to arrest workers if they absconded from plantation.[38] This breach of contract was also made a penal offence.[39]

---

37 Bandhua Mukti Morcha v Union of India AIR 1984 SC 802.

38 R.C. Saxena: Labour Problems and Social Welfare (1981) p. 761.

39 The Workmen's Breach of Contract Act 1859; The Employers and Workmen's (Disputes) Act 1860; and the Indian Penal Code (Ss. 490 and 492) now omitted

These provisions favoured the employers and crushed the rights of the workers to leave their jobs according to their choice. The exploitation of labour reached such unbearable limits within two decades of the Establishments of factories that it invited public attention and criticism. Major Moore

Inspector in Chief of the Bombay Cotton Department wrote in Administrative Report for 1871-73, "The hour of work of cotton mills had not been subjected to any regulation, that the working day was undoubtedly long, that women and children had been employed in large numbers, and that as the work was fatiguing it was desirable to regulate the hours of labour of women and children. As a result the Government of Bombay set up Bombay Factory Commission 1875 and led to the enactment of the First Factory Act 1881. However the British Government of India also appointed the First Factory .

Commission in 1890 on the recommendations of which the Indian Factories Act 1891 was enacted, with serious drawbacks and limited coverage.

Thus in India, the relationship of capital and labour is found in the Workmen's Breach of Contract Act 1859 and the Employers' and Workmen's (Disputes) Act I860.'[60] The employers could seek enforcement of the relationship by resorting to the said statutory measures for it was an offence to commit breach of contract. This state of affairs was also recognized by the Indian Penal Code 1860. Under the Indian Contract Act 1872 and the subsequent pronouncement of the ordinary courts of law covered the said relationship within the fold of the statute and damages were awarded for any breach of contract by the contracting parties. Therefore, it would be inaccurate to emphasize that the justice was rendered by the courts in India on the basis of "justice equity and good conscience." But the courts in India were adhering to the Common Law of England as it was not modified by the Trace Unions Act 1871.

The earliest known trade unions in India were: - (1). The Bombay Mill-hands Association, a loose organization formed in 1890 for the purpose of memorializing government for improvements in factory law and which soon became moribund after the passing of the 1891 Act. (2). The Amalgamated Society of Railway Servants of India and Burma formed in 1897 by Anglo-Indians and Domiciled Europeans employ railways, more as a friendly society than a combination for securing concessions. led on Printers' Union started in Calcutta in 1905. and (4). The Mumbai Postal Union!

which was formed in 1907. The Kamgar Hitwardhak Sabha Mumbai, which came into existence in 1910 was a body of social workers who were interested in questions connected with the general welfare of labour and was an association rather workers than of the workers. Apart from the cases cited, the trade union movement is known in the west did not begin in India till almost after the end of the First War.[40]

So far as the early experience of trade unionism in India is concerned, in 1918 Gandhiji was invited by the ardent social worker and labour leader, Miss Anasuyabehn Sarabhai, to help the cause of workers in Ahemdabad. In a sense, the foundations of trade unionism in Ahemdabad were laid in that year. "It all started with the contemplated abolition or reduction of the 'plague' bonus towards the end of 1917, when the workers demanded a 50 percent increase in wages as dearness (cost of living) allowance. The workers leader was Miss Anasuyabehn Sarabhai, a social worker and sister of Ambalal Sarabhai, Chairman of the Millowners' Association. An Arbitration Board consisting of Mahatama Gandhi, Vallabhai Patel and Shankerlal Banker on behalf of workers, and of three millowners led by Ambalal Sarabhai on behalf of employers, with the Collector as Umpire, was set up. It appears that some workers went on strike without waiting for the functioning of the Arbitration Board and in consequence the employers pleaded that they were no longer bound by the agreement to arbitrate and that unless the workers accepted a 20 per cent increase in wages and returned to work, they would dismiss ail workers. To a suggestion by Shankerlal Banker that a larger increase in wages be given, the Millowners were completely outspoken and said:

> *"He assumes that Mills are run out of love for humanity and as a matter of philanthropy, that their aim is to raise the conditions of the workers to the same level as that of the employers. His approach is wrong. In reality mills are privately owned and are run with no other motive than to make profit..,The employment of labour and conditions of employment are determined purely on {he basis of supply and demand. Mr. Banker's approach is impossible, unachievable, visionary and Utopian. It is not practical for this world, for ourcountry and this city."*

[40] K.D. Srivastava: Law Relating to Trade Unions and Unfair Labour Practices, (1994) pp. 3-4.

A similar development took place in Madras when the Madras Labour Union was formed under the leadership of B.P.Wadia on 27th April 1918. The birth of this union was the result of the hardships which the employees had to suffer in the Buckingham and Cornatic Mills, and which ultimately led to a strike. After Wadia helped to form the union, it appears that the Governor of Madras sent for him on May 18, 1918 and expressed disapproval of his line of work. Wadia however, stoutly replied that h: could not discontinue his activities.

In October 1920, there was again trouble in the said mill over the passing over of the claims of a side jobber for promotion. As a result of trouble, the management instituted a campaign of dismissals and about 50 men were dismissed in a few days. In consequence the weaving master was confined to his room and his revolver was snatched away by the workers, Immediately after this incident, the management declared a lockout "in view of the assault on weaving master and the general turbulent attitude of the workpeople." The Union held meetings every day and appointed a lock-out committee' with Wadia as President to take measures to defeat the employers. About a month after the lockout, Messers Binny and Co. filed a suit against Wadia and the other members of the lockout committee, "for interfering with work people and dissuading them from working and thereby causing serious loss to the Company" and claimed damages to the extent of Rs. 75000. They also applied for an interim injunction against the defendants, which was granted until the disposal of the civil suit. Later other important persons intervened and the matter was settled. But this incident shows that the approach of the employers both at Ahmedabad and Madras in the first quarter of this century was similar to the approach of the employers in other countries in the early stages of development of trade union movement.

The institution of legal proceedings against Wadia in 1920 gave rise to agitation by the political leadership in India, as well as by the British Labour Party, in which a demand was made for a legislation of trade unions and their activities. The formation of the I.L.O. in 1919; the active interest taken by the nationalist movement in the organisation of the working class; and founding of the AITUC in 1920, also helped the process. The result was the Indian Trade Unions Act 1926. Till the Trade Unions Act 1926 was passed, consequent upon the uproar caused by the injunction and damages awarded against Mr. Wadia who in 1918 organised a strike in a leading Buckingham

The Buckingham and Cornatic Mills Mardas Case of 1920, not reported in any legal journal since it was compromised.

Corrtatic Mill in Madras, it was virtually impossible for a trade union to carry on its legitimate activities because of the legal difficulties arising out of the ordinary law of contract torts and criminal and civil conspiracies, in respect of which the Indian law had borrowed heavily from the common law of England. The Trade Unions Act 1926 although fell short of the protection provided to the trade unions by the Trade Disputes Act of 1906 in Britain, still gave certain basic protection to trade union in pursuit of their objectives of organising labour into trade unions and carrying on collective bargaining on their behalf [41]

Since India was under the rule of the Great Britain till 14th August 1947, the industrial law in India had been heavily borrowed from the Great Britain. The devices of exploitation, injustice, oppression and repression of the labour generated in the feudal system in England and continuously put into service for centuries had also been used in India.

After the Norman Conquest of England in 1066, the concept of labour rooted in the feudalism established between the Dommsday Book of 1086 and Black Death or Plague of 1348 during which repressive measures from sword to Crown enactments were used to hold the subjugated people who pressed for liberty, in bondage, and English society transformed into three fold divisions of nobles or warriors who fought, the clergy who prayed and the peasants who toiled, with free village communities becoming manorial ones in which the lord owned a legal estate and upon which dependent cultivators lived. These villagers were a self-contained community and lord controlled and dominated their lives and circumscribed their outlook.[42] The lord was the core of this system and manorial hall was the economic centre around which were grouped the hierarchies of peasantry. Manor was organised upon capitalist lines and the relation between the lord and his subject was essentially that of capital and labour.[43].

---

41 Anand Prakash, Law Relating to Trade Unions and Trade Disputes, "The Indian Legal System, (I.L.I.) 1978, p. 420.

42 Bonnet: England from Chaucer to Coxton (1928) 55

43 Lipson: Growth of English Society (1949) 5.

The developing economy money exchange resulted the payment in wages for services and the short supply of workers due to the Black Death enhanced the villeins or a serf. To prevent the flight from the manor the emergency Ordinance of Labourers 1949 and the permanent Statute of Labourers 1350 provided that villeins and serfs "shall be bounden to serve" their lords and to prevent the demands for increased wages, all men and women were required to, "take only the wages, livery, need or salary, which were accustomed to be given" in 1346, three years before the Black Plague struck.

The tensions engendered by these laws culminated the Great Peasants Revolt 1381, the first important struggle between capital and labour. It is at this period that the emancipation of the feudal serf occurred and henceforth the worker became an individual who could contract and receive money wages for service and who was no longer connected with or tied to the land or a lord,[44] and the basis was laid for the eventual use of the conspiracy doctrine against the future trade union of workers. Between 14th and 18th centuries mercantilism was the period of governmental interventionism in labour relations. A whole series of Acts, regularly passed by the Parliament since 1349 till 1800 establishing a system of wage regulation, also made workers' combinations illegal and criminal either generally or in various trades, if workmen do conspire, convenient or promise together that they shall not make or do there works but at a certain price or rate or shall not enterprise or take upon them to finish that another has begun or shall not work but a certain hours and times, to combine in order to improve their wages and conditions.

The Elizabethan Statute of Artificers 1542 and Poor Laws of 1601 designed to maintain the status quo of fixed and stable economy, forced the unemployed persons between twelve and sixty years of age to become servants in husbandry; punishment was meted out to those who refused to work at ordinary wages; and subjected those to whipping and jail if a direction to labour was disobeyed. The Combination at 1799 and 1800 rendered criminal all agreements for advancing wages, altering hours and the like, all attendance at or persuasion to attend meetings for such purposes and all combinations of this kind.

---

[44] Clapham: Concise Economic History of Britain (1949) 120-176.

The Industrial Revolution of mid-eighteenth century did not change the established economic and political forms overnight and it merely confirmed what then existed. Under the concept of laissez faire' profit determined processes of manufacture and factor-cost replaced other reasons for hiring and firing of workers Two classes rapidly came into existence, the owners of the new factories and the workers in them, and the ancient struggle for entrepreneurial status and freedom of contract gave to the new struggle for a job and a wage without which life in a money economy was impossible.

The law evolved as a method of keeping peace between equals, it bore heavily upon those not so equal and especially was the case when un-equals plotted against their lord. This type of conspiracy, however was political seeking to overthrow an existing power whereas the labourers who conspired to obtain more wages had no legal interest in replacing one master for another. But by a bit of specious legal reasoning the combinations of workers seeking higher wages were made criminal conspiracies, and by a further bit of speculative judicial ratiocination, these conspirators were held to be criminals merely because they joined together. This feudal approach, conditioned by those days of status was finally utilised by the Courts to denounce contract employees in the modern era for demanding higher wages. Thus the employer created by the Industrial Revolution reached back into the feudal period for a judicial weapon utilised by a master to nullify the efforts of servants.

The Wage Fixing System established under the Acts passed regularly by the Parliament since 1349 onwards and not finally abolished until statutes of 1813 and 1824 whereas in fact the Magistrates had long since ceased to fulfil their wage-fixing functions; the Combinations Acts regularly passed between 14th century and 1800 making workers combinations illegal and criminal either generally or in various trades if workmen combine to improve their wages and conditions of their work at certain price or rate; and the attitude of Judges, who enforced these Acts were the three factors joined together to make the combination of workers and any thing like strike action absolutely illegal and criminal offence for the prosecution and punishment of imprisonment with hard labour unabatingly for criminal conspiracy as per the Acts passed, common law conspiracy under the Judge made law, oath taking and breach of statutes for failure to fulfill their duties to the master employing them until the English

Conspiracy and Protection of Property Act 1875 was passed repealing the monstrosity of criminal conspiracy.

After the grant of immunity from the liabilities of criminal conspiracy in 1875, the civil conspiracy was put into service against the workers for any thing like strike action, through Judge made law for tortuous liabilities which resulted the enactment of the Trade Disputes Act 1906 that gave unions virtually complete immunity from action in tort and thereby created the basis of the present liberty to strike to the trade union was thereafter that the English Trade Unions enjoyed complete immunities from the ghosts of criminal and civil conspiracies. Thus "almost any action" wrote the Webbs, "taken by Trade Union to introduce man not to accept employment at a struck shop resulted under the new Act, in imprisonment with hard labour. The intolerable injustice of this state of things was made more glaring by the freedom allowed to the employer to make all possible use of black lists' and 'character notes'... In short boycotting by the employers was freely permitted; boycotting by the men was put down by the police."[45]

The modern capitalism, as a system of economic organisation marked by the stability in concepts of production, i.e. "a regular co-operation of two groups of the population, the owners of the means of production and the property less -workers, now conditions and brings into being those stable forms of organisations of employees. Thus from the seeds of concept of labour rooted in the feudalism established after Norman Conquest of England, successively nourished by the early doctrines of mercantilism a philosophy of economic protectionism and nationalism, the "commercial and mercantile system" from 14th to 18th century with governmental interventionism in labour relations; later mercantilism with governmental non-interventionism under the doctrines of laissez fairer' under which the authority of the State had never entered the .wage-cost English tug-of-war and the employer and employees were free to contract upon any legal basis they desired under the philosophy of natural rights from 18th to I9^{lh} centuries; the Industrial Revolution of mid-eighteenth century and the recent concepts of social legislations, there sprang various arrangements and relationships between the English employer and employed. Thus the concept of labour rooted into the relationship of owner and slave or lord and

[45] Webbs; History of Trade Unionism (1920) 284.

serf during feudalism, was later on succeeded by the concept of master and servant relationship during mercantilism and lastly culminated into the industrial relationship of employer and employees after the Industrial Revolution as the modern concept of industrial relation, in Great Britain.

In the U.S.A. under the conditions existing in 18th and 19th centuries the English doctrine of criminal conspiracy was applied to labour organisations by American employer and permitted by Judges as requested by lawyers as the *Philadelphia Cordwainers' Case* based upon an indictment of conspiracy to raise wages was decided in 1806 in-Philadelphia and found the defendants guilty and the same result occurred elsewhere in some of the American States. The doctrine of criminal conspiracy was given a serious setback by the decision of the Supreme Court of Massachusetts in 1842 in *Commonwealth v. Hunt* but at the same time presented the American civil-tort doctrine to be applied to labour unions namely that union is not per se, unlawful, but if it acts through or for illegal means or ends, it may be prosecuted and sued, as may the individual actors.

More effective means of dealing with unions were found by court in junctions started in 1880 which proved to be a great boon to employers as it could be secured quickly before the employer had been put to a loss as a result of the strike, and if an injunction was disobeyed an action for contempt of court followed with dire consequences. A very large number of injunctions were issued by courts until 1932 whenjthe Norris-La-Gurdia Act put severe restriction on their issue.

American employers also used to liquidate trade unionism through the 'open shop and yellow dog contracts' under which only non-union labour and the workers undertook not to join any union, were employed; black list of union members were maintained and all such workers weeded out. However Norris-La-Gurdia Act in 1932 declared 'yellow dog contracts' illegal. Accusation of trade unions of being agents of communism, out to bring about a political revolution to overthrow the government by force and violence for the benefit of hereditary foreign enemy, the Great Britain, emissaries of Communist International bent upon changing the way of life of Americans, by employers skilfully with the assistance of large well financed propaganda, played up the red score. Employers also used spies and strike-breakers to report on the activities of union leaders and to put down strikers by force invariably

helped by the state militia and sizeable squad of private police clothed some times with the authority of United States and called deputy marshalls maintained by the employers themselves which compelled the workers to meet secretly and to organise a type of organisation complete with ritual, sign-grips, pass words, etc so that no spy of the boss can find his way into the lodge room to betray his follows and the Order of Knights of Labour came into existence exactly one hundred years ago.

Thus employers used every weapon in their armoury whether, legal or illegal to put down trade unionism and during the most part of the 19th century employers took action against unions under the English common law of conspiracy, which was held applicable in the U.S.A. The early antipathy to the movement owed its origin to the prevailing system of slavery when the slave workers toiled for long hours in some states to assert themselves for gaining wage increases and better conditions of work. However full freedom of action for collective bargaining was not gained by the labour until the enactment of the National Labour Relations Act 1935 popularly known as the Wagner Act, which enacted the law on unfair labour practices. Thus in U.S.A. too the trade union movement had its trials and tabulations before it was accepted, first as a necessary evil and later on, as an essential element of the democratic system.

The system of slavery and economic bondage were in vogue during ancient and medieval periods in India. Modern period is also not exception as the bonded labour is still prevalent as found by the Supreme Court in 1984, in *Bandhua Mukti Morcha case.* Modern India owes its origin to contact with Europe, first through trade and later through conquest, as a part of British Empire which ended on 14th August 1947.

Modern factory system began in India with a few cotton textile mills of which about a dozen had come into existence by 1861 and by 1880 a small core of modem factory system supported by railways and communications had come into existence. The industrial and systematic relationship of employers and employees originated in India only in the later half of the 19th century. The first economic activity developed in British India was plantation, where workers from far off places and surrounding villages were dragged by the intermediaries to work on meager remuneration. The working conditions were unduly long hours on starvation wage and being unsuitable environment, place of residence, working life and culture to their health and physique

there were heavy rate of absenteeism and leaving of job. To restrict absenteeism the Government enacted 1863 and 1901 Acts providing for licensing of recruiters, the registration of immigrants, duration of contracts from three to fife years and planter will have powers to arrest workers if they absconded from plantation. The breach of contract was also made a penal offence under the Workmen's Breach of Contract Act 1859, The Employers and Workmen's (Disputes) Act 1960 and the Indian Penal Code under Sections 490 and 492 (now omitted). These provisions favoured the employers and crushed the rights of the workers to leave their jobs according to their choice.

The exploitation of labour reached such unbearable limits within two decades of the establishments of factories that it invited public attention and criticism which resulted the enactment of the first Factory Act 1881 on the basis of Bombay Factory Commission report set up in 1875, and the Indian Factories Act 1891; on the recommendations of the First Factory Commission set up in 1890.

The Employers could seek enforcement of the relationship by resorting to the said statutory measures for it was an offence to commit breach of contract under the Workmen's Breach of Contract Act 1859; the Employer's and Workmen's (Disputes) Act I860 and Sections 490 and 492 of I.P.C. Under the Indian Contract Act 1872 and the subsequent pronouncement of the ordinary courts of law covered the said relationship within the fold of the statute and damages were awarded for any breach of contract by the contracting parties. Thus the Courts in India were adhering to the Common law of England as if it was not modified by the Trade Union Act 1871. The trade union movement as it is known in the west did not begin in India till almost after the end of the First World War.

Till the Trade Unions Act 1926 was passed as a result of the uproar caused by the injunction and damages awarded against Mr. Wadia the President of a Union, who in 1918 organised a strike in a leading Buckingham Cornatic Mills in Madras, it was virtually impossible for a trade union to carry on its legitimate activities because of the legal difficulties arising out of the ordinary law of contract, torts and criminal and civil conspiracies, in respect of which the Indian law had heavily borrowed from the Common law of England. The Trade Unions Act 1926 although fell short of the protection provided to the trade unions by the Trade Disputes Act 1906 in Britain, still gave certain basic protection to trade unions in pursuit of their objectives of

organising labour into trade unions and carrying on collective bargaining on their behalf.

Thus all sorts of injustice, exploitation, oppression and repression of poor, weak, hapless and helpless labour had been rooted in the social, economic, political and legal systems established after the Norman Conquest of England, successively nourished by the Acts regularly passed by the Parliament, enforced by the Government and the Courts favorably to the employers and unfairly and harshly to the labour throughout the centuries, created a regular system of exploitation, repression and injustice to workmen and their trade unions against which a long drawn-out struggle had been waged and fought by the labour until the complete immunities granted to them upto 1930 in U.S.A. and India also which followed the English law in that regard, after which the trade union movement has been accepted as an important necessity.

(IV) Conceptual Framework of Unfair Labour Practice and its Constituents :

In the forgoing Chapter .we have studied the historical background as to how the industrial relations had evolved from the concept of labour rooted in the feudalism established after the Norman Conquest of England and later on nourished through the mercantilism Industrial Revolution, doctrines of 'laissez faire' and the modern social welfare legislations and how a long drawn-out struggle had been waged against the devices of exploitation, injustice, oppression and repression rooted with the concept of labour in the social, economic, political and legal system and perpetually utilised by the employers favoured by the Parliament, the Governments and the Courts under which the workers and their unions had been condemned as conspirators and criminals; prosecuted and punished with rigorous imprisonments for criminal and civil conspiracies for combinations, failure or neglect of duties, breach of oaths and breach of contract throughout the centuries since 1349 till 1875 and 1906 unless compete immunities had bee achieved from criminal and civil conspiracies in the United Kingdom, and how the same devices of exploitation injustice, oppression and repression had been adopted and used indiscriminately by the employers in U.S.A. and India against the workers and their unions until the complete immunities could be achieved by them from the criminal and civil conspiracies respectively upto thirties of the twentieth century, where from the trade union movement could gain the ground.

The present Chapter is devoted for the study of the concepts involved under the concept of unfair labour practice and to study the various ingredients and principles incorporated under the unfair labour practices in India.

(A) Concepts Involved :

Historically speaking unfair labour practices have arisen out of the efforts made for strengthening collective bargaining and the need felt for prohibiting or curbing the activities indulged in by the employers and/or the unions in putting hurdles in the way of the success of collective bargaining.' The discovery that was made in the course of the search for making collective bargaining a success, was the need for designating the sole bargaining agent. The representative union vested with the right of sole bargaining agent was found to be the lyinch-pin of the system of collective bargaining.[46] "The denial by some employers of the right of employees to organise and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and the other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce." "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organised in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." The experience has proved that protection by law of the right of employees to organise and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes; the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees". With this record of experience the United States of America declared its policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of

[46] Maharashtra Committee on Unfair Labour Practices. Report (1969) 40.

collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[47] . With this declared policy of the nation the United States firstly recognized the rights of employees in the following terms: -

> "Employees shall have the right to self-organization, to form join or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labour organization as a condition of employment as authorised in Section 8 (a) (3). "[48]

And thereafter identified and defined certain activities as unfair labor practices firstly in 1935 on the pan of employers,[49] and secondly by amendment in 1947 and 1959 on the part of employees and their organizations and agents.[50]

This was the first legislative recognition and definition of" unfair labour practice in U.S.A. through which the labour's right to self-organization, to form, join or assist labour organization; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all of such activities, had equally been recognized and defined in clear terms.[9] That is why the Wagner Act 1935 had been regarded "by the American workers as their "Magna Charta". Thus where the unfair labour practices are recognized as a substantial source or cause leading to 'strikes and other forms of industrial strife or unrest' i.e. a concept or device for the removal of impediments, hurdles or obstructions in the way of collective bargaining; they must also equally be considered as a concept of rights, freedoms and liberties of employees to self-organization to

---

47 S. 1, Statement of Findings and Polities of National Labour Relations Act 1935.

48 S.7of National Labour Relations Act 1935.

49 S. 2(8} defined unfair labour practices to mean any practice listed in S.8. S.8 (a) enumerated five activities of unfair labour practices for the employers. See Chapter III Part 11-4 notes 22 and 23 supra.

50 S. 8(b) and (e) L.M.R. Act 1947. See Chapter III Part 11-5 notes 25 and 26 supra.

form, join or assist a labour organization; to bargain collectively through the representatives of their own choice; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all of such activities, because it is Section 7 that guarantees the substantial rights there under and substantial hurdles thereto in existence as unfair labour practices recognized under Section 8 of the Act are co-related to each other. Therefore there can be no dispute that unfair labour practice is a concept of rights, freedoms and liberties of labour defined under S.7, it is also a concept of impediments, hurdles or obstructions thereto.

The provisions of unfair labour practices on the part of employer ensure the protection of any unfair labour practices he not only violates the said right of any employee but also violates the provisions of law defining such practice as actionable and condemnable by Board on the complaint of the labour organization.[51] In such a legal situation the provisions of unfair labour practices not only emerge into a concept of the protection of, those rights but also into a concept of violation of those rights and violation of statutory provisions of law. Therefore it is also a concept of protection of rights; a concept violation of rights and a concept of violations of statutory law.

Once it is admitted that unfair labour practices are involving the violation of rights of the party concerned and also the provisions of statutory law such practices must also be held to cause injury or impairment or encroachment of those rights and that being so it has been made actionable and condemnable by the aggrieved party through the statutory bodies-Board, or its organs. Therefore in those situations the unfair practices must also emerge as a concept of injury (legal injury) and impairment to a party against which such practices are committed and by a party who indulges in such practices. In such legal situations the unfair labour practices must also emerge into the concept of injury and impairment and at the same time into the concept of legal wrong and where it is punishable as an offence[52], it must turn as a concept of offence. So it is also a con of injury and a concept of legal wrong or offence, as the case may be. Accordingly where it is a concept of rights, it is a concept of duties and

---

51 S. 10 of the Act 1935.

52 In India by S. 25-U of the Industrial Disputes Act 1947 unfair labour practices are punishable as an offence.

obligations and where it is a concept of injury and impairment it is also a concept of obligations and liabilities.

The individual employee or worker has normally no social power because as an individual he has no bargaining power at all. The worker as an individual has to accept the conditions which the employer offers. On the labour side power is collective power. The individual employer represent an accumulation of material and human resources. Socially speaking the enterprise itself is the collective power. If a collection of workers; in the name of trade union or in any other name negotiate with the employer, this is thus negotiation between two collective entities both of which are or may at least be bearers of power. Therefore the concept of unfair labour practice which encourages the trade unionism by prohibiting the employers to interfere with, restrain or coerce employees in !he exercise the rights of self organization, to form, join, or assist labour organizations for the purpose of collective bargaining through representatives of their own choosing to dominate; or interfere with administration of labour organization; by discrimination to encourage or discourage membership in any labour organization etc., is a conceptual force for equalising the unequal bargaining power which is inherent and must be inherent :n the employment relationship. Thus it is a concept to counter-act the inequalities of bargaining power between the two unequal partners of production.

The concept of unfair labour practices by equalising the unequal partners of production in industries, where it create balancing between the two unequals, it also promote the social and economic justice to poor, weak and propertyless workers who sell (heir labour for their livelihood. At the same time the concept of unfair labour practice establishes the fair standard of human and institutional behaviour in labour-management relations, by condemning the unfair labour practices. Thus it is not only a concept of social and economic justice but also a concept of fair standard of human behaviour in labour relations and consequently also a concept upholding moral and ethical values in such dealings.

It has been well recognised fact[53] that unfair labor practices cause industrial strife or unrest when the legitimate rights of one party are infringed and the panics resort to show of power and strength for the same. Therefore the provision of unfair

[53] S.I of Wagner Act 1935.

labour practices is also a concept legitimatising the rights of partners of production because the concept of unfair labour practices prescribed not only for employers but also for labour organizations substantially to avoid the industrial strife an unrest and create devices for the employers, employees and labour organizations to recognize under the law one another's legitimate rights in their relations with each other and above all recognize under the law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.[54]

Thus the-provisions enacted on unfair labour practices in the United States law prescribing .the five unfair labour practices on the part of employers and nine unfair labour practices on the part of labour organizations and their agents substantially concentrates around the trade unionism - one to waken the union and the other to strengthen the union and the activities involved in doing so have been condemned as unfair labor practices on the part of both the partners of production. So Union motivation is the peculiarity of the U.S. law on unfair labour practices. However it has to be admitted that the provisions of unfair labour practices involve multiple concepts confined to union motivation only in U.S. circumstances.

(B) Constituents of Unfair Labour Practices :

An attempt here is made to define and confine the concept of unfair labour practices with references to its constituents since like other legal concepts it must also have its scope, limit and amplitude for its proper appreciation and adjudication by identifying the substantive aspects of unfair labour practices, if it not possible to define and confine the same with reference to logical precision covering the wide variety to ' aspects of human behavior in industrial relations. This effort is divided into two parts' firstly the ordinary or general approach in literal sense and secondly the substantive approach.

(1) Literal Approach :

The term "unfair labour practice" is constituted of three independent words of English language having different meaning and expressions. But when they arc

---

[54] S. I(b) of Labour Management Relations Act of 1947, declaration of policy of U.S.A. when the unfair labour practices for labour organizations and their agents were enacted.

joined, a compound word is created and they disclose one sense containing three indexes, which must be understood in literal terms also as to what 'unfair labour practice' must mean in simple terms of English language.

The word 'unfair' means not just, partial, inequitable, dishonest or unethical in business dealings.[55] It is an adjective of the English language so it conveys the qualitative sense of a particular thing, action, behavior dealing or practice etc. In other words the term 'unfair' signifies the .sense that is 'not fair', not corresponding to approved standards as of justice, honesty ethics or the like, disproportionate, undue, beyond what is proper or fitting and characterized by irregular or unethical business or administrative practice or method etc.'[256] So being an adjective and pre-fixed to the word 'labour' it j qualifies the term 'labour'.

The word 'labour' means 'productive activity especially for the economic gain the body of persons engaged in such activity especially those working for wages, the body of persons considered as a class (distinguished from management and capital), work especially of hard and fatiguing kind-toil, job or task done, to perform labour or exert one's powers of body and mind.'[57] Although the word 'labour' is a noun of English language but being pre-fixed to the word 'practice' which is also another noun of the English language, it acts here as an adjective and therefore it also qualifies the other noun 'practice'. Accordingly it adds special or a particular sense or quality to the 'practice'.

The term 'practice' indicates the sense of "habitual or customary performance, operation, habit, custom, repeated performance or systematic exercise for the purpose of securing skill or proficiency, the skill gained by experience or exercise, the action or process of performing or doing some thing or the exercise or pursuit of profession or occupation."[58] Accordingly the term "unfair practice" must mean any practice in business involving the general public or competing parties that is prohibited by state and regulated by an appropriate government agency.[59] Therefore any 'unfair practice' when related to the labour must be known as 'unfair labour practice' which must mean

---

55 Websters, New World Dtaionary.Indian Print (1976) 816.
56 Rensem House Dictionary of the English Language (1983) 1519
57 Id. at p. 798.
58 Id. at p. 1128
59 Id. at p. 1549.

any practice in any industry involving the labour and employer-the competing parties, that is prohibited by the labour legislations and regulated by an appropriate government agency. This is £ what we may ordinarily understand the literal meaning of the 'unfair labour practice' which involves one or the other qualities indicated by the term 'unfair' and related to any act of the labour and management in any industry.

Thus the term 'unfair' labour practice' prima facie and ordinarily involve three words all having distinct and different meaning not related in any manner with each other in the terminology of the English language, but when these three words are used together they create a compound word indicating only one phenomenon in one sense and at the same time reflecting the mixture or complexion of all the three distinct senses. The word 'unfair' is the index of the quality being the adjective of the English language, and signifies the quality of the noun 'labour' with which it is used. The term 'labour' is the index of a discipline or territory or field, sphere, faculty, department or particular activity of certain persons in relation to employment for hire and reward. And the term 'practice' is the index of the behavior, conduct, commission or omission of an act of the competing parties in the industry.

(2) Substantive Approach

The Fifth Schedule of the Industrial Disputes Act defines unfair labour practices, on the pad of employers, workmen and their trade unions. The 1st part of it deals with the unfair labour practices on the pun of employers and their trade union, whereas second pan deals with that of workmen and their trade union, running into 16 and 8 items respectively, in detail. Why are these labour practices treated as unfair? This is one of the important questions that may be posed to ascertain the material ingredients of term 'unfair' that is attached to labour practices, and the answer to that question may specify the same if given with material substance. The best answer that can be given in terms of the provisions of the Act dealing with unfair labour practices, must be that the labour practices are condemned as unfair because the acts or omissions which constitute unfair labour practices, are ' illegal, violate statutory provisions, encroach upon legal rights granted thereunder cause injury to persons and arc made actionable wrong or punishable as an offence. The second important question is why are such practices also treated as labour practices? The substantive answer to this question may specify the essential ingredients of the term 'labour' if

answered properly having regard to the provisions of the Act dealing with! unfair labour practices. The best answer in that regard must be that such unfair practices are also treated as labour practices because the acts or omissions that constitute unfair, labour practices, are committed or perpetrated only either by the employers or their trade unions, or the workmen or their trade unions against the rights or interest of each other in any industry, during the course of, for or in respect of employment relationships. The last and equally important question to ascertain the constituents of term 'practice' may be posed as to why such unfair acts or omissions have been treated as such practices? The best answer that may justify the use of the term 'practice' may be given having regard the historical facts in the consideration and the term defining the unfair labour practices. Justifiable answer in that regard may be that such unfair acts or omissions which constitute unfair labour practices were treated as such practices because the employers, workmen and their trade unions had habitually or repeatedly committed or perpetrated such acts or omissions in industries against the rights or interests of each other during the course of, for or in respect of employment relationships whether with or without any specific motive or intention. Thus the answers to these three question specify the essential ingredients of unfair labour practices, namely as (a). Perpetrators. (b). Victims. (c). Industry. (d). Employment Relationship, (e). Rights of Parties. (f). Illegal act or omissions. (g). Violate Statutory Provisions. (h). Violate Legal Rights (i). Cause Injury to persons. (j). Actionable Wrong / offence. (k). Acts or omissions. (l). Motive-with or without. (m). Mens rea if any, and (n). Commission/engaging in such acts or omissions.

These fourteen constituents of unfair labour practices deserve consideration in some detail through which their scope may be defined and confined substantially.

(a) Perpetrators :

Section 25-T of the Industrial Disputes Act prohibits an employer or workman or a trade union from committing any unfair labour practice. The Fifth Schedule also corresponds the same persons in Part I and II with one addition of trade unions of employers. Therefore the persons who perpetrate or commit unfair labour practices may be defined:- (I). Employer, (2). Trade Unions of employers, (3). Workmen, and (4). Trade Unions of Workmen, only and no other persons than these four types of persons. So the scope of unfair labour practices with respect to the persons who may

be perpetrators of unfair practices stand defined and confined. Now this scope depends on the scope of the three terms i.e. 'employers; workman' and 'trade union' which need actual consideration for defining the scope of unfair labour practices.

(ii) Employer :

Any person, who owns, controls or runs an industry and employs workmen therein may be termed as employer in an ordinary sense. The term 'persons' must include any company or association or body of persons whether incorporated or not,[60] and also include the artificial or juridical persons as well. The word 'employer' has been defined in S. 2(g) of the Industrial Disputes Act 1947 and the manner in which the definition is drafted shows that 'the employer' whether they are government or private person are included within the ambit of the Act as it is clear that its elaborate machinery was devised not only for the industries run by the government and local authorities but also for the industries run by private persons.[61]

(ii) Workman :

The term 'workman' has been defined by the Industrial Disputes Act under S. 2(s), in the following terms:

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person:

(i) Who is subjected to the Air Force Act 1950 (45 of 1950), or the Army Act 1950 (46 of 1950) or the Navy Act 1957 (62 of 1957); or

(ii) Who is employed in the police service or as an officer or other employee of a prison; or

---

60 S. 11 of the Indian Penal Code 1860.

61 Western India Automobile Assn. v. Indian Tribunal (1947) LLJ 245(246)

(iii) Who is employed mainly in a managerial or administrative capacity; or

(iv) Who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per menses or exercises, either by the nature or duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

What determines whether a person is a workman or an independent contractor is whether he has agreed to work personally or not. If he has, he is workman although he gets other person to work along with him and these persons are controlled and paid by him.[62] A person not engaged in 'skilled or unskilled manual, technical or clerical work; even though employed in any industry, is not a workman.[63] Only such employees are covered by the definition of 'workman' which in conjunction with their employers can be considered as 'industry' under S. 2(j)[64]. Expression 'employed in any industry' includes work incidentally connected to main industry.[65] Thus in view of the definition of 'workman' under S. 2(s) quoted above all the employees subjected to Air Force Act 1950, Army Act 1950, and Navy Act 1957; persons employed in the police and prison services; the persons mainly employed in a managerial or administrative capacity or employed in supervisory capacity drawing wages more than Rs. 1600/-per month or exercise either by nature, of his duties attached or to the office or by reason of the powers vested in him functions mainly of a managerial nature, are excluded from the ambit of ihe term 'workman'. Therefore such person although employed by the employer cannot be the person who may commit or may be the victim of the unfair labour practices under S.25-Uof the Industrial Disputes Act, 1947.

(iii) Trade Union :

The term 'trade union' has been defined to mean a trade union registered under the Trade Unions Act 1926.[66] The Trade Unions Act 1926 provides for the registration of trade unions and in certain respects defines the law relating to registered Trade Unions, It defines[67] "Trade Union" to mean, "any combination,

---

62 Chemical Works Ltd. v. State of Saurashtra AIR 1957 SC 264.
63 A. Sundarmbal v. Govt. of Goa (1988) 4 SCC42
64 Safdarjung hospital v. Kuldeep Singh Sethi (1970) SCC 735,
65 J.K. Cotton Spg. & Wvg. Mills v. Badri Moti AIR 1964 SC 737
66 S.2(qq) Industrial Disputes Act, Inserted by Act No. 46 of 1982, S.2 w.e.f. 21.08.84.
67 S.2(h).of Trade Union Act, 1926.

whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers; between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions:

Provided that this Act shall not affect:-

(i) Any agreement between partners as to their own business;

(ii) Any agreement between an employers and those employed by him as to such employment; or

(iii) Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade or handicraft."

It is thus clear that any combination, whether temporary or permanent, will be a trade union if it is formed primarily for one of the following purposes:-

(1) To regulate the relations between workmen and employers;

(2) To regulate the relations between workmen and workmen;

(3) To regulate the relations between employers and employers; and

(4) For imposing restrictive conditions on the conduct of any trade or business.

The expression "trade union" also includes federation of two or more Trade Unions. It is clear from the definition of the expression "Trade Union" that it could be a combination either of workmen or of employers or of both, provided it is formed primarily for one of the purpose mentioned in Cl. (h) of S. 2 of the Act. It is therefore, possible to 'have a Trade Union consisting only of employers. The emphasis in S. 2(h) is on the purpose for which the union is formed and not so much on the persons who constitute the Union.[68]

The law does not make registration of the unions compulsory. In fact it is the

[68] Register Trade unions v. M. Miiriaswami 1974 Lab. I.C. 695 (Kant).

union already formed which can be registered.[69] The registration can be applied for only by the members of the trade union. The application can be made after complying with the provisions of the Act with respect to registration.[70] Any seven or more members of a trade union can apply for registration of the trade union,[71] to the Registrar[72] and on being satisfied that all the requirements of the Act with regard to registration have been complied with, the Registrar registers the trade union,[73] and issues the certificate of registration.[74] On the registration a trade union acquires the status of a body cooperate in the name under which it is registered, with a right to have perpetual succession and a common seal with power to acquire and hold property and to contract and can sue and be sued.[75] A registered union enjoy immunity from prosecution for criminal conspiracy and civil action.[76] An agreement between the members of a registered trade union in restraint of trade is not void or voidable,[77] and after registration no other evidence is required to prove trade union.[78] The trade union which is not registered under this Act does not enjoy the aforesaid immunities, rights and powers. However both types of trade unions may commit unfair labour practices.

(b) Victims :

It is an unfair labour practices on the part of employer to interfere with, restrain from or coerce, workmen in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection either by threatening workmen with discharge or dismissal, if they join a trade union; or threatening a lockout or closure, if a trade union is organized; or by granting wage increases to workmen at crucial periods of trade union organization, with a view to undermining the efforts of the trade union at organization.[79] The terms, "to interfere with, restrain from or coerce workmen in the exercise of their right to organise, form, join or assist a trade union,"

---

69 Section 4.
70 Sections 5 and 6
71 Section 4.
72 Section?.
73 Section 8.
74 Section 9.
75 Section 13.
76 Sections 17 and 18
77 Section 19.
78 Section 9.
79 Item 1 of Part I of Fifth Schedule, Industrial Disputes Act, 1947

or "threatening workmen with discharge or dismissal if they join a trade union," or "threatening a lockout or closure if a trade union is organized" or "granting wage increase to workmen at crucial periods of trade union organization, with a view to undermining the efforts of the trade union at organization," clearly established that the workmen and their trade union are victims of all these unfair labour practices. The language used in Items 2 to 16 of Part I of the Fifth Schedule of the I.D). Act discloses that workman/workmen and their trade union arc the victims of all these unfair labour practices. Thus workman/ workmen and their union are the victims of all the employer unfair labour practices. Similarly the employer and the non-striking and managerial or other staff may be the victims of all the unfair labour practices on the part of workmen and their trade union enumerated under Items 1 to 8 of Pat II of Fifth Schedule of the Industrial Disputes Act. But managerial and other staff are here treated as part of employer for the purposes of brevity. The terms employer, workmen and trade union have already been defined as perpetrators, so needless to elucidate here also.

(c) Industry :

The status of workman is related to industry run by the employer. So the scope of industry affects the scope of unfair labour practices whether by the employer or the workmen or their trade unions. If a concern is not an industry the persons employed therein may not In- workmen within the meaning of the Industrial Disputes Act, so may not be the persons to commit or to be the victims of unfair labour practices. So 'industry' is the most important constituent of the unfair labour practices. It has been defined to mean "any business, trade undertaking, manufacture or calling of employers and includes any calling, service, employment handicraft, or industrial occupation or avocation of workmen."[80] What may be an 'industry' under the Industrial Disputes Act has been answered by the Supreme Court in famous case,[81] by laying down the four test in pars 140 to 143 as under "140. 'Industry' as defined in Section 2(j) and explained in Benerji (supra) has a wide import.

I. (a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical)

[80] S.2(j) Industrial Disputes Act 1947.
[81] Bangalore Water Supply and Sewerage Board v. A. Kajappa AIR 197J SC 548

(Hi) for the production and / or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making on a large scale prasad or food), prima facie there is an 'industry' in that enterprises.

(b) Absence of profit motive or gainful objective is irrelevant be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test-is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

141.11. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) Undertaking must suffer a contextual and associational shrinkage as explained in Banerje (supra) and in this judgment; so also service, calling and the like. This yields the inference that all organized activity possessing the triple element in I (supra) although not trade or business may still be 'industry' provided the nature of the activity, viz. the employer-employee basis bears resemblance to what we find in trade or business. This takes into the fold of 'industry' undertakings, callings and service adventures 'analogous to the carrying on the trade or business. 'All features, other than the methodology of carrying on the activity viz. in organizing the cooperation between employer and employee, may be dissimilar. It does not matter if on the employment, terms there is analogy.

142.III. Application of these guidelines should not stop short of their logical reach by invocation of creeds cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (it) clubs, (Hi) educational institutions, (iv) co-operatives, (v) research institutes (vi) charitable projects and (vii) other kindred adventures if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of Section 2(j).

(b) A restricted category of professions, clubs, co-operatives and even gurukulas and little research labs may quality or exemption if, in simple ventures substantially and going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters marginal employees are hired without destroying the non-employee character of the unit.

(c) If in a pious or altruistic mission may employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause such as lawyers volunteering to run a free legal services, clinic or doctors serving in their spare hours in a free medical center or ashrarnites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not relationship then, the institution is not an industry even if, stray servants, manual or technical are hired. Such eleemosynary or like undertakings alone are exempt - not other generosity, compassion developmental passion or project.

143. IV. The dominate nature test: -

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertakings some of whom are not workmen' as the University of Delhi Case (supra) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as; explained in the Corporation of Nagpur (supra) will be the true test, whole undertaking will be 'industry' although those are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions,

strictly understood, (alone) qualify for exemption, not the welfare activities or economic, adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions if there are units which are industries and they are substantially severable then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

While interpreting the definition of 'industry' as detained in the Act, the Supreme Court observed that the Government might restructure this definition by suitable legislative measures. It was accordingly proposed[82] and the definition of the term 'industry was restructured by the I.D.(Amendment) Act 1982.[83] Thus certain

---

[82] Para 2(ii) of Statement of Objects and Reasons, Industrial Disputes (Amendment) Bill 1982.

[83] S.2(c) of Industrial Disputes (Amendment) Act 1982 enacted that Clause (j) shall be substituted on enforcement by this version: -

"(j) industry" means any systematic activity carried on by cooperation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely! spiritual or religious in nature), whether or not:-

(i) any capital has been invested for the purpose of carrying on such activity; or

(ii) such activity is carried on with a motive to make any gain or profit, and incfudes-

(a) any activity of the Dock Labour Boards established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948);

(b) any activity relating the promotion of sales or business or both carried on by an establishment, but does not include —

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the fore going provisions of this clause) and such other activity is the predominant one,
Explanation------For the purposes of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act 1951; or

(2) Hospitals or dispensaries; or

(3) educational, scientific, research or training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the government relatable to the sovereign functions of the government including all the activities carried on by the departments of the Central Government; dealing with defence research atomic energy and space; or

(7) any domestic service; or

(8) any activity, being a profession practiced by an individual or body of individuals, if the number of persons employed by the individuals or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a cooperative society or a club or any other like

institutions mentioned in sub-clauses (1) to (9) of the restructured definition of 'industry[1] have been excluded from the scope of term 'industry' as interpreted by the Supreme Court. But for notification of date with effect from which it was to be enforced, the same has not come into force so far. Therefore the term 'industry' as interpreted by the Supreme Court in the Bangalore Water Supply case (supra) still holds the field, and thereby the extended scope of industry is still prevalent under the Industrial Disputes Act 1947.[84]

(d) Employment Relationship :

The term 'industry' as defined in the Industrial Disputes Act[85] and interpreted by the Supreme Court as, "any systematic activity carried on by cooperation between employer and his workmen whether such workmen are employed by such employer directly or by or through any agency including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes,[86] having widest possible emplitude, incorporates the employment relationship as one of the most important ingredients of industry. Similarly the term 'workman' as defined,[87] also incorporates the element of employment relationship between the employer who owns or runs the industry and the workmen employed therein. The term Trade Union' also visualizes the employment relationship. Thus the terms 'industry', 'employer', 'workman', and 'trade union' which are the basic constituents of industrial relations, are kept alive with the blood employment relationship. This brooding omnipresence of employment relationship in industrial relations, therefore envisaged that all the activities that termed as 'unfair labour practices' whether on the part of employer or workmen or their trade unions expressly on impliedly incorporate and contemplate the employment relationships therein. Like the life is impossible without blood in human being, so unfair labour practice is impossible without employment relationship between employer and workmen in any industry. Thus all the sixteen unfair practices on the part of employers and eight unfair labour practices on the part of workmen and their trade unions expressly or impliedly incorporated the employment relationship thereunder.

---

body of individuals, if the number of persons employed by the cooperative society club or other like body of individuals in relation to such activity is less than ten."

84 General Manager Telecom v. S.Sriniwas Rao, AIR 1998 SC656(658).

85 Section 2(j).

86 Supra note 27 para 140.

87 Section 2(s) Industrial Disputes Act.

(e) Rights of Parties :

It has already been discussed,[88] that while defining unfair labour practices, the United States law firstly recognised the labour's "right to self-organization, to form, join or assist labour organizations, to bargain collectively through representatives of their own choosing and the engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection", and also, "right to retrain from any or all of such activities,"[89] and the activities through which those rights were interfered with, were termed as unfair labour practices, and that is why unfair labour practices confined to unionism only. The Industrial Disputes Act did not define those rights in any provisions but in the activities of unfair labour practices itself. The 1st item of the unfair labour practices on the part of employers and their trade unions[90] specifically-incorporates certain rights workmen while stating the activity of unfair labour practice, "to interfere with, restrain[1] from, or coerce, workmen in the exercise of their right to organise, form join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, "and thereby, the rights of workmen to organise, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection have been recognised thereunder. These are the trade union rights of workmen which have not been specified elsewhere in such details. Items 2,3,4,6,8,12 and 15 are other activities through which these trade union rights may be violated. But Items 5,7,9,10,11,13,14 and 16 are the activities of unfair labour practices through which the other natural rights of workmen not related to trade unionism, have been impliedly recognized thereunder. These rights may be based on the, provisions of the Constitutions, other statutory provisions of Acts, contract, settlement, award, customs and practice as well. That is why the Tribunal held that to establish an unfair labour practice, it must be shown that the employee concerned was victimised for trade union activities or that the employer terminated the employment in bad faith with an ulterior motive or committed an encroachment on any natural, contractual, statutory or legal rights of the employee.[91] Items 13 states the failure to implement award, settlement or agreement, is an unfair labour practice, by which

---

88 Chapter IV, Part I, Concepts Involved, Supra notes 6,7,8 and 9.
89 S.7 of National Labor Relations Act, 1935.
90 Part I Fifth Schedule, Industrial Disputes Act 1947.
91 J.K. Eastern Industries Lid. v. Their Workmen, (1951) ILLJ 44.

rights created under award, settlement or agreement when not implemented becomes unfair on the part of employer, discrimination, favoritism or partiality to one set of workers regardless of merit, is violation of rights of equality, a right under Art. 14 of the Constitution. Discharge or dismissal of workmen for the reasons mentioned in Item 5(a) to (g) implies other natural rights of workmen that can be violated. Thus provisions of unfair labour practices expressly or impliedly incorporate and contemplate the workmen's trade union rights as well as other natural, statutory, contractual and other rights based on award, settlement .and agreement etc., the violation of which have been termed as unfair labour practices on the pan of employers or their trade union.

So far as the rights of employers are concerned, the common law has already recognised those rights in discharge of which the employers have, since long, been exercising them by prosecuting the workmen in many ways and the items of unfair labour practices on the part of workmen and their trade unions have again incorporated and complemented expressly as well as impliedly the right of the employers against the workmen and their trade unions. Thus rights of workmen as well as employer and their trade unions have been incorporated in the activities of unfair labour practices, in the absence of which such activity may not amount to be an unfair labour practice on their part. It is the incorporation of all those rights beyond trade unionism that extended the scope of unfair labour practices with respect of those rights also.

(f) Illegal Action :

All the sixteen unfair labour practices on the part of employers and eight unfair labour practices on the part of workmen and their trade unions in the Fifth Schedule of the Industrial Disputes Act constitute illegal actions. The term 'illegal' has been defined elsewhere equally applicable to almost all types of actions, whether civil or criminal. The Indian Penal Code while defining the term 'illegal' states that "the word 'illegal' is applicable to every thing which is an offence or which is prohibited by law, or which furnishes ground for a civil action."[92] The work 'illegal' has been given here an extensive meaning, including anything and every thing, which is prohibited by

[92] Section 43, Indian Penal Code 1860.

law or which constitutes an offence and which furnishes the basis for a civil suit, ending in damages.[93] Generally the word 'illegal' has the same meaning as the word, 'unlawful'.[94] Unfair labour practives have been treated as an offence,[95] and have also been prohibited by the provisions of law.[96] At the same time the same have been made the basis of civil action through a complaint to the Industrial Tribunal or Labour Court as the case may be.[97] Thus unfair labour practices which are prohibited by the provisions of law; which are also made punishable as an offence and which have been made the basis of civil action through complaints to Industrial Court and Labour Court are illegal actions on the part of employers or workmen or their trade unions, which may also be condemned as unlawful, unjustified, dishonest, unethical, improper, irregular, wrongful, vicious, discriminatory, biased, partial or void actions. Thus unfair labour practices being illegal actions unsustainable under the law smell out the flavour of 'non-est' of law.

(g) Violation of Statutory Provisions :

All the sixteen activities of unfair labour practices on the part of employers and their trade unions, and all the eight activities of unfair labour practices on the part workmen and their trade unions in the Fifth Schedule of Industrial Disputes Act constitute statutory' provisions under that Act. These provisions prescribe the activities which need not be committed by the employers or workmen and their trade union and the same have been prohibited by a' statutory provisions contained under S. 25-T of the Act and if committed by any such person, that has been made punishable under S. 25-U of the Act. All these statutory provisions conjointly deal with unfair labour practices to punish the same as an offence if committed. So commission of any activity of unfair labour practices prescribed under the Fifth Schedule of the Act constitutes violation of those provisions of the Act. Therefore the commission of any unfair labour practice detailed in the Fifth Schedule of ID. Act whether on the part of employer or on the part or workmen or their trade unions solves and incorporates an element of violation of those statutory provisions enacted thereunder.

---

93 Bhagwan Din v. Emperor AIR 1929 AH. 935(936).
94 Emperor v. Fajlur Rehman AIR 1930 Pat. 593(595).
95 Section 25-U Industrial Disputes Act, 1947.
96 Section 25-T, Industrial Disputes Act, 1947.
97 S. 28(1), M.R.T.U.P.U.L.P. Act 1971.

(h) Violation of Legal Rights :

All the sixteen activities of unfair labour practices on the part of employers or :their trade union and all the eight activities on the part of workmen and their trade union by nature itself offend and violate the rights, freedom and liberties of the concerned parties. For instance, the rights of workmen to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, are offended and violated when an employer interferes with, restraints from or coerces the workmen in exercise of those rights, either by threatening them with discharge or dismissal, if they join a trade union; or by threatening a lockout or closure, if a trade union is organized; or by granting wage increase to workmen at a crucial periods of trade union organization, with a view to undermining the efforts of the trade union at organisation.[98] These are the express rights of the workmen that are violated or offended by this activity, if committed. Similarly other activities enumerated for 2 to 16 also offend and violate the trade union as well as other rights, freedoms and liberties of the workmen of their trade union if an employer commits such activities against the workmen and their trade union. In the same way the rights of employer are offended and violated if the workmen and their trade union commit any activities of unfair labour practices enumerated in Part II of the Fifth Schedule. So where the provisions of unfair labour practices have expressly or impliedly incorporated the .trade union rights or other natural, statutory, contractual and other rights based on an award, settlement and agreement etc. of the workmen, the same provision have also incorporated ;he encroachment, deprivation, violation or taking away of those rights by the activities provided thereunder if committed. What is true to the rights of workmen and their trade union the same is equally true to the rights of employers through the activities of unfair labour practices on the part of workmen and their trade union. Thus the labour practices are unfair because they offend, violate encroach upon, deprive or take away the rights, freedoms or liberties of the parties thereto and therefore constitute one of the material ingredients thereof.

(i) Cause of Injury :

No more, there can be doubt on the proposition of law that unfair labour practices detailed in the Fifth Schedule of the Industrial Disputes Act are the statutory

[98] Item, I, Part I, Fifth Schedule. Industrial Disputes Act, 1947.

provisions of law, which enacted and incorporated the righls of the parties thereto, and thereby a clear concept of statutory rights of the parties comes into existence. Further the activities incorporated thereunder also violate the statutory provisions creating the rights thereunder. A legal right is one which is either enforceable, or recognised by rule of law.[99] The test of enforceability, though it may be a normal one, is not the only test for determining a legal right. A legal right may be asserted even for determining agencies. It includes the liberty or freedom from penalty.[100] The rights that have been recognised under the provisions of': unfair labour practices have been made enforceable, though on the complaint of the appropriate Government, to the judicial Magistrate of 1st Class, under the Industrial Disputes Act,[101] whereas by a complaint of any union or any employee or any employer of any Investigating Officer, to the Industrial Court of Labour Court as the case may be.[102] So violation of those rights legally recognised and made enforceable under the law,; incorporated the concept of legal injury to those persons whose rights so recognised encroached upon or taken away by activities provided thereunder.

What is injury, has not been defined by the Industrial Disputes Act. The word 'injury' denotes] any harm whatever illegally caused to any person in body, mind, reputation property.[103] So an injury is an act contrary to law. The definition of 'injury' in section is very vide,[104] and has been held to include every tortious act.[105] 'Injury' is wider in import than damage. The definition in this section shows that 'injury' embraces only such harm to body, mind, reputation or property as may be caused illegally. An employer, if interferes with, restraints from or coerces, a workman in the exercise of his right to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, by threatening him with discharge or dismissal, if he join a trade union, or by threatening a lockout or sure, if a trade union is organized; or by granting wage increase to workmen at crucial periods of trade union organization, with a view to undermining the efforts of the trade union at organization; cause harm to such workman to his body, mind, reputation or property by such activity. That activity is,

---

99 K.K. Pasidey v. Narpal Singh 1973 Cri.L.J. 1640 (Raj)
100 Denial tiailey Walcott v. State AIR 1968 Mad. 349
101 Section34.
102 Sectiou28(l) Maharashtra Act 1971.
103 Section 44 Indian Penal Code 1860.
104 Baijnali Bhagat v. Emperor AIR 1940 Pat 486 (492).
105 Shamumal v. RA. Gordon AIR 1936 Sind 290.

no doubt, illegal as recognised by the Act and prohibited. Like this other activities on the part of employer enumerated as 2 to 16 in Fifth Schedule of Industrial Disputes Act also cause injury to the workman concerned. Similarly the activities under Items 1 to 8 on the part of workmen and their trade unions if committed against the employer cause harm to his body, mind, reputation or property as the case may be. Thus all these activities defined as unfair labour practices on the part of employers or workmen or their trade unions, if committed against each other will cause injury to the persons against whom they are committed, that is why they have been treated as victims also. Therefore unfair labour practices, cause injury to the person against whom they are committed, and it is because of this essential element of 'injury[1] incorporated in the labour practices which resulted them to be treated as 'unfair'.

(j) Offence or Actionable Wrong :

As a general rule the word, 'offence[1] denotes a thing made punishable by the Penal Code, but not a breach of a 'special' or local law.[106] The definition of 'offence' in this section differs some what materially from the definition in S. 2(n) of the Code of Criminal Procedure 1973, under which 'offence' means "any act or omission made punishable by any law for the time being in force." This definition is the same as in $.3(38} of the General Clauses Act of 1897. It may be noted that this 4efinition is much wider than the definition in S. 40 under which 'offence' denotes any thing made punishable only by the Penal Code or by any special or local law, whereas under the two other enactments it means an act or omission made "punishable by any law for the time being in force". To constitute an offence under these two enactments all that is necessary is that the act or omission should have been made punishable by a law enacted by Legislature or by a body of persons authorized to do so,[107] and that the law must be in force in the territories of India.[108]

The Industrial Disputes Act, 1947 as amended in 1982 is a law enacted by the Union Legislature and the law dealing with unfair labour practices has been enacted thereunder, and is in force in the territories of India. The term 'unfair labour practice' has been defined,[109] to mean any of the practices specified in the Fifth Schedule. The

---

106 Section 40 of Indian Penal Code 1860
107 Raj NaraiK Singh v. Atma Ram, AIR 1954 All 319.
108 Govind Kesheo Pawar v. State of M.P. AIR 1955 Nag. 236.
109 Section 2(ra) Industrial Disputes Act 1947.

Fifth Schedule has enacted 16 and 8 unfair labour practices on the part of employers and their trade unions;[110] workmen and their trade unions respectively.[111] It has been provided that, 'no employer or workman or a trade union whether registered under the Trade Unions Act, 1926 or no shall commit any unfair labour practice.[112] Thus an employer or workman or trade union; has been prohibited to commit any unfair labour practice. Not only this, the prohibition has been sanctioned by punishment by providing that, "any person who commit any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both."[113] However any person guilty of committing any unfair labour practice can be prosecuted before the competent Court on a complaint made by or under the authority of an appropriate Government under S.34(l) read with S. 25-U of the Industrial Disputes Act.

On the other hand, Maharashtra Act 1971, has also been enacted by the Maharashtra Legislature to deal with unfair labour practices and recognition of trade union and is a law inforcc in the Maharashtra State, a territory of India. It has also defined the 'unfair labour practices' to mean any of the practices listed in Schedules II, III and IV, unless the context requires otherwise in this Act.[114] S. 27 prohibits an employer or union or employee from engaging in any unfair labour practice. But where any person has engaged or is engaging in any unfair labour practice then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint either under Section 5 or as the case maybe under Section 7 of the Act. As per Section 7 the Labour Coin is competent Court to decide complaints relating to unfair labour practices described in Item I of Schedule IV and to try offences punishable under this Act and the complaints regarding the rest of the unfair labour practices can be dealt with by the Industrial Court Under Section 5. The orders which the Court can pass on such complaint is indicated by S. 30, relevant part of which runs as under:-

> "30(1) where a Court decides that any person named in the complaint has engaged in, or is engaging in any unfair labour practice it may in its order:-

---

110 Part-I, Fifth Schedule
111 Part-II, Fifth Schedule
112 Section 25-T.
113 Section 25-U.
114 Section 26.

(a) declare that an unfair practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;

(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation).as may in the opinion of the Court be necessary to effectuate the policy of the Act;

(c) where a recognised union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all or any of its rights under sub-section (I) of Section 20 or its right under Section 23 shall be suspended.

(2) In any proceeding before it under (his Act, the Court, may pass such interim order (including any temporary relief or restraining order) as it deem just and proper (including direction to the person to withdraw temporarily the practice complained of, which is an issue in such proceeding) pending final decision;

Provided that, the Court may on an application in that behalf review any interim order passed by it."

If the orders of the Court whether final of interim are not complied with by any my against whom such orders are passed, it can be prosecuted under S. 48(1), which lays down as unden-

"48(1) Any person who fails to comply with any order of the court under Clause (b) of sub-section (1) or sub-section (2) of Section 30 of this Act shall on conviction, be punished with imprisonment which may extend to three months or with fine which may extend to five thousand rupees."

Thus there is no direct prosecution against a party guilty of having engaged in any unfair labour practice. Such a prosecution has first to be preceded by an adjudication by a competent Court regarding such engagement in unfair labour

practice. Therefore the act of engaging in any unfair labour practice by itself is not an offence under Maharashtra Act. while such commission of unfair labour practice itself is an offence under the Industrial Disputes Act."[115]

(k) Act or Omission :

Although the dictionary meaning of the word "unfair labour practice" denotes a sense of 'habitual or customary or repeated performance or operation,[116] but all the sixteen and eight items of unfair labour practices on the part of employers and workmen and their trade union prescribed respectively in the Fifth Schedule of the Industrial Disputes Act do not indicate any habitual, customary or repeated performance of any act thereunder. All the practices indicate acts of single nature. It is no doubt true that repeated, customary or. habitual action constitute practice. So all the unfair labour practices are constituted of activities that have repeatedly, habitually or customarily, been committed by the employer and workmen in industrial relations. It is with this repeated performance of such activities that have taken the recognised status of practice to indulge in such activities by the employers and workmen while dealing with each other in employmer relationships. Thus every practice is constituted of an act or omission or series of acts omissions, ¸since acts done extend also to illegal omissions,[117] and the word, 'omission denotes as well a series of omissions as a single omission.[118] Thus unfair labour practic could arise even out of a single transaction and the Labour Court has power to give finding even on the basis of one act of the employer or workmen. It is in the public interest that even a single act of an employer or workmen should be condemned, if« amounts to an unfair labour practice, for the policy of the legislature is to weed out any such practice before it has spread and become a danger to the industrial peace.[119]

While "failure to implement award, settlement of agreement"[120] is the j glaring instance of illegal omission on the part of employer all other unfair labour practice under Fifth Schedule on the part of employer or workmen and their trade unions are the instances of acts of commission.

---

115 Hindustan Lever Ltd. v. Ashok V. Kate, AIR 1996 SC 285(296).
116 Morris D. Forkosch; A Treatise on Labour Law (1965) 8-9.
117 Section 32, Indian Penal Code 1860.
118 Section 33. Indian Penal Code 1860.
119 Eveready Flash Light Co. v. Labour Court. (1961) IILLJ 204 (209).
120 Item 13, Part-I, Fifth Schedule, Industrial Disputes Act 1947.

It may be noted that an act, properly speaking, means some thing voluntarily done by a human being and having an effect in the sensible world. It involves an operation of the mind as well as of the body. Actions prescribed in the Fifth Schedule no doubt disclose the involvement of body for the operation of such actions. Whether the operation of mind is involved or not is a question to be considered in the following discussions.

(l) Motive With or Without :

Motive is not to be confused with intention. If a man knows that a certain consequence will follow from his act, it must be presumed in law that he intended that consequence to take place, although he may have had some quite different ulterior motive for performing the Act.[121] While intention is state of mind consisting of a desire that certain consequence shall follow from the party's physical act or omission,[122] motive is an ulterior intention, the intention with which an intentional act is done. Intention when distinguished from motive relates to the means, motive to end.[123] Their Lordships of the Supreme Court pointed out the distinction between motive intention and knowledge as: "Motive is something, which prompts a man to form an intention, and knowledge is an awareness of the consequence of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things."[124] Thus motive is the longing for the-satisfaction of desire which induces the mind to wish and then to intend doing something which would bring about the realization aimed at. The word "intention" is used to denote the mental attitude of man who has resolved to bring about a certain result if he can possibly do so, He shapes his line of conduct so as to achieve his desire end.[125] Motive and intention are thus two different things. While motive directed to the ultimate end, good or bad, which a person hopes to secure, his intention is concerned with the immediate effects of his acts. End can not justify the means. In other words motive

---

121 Mir Chilian v. Emperor, AIR 1937 All 13(14).
122 Mark, On Element of Law, IV ed. S.220.
123 Glanville William, Criminal Law, p.41, Section 15, cited in Kanju Moideen Mathararu v. Kandan AIR 1959 Ker. (46(148).
124 Basdev v. State of Papsu AIR 1996 SC 488 (490).
125 Russel. On Crimes. XI ed. p.44.

docs not justify the intention.[126] The motive, object or design of a person should never be confused with his intention. The criminal law regards only a man's intentions and not his motives.

Unfair labour practices enumerated 1,2,3,4,6,11,12 and 15 on the part of employer involve the anti-union motivation whereas the others items of unfair labour practices do not involve anti-union motivation of employer. The unfair labour practices on the pan of workmen involve the anti-employer motivation to strengthen the union workmen. Apart from the express motivation of the employers to weaken the trade unions and the workmen and their trade unions motivation to strengthen the trade 'unions, the other motive, object or design beyond unionism may also be inferred according to the facts and circumstances under which an unfair labour practice is committed and the nature of right that is violated thereby, which may spell out the mala-fides or the lack of bona fides of the perpetrator.

(m) Mens rea :

Lord Kenyon C.J., long ago declared: It is a principle of natural justice and our law that 'actus non facit reum nisi mens sit res' the intent and the act must both concur to constitute the crime."[127] "This ancient maxim has remained unchallenged as a declaration of principle at common law throughout the centuries upto the present day. I long, therefore, as it remain unchallenged no man should be convicted of crime common law unless the two requirements which it envisages are satisfied, namely that there must be both a physical element and a mental element in every crime"[128]. In *Brend v. Wood*, Lord Goddard, C.J. said: "It is of the almost importance for the liberty of the subject that Court should always bear in mind that unless a statute either clearly or by necessary implication rules out 'mens res' as constituents part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[129]

So far as statutory offences are concerned the law relating to 'mens rea' in England is thus summed up in Halsbury' s Laws of England: [130]

---

126 Sanjiv Ramanpa v. Emperor AIR 1932 Bom. 545 (547).
127 Fowler v. Padget (1798) 7 TLR 509 (514).
128 Russel, On Crimes, 11th ed. Vol.1 p.23.
129 Brend v. Wood (1946) 62 TLR 462 (463).
130 III ed. Vol. 10, Section 58 pp. 273, 274.

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may requires a specific intention, malice, knowledge, willfulness or recklessness. On the other hand it may be silent as to any requirement of 'mens rea,' and in such a case, in order to determine whether or not 'mens rea' is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases the Court have concluded that, despite the absence of express language the intention of the legislature was that 'mens rea' was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of 'mens rea'. Instances of this strict liability have arisen in the legislations concerning food, and drugs, liquor licensing and many other matters. "[131]

In India also the law is the same with respect to offences under statutes other than the Indian Penal Code. The position is thus, summed up in a case of State v, Ismail Shankur Morani:[132] "Thus there is a judicial agreement that in order, to find whether by a statute we must turn to the words of the statute and see what the intention of the Legislature was when it created the offence, by enacting the statute. Did the legislature intend the doing of an act, per se, without anything more should constitute an offence or did it intend that the doing of it with a certain state of mind should amount to an offence? If the essence of an offence lay solely, in the doing of an act and nothing more was required, the question of 'mens rea' would not arise and the state of mind, knowledge or intention of the doer would be irrelevant. On the other hand, if the legislature intended that the state of mind of the doer should be a constituent of the offence, the prosecution would fail without the proof of 'mens rea'." If the Legislature has omitted to prescribe a particular mental condition, the presumption is that the omission is intentional and in, such a case the doctrine of 'mens res' is not applicable.[133] Where the doctrine of 'mens rea' is intended to come into operation and a guilty mind is deemed essential for the proof of an offence, the statute itself uses the words like "knowingly," "willingly," "fraudulently", "negligently" and so on. The absence of qualifying words connotes that the offence is intended to be one of absolute prohibition.

---

131 Ibid at p. 274

132 AIR 1958 Bom. 103(109,110).

133 Legal.Remembrencer Bengal v. Arnbika Charan Dulal, ILR 1946(2) Cal. 127.

The Industrial Disputes Act is not a penal statute and the Union Legislature created the statutory offence of unfair labour practices thereunder by amendment in 1982. The language used to define the offence of unfair labour practices in the Fifth Schedule discloses that the Legislature intended that the doing of an act, per sc, without any thing more constituted the offence of any unfair labour practice. Further for committing any unfair labour practice, certain state of mind is not required. At the same time the essence of unfair labour practice lay solely in the committing of an activity and nothing more, is required.' The statutory provisions defining the activities of unfair labour practices in this Schedule do not use the words like, "knowingly," "willingly," "fraudulently", "negligently" and so on, as proof of offence for the doctrine of 'mens rea' to come into operation. Therefore the absence of such qualifying words from the language used in the activities of unfair labour practices in the Fifth Schedule of the Industrial Disputes Act, proves the intention of the Legislature that while enacting the unfair labour practice as an offence, 'mens rea' was not intended to be the essential ingredient of any unfair labour practice. So no particular state of mind is needed, and only the act that amounts to an unfair labour practice, is sufficient to prove the guilt of unfair labour practice of any person. Thus the unfair labour practices constitute the strict liability under the Industrial Disputes Act.

(n) Commission or Engagement :

Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both,[134] is a mandate under the Industrial Disputes Act, after prohibition of unfair labour practice has been provided under S. 25-T in terms that, "no employer or workman or a trade union, whether registered under the Trade Unions Act 1926 (16 of 1926), or not, shall commit any unfair labour practice." Thus S. 25-T prohibits an employer, workman or a trade union from committing any unfair labour practice, while S. 25-U provided penalty for committing any unfair labour practice, since the term, 'commits" and "shall commit" have been used therein respectively. So it is the commission of unfair labour practice that has been prohibited and made punishable finder the Industrial Disputes Act, on a

[134] Section 25-U. Industrial Disputes Act 1947.

complaint made by or under the authority of an appropriate government under S. 34(1). The term "commit" is generally used in a sense to perpetrate or to do, especially, a crime, sin or blunder, and in the context in which it has been used in these two provisions, being followed by the words, "any unfair labour practice," becomes a transitive verb indicating the object thereof, "any unfair labour practice," discloses the sense of completion of an act of unfair labour practice. Consequently the prohibition and punishment under the Industrial Disputes Act is against the commission unfair labour practice which may include the final acts of such commission.[135]

On the other hand, S. 27 of the Maharashtra Act creates prohibition on engaging in unfair labour practice stating that, "no employer or union and no employee shall engage in any unfair labour practice. S. 28 provides the procedure for dealing with complaints relating to unfair labour practices. Sub-section(l) uses the words, "where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court Competent to deal with such complaint..." S. 30 deals with the powers of Industrial and Labour Court and the nature of the order which the Court can pass on such complaint is indicated by clauses (a), (b) and (c) of sub-section (1) and sub-section (2). Sub-section (1) also uses the words, "where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order:- (a) declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice; (b) direct all such persons to cease and desist from such unfair labour practice... (c) where a recognised union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled..." Sub-section (2) provides that in any proceeding before it, under this Act, the Court may pass such interim order (including any temporary relief or restraining order) as it deems just and proper (including direction to the person to withdraw temporarily the practice complained of, which is an issue in such proceeding) pending final decision. S. 48 provides punishment for the contempt of Industrial or Labour Courts, Thus the words, "shall engage in", "has engaged in or is

[135] Supra note 61 at p. 296.

engaging in," and "has engaged in, or is engaging in," any unfair labour practice have" been used in sections 27,28 and 30 respectively. So it is the engagement in any unfair labour practice that has been prohibited and made adjudicable under the Maharashtra Act and it was only thereafter that the prosecution could be initiated under S. 48 against any person who fails to comply with any order of the Court under Clause (b) of sub-section (1) or sub-section (2) of S.30 of this Act.

Thus Maharashtra Act prohibits the concerned party even from engaging in any unfair labour practice. The word "engage" is more comprehensive in nature as compared to the word "commit",[136] This also clearly indicates that the complaint can be made regarding the alleged actions which amount to unfair labour practice, but which have yet finally culminated into ultimate action but are in the pipeline or are be attempted,[137] Thus the expression, "engaged in or is engaging in any unfair labour: practice" in sub-section (1) of S. 28 is of wide ambit. The Legislature very wisely did, not use the expression, "where any person has committed unfair labour practice" and the' expression "engaged in or is engaging in" clearly indicates that once the employer* engages in an unfair labour practice then the employee can approach the Labour Court and it is not that the cause of action for complaint accrues only when the unfair labour of' employer ends with order of discharge or dismissal.[138]

Accordingly S.27 of Maharashtra Act gets attracted even at a prior stage when such unfair labour practice is sought to be resorted to by the party concerned by engaging himself in such unfair labour practice. The prohibition against engagement in any unfair labour practice as mentioned in S. 27 will cover all stages from the beginning to the end, when the process which is initiated by the concerned employer or the union in connection with the alleged unfair labour practice starts and ultimately terminates.[139] So complaints under S. 28(1) cover both types of grievances against the party, (1) that: he has engaged in any unfair labour practice; and/or (2) he is engaging in any unfair labour practice. The section uses the twin phrases, "has engaged'" and "is engaging in" to indicate that it not only covers the finished, complete or continuous action but also an incomplete and continuous action.[140] Similar words are found in S.

---

136 Supra note 61 at 294.
137 Supra note 61 at 295.
138 Aslwk Vishnukote v. M.R. Bhope (1992) 64 FLR 808(Bom.DB).
139 Supra note 61 at 293.
140 Id. at 294.

30(1) which deals with the powers of the Courts and provides that where the Court decides that any person lamed in the complaint has engaged in, or is engaging in any unfair labour practice, it may by its order give relief as mentioned in clauses (a), (b) and (c) of that sub-section:[141]

(C) Principles Incorporated :

The rules regarding the unfair labour practices are based upon principles of social justice and industrial equity. From the above survey of various studies dicta reports and statutory provisions made in India and aboard it may be concluded that:-

(a) Unfair labour practices do not have any judicial base under the common law. It is a legal character imputed to an employer's employees' or trade union' act or omission in its industrial relationship with one another.

(b) The effect of investing the character on any act or omission as an unfair practice, is to vitiate such act or omission as 'non-est or legally inoperative.'

(c) An Act or omission may be characterized as unfair labour practice if it offends the concept of framework of social justice or industrial equity. Stated in the words of the lawyer in the olden days,: "if it is against the principle of justice equity and good conscience as applied to labour matters that act or omission would be an unfair labour practice." It is therefore basically a rule of industrial law, a principle of labour ethics and concept of behavioral morality.

(d) It is used in industrial law as "weapon of offence" to challenge the propriety and legality of action or omission of the other side.

(e) It is a negative expression of industrially desirable norms and standards and behavioral control in labour relations,

(f) Unfair labour practice arc therefore those acts or omission of employers or, workmen or their associations and unions which are :-

[141] Id. at 296..

(i) Violative of any statutory provisions to this effect; or

(ii) Violative of any principle of social justice or industrial equity; or

(iii) Obnoxious as judged by the contemporary socially desirable standard norms of dealing with each other in industrial relation matters.

(iv) Encroachment on any of the natural, contractual, statutory or legal rights[142] of the other party i.e. depriving workers of statutory dues,[143] or making' them sign contracts for casual labour for years.[144]

(v) Victimization for trade union activities, [145]

(vi) Acts of termination of employment relationship in bad faith or with' ulterior motives or which would be shockingly disproportionate to the misconduct, or vindictive[146] perverse capricious or discriminate activities[147].

(vii) Tempering, interfering or coercing the will, decision or opinion of other party by undesirable methods like bribing, luring, threatening intimidating or forcing.

(g) Even a single act or omission may be unfair labour practice[148] and not restricted to cover the categories of anti-union employers conduct.[149]

(h) The rule of Industrial law is flexible and dynamic as are all other concepts social justice. As a vital principle of good industrial relations the scope of unfair labour practices will tend to be ever expending and dynamic.

---

142 Rampuria Cotton Mills v. Their Workmen (1950) LLJ 969 (971).
143 People's Union for Democratic Rights v. Union of India AIR 1982 SC 1473.
144 L Robert D'Souza v. Executive Engineer S.Rly. AIR 1982 SC 854 (864).
145 Workmen William Magor & Co, v. William Magor & Co. AIR 1982 SC 78.
146 R.L Mishra v. State ofU.P.. AIR 1982 SC 1552.
147 A. Singh v. State of Punjab (1983) ILLJ 411.
148 Eveready Flash Light Co. v. Labour Court Bareilly, (1961) II LLJ 204.
149 Ibid, p 90.

(i) Like codification of other industrial rights and obligations as they attained universal acceptance and long felt need was expressed, the law on the unfair labour practice was codified in view of the urgency for codification of this branch of jurisprudence.

(j) Though the trade union development and evolution of industrial law in United States of America and other foreign countries has been different from India, the broad principles of labour jurisprudence, the desirable norms and standards of industrial morality, social equity and labour ethics are not very different. The law of unfair labour practice has developed in U.S.A. and that has been taken as a useful precedent for jurisprudentially formulations in India.

(V) Conclusion :

The term 'unfair labour practice' ordinarily involve three words all having distinct meaning not related in any manner with each other but when these three words used together they create a compound word indicating only one phenomena in one sense and at the same time reflecting the mixture or complexion of all the three distinct sense. The word 'unfair' is the index of quality conveying the sense of not fair, not corresponding to approved standards as of justice, honesty, ethics or the like, disproportionate, beyond what is proper or fitting etc. which qualifies the term 'labour' an index of a discipline or territory or field, sphere, faculty, department or particular activity of certain persons in relation to employment for hire and reward, and 'practice' is the index of the behavior, conduct, commission or omission of an act of the person or party. Thus unfair labour practice means in literal sense, any practice in any industry involving the labour and employer, the competing parties that is prohibited by the labour legislation and regulated by an appropriate government agency.

Fifth Schedule of the Industrial Disputes Act specifies sixteen and eight unfair labour practices in Part I and II one the part of employer and their trade unions as well as workmen and their trade unions respectively. Why are these labour practices treated as unfair, is an important question the answers of which specific the material ingredients of the term 'unfair' if answered in terms of the provisions of the Act, and that is, the labour practices are condemned as unfair because the acts or omissions

which constitute unfair labour practices, are illegal, violate statutory provisions, encroach upon legal rights granted thereunder, cause injury to the persons and are made actionable wrong punishable as an offence.

The second important question is, why are such unfair practices treated as labour practices, the answers of which specifics, the essential ingredients or constituents of the 'labour' if answered having regard to the provisions of the Act that must be that such unfair practices are also treated as labour practices because the acts or omission that constitute unfair practices, are committed or perpetrated only either by the employers or their trade unions, or the workmen or their trade unions against the rights or interest of each other in any industry, during the course of, for or in respect of employment relationship.

The last equally important question is, why such unfair acts or omissions have been treated as practice, the answer of which signifies the essential ingredients or constituents of term 'practice' if answered having regard to the historical facts in consideration and the term defining the unfair labour practices and that is, that such unfair-acts or omissions which constitute unfair labour practices are treated as such practices because the employers, workmen and their trade unions had habitually or repeatedly committed or perpetrated such acts or omission in the industries against the rights or interest of each other during the course of, for or in respect of employment! relationships whether with or without any specific motive or intention.

Therefore in terms of the provisions of Industrial Disputes Act 1947 any unfair labour practice enumerated either under Part I or Part II of the Fifth Schedule the most essential ingredients or constituents which substantially define and confine the scope of unfair practice, has to involve the following fourteen constituents, namely:-

1. The Perpetrator, i.e. the person or persons who commit or perpetrate unfair labour" practice must be either employer, or a trade union of employer or workmen or a trade union of workmen only and non else. The terms employer, workman and trade unions have been defined in the Act under S. 2(g), S.2(s) and S. 2(qq)-respectively.

2. The Victim:- The workman/workmen and their union must be the victim of any employer unfair labour practices under Part I and the employer or the non-

striking workmen or managerial or other staff may be victims of all or any of the unfair labour practices on the part of workmen and their trade unions in Part II and non else.

3. Industry: - Industry is the most important ingredient without which the employment relationship between the employer and workmen cannot be established since workmen are employed there by employer. S 2(j) of the Act defined the term 'industry' the scope of which has been laid down by the Supreme Court in Bangalore Water Supply and Sowerage Board v. A. Rajappa[150], in four tests of industry, which still holds the field since the restructured term of 'industry' by the Industrial Disputes (Amendment) Act 1982 has not so far been enforced, and thereby the extended scope of industry is still prevalent under the Act.[151]

4. Employment Relationship: - The terms 'industry', 'workman', 'employer' and 'trade union' the basic constituents of industrial relations are kept alive with the blood of employment relationship-the brooding omnipresence, without which no industry subsist so no unfair labour practice can be there without employment relationship between the two.

5. Rights of Parties :- The provisions of unfair labour practices expressly or impliedly incorporate and contemplate the workmen's trade rights as well as other natural, statutory, contractual and other rights based on award, settlement and agreement etc. the violation of which have been termed as unfair labour practices on the part of employers and the employer rights have already been recognised under the common law as well as expressly or implied under the unfair labour practices on the part of workmen and their trade unions. Thus the rights of employers, workmen and their trade unions have been incorporated in the unfair labour practices that too beyond trade unionism extensively without which such activities cannot amount to be unfair labour practices on their part.

6. Illegal Action :- The unfair labour practices being prohibited under the law, made punishable as an offence or made the basis of civil action through

---

150 AIR 1978 SC 548.

151 General Manager Tele-Corn, v. S.Sriniwas Rao, AIR 1998 SC 656 (658).

complaints to Industrial Court and Labour Court arc illegal actions on the part of employers, workmen or their trade unions condemnable as unlawful, unjustified, dishonest unethical, improper, irregular, wrongful, vicious, discriminatory, biased, partial or void and unsustainable under the law smell out the flavour of 'non-set' of law.

7. Violation of Statutory Provisions :- The commission of any unfair labour practice on the part of employers, workmen and their trade union detailed in the Fifth Schedule of the Act constitute the violation of those statutory provisions of the Act.

8. Violation of Legal Rights :- Unfair labour practices under the Fifth Schedule on the part of employers, workmen and their trade unions are the legal provision conferring expressly or impliedly the trade union or other natural, statutory and contractual rights and same provisions constitute violation encroachment or deprivation or taking away of those rights if such activities are committed by employer. What is true to the rights of employers, since unfair labour practices offend, violate, encroach upon, deprive or take rights, freedoms or liberties of the parties thereto therefore constitute violation of legal rights.

9. Cause Injury:- Violation of the rights legally recognised and made enforceable under the law, incorporates the concept of legal injury to those persons whose rights so recognised are taken away or encroached upon by any act. The unfair labour practices recognizing legal rights of the parties, under those provisions law, being made enforceable on complaints by or under the authority appropriate Government, cause legal injury to the party against whom it is committed. It is because of this essential element of 'injury' incorporated in the labour practices which result them to be treated as unfair.

10. Offence / Actionable wrong:- Since an employer, or workman or a trade union has been prohibited to commit any unfair labour practice under S. 25-T and any person who commit any unfair labour practice is made punishable with imprisonment upto six months or fine or both under S. 25-U of the Act so unfair labour practice constitute offence under the Industrial Disputes Act whereas under the Maharashtra Act unfair labour practices constitute

actionable wrong since on complaint by employer, or workmen or trade union or Investigating Officer action can be taken against the person who is engaging or has engaged in any unfair labour practice, under S. 28, before the Industrial Court or Labour Courts.

11. Act or Omission:- Every unfair labour practice is constituted of an act or omission or series of acts or omissions. An act properly speaking, means some thing voluntarily done by a human being and having an effect in the sensible world. It involves an operation of the mind as well as of the body. Unfair labour practices in Fifth Schedule disclose the involvement of body for the operation of actions, mind also in some others.

12. With or Without Motive:- The unfair labour practices under Items 1,2,3,4,6,11,12 and 15 on the part of employers involve the anti-union motivation whereas the other items do not involve such motivation of employer. Unfair labour practices on the part of workmen and their union involve the anti-employer motivation to strengthen the union of workmen. Apart from the express motivation of the employers lo weaken the trade unions and or ihc workmen to strengthen the trade unions, the other motive, object or design beyond unionism are also incorporated under the unfair thereby which may spell out the mala fides or the lack of bona fides of the perpetrator.

13. Mens Rea:- The statutory provisions defining the unfair labour practices in the Fifth Schedule of the Act do not use the words like, 'knowingly', 'willingly', 'fraudulently', 'negligently' and so on as proof of offence for the doctrine of ‘mens rea' to come into operation therefore 'mens rea' was not intended by the Legislature to be an essential ingredient of any unfair labour practice under the • Fifth Schedule of the Act. So no particular slate of mind is needed and only an act that amounts to an unfair labour practice is sufficient to prove the guilt of any person, and unfair labour practices constitute strict liability under the Act.

14. Commission / Engagement:- It is the commission of unfair labour practice that has been prohibited and made punishable under the Act, on complaint made by or under the authority of an appropriate Government, under S. 34. The term

'commit' discloses the sense of completion of an act of unfair labour practice so the commission of unfair labour practice includes the final acts of such commission. The Maharashtra Act prohibits the concerned party even fr engaging in any unfair labour practice. The word 'engage' is more, comprehensive in nature as compared to the word 'commit'. The prohibition' against engagement in any unfair labour practice under S. 2 cover all stages from the beginning to the end, and the twin phrases, "has engaged in" and "is engaging in" used in S. 28(1) cover both types of action and indicate that it not only covers the finished, complete or final action but also an incomplete and continuous action.

According to the various concepts and various ingredients or constituent involved, in the unfair labour practices enacted under the Industrial Disputes Act various principle of industrial jurisprudence, industrial morality and ethical values social and (economic justice and behavioral control of human and institutional behavior in industrial relations are involved.

CHAPTER—2

EMPLOYERS UNFAIR DISCHARGE, DISMISSAL, RETRENCHMENT AND TERMINATION

(I) Discharge :

The word "discharge" means discharge of a person in a running and continuing business and not discharge of all workmen when the industry itself ceases to exist on a bona fide closure of business.

(A) Discharge and dismissal distinguished :

Discharge is a termination of service of a workman. Both these kinds of termination of service are disciplinary actions for misconduct of an employee. The grounds of discharge and dismissal may be the same as enumerated in Order 14 of the Model Standing Orders, but it would not be the same thing as dismissal, for in the case of discharge proper notice (or payment of wages in lieu of notice) would be necessary. There is a substantial difference between the two. The incidence of discharge affords an employee with his 'full right to provident fund, gratuity and other benefits. Dismissal is a punishment which deprives' him of a number of such benefits.[1]

The consequences of discharge are 'not as grave as of dismissal. The 'rounds in both the case are the same and so it becomes a problem to the employer to make the award—dismissal or discharge. Order 14(6) of the Model Standing Orders gives guiding principle of solution In this respect. It reads as follows:

"In 'awarding punishment under 'this Standing Order, the manager shall take into account, the gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstances, that may exist. A copy of the order passed by the manager shall be supplied to the workman concerned.

---

[1] D.B.R. Mills v. Their Workmen, (1952)I AC 54.

In certain: casts, the Standing Orders of a company provide distinct procedures for dischage and dismissal. An employer is justified iii awarding discharge, if he follows that procedure. Nevertheless, the employer is not bound to follow the procedure for dismissal upon misconduct, even if that was his reason for discharge.[2]

In comparison with dismissal, discharge is a lighter penalty, no doubt ; but 'it will be wrong for an employer to carry with the notion that he can rely on vague grounds for discharge. The ground's of discharge must always be substantial. The allegations of misconduct, inefficiency and dishonesty, contempt of the prevailing rules, disrespect for the authority, indifference to work whatever it might be, must be proved with evidential procedure of enquiry and the opportunity given to the workman concerned before the employer takes up the matter of termination of his services.

(B) Notice of Discharge :

The employee as well as the employer has the right to have notice. The employer, when he desires to put end to the services of an employee, must give the employee time and opportunity to find other employment. He must not be deprived of: his earnings during the time. Similarly, an employee wishing to give up employment is to give the employer time and opportunity to find a substitute.

Standing Order No. 13 of the Model Standing Orders prescribes that for terminating employment of permanent -workman, notice in writing must be given either by the employer or the workman— one month's notice in the case of monthly-rated workmen and two weeks' notice in the case of other workmen ; one month's or two weeks' pay, as the case may be, may be paid in lieu of notice. No temporary workman whether monthly-rated, weekly-rated or piece-rated and no probationer or badli shall be entitled to any notice or pay in lieu thereof, if his services are terminated.

In the absence of Standing Orders an employee may be discharged iii accordance with the contract of service. In making such discharge, even in case of

---

[2] 1952 LAG 54

misconduct, charge-sheeting the employee and holding an enquiry there into will not be necessary, and no reasons are to be assigned for the termination.[3]

(C) In the case of a permanent workman :

Notice: Notice is an essential part of action. The proper course is first to serve show-cause notice in the proceedings of termination of service. The fundamental principle of natural justice should in no way be violated, and the proper procedure is to be followed, even where an employee is discharged in accordance with the contract of employment and for genuine administrative purposes. Non-compliance may lead to a serious injury to a party. The employer must never ignore the fact that under section 33 of the Industrial Disputes Act, 1947 the Tribunal has judicial powers to exercise to be ensured that the employer has acted lawfully and in a bone fide manner and his actions have corroborated with the fundamental principles of natural justice.

An employer has the discretion to give one month's notice or one month's pay in lieu of notice. The only condition is that there should not be victimization. Where the discharge has been made in bona fide manner and the employee has been paid his dues up to the date of termination of his services plus one month's pay in lieu of notice, the action taken by the management is not unjustified. It is then not obligatory On the management to follow the procedure laid down in the Standing Orders for dismissal On the grounds of misconduct.

(D) In the case of a temporary workman :

Notice : It s provided in the Model Standing Orders [Orders No. 13 (2)] that a temporary workman—a probationer or a Badli, is not entitled to any notice or pay in lieu thereof if his services are terminated.

Temporary workmen and apprentices may be discharged or dismissed at any time without notice. But a probationer who Is not confirmed at the end of the probationary period and continues to be employed must be given a notice as a permanent worker. If the employee is just a probationer, there is no question of

[3] Somenath Sahu v. State of Orissa AIR 1970 SC 1217

notices But where his case is on the margin and the status of the workman is not decisive, the award of one month's wages and dearness allowance is allowable by the Tribunal. The company, at the end of the probationary period, should either discharge the probationer or confirm him. Where the employer takes no action, the employee would continue to be in service as a probationer.[4] If the company acts. otherwise and terminates the service of such probationers, the company may be directed to pay such probationers 30 days' wages plus dearness allowance in lieu of notice.

The employers are not bound to retain the service of the employee, provided that the motive of the employer is not mala fide and that the procedure regarding discharge or dismissal has riot been inconsistent with the provisions of the Industrial Disputes Act, though the procedure in this regard may be different in the Standing Orders of a company.

Discharge: In discharging a temporary workman, the question that comes up before an employer is as to who should be discharged first. All other things being equal the principle of seniority should always be observed. It will be wrong to discharge an employee, retaining the service of a junior to him. The principle of natural justice must have its place in the mind of an employer while discharge a temporary workman. It will be an arbitrary act on the part of the employer and also a violation of the principles of natural justice, when a temporary workman is discharges during the period of leave, as the termination of service at that time will affect the workman financially.

"A temporary operator may be on leave with or without pay. In the case where he is on leave with pay, the termination of his service on the terms of Standing Order No. 20(b) which does not require any notice or pay in lien of notice would affect him financially, because, for the remaining period of his leave after the termination of his service, he would not get his pay which he would have been entitled to, under the order of the management, granting him leave With pay. IF he was on leave without pay. It would also affect him, because his right to rejoin after the expiry of his leave

4 Express Newspapers Ltd. v. Labour Court, Madras (1964)I LLJ 9

would be cut off. In these circumstances, it has been held that an employee discharged during leave period ought to be compensated.[5]

(E) In the case of a probationer :

Notice: The employer has exclusive right to terminate the service of a probationer at the end of his probationary period,[6] if he. is not satisfied with his work. Under the Model Standing Orders a probationer can be dismissed or discharged without notice. It is not even necessary for the employer to indicate, during the period of probation, that the services of the . probationer were not satisfactory. The employer has the right to discharge a probationer, after his probationary period has terminated, if his services were considered not to be satisfactory.

Discharge : Both the parties—the employer and the probationer are bound by a contract of employment for a certain period of time. And, in this respect, a probationer stands in a better position than a temporary worker or an apprentice inasmuch as temporary work- men and apprentices may be discharged or dismissed at any time without notice.

(F) Grounds of discharge :

As it has been discussed, discharge and dismissal are substantially different but the grounds in both cases are almost the same.

The reasons for the termination of service may be grave. What matters an employer In adopting the course of action—discharge or dismissal—is to take into account of the employee's motive and intention behind the misconduct. If the intention is mala fide, the dismissal should be the decision. Sometimes the misconduct committed is the same but the intention of the employee behind the misconduct is not in all such cases the same. The procedure of establishing the offence is the same as in the case of dismissal. it is from the evidence at the enquiry that the real difference between the two can be made out Whatever may be the reason for discharge it must be communicated to the workman before. the order of termination of service is

---

5 Victoria Oil Mills Ltd., Kanpur v. Sri Kamaluddin (1952)I LLJ 179.
6 Buland Sugar Co. Ltd. v. M.M. Dargan, (1952)I LLJ 504.

passed. The employee need to be charge-sheeted, given an opportunity to explain his conduct and an enquiry to be held. The principles of natural justice must not be overlooked.

The most important and common grounds of discharge are negligence, overstay leave, Inefficiency and suspected loyalty of he employee.

(1) Negligence :

Negligence is a misconduct under the Model Standing Orders [Order No. 14(3) (i)]. It is a ground of dismissal. as well. It depends much upon the evidence and circumstances to establish whether a case is one of dismissal or of discharge. Mere careless- ness or a stray act of negligence may not be sufficient for terminating employment.[7]

The procedure followed by the management for the enquiry must be accurate no loophole should be allowed to be crept in the evidential process, either by elimination or by omission. The evidence must not be insufficient, it must be comprehensive; Defective process of evidence may cause the decision to be reverted. The authenticity of evidence is thus a potential requirement as much for dismissal as for discharge

(2) Overstay leave :

Overstay of leave without intimation is always good ground for discharging the employee.[8] Overstay of leave is a misconduct if it is provided for in the Standing Orders of a company. And, If that be the provision, a proper procedure must be followed prior to discharge or dismissal. There should be a regular charge-sheet and enquiry and the record of the evidence taken by the management. The employee charged with the misconduct must be given an opportunity to explain it. It is the management who are to be satisfied with the explanation. The Court's duty in this respect is to see that the alleged satisfaction was bona fide and the management had properly made use of such provision as in the Standing Order.

---

7 Jugal Kishore Prasad Verma v. Supdt, Collieries Giridih (1950)I LLJ 301

8 (1959)I LLJ 289

(3) Inefficiency :

Inefficiency can be a ground of discharge only If It has been mentioned In the Standing Orders of a company. it is rather a vague charge ; there Is the possibility of its being misused. In establishing the charge, tha Tribunal must ascertain whether the bona fides of the management was proved and the management made a' proper examination of the question as to whether the workman was, in fact, inefficient or not.

A workman having been suffered from an injury and so being physically incapable, may demand later on for employment in a lighter post. The company may discharge him in such a case and Is not unjustified as the company is not bound to create a job as to involve a lighter work for the employee.

(4) Suspected loyalty :

A workman, in employment or under contract of service, must serve his employer with good faith and full loyalty. It Is not unreasonable for an employer to expect that the employee will be devoted to his master's business alone and that he will not enter into any other competitive business. Where any lacking is found, there is hardly a chance for an industry to flourish. Good faith and loyalty towards the company once suspected and once the management is satisfied that the employee is. no longer a loyal servant, the employer is given the scope to exercise his right to discharge the workman concerned. Dismissal Is the proper punishment to be awarded to an employee failing a contract of service in serving his employer with good faith and fidelity.

Apart from these grounds of discharge, a workman may be discharged on any of the grounds treated as misconduct for dismissal. The degree of punishment—discharge or dismissal will depend on the past record of the employee and the merits of evidence in his favour, as well as the consequences of the Act. In the circumstances favorable. to the employee and the consequences not so serious, the employer will discharge and not dismiss. In case of an employee found guilty of gross misconduct, the rule of the 'condonation of misconduct may be taken Into consideration and the employee be merely discharged. In such cases, the order of discharge has to be passed after condonation of the misconduct. Once the misconduct Is condoned, there is no question of punishment.

(G) Rule for wrongful dismissal or discharge :

No hard and fast rule can be laid down in dealing with cases of illegal dismissal or discharge, nor it is possible to lay down exhaustive rules on the subject of unjustified termination of service.[9] Each case should be considered on its own merits. On the question of security of service where dismissal or removal from service is found to be unjustified, the normal rule would be reinstatement. In unusual or exceptional cases such as in the case of **Shamnagar Jute Factory Ltd.,**[10] Industrial Tribunals may have to consider whether in the interest of the Industry itself, it would be desirable either to direct reinstatement or Instead award compensation in lieu thereof,[11] balancing consideration of the conflicting claims of the employer on the one hand and of the workmen on the other. The long time lag, if there be any, between the date of the order of dismissal or discharge by the employer and the date of the decision by the Tribunal may also be a factor which the Tribunal may consider in giving the award, though it is not open to the employer to stand on the plea that he has meanwhile engaged fresh employees in place of those whom he had dismissed.

The right of reinstatement of the workmen for wrongful termination of service or their dismissal has been recognised by the Supreme Court and various Industrial Tribunals. The principles laid down by the Labour Appellate Tribunal In the often quoted case of **Buckingham & Carnatic Mills**,[12] and subsequently confirmed by the Supreme Court In the case of **Indian Iron and Steel Co. Ltd**.,[13] have come to be accepted as sound principles and have been followed in the subsequent decisions by the Supreme Court itself like the **Provincial Transport Service v. State Industrial Court & Another**;[14] **Chartered Bank, Bombay v. Chattered Bank Employees' Union**[15] ; **G.M.D.C. v. P.H. Brahmbhatt**[16] **and Telco v. S. C. Prasad.**[17]

---

9 Buckingham & Carnatic Mill's case, (1952) LAC 490 (LAT)
10 (1964)I LLJ 634 (SC)
11 United Commercial Bank Ltd's case, (1962)Il LLJ 578 (SC)
12 (1957)II LLJ 314
13 (1958)I LLJ 260
14 (1962)II LLJ 360
15 (1960)II LLJ 222
16 (1974) LIC 155 (SC)
17 AIR 1969 NSC 61 (SC)

(H) Tribunal's jurisdiction :

To the question of confirmation, whether it will be given or not the decision of the management is final. The Tribunal has nothing to do or interfere with the decision of the management. The Tribunal can, however, examine the ground on which the management refused to confirm as well as other facts for the purposes to see whether it was actuated by motives of victimisation or other ulterior motives.

(II) Dismissal :

Dismissal is a termination of service But any and every termination of service is not a dismissal. The expression "termination of service" is a wider term which includes discharge, dismissal, retrenchment, and all other ways of determination of employment, e.g. resignation, retirement, death, closure, lay-off.

The term "dismissal" of a workman attaches with it an implication of punishment foe- some kind of misconduct on his part, while a termination of service of a workman brought about by the exercise of contractual right, or by compulsory retirement in terms of service conditions does not tantamount to a question of implications of punishment and therefore, is not per se a dismissal. There is slur cast on the workman concerned in the case of dismissal, whereas in a case where his services are dispensed with there is no such slur.[18] Dismissal is the extreme penalty for an act of misconduct, although every act of misconduct, even falling under the standing orders, does not entail dismissal.

(A) Dismissal—an industrial dispute :

It is laid down in section 2A of the Industrial Disputes Act, 1947, that where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer contracted with, or arising out of, such discharge, dismissal, retrenchment or termination, shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute. Thus dismissal of even a single workman now raises an industrial dispute for which reference may be

[18] State Bank of India v. Its Workmen 1957 LAC 483

made by the appropriate Government to Board, Court or Tribunal under section 10(1) of the Act. Dismissal or discharge of a workman falls under the Second Schedule, in pursuance of section 17, of the Industrial Disputes Act.

(B) Charge sheet and enquiry to precede dismissal :

The management cannot dismiss a workman for an act or omission amounting to misconduct unless he is served with a proper charge sheet. The charge for the act or omission amounting to misconduct must be clearly mentioned in the charge sheet so that the delinquent employee may have an opportunity for explanation. A proper departmental enquiry . needs also to be conducted into the misconduct, observing the rules of natural justice. The dismissal of an employee without holding a depart-mental enquiry is not valid. As the Supreme Court has held it in **Provincial Transport Services v. The State Industrial Court, Nagpur,**[19] departmental enquiry should be held even where upon contractual terms an employee may be liable to dismissal. There is no impediment to the passing of an order of dismissal by the management when the departmental officer comes to the conclusion that the charge leveled against the workman alleged has been established. But Section 33 of the Industrial Disputes Act imposes a ban on passing such an order during the pendency of adjudication or conciliation proceedings in which the workman is concerned, save and except with the express permission in writing of the authority before which the proceeding is pending.

(C) The procedure—when an employee refuses to accept charge sheet :

If the Service Rules or Standing Orders of a company provide for the mode of serving 'the charge sheet on the delinquent workman, then, it should invariably be followed as laid down in the Service Rules Or Standing Orders. But if the charge sheet is not accepted by a workman charged with misconduct, then the following procedure is to be followed

If a workman refuses to accept the charge sheet when tendered to him by hand, it is the bounden duty of the company to send the same by Registered Post (Acknowledgement Due) and after waiting for the period as specified in the charge

[19] AIR 1963 SC 114

sheet for the explanation to hold an enquiry into the charges levelled against the workman concerned and is satisfied, to order his dismissal on that particular Standing Order. When the Registered letter containing the charge sheet sent to the address of the workmen is returned undelivered, then it is necessary to publish a notice in a local newspaper in the regional language with a wide circulation, containing the name/names of the workman/workmen against whom action is proposed to be undertaken and the charges framed against him/them It is not enough to display the charge sheet on the notice board of the company.[20]

If a workman is summoned personally in the presence of at least two witnesses by. the competent authority to receive the charge sheet, and he takes it but refuses to sign or thumb mark the duplicate in token of having received the same, an endorsement to flat effect should be made by the competent authority on the duplicate copy of the charge sheet arid it should be witnessed by two witnesses.

(D) Dismissal and Removal :

There is difference between dismissal and removal. Dismissal is not only the termination of services but it also bars future employment. When a person is dismissed he becomes ineligible for re-employment, but where a person is removed, no such disqualification attaches.[21] When an order is made that the services of a person be dismissed with, it will amount to removal.[22]

(E) Authority for order of dismissal :

The law requires that the order of dismissal or removal should be passed by an authority who made the appointment. But this does not mean that the very same authority who made the appointment or his direct superior should pass the order of dismissal.[23] If the order is passed by an authority, not lower in rank or grade to the appointing authority, the order will be up held.[24] Similarly an order of dismissal passed by an authority superior to the appointing authority is valid.[25]

---

20 Bata Shoe Co. Pvt. Ltd. v. D. N. Ganguly AIR 1962 SC 1158.
21 Satish Anand v. Union of India AIR 1953 SC 250
22 State of Orissa v. Govindadas (1959) SC(c/A 412/58)
23 Mahesh Pársh ad v. State of U.P. AIR 1955 SC 70
24 Venkatarao v. State of Madras AIR 1954 Mad 1043
25 Gurumukh Singh v. Union of India AIR 1963 Punj 370.

Other, than on the' questions to or arising from strikes and lock-outs, the management can put an end to the employment of a worker in the following ways,

(1) By dismissing him for misconduct; in which case a fair and proper enquiry will have to be held and the worker concerned must be afforded an adequate and reasonable opportunity of defending himself.

(2) By retrenchment, that is to say, by terminating services of S an employee on the ground of the staff being surplus, subject to lawful compensation as the retrenched worker becomes entitled to.

(3) By Lay-off which is a temporary retrenchment.

(4) By termination in conformity with the conditions of contract

(F) Important grounds of dismissal :

Two stages of dismissal have been dealt with in the foregoing chapter, namely, (1) Charge-sheet and enquiry and (2) Suspension pending dismissal. Grounds of dismissal are now to be discussed.

(G) Dismissal follows misconduct :

Misconduct is a generic term which means wrong or improper conduct, bad behaviour, unlawful behaviour or conduct. It includes malfeasance misdemeanour. The term does not necessarily imply corruption or criminal intent.

Under order 14(3) of the Model Standing Orders, the following acts or omissions constitute misconduct :

(a) Wilful insubordination or disobedience, whether individually S alone or in combination with others, to any lawful and reasonable order of a superior.

(b) Theft, fraud or dishonesty in connection with the employer's business or property.

(c) Wilful damage to or toss of employer's goods or property.

(d) Taking or giving bribes or illegal gratification.

(e) Habitual absence without leave or absence without leave for more than 10 days.

(f) Habitual late attendance.

(g) Habitual breach of any law applicable to the establishment

(h) Riotus or disorderly behaviour during working hours at the . establishment or any act subversive of discipline.

(i) Habitual negligence or neglect of work.

(j) Frequent repetition of any act or omission for which a fine may be imposed to a maximum of 2 per cent of the wages in a month.

(k) Striking work or inciting others to strike work in contravention of the provisions of any Jew, or rule having the force of law.

Apart from these acts and omissions which amount to misconduct, "go-slow" is also regarded as a misconduct. In **Bharat Sugar Mills Ltd. v. Jai Singh and Others,**[26] the Supreme Court observed as follows ; "Go-Slow" which is a picturesque description of deliberate delaying of production by workmen pretending to be engaged in the factory is one of the pernicious practices that discontented or disgruntled workmen sometimes resort to. It would not be far wrong to call this dishonest. For, while thus delaying production and thereby reducing the output, the workmen claim to have remained employed and thus to be entitled to full wages Apart from this also, go-slow is likely to be much more harmful than total cessation of work by strike. For, while during a strike much of the machinery can be fully turned off, during the "go-slow" the machinery is kept going on a reduced speed which is often extremely damaging to machinery parts. For all these reasons "go-slow" has always

[26] (1961)II LLJ 644

been considered a serious type of misconduct. "Go-slow" is not a recognised and legitimate weapon in the armoury of labour.[27]

According to the Model Standing Orders appended to the industrial Employment (Standing Orders) Act, 1946 which requires the Standing Orders of a concern to be in conformity with the Model Standing Orders, go-slow is a misconduct.

(H) Wilful insubordination or disobedience :

Dismissal is a serious step. Charging the employee with misconduct must be an appropriate offence. The employer must be so very careful in adopting the procedure for dismissal.

Mere failure to obey an order does not amount to insubordination. It is only a wilful disobedience to a lawful and reasonable order or command of a superior that is punishable with dismissal.

A company is autonomous in its spheres to make rules for the maintenance of discipline and for the safety and security of its staff and premises. Dismissal by the company in cases of disobedience and disrespect to such rules is a misconduct of a serious nature and so justified, contempt of the prevailing rules, disrespect for the authority of the employers and indifference to the work of the factory certainly deserve punishment and the termination of services of the employee on such grounds is justified. Where insubordination and disobedience are due to the unreasonable orders of the employer, the dismissal case has no support. A workman is bound to obey the orders of his employer but the order must be reasonable. In **Bharat Airways Ltd., Calcutta v. Their Workmen,**[28] caste Hindu leaders refused to unload raw hides from plane. When 'chamars" were specially employed for the purpose, the refusal to unload by the caste Hindus did not amount to insubordination. The Tribunal held that the order was not reasonable and the dismissal of the workmen was illegal.

---

27 Firestone Tyre & Rubber Co. (India) Ltd., Bombay v. Bhoja Shetty & Another (1953)1 LLJ 599 (LAT)

28 1953-54 FJR 481

The refusal for overtime work due to some emergency, where general order in this behalf has been placed upon the notice board asking all workmen to work overtime, is a case of willful insubordination or disobedience.

Smoking in the prohibited area is an act of wilful misconduct An order of dismissal. on the issue is quite reasonable.

(I) Theft, fraud or dishonesty :

Theft, fraud and/or dishonesty also constitute misconduct of a serious nature, confirmed by the Standing Model Orders [Order No. 14(3)]. Theft is an offence under section 378 of the Indian Penal Code which is defined as "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

By "fraud" is meant an intention to deceive, whether it be from any expectation of advantage to the party himself or from ill-will towards the other is immaterial.[29]

The management is not debarred from taking disciplinary action against a workman suspected of theft. The question is whether it is permissible for the management to take disciplinary action against the worker, when criminal proceedings have been initiated against him and are pending with a Criminal Court. There is no law to require disciplinary proceedings to await the result of proceedings in a Criminal Court for the same offence.

A charge of fraud whether in civil or criminal proceeding must be established beyond reasonable doubt. Circumstances of mere suspicious should not be taken as proof of fraud, but the evidence must be sufficient to overcome the natural presumption of honesty and fair dealing. Fraud is not to. be presumed,. based on mere speculation or surmises. There must be some positive materials on record to draw an inference of fraud.

A criminal conviction for fraud for offence unconnected with employment may be a good ground for dismissal from service. But, fraud of a civil nature not

[29] Lailt Mohan Sarkar (1894) 22 Cal 313 and Khander Singh 22 Born 768

connected with employment: and if proved in a Civil Court is not persuasive to an employer to dismiss the employee from, service. The question of dismissal depends upon the facts and circumstances of the case. It is to be considered to see, if the conduct of the employee, though it may be outside his employment, has incompatibility with the nature of employment and duties entrusted to the employee. If it is so, it will amount to misconduct and entitle the employer to take up the question of dismissal of the employee from service.

(J) Taking or giving bribes or any illegal gratification :

Taking or giving bribe or any illegal gratification is a misconduct under Order No. 14(13) (d) of the Model Standing Order, because it fundamentally affects the interest of a concern and also causes bad discipline among the employees. It is not in every case that the punishment on such misconduct must necessarily be dismissal. An order of discharge may take the place The gravity of the charge depends upon the act of omission of the party. There may also be consideration of lighter punishment, where dismissal is thought to be too severe a punishment. The Tribunal cannot interfere with the punishment which has been pronounced by the management. The power to minimize the punishment rests with the discretion of the management only.

(K) Habitual absence and habitual late attendance :

Under Model Standing Orders [Order No. 14(3) (e) (f)] habitual absence without leave for more than 10 days and habitual late attendance are treated as misconduct to amount to dismissal.

As to how and for how long absence without leave is to be treated as a misconduct depends upon the Standing Orders of a company. The Industrial Employment (Standing Order) Central Rules, 191, prescribe a period of 10 days of absence without leave beyond which the absence, if not applied for, is to be treated as misconduct.

Habitual late attendance is also a common ground of dismissal. An employee habitually came late to the office. He was given three warnings and was suspended for

a period of 6 months still he did not give up the habit. The management dismissed him on the ground of misconduct. It was held that the dismissal was justified.[30]

(L) Riotous or disorderly behaviour and acts subversive of discipline :

The ground of dismissal is covered by Order No. 14(3) (h) of the Model Standing Orders.

In Industrial Employment Standing Orders, riotous or disorderly behaviour has not generally been defined although the same appears in the list of acts and omissions which will constitute misconduct. Thus in the Model Standing Orders framed in pursuance of: the Industrial Employment (Standing Orders) Central Rules, 1946. the following, inter alia is treated as a misconduct:

"Riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline".

In Bengal Industrial Employment (Standing Orders) Rules, 1946 also the following appears as a misconduct in the Model Standing Orders framed under the Rules;

"Drunkenness, intoxication, riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline."

The Model Standing Orders framed by different State Govern merits and certified Standing Orders contain similar provision.

There have been a number of judicial decisions on the subject which will throw light on the scope of the meaning of the expression. Fighting in the premises of an establishment is a misconduct and an act subversive of discipline, even if the fighting is for reasons private to the persons, as it creates disturbance In the work-place.[31]

---

30 Tobacco Mfg. Co. (India) Ltd. v. Cigarette Factory Workers' Union (1953)Il LLJ 42.
31 Jagannath Bhatia v. Orient Paper Mills Ltd. (1956) LAC 95

Passing of urine -in the department is an act of nuisance and is a misconduct.[32] It will not be a misconduct unless it is shown that the same was Involuntary.[33] When a worker indulges in grossly obscene behaviour, it is a disorderly behaviour and is a misconduct.

Any assault of an employee by another employee will be a misconduct involving an act subversive of discipline, and will be sufficient for discharge or dismissal if the same is connected with employment relation although - the act of misconduct was committed outside the premises of. the establishment.[34] Whether an act committed outside the premises will constitute a misconduct involving an act subversive of discipline and will attract disciplinary action is dependent on consideration as to whether the act has direct connection with the contentment or comfort of men at work or has a material bearing on the smooth and efficient working of the concern.[35]

In **Mill Mazdoor Sdbha v. Empire Dyeing and Manufacturing Co. Ltd.,**[36] the action of the management in dismissing workman for assaulting the labour officer of the company outside the working hours and Outside the premises of the establishment was upheld as coming within the scope of "subversive of discipline".

The assault of a worker by one of his workers, although the aggrieved worker compromised the case, was held to be a fit case for dismissal.[37]

Any participation in rowdism is an unruly act and is taken as an act of misconduct subversive of discipline.[38]

Using abusive and insulting language by an employee of a concern in addressing his superior officer is treated as a misconduct subversive of discipline. Such an employee is liable to dismissal.

---

32 Management of D.C. M. v. Its Workmen, Delhi, Govt Gazette dated 9.7.59, Part VI, 297 (IT)
33 Western India Match Co. Ltd. v. Its Workmen (1955)I LLJ 151 (LAT)
34 Bengai Chemical & Pharmaceutical Works Ltd. v. B. C. & P. Mazdoor Union (1955)II LLJ 24 (LAT) ; Shalimar Rope Works Ltd. v. Shalimar Rope Works Mazdoor Union (1953) LAC 584 ; (1953) LLJ 876
35 Kanan Dewan Hills Products Ltd. v. Their Workmen (1957) LAC 30 ; Shalimar Rope Works Mazdoor Union v. Shalimar Rope Works Itd. (1953)ll LLJ 876
36 (1957)I LLJ 415 (LAT)
37 Vlurtija Gulam Rasul v. Aryodhya Ginning and Mfg. Co. Ltd. (1956) ICR 7081. C.(Bom)
38 Mukund Singh v. Barakar Coal Co. Ltd. 6 FJR 177

Where, however, the incident is purely domestic the management has no right to take disciplinary action.

It is not possible to set out an exhaustive list of an acts which are to be regarded as subversive of discipline. Any act on the part of the workman , having the tendency or effect to disturb the peace arid good order should be regarded as subversive of discipline.

The limitation of the employer to take disciplinary action against an employee for misconduct. for acts which fall in the private sphere of employees must be kept in view as the employer is not the general custodian of morals of his employee and any act, however grave, is not a misconduct, if the same is in his private life and does not affect the employer in any way.

(M) Habitual negligence or neglect of work :

If a worker offers himself for a skilled job, he impliedly undertakes to perform the job in a skilled manner and is expected to perform the job having full knowledge of the operation and the technical requirements of the job. A driver having a driving licence, when he fails to perform the job in a manner not behaving an expert is taken to do an act. of negligence. His plea that he was not capable of performing and giving better performance will have no force. But an employer cannot take action against an employee for an act of negligence when the incompetence of the person concerned was within his full knowledge, when the appointment had been made.

Apart from ‘being an expert a workman in an industry must be a careful person. Carelessness in the performance of duty and thus causing loss to the employer and risk to the lives of the persons working In the industry is an act involving negligence. Indifference to duty is also an act involving negligence.[39]

A watchman’s duty 8 to keep awake and to go to his rounds regularly. There will be a serious breach of such duty If he Is be found asleep. "Prima fade” he would: be liable to dismissal if the charge of his sleeping on duty is proved against him.

---

[39] Royal Printing Works v. Industrial Tribunal (1959) II LLJ 619

The person employed in service is expected to work with the normal speed and give normal production. "Go-Slow" Is an instance of deliberate low production and is an act of negligence and if the same causes any damage or loss to the employer, that will be a serious misconduct for which the services of the employees are liable to be terminated.[40] But, where an employee gives consistent low production,. he may be charged for incompetence, but not negligence.

If a particular Instruction of the superior officer or a service rule binding upon an employee is wilfully violated and damage to the company's property occurs, then that will be a clear case o negligence. Similarly, where violation of instruction s due to forgetfulness not amounting to wilful disobedience, it will then also be an act of misconduct involving negligence. Where, how ever, the obedience a particular order may be delayed on account of rush work, it will constitute negligence although it may not be an act of disobedience

The inability of an employee to perform a job an account of illness or imprisonment may be an act involving incompetence but will not be treated as an act of negligence.

(N) Inciting strike and taking part in an illegal strike :

Striking work and inciting others to strike work in contravention of the provisions of law or rule having the force of law, is also treated as one of the important grounds of dismissal under Order Na. 14 (3) (k) of the Model Standing Orders.

Sections 22 and 23 of the Industrial Disputes Act, 1947, lay down general prohibitions for strikes and lock-outs. Section 22 lays down that no person employed in public utility service shall go on strike in breach of contract— .

(a) Without giving to the employer notice of strike, within six weeks before striking ; or

(b) Within fourteen days of giving such notice, or

[40] Dassapa Tinappa v. Shree Vivekanand Mills Ltd. (1953)I LLJ 765

(c) before the expiry of the date of the strike specified in any such notice as aforesaid ; or .

(d) During the pendency of any conciliation proceeding before a conciliation officer and seven days after conclusion of such proceedings. .

In my opinions : No party should take the other party by surprise. There should not be any lock-out or strike before serving fourteen days notice, and after six weeks from the date of serving the notice. The strike or lock-out must be staged within these 28 days and if not done, a fresh notice need be given. If there be an industry with two independent wings, one of which is a public utility service, notice by the other to go on strike s not necessary.[41]

Section 23 also lays down the same principle viz. "no workman who Is employed in an industrial establishment shall go on strike n breach of contract." Thus any strike which is in contravention of any of the provisions of sections 22 and 23 is an illegal strike [see. 24]. It shall be an illegal strike, if it is continued in contravention of an order made by the appropriate Government for the prohibition of its continuance under section 10 (3) of the Industrial Disputes Act.

When a strike in pursuances of an industrial dispute has already commenced and is in existence at the time of the reference of the dispute to a Board, Labour Court, Tribunal or National Tribunal, the continuance of such strike shall not be deemed to be illegal provided that such strike was not, at its commencement, in contravention of the provisions of this Act or the continuance thereof was not published under sub-section (3) of Section 10.

A workman's participation in an illegal strike gives the employer certain rights against the workman based on public policy. The employer has the right to withhold payment of wages for the period of his absence from work on account of illegal strike. It is open to the employer to rely upon illegal strike as a valid ground for dismissing the workers, unless there occurs any procedural flow in the matter of dismissal.

---

41 Swadeshi Industries (1960) II LLJ 78 (SC)

A strike, legal or illegal, does not automatically put an end to the relationship. between the employer arid the employee, but, certain obligations flowing from the relationship are undoubtedly affected. The ultimate object of the Industrial Disputes Act is to create harmonious relationship conducive to peace in industries. An unfettered right of the employer to dismiss a workman for his absence due to his mere participation in an illegal strike is not always desirable. If, however, a particular workman who joined the strike is guilty of violence or of subversive activities, such as destruction or attempted destruction of the employer's property, Intimidation or coercion of loyal employees, etc., the position would be different ; but in such cases, the workman should be appraised of the precise charges against him and should be given a chance to have his say In the matter before he can be dismissed.

Stay in strike or sit-down strike in conjunction with any destruction to the property of the employer causes a strike to be illegal and the dismissal In such cases is justified.

A workman cannot be dismissed for joining a strike which is not illegal but which is simply unjustified. The employer, however, will have the right to dismiss a workman joining an unjustified strike :

(a) when the strike itself was not bona fide, or

(b) when it was launched on other considerations and not solely with a view to better the conditions of labour.[42]

Where the strike. is the result of a genuine trade dispute of which sufficient notice has been giver to the employer, it is not an illegal strike but a Justified one.

Incitement to strike, even on Sundays, is a misconduct. The attendance of workers on Sundays is certainly optional, but he can attend if he likes and as provided in the Standing Orders he may work on Sunday i.e. more than 48. hours a week. The. provision of receiving double the basic rate is for the workmen an incentive to work on Sundays. It is for this reason that an incitement to strike, on Sunday is held to be a misconduct.

---

[42] Ram Krishna Iron Foundry v. Their Workers (1954) LCC 73

(O) Go-Slow Policy :

Go-slow policy has been taken as a misconduct under the Model Standing Orders appended to the Industrial 'Employment (Standing Orders) Act, 1946 and also under the labour' legislation. It is not a legitimate, weapon in the hands of the labour for the purpose of asserting claims but a passive method of registering a protest, a tactic but not a legal right.

Where workmen adopt this insidious method of undermining the stability of a concern and as a considerably reduced, the Tribunal should not refuse permission to dismiss such, workmen.

(III) Retrenchment :

(A) Pre Conditions for a valid retrenchment :

Section 25-F postulates three conditions which have to be fulfilled by an employer before affecting retrenchment of his workmen. The conditions given in clause (a) and (b) of Section 25-F is an obligatory and constituting into condition precedent. But since the condition shown under clause (c) of Section 25-F does not intend to protect the interest of workman, failure to comply with the said condition would not invalidate an order of retrenchment, as it is not a condition precedent to retrenchment. However, the compliance of such condition is necessary as the provisions under Section 25-F of the act are mandatory.

(1) Notice to the workman or wages in lieu thereof :

The first part of clause (a) of Section 25-F of the Act prescribes the requirement of one month's notice in writing indicating the reasons for retrenchment. But the second part dispenses with the requirement of notice provided wages in lieu of such notice has been paid to workman. In such a case the requirement of intimating reasons to workman is not necessary. An employer cannot take advantage of the Standing orders pleading that one-month notice under Section 25-F is not necessary when 48 hours notice as prescribed under Standing Orders has been given. But the retrenchment notice would not be invalid where specific date of termination is not mentioned though one month's wages in lieu of notice is given.

The only exception to the mandatory requirement of notice is not necessary where the retrenchment is under an agreement, which specifies a date for termination of service.

(2) Retrenchment compensation under Clause (b) of Section 25-F :

The object of Legislature in making conditions laid down in clause (a) and (b) of Section 25-F of the Act obligatory and constituting them into conditions precedent is to partially redress the hardships resulting from retrenchment. Clause (b) lays down that as a precondition to retrenchment a workman should be paid compensation at the time of retrenchment at the rate of fifteen days average pay for every competed year of continuous service or any part thereof in excess of six months.

If the workman was asked to go forth with, he had to be paid at or before the time when he was asked to go and could not be asked to collect his dues later.

(3) Notice to the Appropriate Government Under Section 25-F (c) :

The question whether the requirement of notice to the appropriate government under Section 25-F (c) is a precondition to a valid retrenchment came directly before the Supreme Court in Bombay Union of Journalists v. State of Bombay.[43] Prior to the decision in this case, the Supreme Court in its obiter laid down that requirement of notice to appropriate Government under Section 25-F (c) is a condition precedent and failure to comply with it constitutes retrenchment invalid. But in this case it was held that though the provision of Section 25-F (c) is mandatory but not laid down a condition precedent to a valid retrenchment. The only requirement is to serve notice to the appropriate government, for such retrenchment no matter it is forwarded prior to the date of effecting retrenchment or afterwards.

(4) Application of the Rule 'Last Come, First Go' :

The principle that ordinarily the last man engaged in one category in an industrial establishment should be the first man to be retrenched was introduced by the industrial tribunals prior to insertion of Chapter V-A in the Act. This has now

[43] 1964-I L.L.J., 351.

been statutorily recognized in Section 25-G of the Act. If an employer wants to depart from this rule he should either record reasons for the departure or should prove that there is an agreement between him and workmen or there stands provision in Standing Orders of the establishment that effect for modifying or completely abrogating the doctrine of 'last come, first go'.

Section 25-G :- Where any workman in an industrial establishment who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category unless for reasons to be recorded the employer retrenches any other workman.

In order to avoid unfair labour practices by the employer on trade union leaders and to safeguard against discrimination of workmen in the matter of retrenchment, the rule 'last come, first go' has to be followed where other things are equal. The seniority of a workman has to be determined according to his length of service in a particular category in an industrial establishment so as to apply the principle of 'last come, first go'.

The requirement of recording reasons for the departure from the rule by the employer under Section 25-G of the Act is to make the retrenchment order a 'speaking order' so that industrial tribunals may be able to look into the reasons to determine whether the departure is justified by sound, sufficient and valid reasons.

If the preferential treatment given to juniors ignoring the rule without any acceptable or sound reasoning, the Tribunal will be well justified in holding that the action of the management is not bonafide and the retrenched workman is entitled to claim re-instatement. The failure to comply with the principle of 'last come, first go' or in case of departure from this principle by the employer, the reasons for such departure not recorded, would make retrenchment invalid.

An employer may retrench any workman of his from service; if the workman were the last to be employed in his establishment the employer can retrench him without assigning any reasons whatever in the notice of retrenchment; if on the contrary, the workman was not the last to be employed, the employer must assign reasons for retrenching him from service and record them in the notice of retrenchment. It seems that whichever way the issue as to retrenchment might be tossed about in discussion in individual cases, it must, in every case, ultimately come down on all fours on Section 25-G.

The reasons for deviation from the rule as contained in Section 25-G have to be shown on the face of the order of retrenchment and could not be seen from other records of the employer. That is what Section 25-G says.

(B) Relief when departure from the rule is unjustified :

If the departure from the said rule does not appear to the labour Court or industrial Tribunal as valid or satisfactory then the action of the management in so departing from the rule can be treated by the Tribunal as being mala fide or as amounting to unfair labour practice. To put it is one sentence, departure from the ordinary industrial rule of retrenchment without any justification may itself, in a proper case, lead to the inference that the impugned retrenchment is the result of ulterior considerations and as such it is mala fide and amounts to unfair labour practice and victimisation.

Now the question is as to what relief should be given to the workmen when their retrenchment is found to be unjustified and improper. In this connection, it would be suffice to say that once it is found that retrenchment is unjustified and improper., it is for the Tribunal of Labour Court to consider to what relief the retrenchment workmen are entitled. Ordinarily, if a workman has been improperly and illegally retrenched he is entitled to claim reinstatement. The fact that in the mean while the employer has engaged other workmen would not necessarily defeat the claim for reinstatement of the retrenched workmen; not can the fact that protracted litigation in regard to the dispute has inevitably meant delay, defeat such a claim for

reinstatement. It has been consistently held by their lordships of the Supreme Court that in the case of wrongful dismissal, discharge or retrenchment, a claim for reinstatement cannot be defeated merely because time has lapsed or that the employer has engaged fresh hands.

(C) Notice to workman in case of retrenchments :

Section 25-F (a) of the Act requires that the workman proposed to be retrenched should be given one month's notice in writing indicating the reasons for retrenchment and the period of notice should expire before retrenchment. Alternatively the employer should pay one month's wage in lieu of notice; if he does not wish to serve the advance notice on the employee as required under law. But from Industrial Disputes (Amendment) Act 1976, the new Chapter V-B was added which incorporate Section 25-N. In this Section the time period of notice is increased from one month to three month and wages thereof if there is not any agreement between the employer and employees. The provision of one month's notice or wages in lieu of notice as laid down under Section 25-F (a) of the Act is mandatory and an employer cannot take advantage of the provisions of Standing Orders prescribing a lesser period of notice, for example a notice of 48 hours for terminating of service of the workman. The only exception to this mandatory requirement is that if the retrenchment is under an agreement which specified a date for the termination of service, no such notice is necessary and employer has got right to terminate service on that specified date.

(D) Remedies in Case of wrongful retrenchment :

Section 10 of the Act gives discretionary power to the appropriate Government to refer an industrial dispute which either exists or is apprehended to the Court, Conciliation authorities or Tribunal according to sub-clauses of the Section. In order to establishment whether a reference for challenging the act of the employee regarding retrenchment of his employee is an industrial dispute. It has been established that a case of challenging retrenchment is an industrial dispute within the meaning of Section 2(k) of the Act. In this way an employee has got right to request the Government to make reference of such retrenchment under Section 10 of the Act.

Before incorporation of Section 2-A the Government was referring the dispute only if it has been sponsored by a group of workers or trade union of that establishment no matter whether it is an ordinary dispute or dispute regarding termination of service. The right to the retrenched workers have been provided under Section 33-A of the Act to make an individual application directly to the concerned adjudicating authority with whom the proceeding is already pending connected with such retrenchment when the employer without obtaining prior permission under Section 33(1) (a) of the Act has retrenched the workmen.

(1) Workman's remedy under Section 2-A :

The purpose of insertion of Section 2-A by the Industrial Dispute (Amendment) Act, 1965 is to give relief to workman who has been wrongfully discharged, dismissed, retrenched or otherwise terminated by the employer and the trade union of that particular establishment has refused to sponsor his case.

(2) Retrenchment whether a charge in condition of service under Section 9-A :

Section 9-A of the Act prohibits an employer from giving effect to any change in the condition of service applicable to any workman in respect of any matter specified in Fourth Schedule without giving notice in the prescribed manner to the workman for such a change. The employer is also prohibited to give effect to the proposed change within 21 days of giving the notice. Item 10 of Schedule Fourth lays down that if there is a case of retrenchment of workmen due to Rationalisation, standardization or improvement of plant or technique, it is a change in condition of service for which employer has to give notice under Section 9-A of the Act. If the employer failed to give such notice, the effected workman is entitled to challenge the action under Section 10 of the Act.

(E) Notice to inspector of factories :

The Rules framed under the Factories Act, 1948 by various Status Government provide that a notice to the Inspector of Factories is to be sent on

retrenchment of the workmen on account of the proposed closure of any Section of department of a factory stating the reason for the closure, the number of workers retrenched or affected with such closure and the possible period of closure.

(F) Notice to the government in case of retrenchment :

Clause (c) of Section 25-F of the Act lays down that a notice in the prescribed manner is to be served by the employer while retrenching his workmen to the appropriate Government. Prior to the ruling laid down in Bombay Union of Journalists v. State of Bombay, the Supreme Court in its obiter said that the requirement of notice under Section 25-F (c) is a condition precedent before an industrial workman can be validly retrenched similar to the conditions laid down in clause (a) and (b). But Gajendragadkar, J. in this case observed that "clause (c) of Section 25-F of the Act cannot be held to be a condition precedent even though it has been included under Section 25-F along with clause (a) and (b) which prescribe conditions precedent. Unlike clauses (a) and (b), clause (c) Is not intended to protect the interests of workmen as such and it is only intended to give intimation to the appropriate government about the retrenchment and that only helps the Government to keep itself informed about the condition of employment in the different industries within its region. It was therefore, held that clause (c) does not constitute a condition precedent, which has to be fulfilled before retrenchment can be validly effected. Non-compliance with the condition laid down in clause (c) before the retrenchment would not therefore, invalidate the retrenchment.

A notice in Form 'P' under rule 76 of Industrial Disputes (Central) Rules, 1957 must be served an Central Government where the Central Government is the appropriate Government.

Rule 76 :- Notice of retrenchment : If any employer desires to retrench any workman employed been in continuous service for not less than one year under him (hereinafter referred to as 'workman' in this rule and in rules 77 and 78), he shall give notice such retrenchment as in Form P (annexure 'B') to the Central Government the Regional Labour Commissioner (Central) and Assistant Labour Commissioner (Central) and

the employment Exchange concerned and such notice shall be served on the Government, the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central) and the Employment Exchange concerned, by registered post in the manner :

(a) Where notice is given to the workman, notice of retrenchment shall be sent within three days from the date on which notice is given to the workman;

(b) Where no notice is given to the workman and he is paid one month's wages in lieu thereof notice of retrenchment shall be sent within three days from the date on which such wages are paid; and

(c) Where retrenchment is carried out under an agreement which specified a date for the termination of service, notice of retrenchment shall resent so as to reach the Central Government, the Regional Laobur Commissioner (Central), the Assistant Labour Commissioner (Central) and the Employment Exchange concerned at least one month before such date:

(d) Provided that if the date of termination of service agreed upon is within 30 days of the agreement, the notice of retrenchment shall be sent to the Central Govt. the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central), the Assistant Labour Commissioner (Central) and the Employment Exchange concerned within 3 days of the agreement"

Rule 76 says that where notice is served to workman or the payment in lieu of notice is given, a notice is to served to the government in the prescribed manner within three days.

(G) Procedure for re-employment of retrenched workmen :

It has been pointed out in Chapter III of the dissertation that most of the countries are adopting the principle of giving preference to the retrenched workmen for subsequent employment as and when vacancy occurs. The provisions under

Section 25-H of the Act now cast a statutory obligation on the employer in India to give opportunity to the retrenched workmen to offer themselves for re-employment and will give preference over others.

Section 25-H :- "Where any workmen are retrenched, and the employer proposes to take into his employee any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizen of India to offer themselves for re-employment and such retrenched workmen who offer themselves for re-employment shall have preference over other persons."

But it is clear that re-employment under Section 25-H of the Act does not import significance of taking back a retrenched workman in the same terms and conditions or on the same pay. Rule 78 of Industrial Disputes (Central) Rules, 1957 prescribes the procedure to be adopted at the time of subsequent employment as and when vacancy occurs.

Rule 78 :- At least ten days before the date on which vacancies are to be filled, the employer shall arrange for the display on a notice board in a conspicuous place in the premises of the industrial establishment details of those vacancies and shall also give intimation of those vacancies by registered post to every one of all the retrenched workmen eligible to be considered therefore, to the address given by him at the time of retrenchment of at any time thereafter:

Provided that where the number of such vacancies is less than the number of retrenched workmen, it shall be sufficient individually to the senior most retrenched workmen in the list referred to in rule 77 the number of such senior most workmen being double the number of such vacancies;

Provided further that where the vacancy is of a duration of less than one month there shall be no obligation on the employer to send intimation of such vacancy to individual retrenched workmen;

Provided also that it a retrenched workman, without sufficient cause being shown in writing to the employer, does not offer himself for re-employment on the

date or dates specified in the intimation sent to him by the employer under this sub-rule, the employer may not intimate to him the vacancies that may be filled on any subsequent occasion.

Immediately after complying with the provisions of sub-rule (1), the employer shall also inform the trade unions on the number of vacancies, to be filed and names of the retrenched workmen to whom intimation has been sent under that sub-rule.

Provided that the provisions of this sub-rule need not be complied with by the employer in any case where intimation is sent to everyone of the intimation is sent to everyone of the workmen mentioned in the list prepared under rule-77 of the Industrial Disputes (Central) Rules, 1957.

Thus employer shall arrange to display on notice board at least 10 days before the vacancies are filled-up, the details of those vacancies. An intimation in writing by registered post has also to be sent to each retrenched workmen on the address given by him at the time of retrenchment. If vacancies are less than the number of workers retrenched, employer may call and give notice to the required persons only according to the seniority list. It retrenched workmen does not offer him for re-employment on the specified date given in intimation letter, employer is not obliged to sent intimation again when subsequent vacancy occurs. The employer has also an obligation to inform the trade unions regarding the details of vacancies and intimation sent to retrenched workmen. Similar are the provisions in various State Rule except some modifications (Bombay) Rules, 1957 lays down 7 days public notice in newspaper also.

If the employer fails to comply with the provisions of Section 25-H of the Act read with the relevant rules made there under, the concerned employee could claim compensation for loss of wages for the period between the date of recruitment of fresh hands and the date he was given employment.

Thus Industrial Disputes (Central) Rules, 1957 deals with the procedure to be followed by an employer in case of lay-off and retrenchment where the appropriate

Government is the Central Government. Similar provisions with minor variations have been incorporated by the State Governments at the time of framing Industrial Disputes State Rules.

(IV) Termination :

The provisions for termination of an employee are laid down in part III which provides that employers, who for legitimate business reasons propose to dismiss employees may do so, but must give them at least two weeks notice or pay in lieu. Employees whose contract is terminated in these circumstances are also entitled to at least two days severance pay for each year of service, with a five-day minimum entitlement. If employers propose to dismiss or lay off 50 or more workers at the same time, they must give notice to the Minister and establish a joint planning committee to review alternatives to termination, and if necessary, develop a plan that will help workers adjust to the loss of their jobs.

Employers who dismiss employees other than for legitimate business reasons may have to defend their action before an independent, government appointed Adjudicator. If an employer cannot demonstrate that a dismissal was for just cause - such as serious work deficiencies or misbehaviour - the Adjudicator may award compensation to the employee and reinstate him or her in their job. The employee may also sue civilly for wrongful dismissal.

Employers who dismiss employees in contravention of the statute - for example, for exercising their right to take leave or for "whistle-blowing" are guilty of a criminal offence. In addition to imposing a fine, the convicting judge may order the employer to reinstate the dismissed employee and to compensate him or her for any loss.

Before exploring these three types of terminations, however, it is important to understand how the general law deals with the end of the employment contract, putting Part III to one side.

Part III preserves "any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to an employee than [his or

her] rights or benefits" under Part III. Why should this reference to "law" and "contract" matter? After all, one might expect that Part III protects workers much more effectively than the ordinary law of contracts or obligations.

Until well into the 20th century, employers could - and often did - dismiss workers for any and no reason, with little or no notice, and with scant regard for their seniority, work performance or utter dependence on their job. However, at some point during the postwar period - especially during the 40 years since Part III was enacted - litigation over employment contracts became more frequent and legal doctrine began to change. Courts indicated that they would no longer enforce contracts that were grossly unfair or that workers had not consciously agreed to. Confronted with employment contracts that were silent on the question of termination, they began to imply a requirement that - absent just cause for discharge - workers be given "reasonable" notice of termination or pay in lieu. Over time, judicial interpretations of what constituted "reasonable" notice became more generous, to the point where employees are now entitled to quite lengthy notice depending on their length of service and their status within the enterprise. Recent surveys of court rulings suggest that employers may be required to provide 50 or more weeks notice to long-serving rank-and-file workers, and 80 or more weeks to those higher in the corporate hierarchy. In most cases, employers prefer to provide pay in lieu, rather than keep departing employees on the premises for such protracted periods.

Finally, courts gradually began to firm up the long-standing requirement that in the absence of just cause, employers may not dismiss workers until the employment contract (including the "reasonable" notice period) has come to an end. Employers who do not wish to give such notice, or pay in lieu, must now show that discharge is justified because the employee has been guilty of serious misconduct or exhibits gross incompetence, that earnest efforts have been made to remedy the situation before resorting to discharge, and that the discharge itself - even if justified - has been undertaken in such a way as to avoid collateral damage to the employee's reputation, psyche or dignity.

These developments, originating in judicial pronouncements and enshrined in the Quebec Civil Code in 1994, seem to offer significant protections for employees facing dismissal. However, they are not quite as significant as they seem. Some

judges are less committed to these new doctrines than others; some are less familiar with workplace realities than others (or perhaps more willing to trust employers' judgments); and all judges are constrained by well-entrenched legal taboos, especially the one that prevents them from ordering the reinstatement of employees who have been wrongfully dismissed. Still, the greatest obstacle confronting discharged workers is not one made by judges; it is inherent in our system of civil litigation. Few ordinary workers can afford to sue. Litigation is too slow, risky and expensive for working people who have just lost their greatest asset - their job. Predictably, then, most wrongful dismissal lawsuits are brought not by ordinary workers but by highly paid managers, salespersons, professionals and technical experts who have greater resources and better prospects of significant recovery.

Part III seeks to square this circle. It gives ordinary workers some measure of financial compensation if they are dismissed for legitimate business reasons. It protects them against being dismissed without proper cause. It allows them to seek relief before Adjudicators and sometimes in the criminal courts, where cost does not represent a barrier. It authorizes Adjudicators and criminal court judges discretion to grant them the remedy they often need and want- reinstatement. And it gives unorganized workers protection against unjust dismissal somewhat comparable to that enjoyed by unionized workers under collective agreements (who, for that reason, have no access to adjudication under Part III).

In the following sections of this chapter, I assess the extent to which Part III succeeds in its various approaches to dismissal and make suggestions for improvement.

(A) Termination for Legitimate Business or Economic Reasons :

At common or civil law, employers who wish to reconfigure or reduce their workforce for business reasons are obliged to give “reasonable” notice to employees they intend to dismiss, unless the contract of employment provides otherwise. Of course, as with other protections supposedly enjoyed by workers under the general law, this one has always been difficult to enforce. Nonetheless, it remains the law today, and Part III does nothing to change it. What Part III does do is establish a different, more accessible procedure under which workers confronting discharge for

business or economic reasons can claim notice and compensation without having to sue.

(1) Notice of Termination and Termination Pay :

Part III requires that any employee who has been employed for at least three months be given two weeks notice of termination or pay in lieu. This is considerably less than the courts deem to be "reasonable notice," at least for employees with any significant length of service. However, the statutory requirement is not quite as negligible as it might seem, since employees are entitled under Part III to an additional sum by way of severance pay (see below). I am not recommending any change in this provision.

Part III does not require that employees give equivalent notice to their employers if they intend to quit. However, the general law imposes such a duty on employees, as do employment standards statutes in eight Canadian jurisdictions. Some employer representatives argued that Part III should be made to reflect the general law in this respect. No doubt sudden quits may disrupt an employer's operations or burden an employer with the additional expense of hiring a temporary replacement or paying overtime to another employee in order to cover the work of the employee who has quit. Moreover, anecdotal evidence suggests that the problem is a very real one in the trucking industry, where employees have been known to quit without giving any notice at all, leaving stranded vehicles and cargo to be retrieved by the employer from some remote location.

However, while it is important to ensure that workers do not put their employers to trouble and expense, it is not necessary to create complete symmetry of obligation between the parties. Employers can afford to provide compensation in lieu of notice much more easily than workers; they are unlikely to sue to collect damages for want of notice; and in any event they can often cope with an employee's departure with few or no adverse consequences. The most sensible solution, it seems to me, is to create a modest deterrent to inconsiderate employee behaviour that causes an employer actual loss.

Recommendation 8.1 Employees should be required to give their employer two weeks notice of their intention to quit. This requirement should apply only if: the employee has been employed for at least three months; the employee has not first been given notice of termination by the employer; and the employer has provided the employee with a written statement of employment terms that stipulates that notice to quit must be given and that failure to give it will result in a monetary penalty.

Recommendation 8.2 If an employee quits without giving notice, and the employer suffers actual loss as a result, the employer should be able to withhold one day's pay from any monies owing to the employee for each week of the notice period that the employee has failed to complete. If an employer wrongfully withholds pay from an employee, an inspector may order the employer to repay any such sum, together with interest.

(2) Severance Pay :

Severance pay, like “reasonable notice” under the law of employment contracts, is based on length of service. For each year served, two days severance pay is required, with a minimum of five days payable to all workers. Consequently,under Part III, a 25-year employee would be entitled to 10 weeks (50 paid days) of severance pay in addition to two weeks termination pay (or notice in lieu) - a total of 12 weeks compensation for loss of their job. Compared with what the courts are likely to award an employee with similar seniority - 50 or more weeks of “reasonable notice” - this is a modest sum indeed. On the other hand, it is provided without the worker having to confront the costs and contingencies associated with civil litigation. Moreover, it equals, and generally exceeds what workers receive under labour standards legislation in other Canadian jurisdictions, all but one of which cap severance and/or termination pay at 10 weeks or less.

Should entitlements to termination pay and/or severance pay under Part III be changed? I believe that a modest increase is justifiable, especially for long-serving rank-and-file employees. Higher severance pay would reflect the fact that older workers are likely to suffer a significant disruption of earnings when they suddenly find themselves on the labour market after many years in one job. Moreover, in a sense, severance pay represents a return on their investment of skills, effort and

loyalty over the long term, to the benefit of the employer. I note also that many federal employers already provide long-service employees more generous termination and/or severance pay than is required by Part III.

Recommendation 8.3 Entitlement to severance pay should accumulate at the rate of three days per year for workers with over 10 years of continuous service.

(3) Group Terminations :

Under Part III, special provisions deal with the dismissal of 50 or more employees during a four-week period. These provisions are designed to facilitate labour market adjustments and are dealt with in that context in Chapter Eleven.

(4) Disentitlement to Termination and Severance Pay :

If employees who have been given notice of termination quit work before the expiry of the two-week notice period to search for or take up other employment, they forfeit not only their right to unpaid termination pay but also their entire entitlement under Part III to severance pay. This seems inappropriate. It is the employer who has initiated the termination of the employment contract for its own business reasons by giving notice. It is foreseeable and desirable that workers facing loss of their jobs should begin to look for other work and understandable that they should start their new job sooner rather than later, if required to do so. And it is often the case that the original employer will benefit from their departure before the end of the notice period. If this employer does suffer a modest loss or dislocation by reason of their early departure, being relieved of the obligation to pay them for the rest of the notice period should provide adequate compensation.

Recommendation 8.4 Workers who quit after being given notice of termination or layoff by their employer, but prior to the expiration of such notice, should forfeit any unpaid termination pay, but retain the right to severance pay. However, if they are discharged for just cause, they should forfeit their right to both termination pay and severance pay.

Part III also denies workers severance pay if they are “entitled to a pension”at the date of termination. The original intent of this language is not obvious, and

whatever was its purpose, circumstances have changed since it was enacted two decades ago. Employees are no longer automatically retired at age 65 as they once were, nor will they likely receive a "defined benefit" pension actuarially calculated to replace a fixed portion of their earnings. Today, more and more jurisdictions are ending the practice of mandatory retirement, and workers' pensions are usually calculated on the basis of contributions made by them and their employers. Moreover, people often receive pensions, either before they actually retire from the workforce, or some time after, and the pensions they receive may bear no relationship at all to their earnings or years of service. The present wording, moreover, creates extreme and unjustifiable anomalies: denial of severance pay does not hinge on actual receipt of a pension, but only on entitlement; nor does it hinge on whether the employee in question is or is not actively seeking work. Thus, a long-serving employee whose employment is terminated a month after she or he becomes "entitled" to a pension of any sort or size is totally disentitled to severance pay even though working at a new job; however, a colleague with comparable service who is two months younger and not yet "entitled" to a pension on the date of termination would receive full severance pay, perhaps amounting to 50 days (10 weeks) or more, even though they decide to give up working altogether.

Clearly these outcomes are difficult to justify on any obvious policy ground. However, the issues are complicated and require closer technical analysis than they can receive in the context of my review.

Recommendation 8.5 The provisions of Part III that disentitle workers to severance pay if they are entitled to pensions should be reviewed in light of changes in the law and practice governing the age of retirement and the shift from defined benefit to defined contribution pension plans. The purpose of the review should be to ensure that Part III does not prematurely, unfairly or unnecessarily deprive older workers of severance pay.

Finally, it is important to acknowledge that the sum of all these recommendations will leave federal jurisdiction workers well short of the protection their counterparts receive in most European Union countries. In deference to the market economy principle and the circumspection principle articulated in Chapter Three, however, I have opted for gradual and modest increments that are well within

the capacity of employers to provide. I note, further, that these costs do not represent a significant burden for federal sector employers.

(B) Termination for Just Cause :

(1) Background :

Employers may discharge employees at any time for "just cause," a somewhat open-ended term that includes serious misbehaviour, gross incompetence and other egregious conduct that violates the general law or the norms of the workplace. However, such discharges are subject to challenge both in the ordinary courts under the general law of contracts or obligations, and before an Adjudicator under Part III. In both types of proceedings, the employee will prevail if no just cause in fact existed, if discharge is deemed an excessive penalty for the wrongdoing, or if it is "unjust" for some other reason such as procedural unfairness by the employer. The way these arguments are framed, the weight attached to them, the method of proceeding,the rules of evidence and the relevance of certain legal arguments concerning what is expected of both parties differs somewhat as between the ordinary courts and Part III adjudication. However, the two types of proceedings differ most importantly in other respects.

The first relates to remedies. If successful in a civil action, an employee is entitled to damages equivalent to whatever compensation he or she would have received if the employment contract had been allowed to run its natural course - that is, for whatever period of notice would have been "reasonable." If an employer has been unfair or high-handed in carrying out the discharge, the employee may be awarded additional damages. By contrast, if successful before an Adjudicator under Part III, an employee is entitled both to reinstatement and to compensation, not only for the duration of the notice period, but for all losses attributable to the discharge. These are potentially more extensive and expensive remedies than those a court might award.

The second difference relates to cost, which effectively keeps most workers out of court. If employees sue, they have to hire a lawyer; if they seek adjudication under Part III, they can appear on their own behalf; and if they do, an Adjudicator will

conduct the hearing in such a way as to ensure that they are not prejudiced because they lack legal representation. If the case is heard in court, it will be conducted in formal fashion, will likely last some time, and may be prolonged even further by an appeal; adjudication is normally speedier and less formal (there are exceptions to this generality)and no appeal is possible. If an employee loses in civil court, he or she will be liable for legal costs incurred by the employer; not so in Part III adjudication.

In effect, then, one great merit of Part III is that it overcomes the main deficiencies of civil litigation. It provides effective remedies and it removes cost barriers to access to justice. It thereby translates a universally accepted principle - that no one should be dismissed without just cause - into a practical reality. Part III can therefore be understood as an exercise in the reform of civil justice. As such, it deserves strong support. Indeed, while most employers would likely prefer not to have to deal with unjust dismissal claims under Part III, surely few would openly embrace the idea that people should be denied a proper hearing because they cannot afford to go to court, or that they should be denied a proper remedy if they have been done a serious injustice.

However, the introduction of adjudication of unjust dismissal claims under Part III in 1978 has produced more far-reaching consequences. As Prof. Geoffrey England's study for the Commission shows, over the years the adjudication system has not only remedied many of the procedural shortcomings of civil litigation, it has significantly modified the old civil and common law doctrines governing wrongful dismissal. Part III Adjudicators,borrowing extensively from the jurisprudence developed over the years by arbitrators in unionized workplaces, have built up their own distinctive doctrines that confer on unorganized federal workers quite extensive substantive and procedural protections. As I note in Chapter Six, this has coincided with, and arguably hastened, the adoption of progressive attitudes and practices in the field of workplace discipline, many of which were also advocated by human resource and industrial relations professionals as a matter of best practice.

Prof. England's study concludes that the adjudication system is fundamentally sound. This view seems to be widely shared: not a single brief received by the Commission called for its outright abolition. On the other hand, Prof. England identified a number of structural and procedural problems with the system, while

additional concerns were identified by the Commission'sown staff studies and by briefs and submissions from Adjudicators, lawyers, employers, workers and unions.

(2) Access to Adjudication :

The first of these concerns deals with potential barriers to access. Only some 1,400 claims for unjust dismissal are filed in an average year by the 500,000 to 600,000 non-unionized workers in the federal domain. While we have no way of knowing how many workers are actually dismissed each year in circumstances that might be considered unjust, this number seems very low. The explanation may be that workers are unaware of their rights or do not know how to protect them. If so, better information and more accessible procedures, both recommended elsewhere in this report, should remedy the situation.

Not surprisingly, some employer groups took the opposite position, that recourse to Part III procedures was already over-generous. Pointing to the fact that similar recourse in Quebec and Nova Scotia is available only to employees with two and 10 years of service, respectively, they suggested that the one-year qualification period under Part III be lengthened. However, on average only some 250 cases per year are actually heard and decided, of which no more than about 75 originate in any one sector under federal jurisdiction. It is therefore difficult to see that employers are being subjected to an excessive volume of claims that might justify restricting access to the unjust dismissal procedures for employees who are presently eligible and who have plausible claims. Nor could the volume be described as excessive even if improvements in the system and its greater visibility resulted in more claims being brought than at present.

Employers also argued that one year was insufficient time for them to evaluate a newly hired employee, and that a person denied a permanent job after one year should not be able to challenge the denial through adjudication. Apart from the fact that employers seldom extend probationary periods beyond a year, the answer to this argument is as follows: if an employee, however long-serving, cannot do the job, the employer may terminate the employment contract; however, the employer must be prepared either to give the employee notice or pay in lieu, or to defend their decision in front of an Adjudicator.

In sum, I see no grounds for making access to adjudication more restrictive than at present.

(3) The Processing of Unjust Dismissal Claims Prior to a Hearing :

At present, complaints of unjust dismissal are assigned to Labour inspectors who work out of regional offices across the country. These inspectors attempt to resolve such complaints informally, initially through a process they refer to as "shuttle diplomacy" and ultimately through more formal mediation. If they do not succeed, an Adjudicator is appointed. The Adjudicator then has the responsibility of carrying the matter forward to a hearing and, ultimately, of writing a decision.

I will deal with the Adjudicator's role below. In this section, I deal with the inspector's management of the proceedings at the initial stages. By way of background, inspectors do not deal only with adjudication - they handle all complaints under Part III, conduct audits, provide educational and informational services to the workplace parties and perform other functions, as well. This broad range of responsibilities has one great advantage: it makes them highly knowledgeable not only about Part III but about the general conditions within which the legislation operates in the local geographic area and in particular sectors and establishments. However, a price is paid for this advantage: they are not always able to give unjust dismissal cases prompt or adequate attention.

In my view, complaints of unjust dismissal involve such important interests of both workers and employers that they ought to be dealt with on a priority basis with a view to resolving or deciding them at the earliest possible moment. This requires that inspectors handling complaints initially should be able to deal with them immediately. Moreover, initial handling often determines what happens to complaints as they subsequently move toward adjudication. It is therefore essential that a single, vertically integrated system should be put in place to handle complaints of unjust dismissal. Unfortunately, so long as these complaints form part of the busy and varied workloads of inspectors working under the direction of Regional Directors who have even broader responsibilities, this is unlikely to happen. I therefore recommend below that unjust dismissal complaints be treated differently from other complaints and be

handled within a separate administrative structure, designed and directed by a Director of Adjudication Services.

However, I am keenly aware that the presence of regional offices and locally situated inspectors enables unjust dismissal complaints to be processed in close proximity to the complainant and the employer. This is especially important if there is to be a chance of resolving complaints amicably without a hearing. To retain this advantage, it is important that personnel be locally available to receive and process complaints in their early stages and to resolve them through negotiations, if possible. Three strategies are available, any of which might work.

The first is to require all inspectors to process unjust dismissal complaints as their first priority, and to give them a defined period of time within which to either resolve complaints or send them forward to the Director of Adjudication Services. The second is to designate one or more inspectors in each regional office as specialists in unjust dismissal, and to ensure that they are allowed to give unjust dismissal complaints priority, even though they may perform other functions from time to time. The third is for the Director of Adjudication Services to develop a local presence by assigning a staff member to each regional office to perform all necessary technical and logistical functions relating to unjust dismissal, as well as the dispute-resolving functions now performed by inspectors.

(4) Disposing of Unjust Dismissal Complaints Prior to a Hearing :

Employers complained that what they described as frivolous, vexatious or clearly unmeritorious claims are sometimes permitted to move through the adjudication system with the result that they confront protracted, costly, acrimonious and ultimately pointless proceedings. No doubt some such claims exist, and there ought to be a way to screen them out of the process at an early stage. Present procedures do not seem to be working well in this regard and should be changed. My recommendation for the appointment of a Director of Adjudication Services with power to dismiss patently unfounded claims should resolve this problem. Similarly, the new procedures that I envisage would allow claims to be diverted to some other forum if that is where they belong. This is most likely to occur in connection with

complaints of unjust dismissal that could also be characterized as violations of human rights legislation (see Chapter Six).

Worker representatives, staff studies and other submissions focus on the obverse of this problem: claims that on their face seem meritorious but take an excessive amount of time to find their way to adjudication. On average, six months elapse from the time a complaint of unjust dismissal is submitted until an Adjudicator is appointed, a further delay of three months until the case is actually heard, and yet another delay of three months before a decision is rendered, as discussed below. Of course, this is not all wasted time. During this period, about three-quarters of all claims are settled or abandoned. The question is whether and to what extent this attrition is caused by delay. If delay is causing employees to abandon arguably meritorious claims, the longer it lasts, the more likely it is that injustice will result.

We have no direct evidence of why workers settle or abandon their claims.No doubt some receive fair offers of settlement and others come to accept that their claim lacks merit. However, a reasonable hypothesis is that since most dismissed workers are suffering the psychological and financial consequences of losing their job, are likely without income, and are unfamiliar with legal procedures and generally without legal representation, many will abandon their claims or settle at a deep discount simply because they cannot afford to wait for a better result. More efficient management of the complaints handling process by the Director of Adjudication Services should shorten time delays and alleviate - if not eliminate - many of these difficulties.

(5) Delays in Hearing and Deciding Cases :

I heard anecdotal evidence concerning the extraordinary amounts of time consumed in scheduling hearings and deciding cases. In the most extreme cases, several years may elapse between the appointment of an Adjudicator and the rendering of a decision. However, even putting these extreme cases aside, the average delay still runs to about six months. This is far too long both for workers who have lost their jobs and for employers who may ultimately have to compensate and reinstate them.

These delays seem to stem partly from the non-availability of Adjudicators.The Labour Program presently appoints Adjudicators ad hoc from an approved list. Most persons on that list - but not all - are highly experienced and knowledgeable individuals who arbitrate grievances in unionized workplaces in the private sector. These individuals frankly have little to gain from adjudicating dismissal cases under Part III where they are paid according to a fixed fee schedule at a fraction of their normal rates; but they accept Part III adjudication assignments because they feel they have a professional responsibility to do so. However, because they have competing prior commitments elsewhere, they are often not able to hear Part III cases promptly or, for that matter, to issue awards within a reasonable time.

In Chapter Nine I recommended the appointment of a permanent panel of full and part-time Hearing Officers to deal with non-payment of wages. These Hearing Officers should also be assigned to hear unjust dismissal cases.They would be deployed on the cab-rank principle: as soon as a case is ready for adjudication, it should be assigned to the first available Hearing Officer. Moreover, since Hearing Officers are to operate under the direction of the Director of Adjudication Services, it should be possible to develop guidelines for processing cases through the successive stages of the system on a fixed and compressed schedule. This would help resolve another difficulty that afflicts the present system: the non-availability of counsel. Armed with guidelines and fixed schedules for the proceedings, Hearing Officers would be able to insist that lawyers make themselves available for proceedings. All of these innovations should ensure that cases are heard and decided much more expeditiously.

(6) The Mechanics of the System :

The day-to-day mechanics of the adjudication system should be entrusted to a small staff working under the direction of the Director of Adjudication Services. Staff members would process complaints as they are received; screen out those that are clearly ineligible for the adjudication system or are clearly without merit; divert those that belong in other forums to their appropriate destination; provide assistance to unrepresented parties and to advocates who are unfamiliar with the process; and organize the logistics of the hearing, the release of the decision to the parties, the

filing of the Hearing Officer's decision in court and, if necessary, the referral of the decision for enforcement.

Some of these mechanical and logistical tasks, such as organizing the hearing, are presently undertaken by the Adjudicator. Delegating them to the Director of Adjudication Services staff would relieve the new Hearing Officers of this burden and allow them to concentrate more fully on the actual hearing process.

(7) Overall Management of the Adjudication System :

As noted, the Director of Adjudication Services would have broad responsibility for managing the adjudication system, as well as other responsibilities. This should help to resolve some other issues confronting the adjudication process. For example, the Director of Adjudication Services should provide unrepresented complainants with self-help kits so that they can act as their own advocates; direct them to legal clinics or other possible sources of representation; and organize training sessions for worker and employer representatives - both lawyers and lay advocates - who may be unfamiliar with unjust dismissal proceedings under Part III. The Director of Adjudication Services, working with the new Hearing Officers, should also develop strategies for ensuring that unrepresented parties - most often workers, but sometimes employers - receive fair treatment during hearings, that obstreperous or abusive litigants and advocates are dealt with promptly and effectively, and that when some special knowledge of cultural context or industry practice would be helpful in dealing with a case, a Hearing Officer is available who possesses such knowledge. Finally, the Director of Adjudication Services should, over time, be able to design and implement expedited and informal procedures that will make the whole process work more smoothly and rapidly. For example, it may be possible to deal with some preliminary matters by teleconferencing; others may require only an exchange of documents and written arguments rather than face-to-face hearings. Procedures should be redesigned with these possibilities in mind.

(8) The Appointment, Powers and Jurisdiction of Hearing Officers :

A concern expressed from time to time is that some inexperienced or unsuitable Adjudicators have been appointed to hear unjust dismissal complaints,that

they conduct hearings in an inappropriate manner and that they render decisions that are out of line with the developed jurisprudence under Part III. The system I have recommended addresses these concerns.

If my recommendations in Chapter Five are followed, the persons appointed as Hearing Officers will be highly qualified. Moreover, the "users committee," recommended below, will have a vested interest in ensuring that only appropriate persons are appointed. I therefore anticipate that all Hearing Officers will have sufficient ability, knowledge and experience to hear cases in a fair and efficient manner and to decide them expertly.

Of course, their ability to do so is not entirely a matter of selecting the right people and instituting appropriate system management strategies. It is also a matter of what powers Hearing Officers are granted by Part III. I offer three important examples of the need to attend to this question.

The first relates to the power of Adjudicators (Hearing Officers, under my proposals) to make certain kinds of procedural, evidentiary and substantive rulings. Prof. England's report, staff studies and various briefs by interested parties suggested that Part III ought to be amended to confer on Hearing Officers powers to excuse non-compliance with statutory time limits under special circumstances, to dismiss clearly unmeritorious claims short of a full hearing, to grant interim relief in limited circumstances, and to deal with egregious behaviour and abuses of process. No doubt other aspects of their powers should be reviewed as well. Given the technical nature of many of these issues, it is not possible for me to do more than recommend that all of these suggestions should be examined closely if and when new legislation is drafted.

The second relates to remedies. Employers expressed the view that reinstatement was an inappropriate remedy, especially for workers who have only one year's seniority. This is a rather surprising claim since reinstatement is awarded in barely 25 cases in a typical year - only about 10% of all cases assigned for hearing on their merits, and only about 30% of successful claims. Admittedly, the possibility that an employee will be reinstated may prompt some employers to offer higher settlements than they otherwise would do. On the other hand, most employers know

that the odds against reinstatement are strong, most are advised by lawyers, and most can afford to risk litigation. Accordingly, the chances of their being pressured into inappropriate settlements are relatively small. Indeed, given that so few successful claimants actually receive the reinstatement remedy, it is conceivable that it is underutilized by Adjudicators, for reasons suggested in Prof. England's report and elsewhere.

Adjudicators apparently differ among themselves about when reinstatement should be awarded or denied, and about the nature and extent of other forms of relief. I do not intend to rehearse these debates. They will largely resolve themselves once cases are heard exclusively by well-trained and highly experienced Hearing Officers. I will note only that the absence of a make-whole remedy such as reinstatement is an anomaly in the common and civil law, largely confined to litigation involving contracts of employment. In most other contexts, courts find ways of restoring the parties to the status quo ante. There is no obvious reason to expand this legal anomaly rather than eliminate it.

The third issue relates to the power of Hearing Officers to hear and decide cases that involve not just claims of unjust dismissal, but complaints alleging violations of other provisions of Part III, Parts I and II of the Canada Labour Code, other statutes such as the Canadian Human Rights Act, the civil or common law or the Canadian Charter of Rights and Freedoms. For example, employees may claim to have been dismissed because they were whistle-blowers, or claimed parental leave, or because they were members of a union or a minority group, or because their job had been downgraded in circumstances that would amount to constructive dismissal at common law, or because they exercised their right of free speech. Should all such claims be justiciable in adjudication proceedings?

In Chapter Six I deal specifically with unjust dismissal claims that also involve allegations of human rights violations and recommended that an understanding be reached with the Canadian Human Rights Commission and the Canadian Human Rights Tribunal to avoid overlapping or multiple proceedings and to ensure that the appropriate expertise is brought to bear on both human rights and unjust dismissal cases. In all other cases, if it becomes clear at the outset of unjust dismissal proceedings that some different set of legal rules is at the core of the complaint, and if

adequate remedies are available under those rules to protect the complainant, then the claim of unjust dismissal should be adjourned and the matter remitted for hearing to the court or tribunal with primary jurisdiction over the subject matter.

Obviously, different considerations apply to cases where a complainant alleges violations of substantive provisions of Part III itself. For example, a complainant may allege that he or she has been unjustly discharged; the employer may respond that the dismissal was provoked by poor work performance or workplace misconduct; and the complainant may then rejoin that in truth they were dismissed for whistle-blowing. In such a situation, under my proposal, Hearing Officers would hear and decide all issues related to Part III, not simply those directly implicated in the claim of unjust dismissal.

(9) Oversight of the Adjudication System :

The job of the Director of Adjudication Services is to promote the efficient operation of the adjudication system and to create conditions that are conducive to fair outcomes. This will require care in the initial drafting of regulations, the design of administrative systems, the selection, training and deployment of Hearing Officers and staff, and the development of innovative day-to-day operating procedures. It will also require the ongoing evaluation of how well all of these, and the legislation itself, are working and, if necessary, periodic re-engineering of the process.

In this connection, input from those who deal with the adjudication system on a daily basis can be most helpful. Accordingly, the Director of Adjudication Services should establish a "users committee" that would include knowledgeable representatives from stakeholder groups, from other interested bodies such as legal and community clinics, paralegal advocates and the labour bar, and perhaps persons knowledgeable about justice delivery systems. The committee's mandate should be to receive and consider periodic statistical and analytical reports on the system, to make practical recommendations for improving the efficiency and fairness of the system, to advise on training courses and educational materials, and to recommend criteria and procedures for appointing as Hearing Officers only those individuals who are highly qualified.

(10) Recommendations :

I now summarize my recommendations, emphasizing that they must be read in conjunction with those in Chapter Nine, which deal with compliance more generally.

Recommendation 8.6 Access to adjudication by employees claiming to have been unjustly dismissed should continue to be provided under Part III to employees who have completed one year of service.

Recommendation 8.7 The adjudication system should come under the direction of a Director of Adjudication Services, who should be administratively responsible for its fair and efficient operation.

The Director of Adjudication Services should have the authority to:

provide information to workers and employers concerning their procedural and substantive rights and responsibilities; receive and process complaints concerning unjust dismissal; assist the parties to such complaints to resolve their differences; dismiss claims that are patently frivolous or vexatious or belong elsewhere; assign cases for adjudication; and take all necessary steps to ensure the proper operation of the adjudication system.

Recommendation 8.8 Adjudication should be undertaken by a new panel of permanent full- and part-time Hearing Officers, rather than by Adjudicators appointed ad hoc, as at present. A detailed review of the procedural and remedial authority of Hearing Officers should be undertaken to ensure that they enjoy the full array of powers needed to conduct hearings and dispose of cases in a fair and effective manner that protects the rights of both workers and employers. If necessary, changes in their powers should be enacted in legislation or by regulation. The power of Hearing Officers to award reinstatement should be retained in its present form.

Recommendation 8.9 Complaints of unjust dismissal based primarily on legal rights other than those conferred by Part III should be referred for adjudication to the

appropriate court or tribunal. Unjust dismissal complaints that also allege violations of Part III should be dealt with in full by a Hearing Officer.

Recommendation 8.10 A "users' committee" should assist the Director of Adjudication Services in maintaining general oversight of the adjudication system.

(C) Wrongful Termination as an Offence :

In certain circumstances, dismissal of an employee may constitute an offence for which prosecution may take place in criminal court. For example, an employer may refuse to accept the return to work of an employee following pregnancy or compassionate care leave, or may discharge an employee for giving information to an inspector. Such offences are punishable on summary conviction by a fine not exceeding $5,000. The convicting judge may also order that compensation be paid to the employee "not exceeding … the wages that would have accrued to the employee up to the date of conviction," and may reinstate the employee in employment.

There are many difficulties with these provisions: criminal court judges are seldom knowledgeable about employment standards; standards of proof are higher in criminal proceedings than in administrative proceedings; judges used to hearing cases involving bodily harm or theft of property are notoriously reluctant to convict or severely punish white-collar offenders; the fines provided are derisory; and the monetary relief for workers is ungenerous. But these difficulties are all overshadowed by a more fundamental one: no prosecutions at all have been brought since 1987 - almost twenty years ago; nor is one likely to be brought soon, given present arrangements.

In Chapter Nine I make a series of recommendations concerning the handling of unfair labour practices - acts of serious or systemic employer misconduct that undermine the integrity of Part III. "Unjust dismissal" in the ordinary sense would not amount to an unfair labour practice. However, dismissal in violation of the statute, and especially dismissal of whistle-blowers, could indeed be described in those terms. If my recommendations are followed, and if the Chief Compliance Officer assumes

primary responsibility for prosecutions, criminal proceedings may once again be used to deal with these egregious cases - though they would be used sparingly. This would require significant overhaul of the present statutory provisions. Recommendations in this regard also appear in Chapter Nine.

Recommendation 8.11 Dismissal of employees in violation of Part III, including dismissal of those who provide information or evidence to inspectors or bring complaints under Part III, should be more clearly identified as an offence. Cases of unjust dismissal not involving statutory violations would not constitute an offence.

Recommendation 8.12 In addition to paying a fine, upon conviction employers should be ordered to reinstate the employees and to compensate them fully for past or future losses attributable to the offence and for any other unpaid wages or benefits owing to them, whether under Part III, under contract or otherwise. In appropriate cases, company officers or directors should be liable to prosecution and, upon conviction, to fines or imprisonment.

(V) Distinction between Discharge, Dismissal and Termination :

There is a substantial difference between discharge and dismissal. The important points of distinction between the two can be summarily discussed as discharge is necessary incidence of the right of an employer to terminate the services of an employee under the terms and conditions of employment. In the case of termination of employment or discharge, the employee would be entitled to his full provident fund, gratuity and other benefit. Dismissal on the other hand, is a result of some misconduct, which might deprive him of a number of benefits.[44]

Where a person's services are sought to be terminated at the expiry of the period of notice, in accordance with the condition of his service, it would amount to discharge.[45]

---

[44] D.B.R. Mills Hyderabad v. Workmen, 1952 LAC 540.
[45] Satish Anand v. Union of India, 1953 SC 293.

An action for discharge can be challenged, if it proceeds from any mala fides on the part of the employer or any victimisation or unfair labour practice.[46]

In consequence of a strike the management decided to discharge certain of its workmen, and it took steps to do so under Standing Order 19 (a) which provides that the employment of any permanent operative may be terminated by fourteen days' notice or by payment of thirteen days' wages in lieu of notice ; the reasons for the termination of service are to be recorded in writing and shall be communicated to the operative, if he is desires, at the time of discharge, unless such communication, in the opinion of the manager, may directly or indirectly lay the company and the Manager or the person signing the communication open to criminal or civil proceedings at the instance of the operative. It is the contention of the employees that an employee's services cannot be terminated under Standing Order 19 without an enquiry when- ever the reason for the termination is some alleged fault of the employee. It is said that the proper course which the company should have followed should have been to take action under Standing Order 21 which deals with acts and omissions which are to be regarded as misconduct for the purposes of punishment by dismissal or otherwise. The adjudicator has found that Standing Order 22 was the proper Standing Order to be applied and that in the absence of a charge-sheet and an enquiry, the employees in question could not have been validly discharged.

Standing Order 19 and Standing Order 22 have application to two different classes of cases. Under Standing Order 19 it is a question of terminating the employee's services after giving him due notice or paying him in lieu of notice. Standing Order 22 has application to quite a different class of cases where misconduct is involved and it is intended to impose a punishment upon the employee. It has been suggested that there is no material difference between discharge and dismissal, for in both cases it means termination of employment. There is, however, a substantial difference between the two. In the case of discharge, it is nothing more than a termination of service, which gives the employee the right to his full provident fund and his gratuity and any other benefits to which he may be entitled. In the case of

[46] D.B.R. Mills Hyderabad v. Workmen, 1952 LAC 540.

dismissal, an employee would be deprived of quite a number of benefits. It is also incorrect to say that action under Standing Order 19 is confined only to cases of discharge proceeding from reasons other than an employee's alleged misconduct ; for, the language of Standing Order 19 makes it clear that the reason inducing the termination of service may be so serious that a communication thereof might directly or indirectly lay the Company and the Manager or the person signing it open to criminal or civil proceedings at the instance of the operative. The fact remains that when a question of discharge arises under Standing Order 19 no charge sheet or enquiry is indicated by the Standing Order, whereas under Standing Order 22 no order of dismissal can be made unless the operative concerned is informed in writing of the alleged misconduct, and is given an opportunity to explain the circumstances alleged against him and a proper enquiry has been held. A discharge under Standing Order 19 could be challenged if the discharge proceeded from any mala fides on the part of the company or any victimisation or unfair labour practice.[47]

Dismissal.—Dismissal is a punishment inflicted for misconduct and after following a rigid procedure giving reasonable opportunity to the work- man to meet the charges levelled against him. As a result of dismissal the workman is deprived of a number of benefits.

Dismissal, Unjustified—Dismissal of a workman on ground of misconduct must be preceded by a charge-sheet which should not be vague.[48] The charge-sheet must be clear. The workman cannot be dismissed on a charge not given in the charge-sheet.[49] After the service of charge-sheet summary dismissal by giving one month's notice and pay in lieu thereof is bad and wrongful.[50] Dismissal on ground of insubordination provoked by management is bad for want of bona fide.[51] Dismissal of a workman after charge-sheet without holding enquiry is bad even if the workman does not participate in it.[52] Dismissal without charge-sheet and enquiry is bad and

---

47 D.B.R. Mills Hyderabad v. Workmen, 1952 LAC 540.
48 Marwari Relief Society v. Bachha Misir, 5 FJR 622 ; Workmen of Kustore Colliery v. Raneegange Coal Assocn. Ltd., 6 FJR 113 ; Modi Sugar Mills v. Mazdoor Sabha, 4 FJR 219.
49 Modi Sugar Mills v. Mazdoor Sabha, 1952 LAC 399.
50 L.N. Dutta v. Jorhat Tea Co., 6 FJR 604.
51 Cawnpore Omnibus Service Ltd. v. D. D. Rae, 1954 LAC 232.
52 Bharat Airways Ltd. v. Workmen, 1953-54 FJR 481.

illegal.[53] An enquiry ex-parte without informing the person affected by it has no value.[54] Dismissal cannot be justified on grounds other than those mentioned in the latter.[55] Mere refusal to accept the warning notice cannot be treated as misconduct. The dismissal on that account would be bad.[56]

53 British India Corporation v. N.T. Gandhi, 1955 LAC 388.
54 Workmen of Kustore Colliery v. Raneegange Coal Assocn, 6 FJR 113.
55 Bathgali Empolyees & Union v. Bathgali & Co. Ltd. 1953 LAC 149.
56 Kahinoor Saw Mills Co. v. Narayan, (1955)2 LLJ 685.

CHAPTER-3

WORKMEN AND TRADE UNION UNFAIR LABOUR PRACTICES

The Constitution of India is based on the edifice of a democratic socialist pattern. The builders of the constitution served out Directive Principles of State Policy enshrined in the chapter-IV of the Constitution, which were the key instrument of transforming a medieval hierarchical Indian society into secular and egalitarian social order. However, realising that this was an uphill and complex task and involved sustained but patient efforts they made the directive principle unenforceable in courts. Nevertheless, these principles were declared to be fundamental in the governance of the country and the state was obliged to apply them in making Article 37. The constitution of India thus aimed at furthering the goals of a social revolution or attempt foster revolution by establishing the condition necessary for its achievement.

(I) Constitutional Objectives of Worker's Participation :

Socio-economic political change envisaged by the constitution necessitated creation of an number of instrumentalities as necessary conditions in legislative, executive and judicial spheres to facilitate realising the desired change.

(A) Article 43-A of the Constitution :

Indian constitution has some provisions for the development of worker's conditions. The provisions, such as right to work, to education and to public assistance in certain cases are available under Art. 41 Provisions for just and humane conditions for work are under Article 42. The provisions with regard to participation of workers in management in industry have been provided in Article 43-A. Article 43-A of Constitution is directly indicating towards the concept of industrial Democracy is real sense. In India this is the only way from which we seek democracy industry. By this we developed the self confidence in workers to their rights and reduce the exploitation of workers. Behind the idea of democracy in industry is to secure the

right of workers. By the inserting of Article 43-A in Indian Constitution, we can freely think that Government has taken steps towards the democracy in industry.

The Government has taken steps towards the idea of Participative Management by the way of Directive Principle of State Policy. The Article 43-A says that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisation engaged in any industry. While deciding the case of Gujarat Steel Tubes Ltd. v. its Mazoor Sabha, the Hon'ble Supreme Court of India dealing with the point of complex of considerations bearing on payment of back wages in the case in question, has expressed the view that the new perspective emerging from Article 43-A of Constitution of India.

The insertion of this article opens a new perspective in industrial relation, participation in relation to discharge, reinstatement, and right to back wage on reinstatement. Article 43-A of constitution of India has brought, a new equation in industrial relations.

Healthy industrial Relations is not only essential for the labour and management but also helps the society in establishing a strong and progressive economic base. Worker's Participation in management has been accepted as an essential future of Industrial Democracy and improved means of achieving peace and harmony in industrial undertakings. It creates a feeling of involvement and belongingness to the industry, which in turns helps in maximising the output of the industry.

We have experienced that various machineries, viz works committee, Joint Management council, Shop Council, Joint Council, Worker Directorship etc., which have experiment of India, in order to ensure greater worker's say in decision-making process have not fully served the purpose. Keeping in view all the circumstances, the Government of India, introduced a Bill in the Raja Sabha, in 1990 regarding the provisions for Worker's Participation in Management in a Industry.

(II) Legislative Progress of Workers Participation :

Legislative progress of worker's participation taking into account view the shortcomings of the various schemes implemented from time to time and also the experience gained in this regarded, the Government decided to review the concept of workers' participation in its entirety and to evolve a fresh approach to make worker's, participation in management more effective and meaningful. Since the consistent criticism of all the previous Schemes had been that it was only voluntary and had no legislative backing perhaps the Government thought it fit to make at least an attempt at removing this criticism,

(A) Participation of Workers in Management Bill -1990 :

The Participation of Workers in Management Bill 1990 was, therefore drawn up and introduced in the Rajya Sabha in 1990 but has still not been passed. The Bill proposed to make provisions for the participation of worker in the management of undertakings, establishments or other organizations engaged in any industry and to provide for mattress connected therewith or incidental thereto. The Salient Features of the Bill are:

1. It covers all the industrial establishments or undertakings as defined under the Industrial Disputes Act, 1947.
2. The Bill proposes to constitute one or more councils at the Shop Floor Level and a Council at the establishment level. These Councils shall consist of equal number of persons to represent the employers and the workmen. All other modalities to be determined by the Central Government.
3. The Bill also envisages a Board of Management of the highest level where representatives of the 'workmen' as defined under the Industrial Disputes Act shall constitute 13 per cent and persons representing 'other workers' shall constitute 12 percent of the total strength of such management. The persons to represent the 'other workers' in the Board of Management shall be elected by and from amongst other workers of the industrial establishment or by secret ballot. The persons to represent workmen on the Board shall be elected from the workmen of the industrial establishment by secret ballot or nominated by

the registered trade unions. Thus, a quarter of the members of the Board are to be employees.

4. If a matter under consideration before the Shop Council or the Establishment Council is beyond its jurisdiction, then, the matter shall be referred to the Establishment Council or the Board of Management, respectively. In case of failure at that level also, the matter is to be referred to the employer for its decision.
5. Penalties for contravention of the provisions of the Act (imprisonment an/or fine)
6. Provision of a Monitoring Committee comprising equal number of members representing the appropriate Government, the workers and the employers may be constituted by the appropriate Government to review and advise them on matter, which arise out of the administration of this Act, any Scheme or any rules made there under.
7. It proposes to omit Section 3 of Industrial Disputes Act, 1947.

The standing Committee on Labour and Welfare Committee recommended that the Central Government should consult the various Trade Union and the industrial establishments before framing any Scheme under the new Act. Another recommendation concerning the election of the workers representatives to the Councils formed under the Act, was that if there was a Trade Union which had the status of the 'collective bargaining agent', them it must be allowed to nominate the representative. But that does not solve the problem when there are multiple Trade Unions and no recognized Trade Union. Besides, there should be reservation for at least woman worker representative.

In case of disagreement at the three levels, then the employer is given the upper hand to decide the matter, The employer may abuse this position and an alternative ought to be found, like reference to an Arbitrator or the matter can be taken to the Labour Commissioner or the Board of Conciliation as provided for in the Industrial Disputes Act. In addition, with respect to penalties under the Act, there is no provision for enhanced punishment in case of previous convictions.

The salutary aspect of the Bill is that at least an attempt has been made to bring about some legislation. The setting up of the Monitoring Committee and

empowering the Appropriate Governments to enforce the Acts commendable. The present Lok Sabha will be the fifth one the Bill has seen. It is hoped that the Bill will be passed at least this time, keeping in mind the promise made by the United Progressive Alliance of 'development with human face' Also' the Left Parties, who have strong pro-labour ideologies are in a position to influence the working of the Government. There appears to be some hope in sigh.

(III) Judicial Trends of Workers Participation in Management :

The first ever workers take-over of a factory-Kamani Tubes Limited in September 1988 was a historic and profound event in India. Kamani Tubes Limited is the only industry in the country which is owned by a cooperative of all employees including workers, staff and officers.

Earlier, the production activities had come to a halt in September 1985 because the municipality had cut off electricity and water supply as the company had failed to clear the bills for a long time. The owners and senior managers of the company abandoned the factory. The workers on the other hand stayed on to guard the property, though they had not been paid wages for nine months prior to the closure. At the root of the matter was a feud in the family that owned the shares of Kamani Tubes Limited. In early September 1986 the Union moved a proposal for forming a workers cooperative that would manage the factory. Around 600 workers came forward to pay Rs.11 each as entry fee and share capital. But the Maharashtra Government refused support. [1] The workers got a boost when the Sick Industrial Companies Act of 1985 came into effect from 12 January 1987. The Board for Industrial and Financial Reconstruction was formed under this act to enquire into sick companies and initiate schemes for their rehabilitation. The Trade Union moved a civil miscellaneous petition for consideration of the workers scheme in January 1987.

The Supreme Court referred this scheme to Board for Industrial and Financial Reconstruction for consideration in October 1987. The Board for Industrial and Financial Reconstruction passed an order on 20 May 1988 that the objections raised by the Kamani family were untenable. It decided that the cooperative would purchase

[1] Sharit K. Bhowmik, workers Take Over Kamani Tubes, Economic and Political Weekly. 1989, Vol. 24 (3) p. 124-125.

all the shares of the company at a token rate of one rupee a share. Subsequently, the Board for Industrial and Financial Reconstruction issued advertisements in newspapers, outlining the Scheme of the workers and calling for objections to it and fixed a date for hearing objection. The objection came from one of the family members, which was rejected by Board for Industrial and Financial Reconstruction. In a last ditch effort to stall the proceedings, Navnit Kamani and others made an appeal to the Supreme Court. The Supreme Court also made a comparison of the schemes put schemes put forward by the workers and that of Ashish Kamani, and found that the former was by for a better one. [2] The Board for Industrial and Financial Reconstruction finally cleared the scheme with some modifications in September 1988. In view of the scheme already having been considered by the Board for Industrial and Financial Reconstruction, the Supreme Court ruled that the workers should be allowed to reopen the factory and asked the government and financial institutions to help them, dismissing Kamani's appeal made by Navneet Kamani.

Though the above case has been hailed in many quarters, it has been pointed out that it is still insufficient to empower the workers fully. In the above case itself, the scheme envisaged a nine-member Board of Directors, in which only two are workers representatives, though they happen to be the major shareholders. In such a situation, the role of the Trade Union becomes crucial, in ensuring that the workers have an effective say in the running of the business.[3]

But workers co-operatives are not unheard of in India. There are a few workers co-operatives in Tripura, West Bengal and Assam. But it also needs to be remembered that not all of them have been successful. It was seen the during the 1970s, there was an increase in industrial sickness[4], which led to many owners and entrepreneurs abandoning and shutting down their business ventures. This led to increasing unemployment,, and led to the impoverishment of the workforce, as their dues remained unpaid. This forced workers to consider the alternative of workers

---

2 Navneet R. Kamani v. R.R. Kamani, AIR 1989 SC 9, at 15-16

3 Supra, footnote 71, at 126.

4 In 1979-86 there were 689 large sick units (as compared to the earlier figure of an 1,28,687 small sick units (as compared to the earlier figure of 16,805), citeh from Ratna Sen, workers Industrial Company operatives and workers management.. Indian Journal of Industrial relation 1995, vol 30 (3), p. 331

management. Thus, it forms a revival strategy during sickness.[5]Thus, workers co-operatives can be viewed as an alternative economic or business organization, like the fourth sector, after the public, private and joint sectors.

National Textile Workers Union v. P.R. Ramakrishnan

The Supreme Court in the landmark decision of National Textile workmen Union v. P.R. Ramakrishan[6] decided the issue of whether workmen of the company have a right to appear and oppose a petition for winding up of the company. The five-Judge Bench, by a majority of 3:2 decided in the affirmative.

Justice Bhagwati, who wrote the leading majority judgment, which was agreed to by Justices Baharul Islam and O. Chinnapa Reddy in their separate judgments, vociferously supported the cause of the workers. Conceding the contention of the management that the Companies Act does not provide for a right of hearing to the workers during the winding up of a Company, Justice Bhagwati, nevertheless went on to hold that.

"But from this exclusion of the workers from the right to present a winding up petition, it does not follow as a necessary consequence that the workers have no right to appear and be heard in a winding up petition filed by one or more of the persons specified in Section 439… they may still be entitled to appear and be heard in support or opposition to the winding up petition. That would depend upon whether their interest is likely to be affected by any order which may be made on the winding up petition… a petition for winding up would almost certainly have an adverse consequence on the workers inasmuch as the continuance of their service would be seriously jeopardized and their right to work and earn their livelihood would be disastrously imperiled."

In short the judgment decided that:

- The principles of natural justice are not confined only to administrative or quasi-judicial proceeding. They apply with equal force to judicial proceedings.

---

5 Ratna Sen. Workers Industrial Company opeeratives and Workers Management Journal of Industrial Relations, 1995, Vol. 30 (3), pp 320-322

6 (1983) 1 SCC 228.

- In the absence of an express provision in the Act prohibiting the workers from being heard during a winding up proceedings, it is to be held that such an opportunity of being heard has to be afforded to the workmen, who are naturally going to be adversely affected by such an Order.
- If this hearing is not afforded, then the Order of winding up could be struck down on that ground.

The right to be heard was also conferred on the workers at the time of appointment of the Provisional liquidator, but non-affording of hearing would not vitiate the order of appointment as it would be open to the workers to challenge the liquidation order in court. Purposes to act as responsible decision-makers.

A large number of trade unions were organised after 1918. The Madras Labour Union was the first trade union of modern type in India. It was formed under the leadership of B.P. Wadia on 27th April, 1918. The birth of the union was the result of the hardships which the employees had to suffer in the Buckingham and Carnatio Mills. The union would take up workers grievances and fight for them against employers. The formation of this union gave a sense of solidarity, a union consciousness among rank and file of the workers. In the years 1919 and 1920, more unions similarly inspired were born in Bombay, Madras, Punjab & Bengal. Railway workers and seamen also strengthened their existing union and formed now ones.

In the same year in which Madras labour union was formed, a significant landmark in the history of Indian Trade Union movement took place that was the formation of *Ahmedabad Textils Labour Association* India's biggest and best labour union. This union is considered as a model union for all India to copy.

Trade unionism received a great fillip with the establishment of the All India Trade Union Congress in 1920 to coordinate the activities of a large number of trade unions. The establishment of AITUC and labour's answer to the Government's claim that no truly representative organisantion of Indian workers existed for the purpose of representing at International labour organisation at Geneva. AITUC thereafter occupied a dominant position as a Central Organisation.

(A) Trade Unions Act, 1926 :

The passing of the Indian Trade Unions Act in 1926 is an important landmark in the history of Trade union movement in the country. The Act provides for registration of trade unions and the law relating to registered trade unions. The main object of the Act is to confer a legal and corporate status to registered trade unions. The important principles which evolved as a result of long and persisting struggle carried on by British Trade Unionists have all been incorporated in the Indian Trade Unions Act. The Act following the English principles, grants immunities to trade unions from prosecution for criminal conspiracy and from civil suit.[7] And provision has been made in the Act, following English principles, that an agreement between members of a registered trade union shall not be void or voidable by reason of the agreement being in restraint of Trade.[8] The Act contains specific provisions as to the objects on which the general funds of a trade union may be spent. [9]

Indian trade unions Act though gave a protective umbrella under which conspiracy can no longer be prosecuted and contracts in restraint of Trade are no longer illegal, but there was nothing in the Act which show that collective bargaining is the function of a trade union nor there are any provisions in the Act for recognition and unfair labour practices which are sine quo non for healthy collective bargaining. The permissive nature of registration provisions gave birth to multi-unionism and inter-union and inter-union rivalry.

(B) Trade Union Bill, 1950 :

It resurrected the provision of the amendments of 1947 by making provision for certification of representative union and the sole bargaining agent and basic protection against unfair practices. Recognised unions were given such right as collecting subscriptions and holding meetings on employer's premises. Employers could be ordered to recognise union by labour courts Collective bargaining was made compulsory by providing that both parties should reply the notice received from the other and the manner of replying was laid down, to gather with a time limit seven days. Strikes and Lockouts were prohibited during the pendency of collective

---

7 The Trade Unions Act, 1926, Section 17 & 18.
8 Section. 19.
9 The Trade Unions Act, 1926, Section 15

bargaining and both parties were put under an obligation to observe collective agreement.

(C) Reasons for Lapse of the Bills :

The Bills lapsed because it was opposed by the left wing trade union leaders for excluding from their scope, Government employees (ii) There was apprehension among union leaders that the elaborate procedures provided by the bills to foster peaceful collective bargaining would unduly restrict the right to strike (iii) Ministries in charges of railways, defence establishments and posts and telegraphs strongly opposed the extension of the bill to their departments

The result was that no action was taken on them and the bills lapsed along with the parliament at the time of the first general election.

When V.V. Giri became Labour Minister in 1952 he set about to revive the lost cause of collective bargaining and tried to revive the Trade Union 1950. But despite of his best efforts he could not succeed and he finally resigned. With the exit of Giri from the Ministry of Labour, the efforts to provide compulsory recognition to trade unions to promote collective bargaining through legislative measures came to an end.

(D) Code of Discipline :

Attempts were again made to set trade union movement on right lines so that trade unions could be able to bargain collectively in a peaceful atmosphere. This innovation approach was based on voluntarism, mutual agreement and moral principle rather than legalism. As a consequent of this approach, Code of discipline was formulated by Central Labour Ministry and ratified at the 15th Session of Indian Labour Conference, held in 1958.

The Code of Discipline is a voluntary measure, which among other things stipulates measures for strengthening of trade unions. The Code inter-alia provides for criteria for recognition of unions and enumerates. Certain activity as unfair labour practices and casts obligation both, on the employer as well as unions to discourage

such practices. In this way, attempt was made to promote collective bargaining by non-legal measures. But it achieved little success due to lack of sanction.

(E) Sporadic attempt by federal units in this direction :

In the absence of central legislation some States have passed appropriate laws dealing with recognition of unions, unfair labour practices, and representative or approved unions etc. to facilitate collective bargaining.

The first attempt in this direction was the Bombay Industrial Disputes Act, 1938, which made provision for the de-facto recognition of trade unions as representative of the workers with whom employers were required to negotiate. The Act was not implemented until 1940 and was superseded in 1942 by war time legislation. Later on Bombay Industrial Relations Act, 1946 introduced several changes.

Legislation in Madhya Pradesh and Rajasthan has also corresponding provisions for recognition. Madhya Pradesh has passed Madhya Pradesh Industrial Relation Act, 1960 closely following the BIR Act 1946.

At the State level only Maharastra has taken lead in enacting law prohibiting unfair labour practices for facilitating collective bargaining for certain industries. Recently it has passed the Maharastra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971.

Except these sporadic attempts by states enactments and non legal code of discipline which tried in vain to over-come the defects of the Trade Unions Act, the law relating to trade unions in India is the same as it was nearly half century ago. Only some minor modifications have been made in the act in 1960 and 1964. the remarkable thing about the Trade Union Act is that despite shortcomings it is still found on the statute book.

The Government of India appointed a *National Commission on Labour in December 1969 under the Chairmanship of P.B Gajendragadhkar* to examine the existing labour policies in all its dimension. The Commission submitted its report in August 1969 with comprehensive recommendations on various aspects of labour

policy. A draft Laobur Code was published which envisages more detailed legislation of Trade Unions, their registration their recognition, the right of recognised unions, unfair labour practices, prohibition of strikes and lockouts and other matters. The recommendations have remained unimplemented so far.

The *Fifth Five Year Plan* has again advocated for collective bargaining. It has been mentioned in the Draft Plan that:–

> "In order to sustain peace for 'higher performance' an improved institutional frame work for effective bargaining relationship between representative of employees and management would need to be created. This would involve the definition of condition for the determination of the representative character of the bargaining agent too."

Accordingly Government of India is intending to make some drastic changes in existing *Trade Union Law* and *Industrial Disputes Act, 1947*. Two Bill are being introduced in the Parliament for this purpose.

CHAPTER – 4

REMEDIAL MEASURES UNDER THE INDUSTRIAL DISPUTES ACT

(I) Industrial Disputes Legislation :

In the absence of statutory measures concerning unfair labour practice, law indirectly makes an attempt to protect workers against employers' right to 'hire and fire' in discharging or dismissing an employee. Statutory restrictions on this right are found in the Industrial Disputes Act[1] 1947 and the Industrial Disputes (Appellate Tribunal) Act[2] 1950 (now repealed) and the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 which provides[3] comprehensive safeguards to employees who are arrayed against an employer in industrial dispute pending for settlement and award. The latter statute provides that if an employer[4] wants to alter the conditions of service of any employee or to discharge or punish him by dismissal with regard to any matter connected with a dispute pending in any proceedings under the Act he has to obtain the sanction or approval of the authorities[5] before which the proceedings are pending. Such authority - whether a conciliation[6] officer or tribunal[7] has to see whether the employer is acting bonafide or is resorting to unfair labour practice or victimisation. If the dismissal is a colourable exercise of the power or as a result of victimisation or unfair labour practice the industrial tribunal would be justified to intervene and set aside such dismissal. The object of section 22 of the Act of 1950 like of section 33 of the Industrial Disputes Act, 1947 as amended was to protect[8] the workmen concerned in disputes which form the subject matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is

---

1 Sections 33 and 33-A of the Act (XIV of 1947).
2 Sections 22 and 23 of the Act (XLVII of 1950).
3 Sections 9-A and 33 of the Act.
4 SKG Sugar Ltd. v. Ali Hasan, AIR 1959 SC 230.
5 Batuk K. Vyas v. Surat Municipality, AIR 1953 Bom. 133.
6 M/s Sasa Musa Sugar Works v. Shobrati Khan & Others, AIR 1959 SC 9-23.
7 The chartered Bank Company v. The Chartered Bank employees Union, AIR 1960 SC 919
8 Automobile Products of India Ltd. v. Rukamii Bala & Others, AIR 1955 SC 258.

further the object of the two Sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between employer and the workmen. To achieve this object a ban[9] has been imposed on the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 33 of the Act which imposes the ban also provides for removal of that ban by granting express permission in writing in appropriate cases by the authority mentioned therein. The purpose of this section being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under the Section is to accord[10] or withhold permission to employers to discharge or dismiss workmen. Before permission to punish or dismiss workmen is granted under section 33 of the Act, the Industrial Tribunal must be concerned with two matters[11] namely :

- Whether the act of the employer was bonafide or whether it was intended to victimise the workman of his act in raising the dispute or in continuing it;
- Whether there was prima facie misconduct on the part of the workman justifying the employer in inflicting the punishment.

If there was no victimisation and the act of the employer was bonafide and if there was prima facie misconduct on the part of the workman the action of the management has to be approved. If on the other hand the enquiry proceedings do not disclose a prima facie case of misconduct or if it is shown that the action of the management was intented to victimise the workman, the approval sought for should not be granted.[12]

Consequently, protection of workers against victimisation and unfair labour practice is carefully elaborated in sections 33-A and 9-A of the Industrial

---

9 The Management Hotel Imperial, New Delhi v. Hotel Workers Union, AIR 1959 SC 1342.
10 National Tobacco of Co. India Ltd. v. Fourth Industrial Tribunal, (1960) 2 LLJ 175; Martin Bum Ltd. v. R.N. Banarjee, (1958) ILLJ 247.
11 Benny Miranda v. Marikar Engineers Ltd., (1958) 2 LLJ 540.
12 Titagarh Jute Factory Co. Ltd. v. Third Industrial Tribunal and Others, C1962) 2 LLJ 328.

Disputes Act, 1947. Section 33-A provides[13] an exclusive right to aggrieved workmen to directly approach the authorities for prohibiting the employer from unilaterally changing the conditions of service for which the dispute is pending for conciliation or award. Section 9-A also restricts the discretion of the employer in introducing a change in the conditions of service applicable to workmen in respect of any matter specified in the Fourth Schedule without a notice of change. Therefore, it is obligatory for an employer to give notice of twenty one days of any change in the' conditions of service concerning any workmen. It has been observed :

What is important to notice is that in making this provision for notice the legislature was clearly contemplating three stages. The first stage is the proposal by the employer to effect a change, the next stage is the stage when he gives a notice and the last stage is when he effects change in the conditions of service on the expiry of 21 days from the date of the notice. The conditions of service do not stand changed, either when the proposal is made or the notice is given but only when the change is actually effected. That actual change takes place when new conditions are actually introduced.

Where employer intended to introduce rationalisation scheme by giving a notice of change dispute regarding which was pending for adjudication and where after the expiry of 21 days the employer attempted to introduce such scheme, the court held introduction of rationalisation scheme was clearly an alteration of conditions of service to the prejudice of workmen.

(A) Protected Workmen - Unfair Labour Practice :

The Industrial Dispute Act[14] also taken special case of those employees who are designated as 'protected workmen' for raising a dispute pending for proceedings against employer's unfair labour practice. Protected workmen's are said to be those workmen who are officers of a registered trade union which is connected with the establishment in question. In all such cases as governed by sections 33 and 33-A of the Industrial Disputes Act the labour tribunal is faced to

---

13 Northbrook Jute Co. v. Their Workmen, (1960) 1 LLJ 580.
14 Section 33(3).

concede the power of the management to direct its own internal administration and discipline to the extent that this power is exercised judiciously in good faith without any motive or victimisation or unfair labour practice and in consonance with the principles of natural justice. But tribunal interfere :

- Where there has been no fair enquiry and there has been a violation of the principles of natural justice.
- Where there is malafides. The harshness or otherwise of the punishment insofar as it may go to establish malafides may be considered;
- Where there is vindicativeness or victimisation;
- Where there is unfair labour practice;
- Where there has been a basic error and/or upon the materials on record the findings of the domestic enquiry are completely baseless or perverse. [15]

The Industrial Disputes Act, is a progressive measure of social legislation aiming at the amelioration of the conditions of workmen in Industry.[16]

However, the provisions clearly dealing with unfair labour practices have been inserted by Act 46 of 1982 with effect from 21-8-1984. Sec. 2(ra)[17] unfair labour practice means any of the practices specified in the Fifth Schedule. The Fifth Schedule[18] contains several practices. In category I, it contains 16 practices which are said to be unfair labour practices on the part of the employers or their trade unions. For example to interfere with, restrain from or coerce workman in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, to establish employer sponsored trade unions of workmen, to discharge or dismiss workmen by way of victimisation, to recruit workmen during strike which is not an illegal strike etc.

On the other hand category II of the Fifth Schedule contain eight practices which are said to be unfair labour practices on the part of workmen or their trade unions such as to advise or actually support or instigate any strike deemed to be

---

15 National Tobacco Co of India Ltd. v. Fourth Industrial Tribunal and Others, (1960) 2 LLJ 175.
16 S.N. Rai v. Vishwanath Lal, AIR 1960 Patna 10.
17 Ins. by Act No. 46 of 1982 vide S. 2(i) (w.e.f. 21.8.1984)
18 Ins. by Act No. 46 of 1982 vide section 23 w.e.f. 21.8.1984.

under the Act, to stage demonstration at the residence of the employers or the managerial staff members, to incite or indulge in wilful damage to employer's property connected with the industry, to indulge in acts of force or violence or to hold out threats intimidation against any workmen with a view to prevent from attending work etc.

(1) Curative Measures Under The Industrial Disputes Act, 1947 :

(a) Policy of the Act :

The preamble, "whereas it is expedient to make provisions for the investigation and settlement of industrial disputes and for certain other purposes," of the Act discloses the fundamental policy of the Act to make provisions for the investigation and settlement of industrial disputes by conciliation and compulsory adjudication only at the initial enactment in 1947, but while amending the Act in 1982 the Indian Parliament felt necessity to codify the law for the prevention of unfair labour practices, realizing that there was no Central law specifying unfair labour practices on the part of employer, workmen and the trade unions of employers and workmen and for imposing any penalty for resorting to such undesirable practices, it was proposed to make suitable provision in the Act to specify certain practices as unfair labour practices on the part of employers, workmen and their trade unions and to provide for penalty for those indulging in such practices.[19]

The policy statement of the Industrial Disputes Act clearly establishes, that our Union Legislature failed to lay down any policy to provide for the recognition of trade unions for facilitating collective bargaining to provide for effective prevention of unfair labour practices and independent machinery to carry out the purposes of according recognition to trade unions and prevention of unfair labour practices and consoled by simply specifying unfair labour practices on the part of employers, workmen and their trade unions and providing for penalties for those indulging in such practices, and concentrated only to deal with industrial disputes.

---

[19] Para 2(x) of the Statement of Object and Reasons of Amending Act, 1982.

(b) Authorities and Powers conferred :

Works Committee, Conciliation Officers, Boards of Conciliation, Courts of Inquiry, Labour Courts, Tribunals and National Tribunals are the specific authorities, constituted under the Act for the purposes contained in the preamble.

(i) Works Committee

- *Constitution*

A works Committee is constituted under Section 3(1) as one of the authorities under the Act Section 3 (1) specifically provides :-

"In the case of any industrial establishment in which one hundred or more workmen are employed or have been employed on any day in the preceding twelve months the appropriate Government may be general or special order require the employer to constitute in the prescribed manner a Works Committee establishment so however that the number of representatives of workmen on the Committee shall not be less than the number of representatives of the employer. The representatives of the workmen shall be chosen in the prescribed manner from among the workmen engaged in the establishment and in consultation with their trade union, if any, registered under the Indian Trade Unions Act, 1926."

To require an employer to constitute a Works Committee in the prescribed manner by an order under section 3(1) the following essential conditions must exist at the time of passing such order :-

- it must be an 'industrial establishment' with respect to which the order is made. The term 'industrial' qualifies the term 'establishment so the requirements of Section 2(j) must be satisfied.
- there must be one hundred or more workmen employed in such establishment on the day of the order or on any day during the twelve months preceding the day of the order.
- such workmen must be the workmen within the meaning of Section 2(s) with respect to the employer for whom the order is made under Section 3(1).

- the Government passing the order must be the 'appropriate Government' within the meaning of Section 2(a) of the Act.

- *Powers and duties*

Section 3(2) mandatorily enjoins on the Works Committees, "to promote measures for securing and preserving amity and good relations between the employer and workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters." The powers of the Works Committee in regard to the range of subjects it can discuss, are very wide. There is no subject concerning the relation of employers and employees which the Works Committee is precluded from considering.[20] But the scope of the duties is confined to two things only : (1) to comment upon matters of common interest between employers and workmen, with a view to promote measures for securing and preserving amity and good relations between them; and (2) to endeavour to compose any material difference of opinion in respect of such matters of common interest or concern. Therefore the duty and authority of Works Committee cannot extent to anything more than making comments upon matters of common interest or concern and to endeavour to compose any material difference of opinion in respect of such matters. Neither 'comment' nor 'endeavour' could be held to extend to decide the question on which differences have arisen or are likely to arise one way or the other.[21] Regarding the powers and functions of the Works Committee, the Supreme Court said :

The language used by the legislature makes it clear that the Works Committees were not intended to supplant or supersede the unions for the purpose of collective bargaining: they are not authorized to consider real or substantial changes in the conditions of service; their task is only to smooth away frictions that might arise between the workmen and the management in day-to-day work. By no stretch of imagination can it be said that the duties and function of the Works Committee included the decision on such an important matter as the alteration in the conditions of service by rationalization.

---

[20] Metal Box Co. of Indian Ltd. v. Their Workmen, (1952) ILLJ 822.
[21] Northbrook Jute Co. Ltd. v. Their Workmen, (1960) ILLJ 580 (583) SC.

Thus, the Work Committee cannot consider important matters like rationalization scheme; or the subject of 'employment' or 'non-employment' which would include the case of 'dismissal'[22] or the reemployment of a 'retrenched workman,[23] or questions involving pay-scales or dearness allowance etc.[24]

(ii) Conciliation Officers :

Section 4 empowers the "appropriate Government" to appoint any number of persons as it thinks fit, to be conciliation officers to perform the duties of mediating in industrial disputes and promoting their settlement. Such appointment must be made by a notification in the Official Gazette of the Government. A conciliation officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period.[25]

The words, "charged with the duty of mediating in and promoting the settlement of industrial disputes," in section 4(1) specifies the nature of duties the conciliation officers is supposed to discharge. Thus, the duty of the conciliation officer is to mediate in and promote the settlement of industrial disputes only and nothing else.

The term 'industrial dispute' has been defined to mean, any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.[26]

Section 11 of the Act empowers that a conciliation officer, for the purpose of inquiry into any existing or apprehended industrial dispute, may enter the premises occupied by an establishment to which the dispute relates, after giving a reasonable notice,[27] and may enforce the attendance of any person for the purpose

---

22 Elgin Mills Co. Ltd. v. Suti Mill Maxdoor Union, (1951) I LLJ 184.
23 J.K. Jute Mill Co. Ltd. v. Rashtriya Mill Mazdoor Sabha, (1952) I LLJ 184.
24 Kemp and Co. Ltd. v. Their Workmen, (1955) I LLJ 48 (53).
25 Section 4(2)
26 Section 2(k)
27 Sub-Section (2)

of examination of such person or call for and inspect any document which he has ground for considering to be relevant to the industrial dispute or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under the Act, and for the aforesaid purposes the conciliation officer enjoys the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of enforcing the attendance of any person and examining him or of compelling the production of document.[28]

Conciliation officers have been assigned the duties to hold conciliation proceedings in the prescribed manner where any industrial dispute exists or its apprehended. Where the dispute related to a public utility service and a notice under section 22 has been given, it is obligatory on the Conciliation Officer to hold conciliation proceedings and in a non-public utility services and in public utility services where notice of strike or lockout is not given, the Conciliation Officer has the discretion to hold or not to hold the conciliation proceedings.[29] A conciliation proceedings in a public utility service is deemed to have commenced on the day on which the notice of strike or lockout under section 22 is received by a Conciliation Officer.[30] For the purpose of bringing about a settlement of the dispute, it is the duty of the conciliation officer to investigate the dispute and all matters affecting the merits and the right settlement thereof without any delay, and he may do all such things as the thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.[31] If a settlement of the dispute or any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer has to sent a report thereof to the appropriate Government or an officer authorized in that regard, together with a memorandum of the settlement signed by the parties to the dispute.[32] If no such settlement is arrived at, it is obligatory on the conciliation officer as soon as practicable after the close of investigation, to send to the appropriate Government a full report and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances

---

28 Sub-Section (4)
29 Section 12(1)
30 Section 20(1)
31 Section 12(2)
32 Section 12(3)

and the reasons on account of which, in his opinion, a settlement could not be arrived at.[33] A report must be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government.[34] A conciliation proceeding is deemed to have concluded: where a settlement is arrived at, when a memorandum of the settlement is signed by the parties to the dispute; and where no settlement is arrived at, when the report of the conciliation officer is received by the appropriate Government.[35]

(iii) Board of Conciliation :

The appropriate Government is empowered to constitute a Board of Conciliation for promoting the settlement of an industrial dispute by notification in the Official Gazette, as occasion arises. The Board consists of a Chairman and two or four other members. The chairman must be an independent person and the other members in equal number are to be appointed to represent the parties to the dispute on the recommendation of that party. If any party fails to make a recommendation within the prescribed time, the appropriate Government has to appoint such as it think fit to represent that party. Though a Board having the prescribed quorum, may act notwithstanding the absence of the chairman or of any of its members or any vacancy in its number but after notification that the services of the chairman or of any other member have ceased to be available the Board cannot act until a new chairman or member, as the case may be, appointed.[36] The quorum necessary to constitute a sitting of a Board is 2 where the number of the members is 3 and quorum is 3 where the number of members is 5 of the Board.[37]

Where an industrial dispute is of a complicated nature and involves important issues and require special handling, Boards are preferred to Conciliation Officers. Industrial disputes are referred to the Board by the appropriate Government under section 10(1)(a). The Board enjoys the same

---

33 Section 12(4)
34 Section 12(6)
35 Section 20(2) (a) and (b)
36 Section 5
37 Rule 14 of the Industrial Disputes Central Rules, 1957.

powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit, in respect of (a) enforcing the attendance of any person and examining him on oath; (b) compelling the production of documents and material objects; (c) issuing commissions for the examination of witnesses; (d) in respect of such other matters as may be prescribed; and every inquiry or investigation by a Board is deemed to be a judicial proceeding within the meaning of section 193 and 228 of the Indian Penal Code.[38] The duties of Board provided under section 13 are same as that of conciliation officer under section 12, except that the Board has also to make its recommendations for the determination of the dispute if no settlement arrives, along with other necessary details and time limit for the Board to submit its report is two months from the date on which the dispute was referred to it or within such shorter period as may be fixed by the appropriate Government. The report must be signed by all the members of the Board and any member of the Board may record his dissent from a report or from any recommendation made therein;[39] and the report of a Board together with any minute of dissent has to be published within thirty days from the date of its receipt by the appropriate Government.[40] A conciliation proceeding is deemed to have concluded when the report of the Board is published, and commences from the date of reference of the dispute to the Board.[41] Thus the conciliation officers as well as the Board are charged with the same duties of promoting settlement of industrial disputes.

(iv) Courts of Inquiry :

Section 6 empowers the appropriate Government to constitute a court of inquiry for inquiring into any matter appearing to be connected with or relevant to an industrial dispute, by a notification in the official gazette. A court of inquiry may consist of one independent person or of such number of independent persons as the appropriate Government may think fit and where a court of inquiry consists two or more members, one of them must be appointed as the Chairman. A court of inquiry having the prescribed quorum, may act notwithstanding the absence of

38 Section 11(3)
39 Section 16
40 Section 17
41 Section 20

the chairman or any of its members or any vacancy, but after notification that the services of the chairman have ceased to be available, the Court cannot act until a new chairman is appointed. The quorum necessary to constitute a sitting of a court of inquiry must be one where the number of members in not more than two; quorum must be two where the number of members is more than two; but less than five and it must be 3 where the number of members is five or more.[42] Where any industrial dispute exists or is apprehended, the appropriate Government may, refer any matter appearing to be connected with or relevant to the dispute to a Court of Inquiry.[43]

The Court of inquiry enjoys the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of (a) enforcing the attendance of any person and examining him on oath; (b) compelling the production of documents and material objects; (c) issuing commissions for the examination of witnesses; (d) in respect of such other matters as may be prescribed and every inquiry or investigation by a court of inquiry is deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the Indian Penal Code.[44] A court of inquiry has to inquiry has to inquire into the matters referred to it and report thereon to the appropriate government ordinarily within a period of six months from the commencement of its inquiry.[45] The report must be signed by all the members of the court of inquiry and any member thereof may record any minute of dissent from the report or recommendation made therein;[46] which has to be published within a period of thirty days from the date of its receipt by the appropriate government.[47] During the pendency of proceedings before a court of inquiry there is no bar against the workmen going on strike and against the employer declaring a lockout[48] and taking action against a workman.[49]

---

42 Rule 14 of the Industrial Disputes Central Rules, 1957
43 Section 10(1)(b)
44 Section 11(3)
45 Section 14
46 Section 16
47 Section 17
48 Section 22 and 23
49 Section 33

(v) Labour Courts :

- *Constitution*

Labour Courts are constituted under section 7. By notification in the Official Gazette, the appropriate Government is empowered to constitute one or more Labour Courts "for the adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under the Act."[50] Labour Court consists of one person only;[51] and the person to be appointed as Presiding Officer Labour Court must have special qualifications required in that regard. A person is not qualified for appointment as a Presiding Officer Labour Court unless:- (i) he is, or has been, a judge of a High Court; or (ii) he has, for a period of not less than three years, been a District Judge or an Additional District Judge; or (iii) he has held any judicial office in India for not less than seven years or (iv) he has been a presiding Officer of a Labour Court constituted under any Provincial Act or State Act for not less than five years.[52] Thus the provision is wide enough to enable the appropriate Government to constitute more then one Labour Courts.[53] Where any industrial dispute exists or is apprehended, the appropriate Government, to any time, may refer the dispute or any matter appearing to be connected with or relevant to, the dispute, if it relates to any matter specified in the second schedule, to a labour court for adjudication. [54] Thus Section 10(1)(c) makes it clear, that the labour court can take cognizance of an industrial dispute only on a reference having been made to it under that section. Hence, a party to a dispute cannot approach to a labour court directly for adjudication of an industrial dispute.[55]

- *Function, Jurisdiction and powers*

Section 7(1) and 10(1) of the specify that the labour court are constituted for the purposes : (i) "for the adjudication of industrial disputes relating to any matter specified in the Second Schedule." Or "any matter appearing to be

---

50 Section 7(1)
51 Section 7(2)
52 Section 7(3)
53 Muthe Steel (India) Ltd. v. Labour Court Hyderabad, 1979 Lab. I.C. 325 (332).
54 Section 10(1)(c)
55 Vishnu Sadav Bhattacharya v. Cycle Industries, 1973 Lab. I.C. 396 (397).

connected with, or relevant to dispute" and (ii) for performing such other functions as may be assigned to them under this Act." Thus the functions or the purposes of the Labour Courts are the adjudication of the industrial disputes or certain other matters and the powers and jurisdiction has been defined in respect of he matters specified in Schedule Second and other provisions to the discusses here under.

- *Adjudication of Industrial Disputes or Matters Connected or Relevant Thereto*

The second schedule specifically refers to section 7, which provides for the constitution of labour courts for the adjudication of industrial disputes relating to that schedule and for performing such other functions as may be assigned to them.[56] But the first proviso to section 10(1) states that where the disputes relates to a matter specified in the third schedule, if it is not likely to effect more than 100 workmen, it can be referred to a labour courts. Thus disputes arising under second schedule can only be adjudicated by a labour courts unless the case falls under the first proviso to section 10(1) of the Act in which case the dispute under the Third Schedule can also be adjudicated upon by the labour courts.[57] Therefore, if one the facts of case, it appears that the dispute relating to a matter covered in the third Schedule in likely to affect more than 100 workman, the reference to the Labour Court would be invalid.[58]

Item 6 of the Second Schedule is the residuary item under which except the matter specified in the third Schedule in respect of which the Industrial Tribunal has exclusive jurisdiction, not only the Labour Court, but even the Industrial Court will have jurisdiction to adjudicate. The jurisdiction of the Labour Court to adjudicate upon matters enumerated in the Second Schedule, or matters in the Third Schedule in cases falling under the first proviso to Section 10(1), or upon all matters other than those specified in the Third Schedule, springs from the reference made to it by the appropriate Government under section 10 of

---

56 South India Bank Ltd, v. A.R. Chacko (1964) ILJ 19 at p. 21, (SC).
57 Sindhu Resettlement Corpn. Ltd. v. Industrial Tribunal (1965) IILLJ 268(273).
58 Management of Gauhati Tpt. Association v. Labour Court 1969 Lab. I.C. 1568 (1573-74).

the Act.[59] Once a Labour Court is constituted to deal with 'industrial disputes', the appropriate government has to refer to it such disputes as fall within its jurisdiction. But if there are more than one Labour Courts so authorized in any area there would obviously be a choice of forum, unless there were certain Rules under which such choice is limited.[60]

Every Labour Court, enjoys the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908 when trying a suit, in respect of the matters :- (a) enforcing the attendance of any person and examining him on oath, (b) compelling the production of documents and material objects, (c) Issuing commissions for the examination of witnesses, (d) in respect of such other matters as may be prescribed, and every inquiry or investigation by a Labour Court is deemed to be a judicial proceeding within the meaning of Section 193 and 228 of the Indian Penal Code.[61] The functions of a Labour Court are of great public importance and are quasi-judicial in nature. The principles of adjudication of disputes referred to the Labour Courts constituted under Section 7 Industrial Tribunal Constituted under Section 7-A and National Tribunal Constituted under Section 7-B are the same.

- Performing such other Functions as may be assigned under the Act

The word "assign" means conferment of powers under the Act on one or more Labour Courts as the case may be.[62] The other matters that can be assigned to Labour Court are :-

⇒ Voluntary reference of industrial disputes by a written agreement between the parties under Section 10 (2).

⇒ Arbitration reference of disputes under Section 10-A.

⇒ Application for permission or approval of Management Action under Section 33.

---

59 Working Journalists of Hindu v. The Hindu (1961) ILLJ 288.
60 Chipping and Painting Empowers Association v. A.T. Zambre (1968) IILJ 193 (198).
61 Section 11 (3)
62 Caromandal Fertilizers Ltd. v. State of Andhra Pradesh (1988) II LLJ 390 at p.391

⇒ Applications under Section 33-C(2) for computation of money due from an employer, capable of being computed in terms of money, and

⇒ Reference of awards or settlements for interpretation in cases of difficulty or doubt under Section 36-A.

- Duty to submit Award to Appropriate Government

When an industrial dispute is referred to a Labour Court for adjudication, it must hold its proceedings expeditiously and submit its award to the appropriate Government within the period specified in the order of reference or extended period for reasons to be recorded under the second proviso of Section 10(2-A). The procedure to be followed by the Labour Court to conduct the proceedings for passing an award on reference of an industrial disputes or other matters, has been prescribed under the Rule 10-B of the Central Rules. As per the direction to be made in the order of reference by the appropriate Government, the party raising the dispute has to file a statement of claim complete with relevant documents, list of reliance and witnesses with the Labour Court within fifteen day of the receipt of the order of reference and also forward a copy of such statement to each one of opposite parties involved in the dispute.[63] Thereafter the Labour Court has to fix the first hearing on a date not beyond one month from the date of receipt of the order of reference and the opposite party or parties have to file their written statements together with documents, list of reliance and witnesses within a period of 15 days from the date of first hearing and simultaneously forward a copy thereof to the other party,[64] upon which a rejoinder to written statement may be filed within a period of fifteen days from the filing of W.S.[65] Thereafter the Labour Court has to fix a date for evidence within one month from the date of receipt of statement, documents, list of witnesses etc. which must ordinarily be within sixty days of the date on which the dispute was referred for adjudication and evidence has to be recorded in Court or on affidavit but the opposite party must have the right to cross examine each of the witness, and for recording the evidence the Labour Court to follow the procedure laid down on rule 5 of Order

---

63 Rule 10B (1) of the Industrial Disputes Central Rules, 1957
64 Rule 10B (2) of the Industrial Disputes Central Rules, 1957
65 Rule 10B (4) of the Industrial Disputes Central Rules, 1957

XVII of First Schedule of Code of Civil Procedure, 1908.[66] On completion of evidence arguments are to be heard within a period of fifteen days from the close of evidence and thereafter the Labour Court must submit its award to the appropriate Government within one month from the date of oral hearing of arguments or within the period specified in the order of reference whichever is earlier, and in case or reference under Section 2-A, the Labour Court must submit its ward within a period of three months from the date of reference, unless extended for reasons to be recorded, in that regard.[67] However the Labour Courts may set aside exparte order on application being filed to the satisfaction of the Court.[68]

An award in writing and signed by the presiding officer[69] has to be published within a period of thirty days from the date of its receipt by the appropriate Government[70] and an award becomes enforceable on the expiry of thirty days from the date of its publication.[71] The proceedings before a Labour Court is deemed to have commended on the date of the reference of the dispute for adjudication and such proceedings is deemed to have concluded on the date on which the award becomes enforceable.[72] If in the course of the adjudication proceedings of an industrial dispute relating to the discharge or dismissal of a workman referred to it, the Labour Court is satisfied that the order of discharge or dismissal was not justified, it may be its award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.[73]

(vi) Industrial Tribunals :

Section 7-A empowers the appropriate Government to constitute one or more Industrial Tribunals for the adjudication of the industrial disputes relating to

---

66 Rule 10B (5) and (6) of the Industrial Disputes Central Rules, 1957
67 Rule 10B (7), (10) and (11) of the Industrial Disputes Central Rules, 1957
68 Rule 10B (9) of the Industrial Disputes Central Rules, 1957
69 Section 16.
70 Section 17.
71 Section 17-A
72 Section 20 (3)
73 Section 11-A

any matter specified in the Second or the Third Schedule and for performing such other functions as may be assigned to them under this Act. The Tribunal consists of one person only and a person is not qualified for appointment as the Presiding Officer of a Tribunal unless he is, or has been, a judge of a High Court, or he has, for a period of not less than three years, been a District Judge or an Additional District Judge.

After the amendment of Industrial Dispute Act in 1982[74] the Tribunal now will have jurisdiction not only to adjudicate upon the "industrial disputes" relating to any matter specified in the Second or Third Schedule but also will have jurisdiction to perform, "such other functions as may be assigned to them under the Act." The amending Act has relegated some functions to the Industrial Tribunals other than the adjudication of disputes on reference under Section 10. Such other matters, therefore have been covered by the amendment. But Section 10(1)(d) further provides that when reference is made of an industrial dispute relating to any matter specified in the Second or Third Schedule, any matter appearing to be connected with a relevant to that dispute can be further referred to the Tribunal for Adjudication. It is immaterial whether any such, "Appearing to be connected with or relevant to" the basic dispute relates to any matter specified in the Second or Third Schedule or not. It is sufficient that the matter is connected with or relevant to the dispute that has been referred for adjudication to the Tribunal.[75]

The first proviso to Section 10(1) lays down that where the dispute related to a matter specified in the Third Schedule and is not likely to more than one hundred workmen, the appropriate Government has the discretion to make the reference to a Labour Court. Thus whereas questions arising under the Second Schedule can be adjudicated both by a Tribunal as well as by a Labour Court, questions arising from matters in the Third Schedule can be referred for adjudication to a Tribunal alone, unless the case fails under the first proviso to Section 10(1)(d). The policy of the Legislature while enacting Ss. 7 and 7-A was to confer jurisdiction to adjudicate disputes arising from the matters in the Second Schedule on the Labour Courts as well as the Tribunal, while it wanted to give

---

74 It was enforced w.e.f. 21-08-1984

75 Hotel Kanishka v. Delhi Administration, 1995 Lab. I.C. 2381 at. p. 2386.

jurisdiction to the Tribunal alone on the disputes arising from the matters enumerated in the third Schedule. In case of an industrial dispute relating to matters other than those specified in Second or Third Schedule, the Legislature included the residuary item 6 in the Second Schedule under which, both the Labour Court as well as the Tribunal will have jurisdiction to adjudicate.[76] Thus there is a marked distinction between the jurisdiction of the Labour Court and that of the Industrial Tribunal. While the Labour Court functions for all purposes enumerated under the Act, has certain duties and responsibilities as prescribed, the matters to be deal with and which are within the jurisdiction of Industrial Tribunal as prescribed under Section 7A are entirely different.[77]

So far as the duties to hold proceedings expeditiously and submit its award to the Government as prescribed under Section 15 by following the procedure prescribed under Rule 10B of the Central Rules, publication of signed award within thirty says from its receipt enforcement of award, commencement and conclusion of proceedings and powers to grant relief of reinstatement or such relief as it deem fit as provided under Section 16, 17, 17-A, 20 and 11-A respectively equally apply to the Industrial Tribunal as to the Labour Court.

(vii) National Tribunal :

Section 7-B empowers the Central Government to constitute one or more National Industrial Tribunal for the adjudication of industrial disputes which, involve question of national importance or of are such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by such disputes. A National Industrial Tribunal consists of one person only to be appointed by the Central Government and a person is not qualified to be appointed as Presiding Officer of such Tribunal unless he is, or has been, a judge of a High Court. Where any existing or apprehended industrial dispute involves any question of national importance or industrial establishments situate in more than one State and likely to be interested in or affected by such dispute, the Central Government may refer the dispute or any matter connected with or

---

[76] Sindhu Resettlement Corp. v. Industrial Tribunal, (1965) II LLJ 268 at. p. 273 (Guj.DB) reversed in Sindhu Resettlement Corp. v. Industrial Tribunal, (1968) I LLJ 834 (SC).

[77] P.P.S.Bommanna Chettier Sons v. Labour Court, 1973 Lab. I.C. 882 at p. 883

relevant to such dispute, wither it relates to any matter specified in the Second or the Third Schedule for adjudication to a National Industrial Tribunal.[78] Thus reference to National Tribunal can only be made by the Central Government whether it is, or is not the appropriate Government.

Where any reference of an industrial dispute is made under Section 10(1-A) to a National Tribunal, it is the National Tribunal alone which will have jurisdiction to adjudicate upon the dispute and any Industrial Tribunal or the Labour Court before whom the same dispute is pending for adjudication, ceases to have jurisdiction to proceed further with the adjudication of the dispute.[79] If the matter under adjudication before the National Tribunal is also pending before the Labour Court or Industrial Tribunal then the proceeding before the Labour Court or Industrial Tribunal as the case may be, is deemed to have been quashed on such reference to National Tribunal.[80] It is also unlawful for an appropriate Government to refer the matter under adjudication before National Tribunal to any Labour Court or Industrial Tribunal for adjudication.[81]

The relevant provisions of Ss. 11, 11-A, 15, 16, 17, 17-A and 20 of the Act and Rule 10B which apply to Labour Court and Industrial Tribunals equally apply to National Tribunal with respect to its other powers, procedure to be followed for adjudication, duty to submit written and signed award, its publication by the Central Government, within thirty days of its receipt, enforceability of award, commencement and conclusion of the proceeding before the National Tribunal and the relief that may be granted to workmen.

From the study of the aforesaid provisions of the Act relating to the purpose for which the Labour Courts, industrial Tribunals and Nationals are constituted; the powers conferred, the duties cast to be discharged and the procedure prescribed to be followed thereunder, it is crystal clear that the Labour Court Industrial Tribunals and National Tribunals have been conferred no jurisdiction and power to intervene, adjudicate or deal with unfair labour practices in any manner and at any stage, since no enabling provision has bee inserted and

---

78 Section 10(1-A).
79 Section 10(6).
80 Section 10(6)(a).
81 Section 10(6)(b)

no existing provision has been amended to confer any power to deal with unfair labour practices while enacting the law for the same in 1982.

Thus the study of the purposes for which the Works Committee Conciliation Officers, Boards of Conciliation, Courts of Inquiry, Labour Court Industrial Tribunal and the National Tribunal have been constituted, the jurisdiction and the power conferred upon them, the duties entrusted to be discharged by them and the procedure prescribed to be followed to exercise the jurisdiction or discharge the duties assigned to them under the Act, makes it crystal clear that none of these authorities had been given any jurisdiction or power or duty to intervene, investigate, inquiry, adjudicate or deal with the unfair labour practices in any manner at any stage by the Parliament while enacting the law an unfair labour practices in 1982 by passing the Industrial Disputes (Amendment) Act, 1982.

(c) Recognition of Trade Union :

Recognition of the representatives of the Workmen is the basic condition not only for collective bargaining but also for negotiations under a system of tripartism, i.e. employer, labour and Government, adopted under the Act, for settlement of grievances and disputes. The Industrial Disputes Act, 1947 Trade Unions Act, 1926 or the Industrial Employment (Standing Orders) Act, 1946 do not contain any provision prescribing any procedure or substantive statutory right for the recognition of any trade union or an obligation of the employers to recognize any trade union of workmen whatsoever majority it may command. The Trade Unions Act, 1926 merely provides for registration of unions,[82] conferring certain rights and immunities from criminal and civil liabilities,[83] to every registered union under the Act. But registration of trade union cannot be taken as recognition, of a trade union. Recognition of a trade union confers on it the right to participate in collective bargaining and thereby to take a hand in shaping managerial decisions. Recognition also confers a status on the union to represent the workers and as a bargaining agent.[84] The Indian Trade Union (Amendment)

---

82 Section 8.
83 Section 6,13,15,16,17 and 18
84 Secretary Meters Staff Association v. United Electrical Industrial Ltd., (1984) II LLJ 446.

Act, 1947 provides provision relating to recognition of trade unions but till today this Act has not been brought into force.

Thus in the absence of any statutory law for recognition, applicable for the entire Central Industrial Sector in India no union can claim a recognition as a matter of right. At the same time no institution like Board or Industrial Court has been created nor any of the authorities constituted under the Act has been empowered to deal with recognition matter independently. The Code of Discipline in Industry, 1958 though created some understanding between the employers and the union on this subject, but that has no statutory force and any right created thereunder cannot be enforced by union against any employer claiming such right to recognition. So the employers have been left free to recognize any union they linked according to their own whims, caprice and arbitrary discretion which unnecessarily increased the multiplicity of union and inter-union as well as intra-union rivalry, thus served interests of the employers in breaking the solidarity of the labour which in itself is also an unfair labour practices on the part of employer for which the labour is compelled to strike, agitate and resort to other pressuring tactics against the employers who in term resort to disciplinary actions against workmen and their trade union under the cover of misconduct under the Industrial Employment (Standing Orders) Rules, 1946 empowering the employer to dismiss, discharge, terminate, suspend or reduce in rank or impose any other punishment upon the workmen.[85] Thus there is an imbalance of obligations between employer and the workmen and their trade union. Where the employer are not kept under any obligation to recognize any union claiming recognition howsoever majority it may command and fulfil the other conditions in that regard, the arbitrary refusal of recognition invites agitation and other pressure tactics but the workmen and their unions are kept under obligations to maintain discipline and production in industry under the cover of misconduct under the Industrial Employment (Standing Orders) Rules, 1946 framed under the Industrial Employment (Standing Orders) Act, 1946. Thus in the absence of any statutory law on this subject applicable to Central Industrial Sector, the recognition matters are not dealt with properly in this sector and the Industrial Disputes Act has no provision to deal with this problem of recognition

[85] Rule 14 of the Industrial Disputes Central Rules, 1957

in any manner. Accordingly the recognition cases are not dealt with properly under this Act, or any other Central law enacted and enforced so far applicable to the Central Industrial Sector.

(d) Provisions Dealing With Unfair Labour Practices :

Section 2(ra) defines unfair labour practices to mean, any of the practices specified in the Fifth Schedule. The Fifth Schedule specified sixteen items of unfair labour practices on the part of employers and trade unions of employers and eight items of unfair labour practices on the part of workmen and their trade union, which have already been dealt with in separate chapters, chapter V-C of the Act dealing with unfair labour practices consists of two Sections only i.e. Section 25-T and Section 25-U which are reproduced hereunder with Section 34 also providing for cognisance:-

(i) 25-T. Prohibition of Unfair Labour Practices :

"No employer or workman or a trade union, whether registered under the Trade Unions Act, 1926, (16 of 1926), or not, shall commit any unfair labour practice."

Thus Section 25-T provides for the prohibition of the commission of unfair labour practices by employer or workman or a trade union whether registered under the Trade Union Act, 1926 or not. The words, "a trade union whether registered under the Trade Unions Act, 1926, or not" covered under the prohibition of this provision in addition to the employer and the workman employed in any industry failing within the meaning of Section 2(j) of the Act. At the same time the term "a trade union" without any adjective must mean a trade union not only of the workmen but also of the employers. So this provision covers the trade unions of the employers apart from that of the employers. So this provision covers the trade unions of the employers apart form that of the workmen also. Thus the employers, the workmen and their registered and unregistered trade unions are covered by the prohibition of unfair labour practices under this provision.

(ii) Penalty for Committing Unfair Labour Practices :

Section 25-U speaks about penalty for committing Unfair Labour Practices. It is as follows :

"Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both."

(iii) Cognizance of Offences :

No Court shall take cognizance of any offence punishable under this Act[86] or of the abatement of any such offence, save on complaint made by or under the authority of the appropriate Government.[87]

No Court interior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act."[88]

Thus Section 25-U provides for penalty for committing unfair labour practice and mandates that whoever is guilty of any unfair labour practice can be punished with imprisonment for a term upto six months or with fine upto one thousand rupees or with both, on being prosecuted before the competent Court on a complaint made by or under the authority of an appropriate Government under Section 34(1) read with Section 25-U of the Industrial Dispute Act. Therefore unfair labour practices under the Industrial Disputes Act are directly dealt with as substantive offence without being preceded first by any adjudication by a competent Court regarding such commission of unfair labour practice.

If any person i.e. employer or workman or a trade union commits any unfair labour practice then such person may be prosecuted on complaint made by or under the authority of the appropriate Government only. So the commission of any unfair labour practice by any person must be complete before a complaint is made for his prosecution by or under the authority of the appropriate Government.

---

86 Industrial Dispute Act, 1947
87 Section 34 (1)
88 Id. section 34 (2)

The word, "commit" used in Section 25-T as well as Section 25-U indicates the finality of the act of commission of unfair labour practice. Therefore it is the completed, finished and final acts of unfair labour practices that constitute the cause of action for making any complaint by or under the authority of the appropriate Government for the prosecution of any person who has committed such unfair labour practice. In addition to that there can be no prosecution unless the offence is complete, and incomplete offence does not confer valid cause of action for prosecution. So the scope of the cause of action to make complaint is confined and limited to the stage of completed finished and final acts of commission of unfair labour practices and no cause of action accrues before that stage if the act of unfair labour practice is continuous, unfinished and incomplete.

The words, "no court shall take cognisance of any offence under this Act" prohibit any Court from taking cognizance of any offence under the Act. In other words all the offences under the Act have been made non-cognisable. The bar created under this provision cannot be taken away "save on complaint made by or under the authority of the appropriate Government." Thus the cognizance of the offence of unfair labour practice cannot be taken by any Court competent to try the same on the complaint made by any other person who has not been authorized to do so by appropriate Government even if he is the victim of the offence of unfair labour practice.

The object of this provision is to avoid false and frivolous complaints and thereby save the party from harassment, that precisely for that reason the Government is required to apply its mind and determine the propriety of the filing of the complaint.[89] So this provision confers two powers on the appropriate Government firstly, to make a complaint itself and secondly, to authorize making of a complaint. As it appears from the language of the Section, it is only a mandate to the Government and confers no power on it. It also prohibits the Court from taking cognizance of any offence punishable under the Act unless the complaint is made by or under the authority of the appropriate Government.[90] Thus when an offence under the Act has been committed, the appropriate

---

89 F.K. Menzlin v. B.P. Premakumar, (1991) I LLJ 55 at p. 58 (Kant.DB).
90 S.N. Hada v. Binny Ltd. Staff Association, (1988) I LLJ 405.

Government will decide whether it will make the complaint itself or whether it will authorize somebody else to make the complaint. In the absence of any specific enabling provision in the Act or the Rules made thereunder, the victims of the unfair labour practices have been specifically deprived of their valuable rights of legal remedies for the unfair labour practices under the Industrial Disputes Act.

The Court who could take cognizance and try such offence have been specified in Section 34(2) of the Act, which states that no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under the Act. Therefore the Court of Metropolitan Magistrate or Judicial Magistrate of Ist class has been empowered to take cognizance and try the offence of commission of any unfair labour practices on the complaint of the appropriate Government only. So it must be taken as established that the Courts of Metropolitan Magistrate or Judicial Magistrate Ist Class have been empowered to deal with the complaints for the offence of commission of unfair labour practice against any person, so competent to deal with them.

No provision has been enacted in the Industrial Disputes Act or the Rules made thereunder which could deal with the complaints for unfair labour practices or prescribe the period of limitation for filing the same either by the aggrieved persons before any of the authorities constituted under the Act or before the appropriate Government. it has already been found that the Cr.P.C. has to apply for making the complaints by the appropriate Government before the Courts of Metropolitan Magistrate or the Judicial Magistrate Ist Class as the case may be, for taking cognizance and for the trial and punishment thereon. Therefore in the absence of any provision enacted in the Act or the Rules made thereunder to deal with the filling of the complaints by the aggrieved persons to the appropriate Government or by the appropriate Government to the Court competent to deal with them as discussed above the provisions of the Cr.P.C. have to apply in that regard.

Chapter XXXVI running through Section 467 to 473 prescribes limitation for taking cognizance of certain offences. Section 468 provides for the bar from taking cognizance of the offence after lapse of period of limitation whereas

Section 469 for the commencement of the period of limitation, Section 470 for the exclusion of time in certain cases, Section 471 for exclusion of date on which Court is closed, Section 472 for continuing offence and Section 473 for the extension of period of limitation in certain cases out of which it is necessary to reproduce relevant part of Section 468 which runs as under :-

"468. (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of any offence of the category in sub-section (2) after the expiry of the period of limitation.

(2) The period of limitation shall be –

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

Section 25-U states the punishment of imprisonment for a term which may exceed to six months for the offence of commission of any unfair labour practice. So by reason of Section 468(2)(b) of the Cr.P.C. the period of limitation for taking cognizance of the offence is one year only from the date of the commission of the offence or where such date is not known to the aggrieved person, for the first day of knowledge of such person whichever is earlier of where it is not known by whom the offence was committed, the first date on which the identity of the offender known to the aggrieved person or the police officer whichever is earlier.[91] Thus it must be crystal clear that the appropriate Government has to file a complaint for any unfair labour practice before the Court within one year from the date of the commission of such practice or the date of knowledge whichever is earlier for trial and punishment on valid cognizance after which no such cognizance can be taken for such practice unless the delay has been properly explained to the satisfaction of the Court at the time of filing of complaint.

[91] Section 469(1)(a), (b) and (c).

The Industrial Disputes Act and the Rules made thereunder do not prescribes any form of complaint that can be made therein either by the aggrieved persons to appropriate Government or by the appropriate Government to the Court. At the same time the pleading of the complaint have not been prescribed with certain details of information to be given therein. Since the Cr.P.C. applies to the complaint that may be made by appropriate Government to the Court for trial or punishment so the term complaint has to be taken as defined in the Cr.P.C. which means, any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.[92] However a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognisable offence is deemed to be a complaint, and the police officer by whom such report is made is deemed to be the complaint.[93] The term non-cognizable offence has been defined to mean an offence for which a police officer has no authority to arrest without warrant,[94] and the offence means any act or omission made punishable by any law for the time being in force.[95]

In accordance with the language of the provision contained under Section 2(d) of the Cr.P.C. a complaint must have the following essential ingredients:-

(i) It must contain any allegation made therein:

(ii) Such allegation may be oral or in writing:

(iii) Such allegation must have been made to the Magistrate:

(iv) Such allegation must have been with a view of an action to be taken under the Code;

(v) It must contain that some person committed an offence;

(vi) That person may be known or unknown; and

---

92 Section 2(d)
93 Explanation under Section 2(d)
94 Section 2(i)
95 Section 2(n)

(vii) It must not be a police report, which means a report forwarded by a police officer to a Magistrate under Section 173(2).[96]

Thus the appropriate Government, who is to make a complaint to a Metropolitan Magistrate or to a Judicial Magistrate Ist Class must contain the aforesaid information with material particulars therein.

The Industrial Disputes Act and the Rules made thereunder do not prescribe any procedure that may be followed by any aggrieved person for making any complaint for the commission of any unfair labour practice to the appropriate Government and the scrutiny or inquiry or investigation of such complain by the appropriate Government before it takes the decision to file any complaint before the Metropolitan Magistrate or Judicial Magistrate of Ist Class. Therefore it has been left to the unguided and absolute discretion of the appropriate Government as to how it comes to the conclusion that a complaint for any unfair labour practice should be filed in any case or not. The act does not lay down any guideline in that regard and the Rules made thereunder are absolutely silent about the treatment of unfair labour practices. But it is undoubtedly clear that once a complain is made by the appropriate Government to a court of the metropolitan Magistrate or judicial Magistrate Ist Class, the Cr.P.C. applies accordingly the procedure prescribed for the complaints therein applies to such complaints and the Court conducts the proceedings thereon according to the procedure prescribed in that regard.

An employer or a trade union of employers may commit any of unfair labour practices enumerated in the Fifth Schedule, against any woman or his trade union and at the same time any workman or his trade union may commit any unfair labour practice against their employer and both employers and workman and their trade unions do indulge in the commission of such unfair labour practice so in order to control the same the appropriate Government must file the compliant for the prosecution and punishment of any person for committing any of the unfair labour practices in the Criminal Court of a Metropolitan Magistrate or a Judicial Magistrate Ist Class against the employers as well as workmen and

[96] Section 2(r).

their trade unions. Since the commission of any unfair labour practice has been defined as an offence under S.25-U of the Act, so any person against whom a complaint is filed must be treated as an offender alleged to have committed such offence stated in the complaint, filed in such Courts. The moment the cognizance of such offence is taken on such complaint and that person is summoned as an accused he is designated as accused of that offence through out the trial, of such case. If on the conclusion of trial he is found guilty of committing any of unfair labour practices he is then adjudged as convict of such offence, and ultimately if sentenced to any term of imprisonment upto six month or fine upto one thousand or with both and sent to undergo such sentence, he is designated as convict and prisoner for all practical purposes, for such offence. Thus the employers as well as the workmen and their trade unions who are the partners of the industrial production in the country are criminalised and stigmatised by words offenders, accused, culprit, convicts and the prisoners and are subjected to face all sort of humiliation, harassment and degradation as such person through out the trial which cannot and does not end in days and months but in years and some times in decades in India.

It has just been discussed that under the Industrial Disputes Act that the partners of industrial production in the country are criminalised, and stigmatised as the offenders, accused, convicts and prisoners and are subjected to humiliation harassment and degradation as such person through out the trial from beginning to end. The appropriate Governments are also the major employers in the public industrial sector therefore the officers and managers of such industry must also be subjected to such degradation and humiliation and also stand criminalised and stigmatised as such offenders accused convicts and prisoner if they commit any unfair labour practice in such industrial sector so liable to be prosecuted and punished. Dismissal discharge termination and removal of workmen from their services are the normal unfair labour practice by such employers and as such subject to prosecution and punishment. No Government would like to prosecute and punish their own officers who manage and run the public sector industries. It is for this reason that the appropriate Government had rarely resorted to file any complaint for prosecution of workmen and their trade unions because prosecution of workmen and their trade union must have necessarily invited to prosecute and

punish the employers also, i.e. officers who manage and run the public sector industries. When there had been rare complaint there was rare trial and rare punishment. It is because of this reason that despite the twenty five years have passed after passing and enforcement of Industrial Disputes (Amendment) Act 1982 w.e.f. 21.8.1984 in respect of the unfair labour practices but no case of prosecution and punishment of any employer and workmen or their trade union has been reported at Central level, or state level, where the Industrial Disputes Act applies. It is because of this reason that the appropriate Government were reluctant to file complaints for the prosecution and punishment of any person for committing any unfair labour practice. Therefore prosecution and punishment of the persons who committed unfair labour practices were rarest among the rare. Or in other words it was almost negligible.

The Courts of the Metropolitan Magistrate or Judicial Magistrates are competent only to award sentence upto six months or fine upto 1000 rupees or with both as per their discretion if benefit of probation is not granted to the convict after holding him guilty for the offence. Thus sentence is the only remedy the Criminal Courts can award on the convicts only and the Cr.P.C. as well as the Industrial Disputes Act do not confer any power upon Criminal Courts to grant any other relief or remedy like declaratory relief, cease and desist order, compensation to the workmen, reinstatement of workmen, backwages or any other relief which are necessary to be granted to the workmen against the engagement of any unfair labour practices enumerated under item 1 to 16 on the part of the employer, and the cancellation of recognitionof union, suspension of certain rights of union, interim relief including temporary relief of restraining order or direction to the person to withdraw temporarily the practice complained of pending final decision of the complaint, to any person aggrieved of any unfair labour practice which are necessary to be granted to the employer against the engagement of any unfair labour practice enumerated under items 1 to 8 on the part of workmen and their trade unions.

Therefore from the above detailed discussion it can be concluded that no relief is available to the workmen or their trade unions against the unfair labour practices on the part of employers and to the employers against the unfair labour

practices on the part of the workmen and their trade unions under the Industrial Disputes Act. Accordingly there is perfect justification to conclude that no effective, efficient, expedient or equitable relief or remedy is available to the workmen and their trade unions against the unfair labour practices on the part of employers or to the employer against the unfair labour practices of workmen and their trade unions under the Industrial Disputes Act.

(2) The Bombay Industrial Relations Act, 1946 :

The Government of Bombay enacted the Bombay Industrial Relations Act, it was enforced in 1947. The Act is based on three Gandhian principles namely, negotiation, conciliation and arbitration. This Act extends to the state of Maharashtra and Gujrat.[97]

The principal objectives of the Act are, to regulate relations between employers and employees and to promote harmoneous relations between them; to promote collective bargaining.

In the Act, there are special provisions to provide for protection of employees in certain circumstances against unfair labour practice of employers, imposing penalties for certain acts, which are in the nature of unfair labour practices, although that expression has not been used in the Sections.

Likewise, the C.P. and Barar Industrial Disputes Settlement Act,[98] 1947, the Kerala Industrial Relations Bill,[99] 1959 and the Madhya Pradesh Industrial Relations Act, [100] 1960; provide for protection of employees in certain circumstances against unfair labour practice of employers. All these provisions also prescribe the penalty for such unfair labour practices. Any employer committing unfair labour practice is punishable with fine which ranges between one thousand to five thousand rupees. The court ordering the fine may direct that the fine realised shall be paid to the employees—who were injured by such unfair labour practice by way of compensation.

---

97 Sec. 1 of the Act 1946
98 Sections 42 and 47.
99 Clause 39.
100 Sections 83 and 86.

(3) The Remedial Measure under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 :

In February 1968, the Government of Maharashtra set up a tripartite committee called the Committee of Unfair Labour Practices under the chairmanship of Justice V.A. Naik. It defined certain activities on the part of employers and trade unions as unfair labour practice. The Committee was of the opinion that the unfair labour practices could not be considered in isolation except in the context of collective bargaining and hence recommended legislation for the purpose of granting recognition to unions as sole bargaining agents and also to legally prohibit certain unfair labour practices.

The Government of Maharashtra subsequently introduced a Bill in the State Legislature and the same was passed in March 1971 and it received the assent of the President of India in February 1972. It came into force on 8 September, 1975.

Object of the Act - (1) Recognition of a representative union which would act as an exclusive bargaining agent for an undertaking; and (2) prevention of unfair labour practices on behalf of employers and trade unions.

The Act extends to the whole State of Maharashtra.

The Act Prohibits[101] on engaging in unfair labour practices both employers or unions and employees. It laid down procedure[102] for dealing with complaints relating to unfair labour practices. An order[103] of the court shall be binding all parties to the complaint, all, parties who were summoned to appear as parties to the complaint, in the case of an employer who is a party to the complainant before such court in respect of the undertaking to which the complaint relates, his heirs, successors or assigns in respect of the undertaking to which complaints relate, .

---

[101] Section 27.
[102] Section 28.
[103] Section 29.

Schedule II of the Act listed unfair labour practices on the part of employer Schedule III enumerated, unfair labour practices on the part of trade unions and Schedule IV, General unfair labour practices on the part of employer.

(a) Policy :

The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971, here in before and after referred to as the Maharashtra Act has been enacted for the objectives, to provide for the recognition of trade unions for facilitating collective bargaining for certain undertaking, to state their rights and obligations, to confer certain powers on unrecognized union, to provide for declaring certain strikes and lock-outs as illegal strikes and lock-outs, to define and provide for the prevention of certain unfair labour practices, to constitute Courts (as independent machinery) for carrying out the purposes of according recognition to trade unions, for enforcing the provisions relating to unfair practices, and to provide for matters connected with the purposes aforesaid.[104] To achieve these objectives stated in the preamble of the Act which specifically include: (1) The Recognition of Trade Unions for facilitating the collective Bargaining for certain undertakings; and (2) Prevention of Certain Unfair Labour Practices, certain authorities in the form of independent machinery has been provided certain special jurisdictions and powers had been conferred; on them; certain procedure has been prescribed and certain special remedies have been provided which in substance constitute the remedial measures thereunder.

(b) Authorities Constituted :

To achieve those objective the Act constitutes Industrial Court, Labour Courts and Investigating Officers in Chapter II as the authorities under the Act an independent Machinery, thereunder.

(i) Industrial Court :

- *Structure*

Section 4 of the Act provides for the constitute of an Industrial Court for the entire Maharashtra State that has been constituted at Bombay by the State

[104] Preamble

Government. It consists of not less than three members one of whom is to be the President. Every member to be appointed must be a person who was or has been Judge of a High Court or was eligible for being appointed as a Judge of such court. However one member may be a person who is not eligible if he possesses knowledge of labour or industrial matters in the opinion of the State Government. Every member must be an independent person not connected with the complaint referred to that Court or with any industry directly affected by such complaint and a member is deemed to be connected with a complaint or with an industry if he has shares in a company which is connected with or likely to be affected by such complaint.[105]

- *Jurisdiction Conferred*

The jurisdiction conferred on Industrial Court has been defined with the application of the Act with respect to be industries to which the Bombay Industrial Relations Act, 1946 applies and to any industry defined under Section 2(j) of the Industrial Disputes Act, 1947 and the State Government in relation to any industrial dispute concerning such industry is the appropriate Government under the Act. However the State Government has been empowered to direct to cease the application of this Act to any industry from any date specified in the notification and from that date this Act ceases to apply to that industry as if this Act has been repealed in relation to such industry by a Maharashtra Act by application of Section 7 of the Bombay University Clauses Act, 1904.[106]

- *Powers Vested*

An Industrial Court constituted under this Act has been vested with the quasi judicial, administrative and legislative i.e. rule making powers exercising administrative superintendence and control over the Investigating Officers and the Labour Court constituted under the Act. It is charged with quasi-judicial powers while it has been empowered to decided; (1) The application of the unions for the grant of recognition, applications of union or an employer for withdrawal or cancellation of the recognition of a union; (2) The complaints relating to unfair labour practices except an unfair labour practice falling in item 1 of Schedule IV;

---

105 Section 4.
106 Section 2(3) read with proviso thereunder.

and (3) The references made to it on any point of law either by any civil or criminal Court and certain appeals from the orders of the Labour Courts.[107] It has been vested with administrative powers while it has been empowered to assign the work and direct the Investigating Officers to verify the membership of unions and investigate the complaints relating to unfair labour practices[108] and to withdraw any proceeding under this Act pending before a Labour Court and transfer the same to another Labour Court of disposal for reasons to be recorded either de novo or from the stage at which it was so transferred.[109] It has been vested with legislative powers while it has been empowered to make Regulations consistent with the provisions of this Act and Rules made thereunder regulating its procedure providing for the formation of Benches consisting of three or more of its members including Full Benches consisting of three or more members and the exercise by such Bench of the jurisdiction and powers vested in them[110] and to exercise superintendence over Labour Courts by making and issuing general Rules and prescribing forms for regulating the practice and procedure of such Courts in matters not expressly provided for by this Act and in particular for securing the expeditious disposal of the cases.[111] The decision, order or declaration made by the Full Bench of the Industrial Court is made binding and to be followed in all proceedings under this Act.[112]

While deciding the complaints for unfair labour practices, if it finds that any person named in the complaint has engaged in or is engaging in any unfair labour practice it has been empowered to "declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in or is engaging in an unfair labour practice; direct all such persons to cease and desist from such unfair labour practices; and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice or reinstatement of the employee or employees with or without back wages or the payment of reasonable compensation), as may in its opinion be necessary to effectuate the

107 Section 5(a), (b), (c), (d), (f) and (g)
108 Section 5(e)
109 Section 45.
110 Section 33.
111 Section 44.
112 Section 35.

policy of the Act.[113] It has also been empowered to pass such interim order including any temporary relief or restraining order as it deems just and proper including direction to the person to withdraw temporarily the practice complained of, which is an issue in such proceeding pending final decision and may review any interim order passed by it on an application in the regard.[114] For the purpose of holding an inquiry or proceeding it has been vested with the same powers as are vested in Civil Courts in respect of proof of facts by affidavit, summoning and enforcing the attendance of any person, and examining him on oath, compelling the production of documents, and issuing commissions for the examination of witnesses[115] apart from the powers to call upon any of the parties to the proceedings before it to furnish in writing, and in such forms as it may think proper any information which is considered relevant for the purpose of any proceedings before it, and the party so called upon has to furnish the information to the best of its knowledge and belief and if so required by the Court to do so verify the same in such manner as may be prescribed.[116] In respect of offence punishable under this Act, it enjoys all the powers of the High Court of judicature at Bombay under the Code of Criminal to confirm, modify to or rescind any order of the Labour Court appealed against or for enhancement of a sentence awarded by a Labour Court, and may pass such order thereon as it may deem fit.[117]

(ii) Labour Courts :

The act empowers the State Government to constitute one or more Labour Courts having jurisdiction in such local areas, as may be specified in the notification and appoint persons having the prescribed qualifications to preside over such Court.[118] A person is not, eligible to be appointed to preside over a Labour Court, unless he is or has been an officer of the Judicial Service in the State and satisfies the requirements of Section 6 of the Act, or possess the following qualifications namely :-

---

113 Section 30(1)(a) and (b)
114 Section 30(2).
115 Section 30(3).
116 Section 30(4).
117 Section 43.
118 Section 6(1)

(i) (a) he is a Bachelor of Laws of a recognized University; or

(b) he has passed the examination for pleaders held by the High Court of Judicature at Bombay; or

(c) he has passed the Advocates Examination conducted by the Bombay Bar Council; or

(d) he has been admitted to the Bar of England, Northern Ireland or Scotland; and has practiced as an Advocate or Pleader in the High Court or Courts subordinate to it for not less than seven years;

(ii) he has sufficient knowledge of Marathi to enable him to speak, read and write and translate with facility from the written- character into English and vice-versa; and

(iii) he has had practical experience of labour and industrial problems or has done research in such problems or made a study of labour and industrial laws.[119]

The Labour Court has been assigned the duties to decide the complaints relating to unfair labour practices described under item 1 of Schedule IV and to try offences punishable under this Act.[120] It has been empowered to decide the references made by the State Government or the employer for the declaration of a strike proposed or commenced, as illegal and references made by State Government or a recognised union or any other union of employees for declaration of any lock-out proposed or commenced by an employer as illegal.[121] All the powers enjoyed by an Industrial Court to decide complaints for unfair labour practices provided under Section 30 are also vested in the Labour Courts to decide the complaints for unfair labour practices under item 1 of Schedule IV. It has been empowered to try offences punishable under this Act.[122] In respect of offences punishable under this Act Labour Courts have been vested all the powers

[119] Rule 3, of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Rules 1975.
[120] Section 7.
[121] Section 25.
[122] Section 39.

under the Code of Criminal Procedure 1898 of a Presidency Magistrate in Greater Bombay and a Magistrate of the First Class elsewhere and in the trial of every such offence empowered to follow the procedure laid down in Chapter XXII of the said code of summary trial in which an appeal lies and rest of the provisions are to apply to such trial.[123]

(c) Investigating Officers :

Section 8 and 9 provide for the appointment of Investigating Officers for any area, having duty to assist in matters of verification of membership of union, investigation of complaints for unfair labour practices and reporting the existence of any such practice in any industry or undertaking to Industrial Court and Labour Courts, under the control of the Industrial Court.[124]

In order to discharge the duties imposed or assigned, an Investigating Officers. Subject to certain conditions, at any time during working hours and outside working hours after a reasonable notice, has been empowered to enter and inspect – any place used for the purpose of any undertaking, or as the office of any union: any premises provided by an employer for the residence of his employees: to call for and inspect all relevant documents which he may deem necessary for the due diligence of his duties and powers under this Act.[125] He has been empowered to convene a meeting of employees for any of the purposes of this Act on the premises where they are employed and may require the employer to affix a written notice of the meeting at such conspicuous place in such premises as he may order and he may also affix or cause to be affixed such notice specifying the date, time and place of the meeting, employees or class of employees affected, and the purpose for which the meeting is convened. He is also embowered to appear in any proceeding under this Act, to call for and inspect any document which he considers to be relevant to the complaint or to be necessary for the purpose of verifying the implementation of any order of the Court or carrying out any other duty imposed on him under this Act and for the

---

123 Section 40.
124 Section 9 read with Sections 28 and 37.
125 Section 37 (2).

aforesaid purposes, the Investigation Officer has the same powers as are vested in Civil Court under the Code of Civil Procedure 1908 in respect of compelling the production of documents.[126]

(d) Procedure Prescribed :

The recognition of trade unions for collective bargaining; and prevention of certain unfair labour practices are the two types of proceedings usually brought before or handled by the Industrial Court except the complaints for one type of unfair labour practices which are handled by the Labour Courts. So these proceedings are called the recognition proceedings and the complaint proceedings, for the purpose of this study, which involve the determination of recognition cases and complaint cases.

(i) Recognition Cases :

Chapter III deals with the recognition of unions. Section 10 specifies the application of this chapter. Section 11 prescribes the conditions for making application by any union for recognition. Section 12 provides for recognition of a union on satisfying the conditions there for. Section 13 provides for cancellation of recognition and suspension of rights. Section 14 provides for recognition of another union in place of a recognized union. Section 15 specifies the conditions of applications for re-recognition. Section 16 provides for the liabilities of union or members which are not relieved by cancellation and Chapter IV prescribes the obligation and the rights of recognized and other unions and certain employees through Sections 19 to 23.

A combined reading of Sections 11, 12, 13, 14 and 15 which are the most material provisions in that regard have the effect that the recognition cases involve as Certification of recognition; De-certification or withdrawal of recognition ; De-authorization or cancellation of recognition and Suspension of Rights.

---

[126] Section 37 (4), (5) and (6).

- *Certification of Recognition*

The provisions of Chapter III apply to every undertaking where fifty or more employees are employed or were employed on any day of the preceding twelve moths.

However the State Government has been empowered to apply these provisions to any other undertaking employing less than fifty employees after a notice of not less than sixty days, by a notification in the official Gazette. But the provisions of this chapter do not apply to the undertakings in the industries to which the provisions of the Bombay Industrial Relations Act, 1946 for the time being applies; and if the number employed in any undertaking to which the provisions of this chapter apply, at nay time falls below fifty continuously for a period of one year these provisions cease to apply to such undertaking.[127]

The Bombay Industrial Relations Act, 1946 contains Chapters III and IV consisting Ss. 11 to 26 providing for the registration of union and approved unions and Chapter V consisting Ss. 27 to 30 contains the provisions relating to representative unions and recognized unions. Wherever this system of registration of approved unions, representative unions and recognized unions under the Bombay Industrial Relations Act, 1946 applies, the Maharashtra Act does not apply for the put-pose of the recognition of unions. S. 10(2) clarifies this matter. So the provisions of this chapter intend to cover those workmen who were not covered by the provisions of the BIR Act, 1946.

A case for certification of recognition apses when any union having a membership of not less than thirty per cent of the total number of the employees in any undertaking for a period of six calendar months immediately preceding the calendar month of the application.[128] applies for being registered as a recognized union for such undertaking in Form A prescribed in that regard[129] to the Industrial Court, on payment of a fees of Rs. 5/. prescribed[130] After preliminary scrutiny of such application being in order, a notice is caused to be displayed on the notice

---

127 Section 10
128 Section 11(1)
129 Rule 4 of the Industrial Disputes Central Rules, 1957.
130 Rule 5 of the Industrial Disputes Central Rules, 1957.

board of the undertaking declaring to consider the said application on the date specified in the notice and calling upon the other union or unions, if any, having membership of employees in that undertaking and the employers and employees affected by the proposal, to show cause within a period of eight days prescribed,[131] as to why the recognition should not be granted to the applicant union.[132] After considering the, objections if any from any other union or unions, employers or employees and after holding such inquiry in the matter as it deems fit, if the industrial Court comes to the conclusion that:-

(a) the applicant union has membership not less than 30% of the total number of the employees in the undertaking for a period of six calendar months immediately preceding the calendar month of the application;[133]

(b) the obligations in respect of membership subscription; meetings of executive committee at the intervals not more than three months; recording of all resolution passed by the executive committee or general body in a minute book and auditing of the accounts once in every financial year by the State Government are complied with;[134]

(c) no other union has been recognised for that undertaking for that time;[135]

(d) the application for recognition has been made bona fide, in the interest of employees and not mala-fide in the interest of employer to the prejudice of the interest of employees;[136] and

(e) at any time, within six months immediately preceding the date of the application for recognition, the union had not aided, instigated or assisted the commencement or continuance of a strike deemed to be illegal under this Act,[137]

---

131 Rule 6 of the Industrial Disputes Central Rules, 1957.
132 Section 12 (1).
133 Section 11(1).
134 Section 19.
135 Section 12(4)
136 Section 12(5)
137 Section 12(6).

The industrial Court has to grant recognition to the applicant-union and issue a certificate of such recognition in Form B prescribed.[138] But any of the other unions, which has notified its claim for recognition, if satisfies the above said conditions requisite for recognition and found to have the largest membership of employees in the undertaking, such other union shall be recognised by the Industrial Court.[139] If file recognition of any union has been cancelled on any one of these two grounds: - (1) it was recognised under a mistake; or (2) the membership of the union has fallen below 30% for a continuos period of six. calendar months, such union may also apply for recognition after three months of such cancellation, and if the recognition has been cancelled for any other ground such union may not apply for recognition except with the permission of the Industrial Court within a period of one year from the date of such cancellation.[140]

- *Decertification or Withdrawal of Recognition*

The cases of decertification or withdrawal of recognition arise when another union is granted recognition and a certificate of such recognition is issued by the Industrial Court to such union in place of an already recognized union in an undertaking. Because by reason of S. 12(4) there cannot be, at any time, more than one recognized union in respect of the same undertaking, the recognized union stands decertified or the recognition stands withdrawn after such other union is granted recognition and certificate of such recognition is issued to such union. S.14 provides the law substantive as well as procedural, for decertification or withdrawal of recognition of unions. The Scheme of this chapter clarifies that out of the various unions of employees who apply for recognition under this chapter, the union having the largest membership has to be recognized and registered.[141] The same principle has been incorporated under S.14.

According to provisions of S.14, any union can apply to industrial Court for being registered as a recognized union in place of a recognized union already registered as such recognized union, for an undertaking on the grounds that it has the largest membership of employees employed in such undertaking after a period

---

138 Section 12(2) read with Rule 7.
139 Section 12(3).
140 Section 15.
141 Samyukta Khadan Mazdoor Sangh Rajnandgaon v. Hindustan Steel Ltd., 1973 JLJ 376.

of two years has elapsed since the date of registration of the recognized union, and a period of one year has also elapsed since the date of disposal of the previous application of that union. The application must be in Form C with Court fee stamp of Rs. 5/- [142] and also complies the other conditions requisite for recognition. On such application, the Industrial Court calls upon the recognized union by a notice in writing to show cause within thirty clays from the receipt of such notice, as to why the applicant union should not be recognized in this place. If the application is found in order on preliminary scrutiny on the expiry of the period of such notice the Industrial Court causes notice to be displayed on the notice board of the undertaking, declaring to consider such application on the date specified therein and calls upon other union or unions if any, having membership of employees in that undertaking, employer and employees affected by the proposal to show cause within prescribed time of eight days, [143] as to why recognition should not be granted after considering the objections if any received upon such notice, or holding such inquiry as it deem fit the Industrial Court finds that the applicant union complies with all the conditions necessary for the recognition and the membership during the whole of the period of six calendar months immediately preceding the calendar month in which the application was made, under S. 14, was larger than the membership of the existing recognized union, then Industrial Court shall recognize the applicant union in place of such recognized union and issue a certificate of recognition in form D prescribed.[144]

But in case any of the other unions is found to have the largest membership of employees employed in the undertaking and such other union has notified its claim for recognition for such undertaking and satisfies all the conditions requisite for recognition the Industrial Court shall recognize such other union and issue a certificate of such recognition in Form D, prescribed.[145]

- *Cancellation of Recognition*

The cancellation of recognition of a union may arise on any of the grounds mentioned in S.13 of the Act. Accordingly the Industrial Court can cancel the

[142] Rules 8 and 9 of the Industrial Disputes Central Rules, 1957
[143] Rule 10 of the Industrial Disputes Central Rules, 1957.
[144] Rule 11 of the Industrial Disputes Central Rules, 1957.
[145] Section 14(4)

recognition of a union after complying with the principles of natural justice i.e. after hearing the union on a show cause notice as to why the recognition should not be cancelled and holding an inquiry and on being satisfied that any one of grounds was found for cancellation of recognition: -

1. the union was recognised under mistake, misrepresentation or fraud, or

2. the membership of the union has fallen down below thirty percent for a continuous period of six calendar months, or

3. the recognised union has failed to observe any of the conditions in S. 19 after it was recognized, or

4. the recognised union has not been conducted bona-fide in the interest of employees, but conducted in the interest of employer to the prejudice of the interest of employees, or

5. the union has instigated, aided or assisted the commencement or continuance of a strike deemed to be illegal under the Act, or

6. the registration of the union under the Trade Unions Act 1926 has been cancelled, or

7. another union has been recognised in place of a recognised union under this Chapter, or

8. the union has committed any practice which is or has been declared as an unfair labour practice under this Act.

- *Suspension of Rights*

The Industrial Court has been given a discretion to cancel the recognition of a union where the Court finds after holding an inquiry upon a show cause notice, that the union has committed any unfair labour practice. However instead of cancellation of the recognition of the union, the Court may suspend all or any of the rights of the recognized union under S. 20(1) or S.23 if it forms such

opinion after having regard to the circumstances in which the practice has been committed and accordingly pass an order and specify the period for which such suspension may remain in force.[146] S.20 (1) specifies some of the substantial rights of a recognized union; (a) to collect subscription from the members from the members on the premises where wages are paid; (b) to put up or cause to be put up a notice-board on the premises of the undertaking in which its members are employed and affix or cause to be affixed notices thereon; (c) for the purpose of the prevention or settlement of an industrial dispute —(i) to hold discussion on the premises of the undertaking with the employees concerned who are the members of the union but so as not to interfere with the due working of the undertaking; (ii) to meet and discuss, with an employer or any person appointed by him in that behalf, the grievance of employees employed in his undertaking; (iii) to inspect, if necessary, in an undertaking any place where any employee of the undertaking is employed; (iv) to appear on behalf of any employee or employees in any domestic or departmental inquiry held by the employer. S.23 provides that the employees who are authorised by a recognized union to appear or act in certain proceeding, are to be considered on duty.

(ii) Complaints of Unfair Labour Practices :

- *Prohibition and its Scope*

No employer or union and no employee shall engage in any unfair labour practice, is the specific mandate of the Act.[147] The terms 'employer', 'union' and 'employee' indicate the category of three persons who are subject to such prohibition. The term 'employer' has been defined in relation to an industry to which the Bombay Industrial Relations Act, 1946 applies, means an employer as define in Clause (14) of S. 3 of the Bombay Industrial Relations Act and in any other case means an employer as defined in Clause (g) of S. 2 of the Industrial Dispute Act.[148] Thus the scope of the prohibition under S.27 with respect to an employer has been defined and extended not only to the employers as defined under S.3(18) of the Bombay Industrial Relations Act, 1946 but also to the

146 Section 13(2).
147 Section 27
148 Section 3(6)

employers as defined under S.2(g) of the Industrial Disputes Act in relation the industries to which such act applies.

The term 'union' has been defined to 'mean a trade union of employees, which is registered under the Trade Unions Act, 1926.[149] Thus in terms of this definition the scope of the prohibition of unfair labour practices with respect to union also stands defined and confined to a trade union of employees only and that too if it is registered under the Trade Unions Act, 1926 only. Therefore in other words the union of employers and the union of employees which are not registered under the Trade Unions Act, 1926 are not covered under the ambit of the prohibition of unfair labour practice under S.27 of the Act. Thus the scope of the prohibition under S.27 is narrow and confined to registered union of employees under the Trade Unions Act only and does not cover the unions of the employers whether registered under the Trade Unions Act or not and the unregistered trade unions of the employees.

The term 'employee' has also been defined in relation to an industry to which the Bombay Act for the time being applies, means an employee as defined in Clause (13) of Section 3 of the Bombay Act and in any other case, means a workman as defined in Clause (s) of Section 2 of the Central Act.[150] The Bombay Act means the Bombay Industrial Relations Act, 1946[151] and the Central Act means the Industrial Disputes Act, 1947.[152] Thus the scope of the prohibition under S.27 with respect to an employee has been defined and extended not only to the employee as defined under S.3(13) of the Bombay Industrial Relations Act but also to the workmen as defined under S.2(s) of the Industrial Disputes Act in relation to the industries to which such Act applies respectively.

Section 27 prohibits an employer or union or employee from engaging in any unfair labour practice, whereas section 25-T of Industrial Disputes Act prohibits employer or workman or a trade union from committing any unfair labour practice. The prohibition under the Industrial Disputes Act is against the commission of unfair labour practice which may include the final acts of such

149 Section 3(17)
150 Section 3(5)
151 Section 3(1)
152 Section 3(2)

commission. While S. 27 of the Maharashtra Act prohibits the concerned party even from engaging in any unfair labour practice. The word `engage' is more comprehensive in nature as compared to the word commit.[153] Under S.27 there is total embargo on the unions of the employees as well as the employees and also on the employer on engaging in any unfair labour practice. S.27 of Maharashtra Act gets attracted even at a prior stag when such unfair labour practice is sought to be resorted to by the employer by engaging himself in such an unfair labour practice. The prohibition against engagement in any unfair labour practices as mentioned in S.27 will cover all stages from the beginning to end when the process which is initiated by the concerned employer or the union in connection the alleged unfair labour practice starts and ultimately terminates.

- *Cause of Action for Complaints*

"Where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a compliant before the Court competent to deal with such complaint either under Section 5 or as the case may be, under Section 7 of this Act."[154] The words, "Where any person has engaged in or is engaging in any unfair labour practice," prescribe two substantial situations for filing a complaint against any person:- (1) where any person has engaged in any unfair labour practice and (2) where any person is engaging in any unfair labour practice. In other words a complaint may be filed against a person who either "has engaged in" any unfair labour practice or "is engaging in" any unfair labour practice. Accordingly these terms substantially define the stages and scope of filling the complaints for unfair labour practices against any person.

The term 'person' contemplates or covers three categories of persons, namely, employer, union and employee/employees because it is the employer only who can engage in any of the unfair labour practices mentioned in Schedules II and IV whereas it is the trade union only who can engage in any of the unfair labour practices mentioned in Schedule III either through it members or

[153] Hindustan Lever Ltd. v. Ashok Vishnu Kate, AIR 1996 SC 285(296)
[154] Section 28(1).

employees. So the term `person' covers these three categories of persons against whom a complaint may be filed, for engaging in any unfair labour practice.

The section uses the twin phrases has engaged in' and `is engaging in' to indicate that it not only covers the finished, complete or continuous action but also an incomplete continuous action. If it is said that only the final act of discharge or dismissal can be covered by the sweep of S. 28(1) then the terminology used by the Legislature "or is engaging in any unfair labour practice" would be rendered totally redundant and otiose, as such a completed action would already stand covered by the earlier phrase, "has engaged in any unfair labour practice." Similar words are found in S. 30(1) which deals with power of the Courts and provides that where the Court decided that any person named in the complaint has engaged in, or is engaging in any unfair labour practice, it may by its order give relief as mentioned in clauses (a), (b) and (c) of that sub-section. Thus scope of cause of action available for filling complaints under S. 28(1) of the Maharashtra Act is wide enough so as to cover not only the finished, completed, continuous and final action of unfair labour practice but also an incomplete and continuous action of unfair labour practice.

- *Locus Standi to File Complaints*

Where any person has engaged in or is engaging in any unfair labour practice, then "any union or any employee or any employer or any Investigating Officer may...file a complaint before the Court competent to deal with such complaint,"[155] well define the concept of locus standi for filling a complaint for engaging in any unfair labour practice, The terms "any union or any employee or any employer or any Investigating Officer" used in this provision confer specifically the right to file complaints for engaging in any unfair labour practice. In other words the right to file such complaints has been divided into four classes of persons namely 1. A union, 2. An employee, 3. An employer and 4. An Investigating Officer. A union or an employee may file complaint against an employer being aggrieved by any unfair labour practice whereas an employer may file complaint against a union or employees being aggrieved of any unfair labour

[155] Section 28(1).

practice of the union or his employees, and an Investigating Officer may file complaints against a union or employees or an employer whosoever engages in any unfair labour practice respectively. Thus first three categories of person incorporate the concept of locus standi being aggrieved of any unfair labour practice of other party whereas an Investigating Officer who has been empowered to file complaints against all the three person cannot be an aggrieved person in any manner. Thus the concept of locus standi has been extended beyond the concept of aggrieved person. Accordingly it must be held that special power to file complaint has been conferred on the Investigating Officers to deal with unfair labour practice effectively under the Act.

"Any union" will only mean a union of the employees employed in a particular industry and not any union whatsoever under the sky. A union should necessarily be a union of the employees employed in a particular industry and that union alone could file a complaint under this provision. The cause of justice will never suffer because under the provisions of Section 28(1) of the Act in such a case the employee himself can file a complaint of unfair labour practice. When the employee himself can file a complaint of unfair labour practice there is no reason for "any union" not connected with the industry to take u the cause of the employee and invite chaotic conditions in the labour field.[156]

However by reason of the provisions of S.21 of the Act a complaint of unfair labour practice covered by Items. 2 and 6 of Schedule IV can only be filed by a recognised union and if there was no recognised union in the establishment, the employee / employees may appear in person in any proceeding related to such unfair labour practices. The correct interpretation to place upon Section 21 is this: Where there is a recognised union only that recognised union can be allowed on behalf of an employee to appear or act or be represented in proceedings relating to unfair labour practices specified in Items 2 and 6 of the Fourth Schedule. Where there is no recognised union an employee may himself appear or act in any proceeding relating to such unfair labour practice. This does not mean that an unrecognised union cannot act or appear in a proceeding relating to such unfair

[156] F.Rehman v. Basoa and Company, (1982)II LLJ 120.

labour practice. It can represent an employee or the employee may appear himself if he so chooses. [157]

Where the employees of the contractors made a grievance that they were discriminated against in the matters of wages and other benefits and filed a complaint before the Industrial Court alleging Unfair Labour Practices within the meaning of items 5, 6 and 9 of Schedule IV and the Industrial Court dismissed the complaint, the Bombay High Court in its judgement[158] observed that in case[159] the Supreme Court has held that the provisions of S.21 of the Maharashtra Act did not lead to the conclusion that a Union other than a representative Union can appear in proceedings relating to all unfair labour practices, other than those specified in Items 2 and 6 of Schedule IV of the Act. Of the aforesaid Act nothing has been made in the judgement that the concerned employees directly affected could not maintain such a complaint. In any case the provisions of S.28 of the Act are clear and they give to the affected employees the right of moving the complaint against the employer. Such right can only be taken away by an express provision in the Act. There is no such provision in the Act. Hence the complaints by the employees affected invoking the provision of Items 5 and 9 of Schedule IV of Act are maintainable.

- *Limitation Period to File Complaints*

The provision under S.28(1) specifying, "where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint," clearly indicate the period of limitation for filing a complaint for any unfair labour practice enlisted in Schedules II, III and IV of the Act. The words, within ninety days of the occurrence of such unfair labour practice, make the specific condition to file complaint by the persons mentioned in this provision. However the Court may entertain a complaint after the period of ninety days from the date of the alleged

---

157 Petroleum Employees Union v. Bharat Petroleum Corpn. Ltd., 1983 MLJ 618.
158 Rama Bala Kate v. Walchandenagar Industries Ltd., (1996) I LLJ 713.
159 Shramik Utakarsh Sabha v. Raymond Woolen Mills Ltd., (1995) II LLJ 321.

occurrence, if good and sufficient reasons are shown by the complainant for the late filing of the complaint.

In order to ascertain whether the limitation has expired or not to entertain a complaint within ninety days, it is necessary to find out whether the activities complained of as unfair labour practices are of recurring nature, or whether the occurrence of the unfair labour practices was over once it was engaged in, any only the effect continues to flow there from. Where the occurrence is of recurring nature, the limitation would continue to extend as long as the occurrence continues. In other words, if the acts of partiality and favoritism continue from time to time the occurrence of unfair labour practice would be of a recurring nature, in such case the limitation will not come to an end on expiry of the ninety days from the date when the unfair labour practices were first committed. This proposition gets support from the case law.[160]

In a case where the contention was raised that the unfair labour practice complaint was barred by limitation and was thus not maintainable, that the seasonal employees of 1982-83 and 1983-84 were terminated in September 1984 and therefore the cause of action if any arose in September 1984 whereas the complaint was filed on 20.4.1990 much beyond the period of 90 days and therefore the same was barred by the low of limitation. The Court found no force in the argument since the termination order impugned in the unfair labour practice complaint was dated 6.4.1990 to be effective from 30.4.1990 for which the complaint was filed on 20.4.1990 which cannot be said to be after 90 days of the cause of action and barred by law of limitation. Thus in fact, the complaint was not barred by law of limitation but assuming for the sake of argument that there was substance in the argument that it was so barred by limitation, the type of unfair labour practices covered by Items 6 and 9 are the continuing or recurring unfair labour practices and, therefore, the complaint as filed on 20.4.1990 cannot be said to be barred by limitation.[161]

---

[160] Maharashtra State Board Tpt Corpn. v. Maharashtra State Tpt. Kamgar Sangathan, 1984 Lab. I.C. 1721.

[161] Maharashtra State Coop. Cotton Growers Marketing Federation Ltd. v. Their Employees Union, (1992) 62 FLR 870(Bom.).

In addition to this the Court has been empowered to entertain a complaint even after ninety days from the date of alleged occurrence for good and sufficient reason shown by the complainant for late filling of complaint by reason of the proviso under S.28(1). What is good and sufficient cause depends upon peculiarities and facts of each case. In India the workmen are ignorant illiterate and in case of dismissal discharge or termination etc even paucity of funds prevents them from taking advice and also in case of availability of free legal advice the common pendency of considering the Court as lender of last resort results in delay. In the lights of these circumstances the Courts now-a-days liberally construe the phrase good and sufficient cause. In a case where the workmen had taken time in moving higher officials and securing justice from the higher officials, the Bombay High Court considered the same as bona fide and sufficient ground for condonation of delay. The caustic remarks of the Court in that case are worth reading. The High Court had recommended that Court should view and examine the application under Maharashtra Act particularly of the individual workmen both from considerations of the head as well as heart.[162]

- *Court Competent to Deal with Complaints*

Section 28(1) also specifies the competency of the Courts to entertain and deal with the complaints for unfair labour practices that may be filed in concerned Courts. It says that where any person has engaged in or is engaging in any unfair labour practice then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court competent to deal with such complaint either under Section 5 or as the case may be, under Sections 7, of this Act. S. 5 provides the duties of Industrial Courts, and S. 7 that of the Labour Court. Clause (d) of S. 5 states that it shall be the duty of the Industrial Court to decide complaints relating to unfair labour practices except unfair labour practice falling in Item 1 of Sch. IV, while the duty of the Labour Court under S.7 has been specified to decide complaints relating to unfair labour practices in Item 1 of Sch. IV.

[162] Apinath Wowan Waghchaure v. M.S.E.B., (1981) 42 FLR 100.

Schedule IV provides Item 1 to 10 general unfair labour practices on the part of employers. Item 1 specifies to discharge or dismiss employees for any reason specified in clauses (a) to (g) as one of the general unfair labour practices on the part of an employer. Thus form the conjoint reading of S. 28(1), S. 5(d), S. 7 and Item 1 of Schedule IV it becomes crystal clear that the Labour Court has been empowered to entertain and deal with only one of the general unfair labour practices on the part of employers relating to discharge or dismissal to employees for any reason specified in clauses (a) to (g) of Item 1. Rest of all the unfair labour practices mentioned in schedule II, III and Item 2 to 10 of Sch. IV had been left to be dealt with by Industrial Court. Therefore the complaints for all or any of the unfair labour practices mentioned in Sch. II, III and Item 2 to 10 of Sch. IV have to be filed in the Industrial Court whereas the complaints for dismissal or discharge for all or any of the grounds specified in clauses (a) to (g) a general unfair labour practice on the part of employer only have to be filed before the labour Courts. Thus the Labour Courts have been made competent to entertain and deal with one employer unfair labour practice relating to discharge or dismissal of employees for the reasons specified in clauses (a) to (g) thereby conferred a limited jurisdiction whereas the Industrial Court had been made competent to deal with all the other unfair labour practices under the Act and thereby an extended jurisdiction had been conferred on the Industrial Court.

- *Form and Contents of Complaints*

The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Rules, 1975 made under S. 61(1) of the Act by the Maharashtra Government does not provide any form for the unfair labour practices. The Industrial Court Regulations, 1975 and The Labour Court (Practice and Procedure) Rules 1975 had been framed by the Industrial Court in exercise of the powers conferred under Sections 33 and 44 the Act respectively. These Regulations and Rules have prescribed the forms to certain pleadings for the complaints of unfair labour practices to be filed in the Industrial Court and the Labour Court separately. Chapter VI of the Regulations deals with complaints relating to unfair labour practices dealt by the Industrial Court, and Chapter V of the Rules deals with complaints relating to the unfair labour practices dealt by the

Labour Courts separately. From 19 has been prescribed for malting complaints before the Industrial Court under Regulation 100 (1) and form 16 has been prescribed for making complaints before the Labour Courts under Rule 60, for unfair labour practices respectively.

Regulation 100 to 117 under Chapter VI of the Regulations and Rules 60 to 77 under 'Chapter V of the Rules dealing with the complaints relating to the unfair labour practices before the Industrial Court and the Labour Courts respectively contain the same provisions except the difference of the number of Forms prescribed thereunder. Forms 19 and 16 require the same pleadings in the complaints for unfair labour practices except the difference of name of the Courts. It is required thereunder that the complaint must contain concise statement of the material facts constituting each unfair labour practice complained of, date of occurrence, name of the person or persons guilty thereof, Every person or union who is alleged to be guilty of any unfair labour practice has to be impleaded in the complaint. The complaint must specifically and separately disclose each unfair labour practice such person or union is guilty of the specific facts constituting that unfair labour practice in regard to the particular person or union and the date of the occurrence of that unfair labour practice.[163] If a complaint under S.28 (1) of the Act covers any unfair labour practice which occurred more than 90 days before the complaint filed, the complainant is required to file a separate application for condonation of delay along with the complaint. That application must disclose separately and specifically each unfair labour practice which occurred more than 90 days before the complaint was filed and in respect of which condonation of delay is sought, the date of the occurrence thereon and the reasons for condonation of delay in respect thereof. Such application must be supported by an affidavit.[164] Apart from the details of documents relied and the witnesses wished to be examined in support of the complaint it must also be signed by the complainant along with the verification of the contents of the complaint accordingly.

---

[163] Regulation 100 and Rule 60 respectively.
[164] Regulation 101 and Rule 61 respectively.

- *Scrutiny and Investigation of Complaints*

Complaints under S.28(1) has to be scrutinized by the officer of the Court authorized to receive them and the same have to be placed before the Court for orders with his remarks on the scrutiny within four days from the date of filing.[165] On receipt of a complaint the Court may, if it so considers necessary, first cause an investigation into the said complaint to be made by the Investigating Officer, and direct that a report in the matter may be submitted by him to the Court, within the period specified in the direction.[166] While investigating into such complaint, the Investigating Officer may visit the undertaking, where the practice alleged is said to have occurred, and make such inquiries as he considers necessary and may also make efforts to promote settlement of the complaint.[167] After investigating into the complaint, the Investigating Officer must submit his report to the Court, within the time specified by it, setting out the full facts and circumstances of the case and the efforts made by him in settling the complaint.[168] If on receipt of the report of the Investigating Officer the Court finds that the complaint has not been settled satisfactorily and the facts and circumstances of the case require that the matter should be further considered by it, the Court proceeds to consider it for determination on merit.[169]

- *Proceedings for Court Decision*

The Court has to take a decision in every complaint filled for any unfair labour practice as far as possible within a period of six months from the date of receipt of the complaint.[170] This period include the period taken by the Investigating Officer for the investigation of the complaint as directed by the Court. Before proceeding to consider a complaint for determination on merit, after the receipt of the report of the Investigating Officer, the Court has to ascertain or find - 1. Whether the complaint has not been settled satisfactorily, and 2. Whether the facts and circumstances of the case require that the matter should be further

---

165 Regulation 102 and Rule 62 respectively.
166 Section 28(3).
167 Section 28(4).
168 Section 28(5).
169 Section 28(6).
170 Section 28(2).

considered by the Court. Accordingly if the report of Investigating Officer submitted to the Court after investigation of the complaint for an unfair labour practice discloses that the complaint has been settled satisfactorily and the Court finds so after hearing the complaint or that the facts and circumstances of the case does not require further consideration of the matter, the Court need not to proceed with the matter for further consideration. It is only in case the complaint has not been settled satisfactorily or the facts and circumstances/ of the case require further consideration of the matter the Court has to proceed with the matter for further consideration on merit.

In case the Court decides to proceed with the complaint, notice in form 20 or in form 8 has to be issued to the respondent and to such other persons whose presence the Court considers necessary for full and fair inquiry into the complaint,[171] on payment of process fee within three days of the Court's order directing the complaint to be proceeded with. However in a proper case the Court mail extend time to pay process fees upto two weeks only.[172] On receipt of notice the person concerned has to file a written statement setting out his case at least 8 days before the date of hearing mentioned in the notice or within the time fixed by the Court whichever is earlier.[173] The parties have to produce the documents sought to be relied upon along with their respective statements of cases submitted in writing i.e. complaints, or applications, initiating a proceeding and written statements. They may produce additional documents, if any, on the first date of hearing also or within such extended time as may be permitted by the Court. Parties are not ordinarily allowed to produce documents after recording of oral evidence is complete and the case is ready for argument excluding arguments on preliminary points if the same are separately submitted.[174] After completion of evidence and hearing arguments the decision has to be given by the Court.

However, if the Court on hearing the parties before it decides that the presence of any other party is necessary before the Court, it may, by specific order direct such party to he impleaded as a party to the proceeding and thereafter

---

171 Regulation 105 and Rule 65 respectively.
172 Regulation 106 and Rule 66 respectively.
173 Regulation 107 and Rule 67 respectively.
174 Regulation 108 and Rule 68 respectively.

notice in Form No. 9 or in Form No. 8 as the case may be, with a copy of such order has to be issued to the person so imleaded.[175] The decision of the Court in the form of an order has to be announced in the open Court on the date fixed in that regard by the Court and has to be published by affixing a copy of the order on the notice board of the Court. The order must contain a direction as to from which date the order becomes enforceable and in the absence of such direction the order has to be enforceable from the date of the order.[176] The decision of the Court is final and cannot be called in question in any civil or criminal Court,[177] and the copy of the same has to be forwarded to the State Government by the Court concerned.[178]

- *Parties Bound by the Decision of Court*

An order of the Court is binding on:- (i) all the parties to the complaint for any unfair labour practices, (ii) all the parties summoned to appear as parties to the complaint whether they appear or not, unless the Court opines that they were improperly impleaded as parties, (iii) heirs, successors or assignees of employer in respect of the undertaking to which complaint relates and the employer was a party to the complaint before the Court, (iv) all persons on the date of the complaint employed in the undertaking to which complaint relates and (v) all the persons who may be subsequently employed in the undertaking to which complaint relates.[179] This provision under S.29 is analogous to the provision contained under S. 18 (3) of the Industrial Disputes Act and Ss. 114 and 115 of the Bombay Industrial Relations Act, 1946 and Ss. 79 and 97 of the Madhya Pradesh Industrial Relations Act, 1960. Therefore merely because the management is changed, there will be no effect on the rights duties and obligations of the employers and employees and they will be deemed to be continued in the new concern even if the old concern is liquidated and new concern carries on the same business, the employees are entitled to refer the complaints etc. regarding the old concern before the Labour or Industrial Court as the case may be, against new concern as regards their rights and obligations.

---

175 Regulation 110 and Rule 70 respectively.
176 Regulation 109 and Rule 69 respectively.
177 Section 28(7).
178 Section 28(9)
179 Section 29.

- *Reliefs The Court May Grant and Effectuate*

In order to effectuate the policy of the Act the Industrial Court as well as the Labour Court have been empowered to grant various reliefs permissible under the Act on the complaint for any unfair labour practice against any person who has engaged in or is engaging in such unfair labour practice. Those reliefs deserve consideration hereunder with some necessary details in order to understand and the assess the actual efficacy of the remedial measures under the Act.

⇒ Declaratory Relief

Section 30(1) (a) of the Act specifically empowers the Industrial Court and the Labour Court to grant the declaratory relief against any person for engaging in any unfair labour practice, which states, "where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, It may in its order (a) declare that an unfair labour practices has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice." In terms of the language used in this provision it is crystal clear that before the Court may in its order declare that an unfair labour practice has been engaged in or is being engaged in by certain person or persons the following essential ingredients must be established:-

1. There must be decision of the Court,

2. Any person named in the complaint has engaged in any unfair labour practice, or

3. Any person named in the complaint is engaging in any unfair labour practice.

Thus the Court has to come to a resolution as a result of consideration of the complaint to the effect that the particular person or persons named in the complaint has engaged in or is engaging in any unfair labour practice as a condition precedent for granting the declaratory relief that an unfair labour practice has been engaged is or is being engaged in by such person or persons. So

a judgement or conclusion or finding of fact that certain unfair labour practice has been engaged or being engaged in by certain person or persons must preceede to the order containing such declaration. In other words if the Court does not decide or does not come to the conclusion to that effect in those circumstances the Court may not grant such declaration. It follows that fact finding conclusions are necessary before granting the said relief and in the absence of such findings no relief can be granted in terms of this provision.

The scope of declaratory relief is wide enough since any person may be named in the complaint for any unfair labour practice. Since the complaint may be filed by the union or employees against the employer or by the employer against the union or the employees for any unfair labour practice specified in Sch. II and IV or Sch. III respectively, on evidence after establishing such unfair labour practice such declaration may be sought against each other. At the same time the declaration covers both types of actions of unfair labour practices i.e. completed and finished, as well as incomplete and continuous actions of unfair labour practice. Accordingly declaration may be granted against an employer or an employee or employees or a union on any complaint made by an aggrieved person concerned or an Investigating Officer for any unfair labour practice specified in Sch. II, III and IV respectively. Thus the relief of declaration that an unfair labour practice has been engaged in or is being engaged in by any person or persons is available on complaint of such unfair labour practice being established by an employer or employee or employees or a union, or an Investigating Officer, against each other, equally.

⇒ Cease and Desist Order

Section 30 (1) (b) of the Act is the most important provision under which many powers have been conferred upon the Industrial and Labour Courts to grant substantial relief to the persons aggrieved of any unfair labour practice. It specifically provides, where a Court decides that any person named in the complaint has engaged in or is being engaged in any unfair labour practice, it may in its order — (b) direct all such persons to cease and desist from such unfair labour practice. The conditions precedent that are necessary to be established on

complaint of any unfair labour practice on evidence for the relief of declaration, are equally necessary to be established for the relief of cease and desist order against any person or persons from such unfair labour practice. At the same time the scope of such cease and desist order is wide enough since the complaint may be filed by an employee or employees or union or an Investigating Officer against an employer for any unfair labour practice mentioned in Schedules II and IV or by an employer or an Investigating Officer against union and employees for any unfair labour practice mentioned in Sch. III and on finding that an of such unfair labour practice being established the Court may pass orders not only against the employer to cease and desists from such unfair labour practice but also against the union or employee or employees for such unfair labour practice respectively. Like declaratory relief, the relief of cease and desist order may by passed by the Court for completed, finished and final as well as incomplete and continuous actions of unfair labour practice. Thus this relief of cease and desist order from the competent Court may be equally available to the employee/employees, union against the employer and to the employer against the employees and the union from any unfair labour practice respectively.

⇒ Compensation to the Employees

Section 30(1)(b) also empowers the Court to take such affirmative action including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, which clearly indicate that in addition to passing an order against an employer to cease and desist from an unfair labour practice the Court may also grant reasonable amount of compensation to be payable to the employee or the employees concerned aggrieved of an unfair labour practice by the employer. The words, compensation to the employee or employees affected by the unfair labour practice unambiguously indicate that the relief of payment of reasonable compensation is available to the employee or employees adversely affected by the unfair labour practice of the employer only whereas this relief may not be available to any employer against an employee or employees or union for any of the unfair labour practice on their part. Thus this relief is available to employees only against the employer and is not available to employer against the employees. However in deserving cases this relief may also

be available against union also who cause employer to dismiss the employer unfairly, and the employer is not wholly responsible for any unfair discharge, dismissal of termination of any employee or employees.

⇒ Re-instatement of Employees

Thirdly S. 30 (1) (b) also provides for the relief of reinstatement available to the employees for any unfair labour practice of discharge or dismissal or termination of their services. The words, reinstatement of the employee or employees, clearly indicate that this relief can be given on the complaint of any unfair labour practice of discharge or dismissal or termination at the hands of employer only. So this relief of reinstatement is confined to employee or employees against the employer only for any unfair labour practice involving the termination discharge or dismissal of the employee or employees concerned, whereas converse of the same is not possible. But before granting the relief of reinstatement the Court has to come to the conclusion that such unfair labour practices had been engaged in by the employer concerned against whom the complaint is filed by the aggrieved persons or the Investigating Officer. In the absence of such conclusion no such relief of reinstatement can be granted against an employer and in favour of an employee or employees.

⇒ Backwages

Fourthly S. 30 (1) (b) also provides for the payment of the backwages to the employee or employees in addition to the relief of reinstatement against an employer for any unfair labour practice or discharge or dismissal or termination of services. The words, "reinstatement of employee or employees with or without backwages" clearly indicate that the Court while directing reinstatement of any employee or employees on the complaint of any unfair labour practice on the part of an employer, it may also award the backwages or may decline to do so as per the discretion of the Court, that may be exercised according to facts and circumstances of the cases. However the Courts have been empowered to grant the relief of backwages while granting the relief of reinstatements in deserving cases of unfair labour practice on the part of employer on the complaint made in that regard to the competent Court.

⇒ Any other Relief Not Specified

Section 30 (1) (b) also empowers the Industrial Court and the Labour Courts to grant such relief which has not been specifically enumerated in the provision itself. The terms, "and take such affirmative action...as may in the opinion of the Court be necessary to effectuate the policy of the Act indicate the much wider scope of the power of the Courts to grant any other relief which has not been enumerated in the provision. The only condition to exercise such power by the Courts is that such affirmative action which forms the substantial relief is necessary to effectuate the policy of the Act. For example direction can be given to the employer or the union to enter into the collective bargaining if it is established that any of them had refused to bargain collectively without any justification, or transfer order ma be cancelled and employer may be directed to restore the office at the same place where from an employee was malafidely transferred from one place to another under the guise of following management policy and such unfair labour practices are established on evidence, upon complaint before the competent Court.

⇒ Cancellation of Recognition of Union

The provision under S. 30 (1) (c) provides for the cancellation or recognition of a recognized union if it is found that such union has engaged in or is engaging in any unfair labour practice. The words, "where a recognized union has engaged in or is engaging in, any unfair, labour practice, direct that its recognition shall be cancelled," unambiguously indicate that this relief is available to the employer or to the rival union on any complaint against any union recognized under the Act, for any unfair labour practice established against it. This provision operates a substantial check on unfair labour practices on the part of recognized unions. At the same time both action of unfair labour practices i.e. completed finished or final actions as well as incomplete and continuous actions of unfair labour practices are covered for such relief that can be sought against any recognized union on complaint before the competent Court. Thus the scope is limited against a recognized union only for the relief of cancellation of recognition.

⇒ Suspension of Certain Rights of Union

Section 30 (1) (c) also provides for the suspension of all or any of the rights of a recognized union in case it is found by the Court that it has engaged in or is engaging, in any unfair labour practice. The language used in the provision, "where a recognized union has engaged in or is engaging in, any unfair labour practice (a Court may in its order) direct that all or any of its rights under sub-section (1) of Section 20 or its right under Section 23 shall be suspended," clearly empowers the Courts to grant this relief to the employer or a rival union on complaint being made to the competent Court for any unfair labour practice enumerated in Sch. III against any recognized union and establishing the same on evidence. The rights of a recognized union under S. 20 (1) are substantial right without which recognition of a union has no meaning and effect. At the same time on suspension of rights under S.23 employees authorized by the recognized union to appear or act in certain proceedings may not be considered as on duty, which is also a valuable right of a recognized union. Thus the provision of suspension of rights of a recognized union on being found to have engaged in or engaging in any unfair labour practice must operate a substantial check on the recognized unions and to curtail an irresponsible behaviour on its part, and an employer aggrieved of such unfair labour practice may knock the door of the Court by filling a complaint in that regard. Thus proper checks and balance are devised in the Act.

⇒ Interim Relief of Injunction

Section 30 (2) empowers the Courts to grant interim reliefs. It provides that, "in any proceeding before it under this Act, the Court may pass such interim order (including any temporary relief or restraining order) as it deems just and proper (including directions to the person to withdraw temporarily the practice complained of, which is an issue in such proceeding) pending final decision:" Interim directions by Industrial Court or Labour Court can be given only on prima facie case that the employer- was guilty of the unfair labour practice. In any case, in the absence of any finding by the Industrial Court of the existence of the prima

facie case of an unfair labour practice, the order becomes unsustainable.[180] The provisions of S. 30 (2), when read in consonance with law laid down by Bombay High Court and the general principles of law applicable to all Court, could only mean that the Court has jurisdiction to make such interim order as it deems just and proper in any proceedings before it under the Act, the dominant objective being to ensure that by unilateral act of either party, the proceedings do not become frustrated or infractuous. If this dominant objective of an interim order is firmly kept in sight, there is little chance of stepping out of line.

However the proviso appended to sub-section (2) or S. 30 gives an indication that an interim order may, perhaps, be made even ex parte and that it may be reviewed on an application made by the aggrieved party. While the Court was not willing to accede to the argument that there was no power to grant an exparte interim order, the Court had pointed out that it was necessary to remember that an experte order should be the exception and not the Rule. As a Rule, the Court should insist upon the party likely to be affected by the order being given notice however short it may.[181]

The scope of interim relief restraining order or directions to withdraw temporarily the practice complained of being in issue in the proceeding pending final decision, is wide enough because it is available to an individual employee or employees or union or Investigating Officer on filling an application for such relief with the complaint for any unfair labour practice against any employer and upon an application of an employer or Investigating Officer along with any complaint for any unfair labour practice against employee/employees or their union, equally. Thus any person i.e. employee/employees or union or employer aggrieved of any unfair labour practice of each other gets an opportunity to rectify the wrong temporarily subject to final decision at the earliest possible stage after filling an application with the complaint for any unfair labour practice against each other equally and effectively.

For an interim relief under S. 30 (2) of Act an application must be filled by a party to the proceeding before the Court supported with an affidavit and copies

[180] Kirlosker Oil Engines Ltd. v. V.B. Bharwkar & Others, (1987)I LLJ 366 (Bom.)
[181] Dalal Engineering P.Ltd. v. Rama Rao Sawant and Others, (1992) II LLJ 384.

thereof must be served on the party against whom interim relief is claimed if such party has appeared before the Court. If the party against whom relief is sought has not appeared till the date of filling of application for interim relief, a notice has to be issued in Form No. 21 or 16A as the case may be, as to why interim relief asked for should not be granted.[182] where in any action filed under Act, it is proved by affidavit or other evidence that any of the parties to the action has committed and/or there is a reasonable apprehension that it would commit an unfair labour practice, so as to frustrate the lawful right of the other party, the Court may, on proof of prima facie case in favour of the concerned party, grant temporary injunction to restrain commission of such unfair labour practice and for make such order for the purpose of stay and preventing such apprehended unfair labour practice until the disposal of the action or further, after considering the caveat, if any, filed by the parties.[183]

Subject to S. 31, the Court is not ordinarily to grant exparte ad-interim injunction or order, but if the party seeking exparte ad-interim relief states the steps it has taken to give notice to the other party for such application and in case when no such notice of injunction is given or has reached the other party, and states the grounds why it has not clone so, and exigencies of the matter, the Court if satisfied in such case, may pass an experte ad-interim injunction or the order in exceptional circumstances anti the Court has to state the grounds why such order was required to be passed without a hearing or issuing advance notice to the other party; and the duration for which the order would remain in force which should not be beyond 15 days from the date of passing the order.[184]

Any party aggrieved by such an injunction order may apply for having that order set aside, after giving 48 hours notice to the party who obtained an interim relief. However in case of exigencies shown by the affidavit or other evidence, Court may, without notice or without hearing the other side, stay the order which it has already passed and mention the duration for which such a stay order will be operative and why no notice of the application for stay could be given to the other

---

[182] Regulation 112 and Rule 72 respectively.
[183] Regulation 115(1) and Rule 75(1) respectively.
[184] Regulation 115(3) & (4) and Rule 75(3) & (4) respectively.

party.[185] Every application for an unfair labour practice must state whether any proceeding relating the alleged unfair labour practice is pending before the State Government or a Tribunal or Labour Court or any other authority under the Industrial Law and while passing orders Court has to take into consideration the pendency of such proceedings.[186]

⇒ Punishment for Disobedience of Court Orders

Section 48 provides for the punishments for the contempt of Industrial or Labour Courts in detail. The provision contained under sub-section (1) deals with unfair labour practices which provides that "any person who fails to comply with any order of the Court under Clause (b) of sub-section (1) or sub-section (2) of Section 30 of this Act shall, on conviction be punished with imprisonment which may extend to three months or with fine which may extend to five thousand rupees." S. 30 (1) (b) as already discussed above provides for substantial or final reliefs on the decision of the complaint for any unfair labour practice where under the Court is empowered to order all such persons to cease and desist from such unfair labour practice, and take such affirmative action including payment of reasonable compensation to the employee or employees affected by such unfair labour practice, or reinstatement of reasonable compensation, as the Court think necessary to effectuate the policy of the Act whereas sub-section (2) provides for granting temporary relief for restraining order or order to the persons to withdraw temporarily the practice complained of, as the Court deems just and proper during the pendency of such proceedings for final decision. S. 55 provides the offence under S. 48 (1) as cognizable offence, and every offence punishable under this Act has been made triable by a Labour Court within whose jurisdiction it has been committed.[187] At the same time the Labour Court has been empowered to take cognizance of any offence on a complaint of facts constituting such offence made by the persons affected thereby a recognised union or on report in writing by the Investigating Officer.[188] For trying the offence, the Labour Court has been conferred all the powers of a Presidency Magistrate in the Greater Bombay and a

---

185 Regulation 115(5) and Rule 85(5) respectively.
186 Regulation 117 and Rule 77 respectively.
187 Section 38.
188 Section 39.

Magistrate of First Class elsewhere under the code of Criminal Procedure 1898 and empowered to follow the summary trial procedure laid down in Chapter XXII of the Code for the trial of every such offence in which appeal lies; and rest of the provisions of the Code are made applicable to such trial.[189]

Thus from the bare reading of these provisions of the Act it becomes crystal clear that the disobedience, or violation or non-compliance or failure to comply with any order or direction passed the Industrial Court or Labour Court whether finally on decision of the complaint of any unfair labour practice or temporarily during the pendency of such complaint, to cease or desist any person from such unfair labour practice or payment of reasonable compensation or reinstatement of any employee or employees with or without backwages affected by such unfair labour practice as the Court think necessary has been made punishable as contempt of Court for which the Labour Court has been empowered to take cognisance on the complaint of facts constituting such offence made by aggrieved person or a recognized union or on a report in writing by the Investigating Officer, and after trial on conviction punish such persons for non-compliance of such order. Thus there is little chance for any person to disobey the orders or directions of the Industrial or Labour Courts by any person whether the employer or employees or the union since the complaints for such non-compliance may be filed by any person aggrieved of such disobedience or by the Investigating Officer. Thus the relief of punishment against the person who falls to comply with any order of the Court is equally available to any person aggrieved of such unfair labour practice.

⇒ Recovery of Money Due from Employer

Section 50 provides for the Recovery of money due from an employer to an employee under an order passed by the Court under Chapter VI, which deals with unfair labour practices. For the recovery of such money the employee himself or any other person authorized by him in writing in this behalf or in case of his death, his assignee or heirs may without prejudice to any other mode of recovery make an application in Form No 24 or 22 as the case may be to the

[189] Section 40.

Court which passed the order,[190] within one year from the date on which such money became due to him from employer, and if the Court is satisfied that such money is so due, the Court has to issue a certificate for that amount to the collector in Form No 25 or 24 as the case may be,[191] and the collector has to proceed to recover the said money in the same manner as an arrears of land revenue. However an application for recovery of such money may be entertained after the expiry of one year, if the Court is satisfied that the applicant had sufficient cause for not making the application within the said period, and the application is accompanied with an affidavit setting out ground why the application was not made in time.[192]

Thus from the detailed discussion of complaint cases for unfair labour practice under the Act, it is crystal clear that like the U.S. Law for unfair labour practice under the Maharashtra Act, there is no direct prosecution against a party guilty of having engaged in any unfair labour practice. Such a prosecution has first to be preceded by an adjudication by a competent Court regarding such engagement in unfair labour practice. Thereafter it should culminate into a direction under section 30 (1) (b) or it may be a subject matter of interim order or relief under Section 30(2). It is only thereafter that prosecution can be initiated against the concerned party disobeying such order of the Court as per Section 48(1). Consequently the act of engaging in any unfair labour practice by itself is not an offence under the Maharashtra Act while such commission of unfair labour practice itself is an offence under the Industrial Disputes Act. Thus the Maharashtra Act effectively intends to prevent the commission of unfair labour practices through the intervention of the competent Court and (nor that very purpose, the Act has been enacted clearly as reflected by the provisions of Section 28 and Section 30 of the Maharashtra Act.

(4) Voluntary Codification of the Parties :

Voluntary code like code of conduct and code of discipline in Industry have been in vague in the country for establishment of good orderly level of industrial relations.

---

190 Regulation 140 and Rule 97 respectively.
191 Regulation 142 and Rule 99 respectively.
192 Regulation 140(b) and Rule 97(b) respectively.

(a) Code of Discipline in Industry 1958 :

In this connection it would be useful to mention the relevant provisions of the Code of Discipline in Industry, 1958. In order to maintain peace, harmony and discipline in industry the Code formulates certain provisions which are in the nature of 'do' and 'do nots' both for management and trade unions. According the management inter alia agrees[193] not to support or encourage any unfair labour practice such as :

- interference with the right of the employees to enroll or continue as union members;
- discrimination, restraint, or coercion against any employer because of recognised activity of trade unions and,
- Victimisation of any employee and abuse of authority in any form.

The Unions agree[194] to discourage unfair labour practice such as

- negligence of duty;
- careless operation;
- damage to property;
- interference with or disturbance to normal work and
- insubordination.

The Code lays down specific obligations on employers and trade unions not to engage or encourage unfair labour practices. On the other hand it casts a duty on both sides not to resort to any unilateral action such as strikes and lockouts resulting in coercion, intimidation, victimisation and litigation. It requires them to abide voluntarily in good faith with norms of conduct laid down in the Code with a view to maintain goodwill and understanding between them for achieving increased output, and higher standard of efficiency. To secure the observance of the code both sides are, therefore, obliged to take prompt action to implement awards, settlements and decisions and to take proper action against those indulging in action against the spirit of the Code. The success or failure of

[193] Clause III (1) Code of Discipline, 1958
[194] Clause IV (IV) Id.

the Code depends upon the willing cooperation, understanding and goodwill of the employer and the employees the strict adherence of which may evolve new dimensions and patterns of industrial ethic suited to our social needs and genius as well.

(b) Code of Conduct :

Soon after the 16th Indian Labour Conference at which the code of Discipline was agreed upon, the Labour Minister convened a meeting of representatives of the four Central Trade Unions organizations[195] to discuss the problem of Inter-unions rivalries. The meeting agreed on a code of Conduct by which the officers present committed themselves and their unions to the observance of the following principles -

(1) Every worker shall be free to join a union of his choice without coercion;

(2) There shall be no dual membership of unions;

(3) Unions will function democratically and hold regular elections of officers and executive bodies;

(4) Unions will not exploit, the backwardness of workers, make excessive demands appeal to caste, communal or provincial prejudice or use of violence, coercion or personal abuse in inter-union dealings;

(5) The formation or continuance of company unions will be opposed.

[195] Indian National Trade Union Congress, All Indian Trade Union Congress, Hind Mazdoor Sabha and United Trade Union Congress.

CHAPTER – 5

REMEDIAL MEASURES IN U.S.A. AND U.K.

(I) Trade Union Movement in United Kingdom :

Historically and politically the British Trade Union movement has special significance in the entire spectrum of world trade union movement. It is perhaps the oldest movement from the point of view of its origin. It symbolizes democracy with justice, liberty and freedom with social accountability which is the hall mark of responsible trade unionism.

Industrial change started in England in about 1760 which created conditions for the growth of the factory system. The new industrialism dispossessed the peasants made them life long slaves be they were women, children, old people and adults without civic facilities like houses, parks, clinics, hospitals, school etc. They worked for long hours for slave wage without security of employment. The employer had unbridled centre and freedom in all matters concerning employment. It is against this background that trade unions began to grow to discuss secretly and openly their wages, hours of work and conditions of employment as the employers and state was suspicious and apprehensive of their organization.

According to 1799 and 1800 the British Parliament passed two Combination Acts which made illegal for workmen to combine for the purpose of improving their wages or conditions of labour or to organize or to attend meetings for such purposes. In effect these statutes declared all forms of trade union activities for raising wages and varying the conditions of labour illegal and unlawful. The Combination Acts were used as a means of oppression and repression. The blanket ban on all sorts of combinations in all trades continued during the Napoleonic wars. Thereafter economic depression followed and under

the leadership of Francis place [1] a movement started against such general prohibition and secured complete repeal of the combination laws. The Combination Laws Repeal Act of 1824 was passed to legalize all trade societies including trade unions.

(A) Trade Unions - Hostility and Support (1825-1900) :

The stigma of illegality having been removed greatly encourage the formation of trade unions with a demand for better working conditions following by wide spread labour unrest and strikes. However, the Combination Laws Repeal Act Amendment Act 1825 imposed some restrictions on trade unions and their activities. Peaceful picketing was considered molestation, intimidation and threatening behaviour and heavy punishment was inflicted on workers. The period after 1830 was greatly influenced by Benthamite philosophy of reforms and freedom. One of the greatest social reformers, Robert Owen, a mill owner from Lanarkshire also did laudable work to improve the conditions of industrial workers. In 1834, Karl Marx established Communist League in London to promote and support the cause of the working class. In 1851, Amalgamated Society of Engineers (ASE) was established. In 1868, in Manchester British Trade Union Congress discussed subject like "Trade Unions are Absolute Necessity", 'Trade Unions are Political Economy'.

(B) Royal Commission on Labour 1867 :

When there was general increase in trade union activities all over England the courts of law were indifferent and even hostile to combination of worker's. The court's rulings in a series of cases during 1866-67 had given union's serious jolts and setbacks Horby v. Close (1867) is an example of such judicial hostility. The court held that a trade union was an unlawful organization as a body in restraint of trade under common law and so it being an illegal body could not secure the protection of its funds. The court further declared that although the

[1] Francis Place : a breaches maker for Englands spent 10 years gathering evidence on evil effects of Combination Acts.

unions having deposited their rules with Registrar of Friendly Societies, it cannot be said that they are covered under the Friendly Societies Act.

In the meantime a Royal Commission on Labour was appointed in February 1867 under the chairmanship of Sir William Erdeto inquire into and report on organization and rules of trade union and employee. As a result of the deliberations of the commission the Trade Unions Act 1871 was enacted. Under the Act trade unions were no more liable to criminal prosecution for conspiracy and contracts in restraints of trade were no longer illegal. However, the Criminal Law (Amendment) Act 1871 rendered the Trade Union Act 1871 .ineffective by imposing penalties for picketing and other strike activities as was evident from R.v. Bunn.[2] In this case the fellow workers of a gas company had been held liable for 'Molesting' the employers because they had threatened to go on strike for dismissal of their fellow worker. After a determined struggle and agitation this Act was repealed by the Conspiracy and Protection of Property Act 1875 to reverse the judgement. It provided that no act committed by a group of workers in furtherance of a trade disputes should be punishable unless it was criminal act which would amount to a crime.

The judicial hostility towards unions could not stem the rising popularity and strength of rapidly increasing trade unions in England during the latter half of the nineteenth century. Trade Unionism was broadening its base by organizing the still unorganized workers.

(C) Trade Union Movement in 20th century :

Inspite of the formation of labour party great strides were made by the trade union movement. The courts were still adverse to trade union activities. In 1901 the court in Quinn v. Leatham[3] refused to uphold the right of the union liable in damages for inducing customers and servants of Leatham for breaking their contracts. In 1901 the Labour Unions suffered another crushing defeat in the

---

2 12 Cox's Criminal Case, p. 316.
3 (1901) AC 495.

famous Taffe Yale's' case[4]. It was alone this judgement which cut at the very roots of trade unionism and once again opened the eyes of trade unionists to launch a struggle for their survival. This judgement was annulled by Trade Dispute Act 1906. This was in effect a kind of Bill of Rights for all English workers. The statute provided for peaceful picketing and barred civil actions against unions for damages for acts committed in furtherance of trade disputes.

During the World War I trade union movement had been firmly established and collective bargaining had come to stay in the resolution of industrial conflict beside the voluntary conciliation machinery. Moreover two other significant developments which gave cohesion to the trade union movement were the shop Steward Movement and the Whitly Councils. Whitly Councils are meant to introduce workers' participation in management by constituting voluntary joint machinery by employers and trade unions for negotiating agreements and for consultation on labour problems. The trade union movement continued to grow strongly during 1914 to 1920.

(D) Trade Union Movement 1920-1945 :

At the end of first world war a bitter conflict developed between the unions and management. The main causes of industrial unrest during 1921 were the rising cost of living wage cuts, retrenchment and unemployment. Employers were on the offensive and committed breaches of collective agreements. The trade union resorted to strikes for stopping breaches of agreements and against wage cuts. A railway strike took place in 1919 for wage claims which had not been pressed during the war. In 1920 a long strike continued in the mining industry. The miners suffered defeat and wage cut began to be imposed by employee in one industry after another. The Trade Union Congress was reorganized in 1921 so that it could give greater assistance to its affiliated unions with a full time staff of experts at London headquarter. At this stage the Government enacted the Trade Disputes and Trade Union Act, 1927, the Act made all sympathetic strikes illegal

4 (1901) AC 426.

strikes that is called by one union to help another in a different industry. This Act was bitterly resented by trade unionists who regarded it as an act of victimization and revenge for the general strike.

(E) Shadow of World War II :

The union bitterness of 1926-27 however, did not last long. On the initiative of TUC talks were arranged between unions and employers association for understanding each other's point of view and for the creation of better atmosphere in the interest of industrial harmony. In this way fresh attempts were made to re-establish a workable and mutually acceptable relationship between trade unions, employers and the Government and by 1940 the trade union had become established and recognized power and force in the regulation of labour-management relations.

During the World War II the British trade unions worked in close cooperation with Government for the maintenance of industrial peace and made voluntary scarifies for the success of democracy and freedom.

(F) Trade Union Movement-Post-War Developments :

After the end of World War II in 1945 the war time coalition government in Britain was replaced by Labour Government. First thing the Labour Government did was to repeal the 20 year old statute the Trade Unions and the Trade Disputes Act, 1927 by the Trade Disputes and Trade Unions Act) 1946 with the result that the law with regard to trade unions was restored to its former state. Trade Unions had become independent and free from State and governmental intervention. The entire system of labour relations or trade union organization is based on free choice of the participants involved in industrial process leading to voluntary collective agreement. The increase in the non-manual trade unionists has been another feature of British trade union movement after 1948. On account of rising prices and increasing unemployment and wage freeze policy of the Government had given rise to a spate of strikes in England after

1950. Many of such strikes were un-official and illegal. There was another onslaught on the trade union movement by the House of Lords in Rookes v. Bernard[5] which invented the tort of intimidation to make union liable for threat to break contract not covered by the Trade Disputes Act 1906. The Trade Unions, therefore, demanded legislative protection which led to the passing of the Trade Disputes Act 1965 which had reversed the decision of Rookes v. Bernard provided that a breach of contract or inducing others to break a contract of employment in furtherance of trade dispute will not be actionable. This legislative measure gave further spurt to unofficial strikes which greatly hampered production and industrial harmony as they take place in breach of appropriate procedure for dealing with disputes.

(G) The Donovan Commission (1965-68) :

In 1965 a Royal Commission was set up to study both trade unions and employer's organizations and their role in promoting the interests of their members and in accelerating the social and economic advances of the nation with particular reference to the law affecting the activities of these bodies. The commission submitted its report in 1968 and remarked that formal system of industrial relations as embodied in industry wide collective agreement has had less influence on what actually happened.

Accordingly the Commission recommended a complete overhaul of existing industrial relations system with the object of developing collective bargaining machinery at company or factory level with factory or company agreements become the norm in place of industry wide agreements. It further proposed that an Industrial Relations Act should be passed with an independent Industrial Relations Commission to advise the Minister of the reform of industrial relations and to investigate and report on such matters as the problems arising out of the registration of agreements by companies. It suggested that the new

---

5 (1964) AC, p. 1129.

legislation provide protection of the freedom of association in furtherance of extension of collective bargaining and the Industrial Relations Commission should be given authority to handle problems of trade union recognition.

In Jan. 1969 a White Paper in place of strife was published which endorsed the Donovan Commission's analysis of industrial relations in Britain and outlined a series of proposals for the reform as recommended by the commission among them setting up of a commission of Industrial Relations, the registration of collective agreements, the right to belong to a trade union, protection against unfair dismissal, the disclosure of information by employers to trade union officials for negotiating purposes.

The Industrial Relations Act 1971 which came into force on February 28, 1972 was bitterly opposed by the trade unions. It was considered by the trade unions as anti-labour and they decided not to register themselves under the Act and refused nominations to the National Industrial Relations Court (NIRC) or the Industrial Tribunals. Hence a movement was launched for the repeal of the Act which was finally repealed by the labour government in 1974. In 1975 Employment Protection Act, was enacted contains provisions to extend the rights of employee in a number of respects to strengthening collective bargaining. The Employment Act 1980 and the Trade Union Act 1984 were- introduced by the Government to increase democracy in trade union.

(II) Trade Union Movement in United States of America :

During the first three decades of the 20th century the industrial workers in U.S.A. hardly received any help from law in their opposition to untrammended authority of the management. The philosophy of free contractualism had emboldened the employers to impose their unlimited authority and power to control labour in the Management and decision making process.

(A) Court Regulation of Labour-Management Relations :

The first known labour case in the U.S. is the Philedelphin Cordwainers[6] case of 1806. In this case group of shoe makers was convicted on the charge of criminal conspiracy to raise their wages. In a similar case of New York People v. Melvin[7] employees has guilty of conspiracy was firmly established and reinstated in Commons v. Gilmore, (1815) known as Pittsburge Cordwarners' case. In this case strike were condemned illegal and striking shoe makers were convicted for criminal conspiracy. On the other hand, the court had held that Criminal conspiracy doctrine did not apply to combination of employers to oppose union demand for wages. A favourable trend is seen in Commonwealth v. Carlisle, (1821)[8] where the Supreme Court of Pennsylvania declared a combination of employers to depress wages of employees below 'natural' level as a criminal act. A more favourable trend is seen in Commonwealth v. Hunt[9] in which the Massachussets Supreme Court decided that strike for closed shops were not crime.

The union had been legalized by Commonwealth v. Hunt[10], which had made the application of the doctrine of criminal conspiracy precarious. The trade union movement became stronger and popular. However the courts had dressed the doctrine in new clothing and continued to use it to trade union activities. The name of the new doctrine was the doctrine of injunction and its application to labour management disputes proved disastrous[11] to labour movement in U.S.A. It was first applied to railway strike[12] of 1877 as a legal weapon to curb the trade union activities.

---

6 Commonwealth v. Pullis, (1806) as reported in Commons and Gilmore, Documentary History of American Industrial Society, (1810) 59-236.
7 2, Wheeler's Criminal Case, p. 262 (1810) (N.Y.).
8 4 Commons and Gilmore documentary, History of America, p. 99.
9 4 Mecalf (Mass. 1842).
10 4 Mecalf (Mass. 1842).
11 See the origin of labour injunction 5, Southern California Law review, p. 105 (1931).
12 See 40 yale Law Journal, p. 508 (1931).

(B) Sharmon-Anti-Trust Act 1890 :

The labour movement revised further setback with the passing of the Sharmon Anti-Trust Act 1890 which declared that "Every contract, combinations in the form of 'Trust' or otherwise or conspiracy, in restrained of trade and commerce among the several states and with foreign nations, is hereby declared illegal". The violation of the Act could attract criminal prosecution. The supreme court in Danbury Hatters[13] case clearly and in definite terms decided that labour unions were included with the scope of the Act.

The Sharmon Anti-Trust Act was widely used by the employers in Labour management conflict to frustrate the attempt of the trade unions to achieve their goals through economic pressure. However Clayton Act, 1914, was enacted to exempt unions from anti-trust law and curtail the use of injunctions in labour matters. While the Clayton Act proved abortive in restraing. The Courts from issuanze of injunctions against trade unions and their members. The courts started applying injunctions in cases involving yellow dog contracts. Yellow dog contracts are contracts where in the workers promise not to join union or belong to any union during the period of employment. In the famous case of Hitchman Coal and Coke Company v. Mitchell[14] the Supreme Court issued injunctions restraining union in its attempt to breads the yellow dog contract on the ground that the company would sustain irreparable loss of injunction was not granted. This yellow dog contract coupled with injunction was a greater threat to labour movement in America than the common law doctrine of civil and criminal conspiracy. The court made the yellow dog contract legally enforceable making union vulnerable to court injunction. It was not only the employers but the law courts also which became extremely hostile to trade union movement.

---

13 Lowe and Lowlar United States, p. 274 (1908).
14 245 USP 229 (1917).

(C) Norris-La Guardia Act, 1932 (Federal Anti-Injunction Act) :

This was enacted in respect to employer employee relationship. The primary object of the Act was to protect unions against indiscriminate use of federal court injunctions and against yellow dog contracts.

(D) National Industrial Recovery Act, (NIRA) 1933 :

While the Norris La Guardia Act of 1932 ended the era of Government by injunction, the administration of Franklin Roosevelt ushered an era of trade union democracy. In his time both the legislature and executive supported and actively took concrete steps for encouraging collective bargaining between labour and management. The National Industrial Recovery Act, 1933 was an effort in the direction to overcome the economic depression by removing the prohibition set up by anti-trust laws permitting business to organise and to improve the standard of labours.

The Act remained in operation between 1933-35 when on may 27, 1935 the National Industrial Recovery Act, 1933 was declared unconstitutional[15] by the Supreme Court of America. The Supreme Court held that the attempt through the provisions of the Code to fix the hours and wages of employees in Inter-State trade was not a valid exercise of federal power.

(E) National Labour Relations Act, 1935 :

When the Supreme Court in the Schechter case declare the National Industrial Recovery Act unconstitutional Senator Robert Wagner of New York introduced the National Labour Relations Bill which both Houses of Congress approved and which received the assent of the president on July 5, 1935. The National Labour Relations Act Commonly known as the Wagner Act. It became the corner stone of labour-management relations which confer protection against

---

15 Schechter Poultry Corp v. United States, (1935) 295 U.S. P. 494.

intimidation discharge and discrimination for union activities and an equal place at the bargaining table.

The trade unions regarded the Wagner Act as their Magna Carta of their freedom which assured workers the right to collective bargaining and guaranteed each the freedom to join or not to join union the employer on the other hand criticized the Act as prolabour and anti employer being one sided in application. It was alleged that it subjects employers to supervision and restraints without corresponding restraints on the employees.

(F) The War Labour Disputes (Smith-Connally) Act, 1943 :

During this period, there was some perceptive change in public opinion against labour on account of sporadic strikes and other forms of industrial unrest which adversely affected production. The rise in strikes led to the Congress to pass the War Labour Dispute Act, 1943. This Act empowered the president to take over any industry producing war material if it is threatened by labour disputes, strikes or lockouts. Strikes and lockouts were declared illegal in government run industry and violation was punishable both fine and imprisonment.

(G) The Labour Management Relations (Taft-Hartley) Act, 1947 :

The Labour Management Relations Act, 1947 properly known as Taft - Hartley Act, retained the unfair practices of employers[16] from the Wagner Act and introduced several regulations governing the conduct of the unions. They are forbidden [17] to coerce employers in the choice of collective bargaining representative or cause employers to discriminate against employees or cause for payment for services not performed or engaged in jurisdictional strikes or secondary bycotts [18] .

---

16 Sec. 8 (a)
17 Sec. 8 (b)
18 Sec. 10(1)

The Taft-Hartley Act, 1947 has been an improvement over the Wagner Act is as much as under the Act of 1947 both the employers and employees are legally obliged to bargain, in good faith where as under the Act of 1935 only employers were required to bargain in good faith, Unlike the Wagner Act. The Taft-Hartley Act also makes collective agreements, enforceable in the interest of stability in industrial relations. In substance the Act seek to restore the balance between those who employ and those who are employed and the interest of the common public.

(H) The Labour Management Reporting and Disclosure (Landrum Griffin) Act, 1958 :

This Act marks another important step in the intervention of the government in the internal affairs of the labour organizations. Previous legislation such as the Norris La Guards and Taft-Hartley Laws had been confined to external activities of the unions. Now under the new Act of the Government had laid down rules as to how union officers are to be elected and removed. The Landrum-Griffin Act is a tacit recognition that trade unions like Corporations are quasi-public in character and therefore subject to watchful attention and minimum regulation of government. The Act also amends the Taft - Hartley Act, 1947 relating to union activities concerning picketing and secondary bycotts.

(I) The Labour Law Reforms Bill, 1977 :

This proposed Bill has been passed by the House of Representatives and it has yet to go through the Senate. If the Act approved by the Senate this measure would be at par with Taft - Hartley Act, 1947 and Landrum Griffin Act, 1958 as one of the few major revisions of the Labour Relations Act, since it birth forty two years ago.

CHAPTER - 6

JUDICIAL PRONOUNCEMENTS

This chapter deals with selected judicial pronouncements of the Supreme Court of India various High Courts of the country and also of Foreign courts

"Practically every change in the law", observed Mr. Justice Brandeis, "governing the relation of the employer and the employees must abridge in some respect the liberty or property of one of the parties, if liberty and property is measured by the standard of the law theretofore prevailing. If such changes are made by acts of the Legislature we call the modification an exercise of the police power, and although the change may involve an interference with existing liberty or property of individuals, the statue will not be declared a violation of the due process clause unless the court finds that interference is arbitrary or unreasonable, or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end".[1]"THE industrial histories of the United Kingdom and the United States have been marked by a tug-of-war between the legislature and the judiciary, the former granting immunities from the restrictions of the common law to trade unions and others engaged in industrial action and the latter in cases subsequent to the legislation issuing decisions designed to impose other limitations on the freedom of industrial action."[2]His arguments were backed by the reference of Trade Union Act 1871 (34 & 35 Vict. c. 31); Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c. 86); Trade Disputes Act 1906 (6 Edw. 7, c. 47); Trade Disputes Act 1965 (c. 48); Quinn v/s Leathem [1901] A.C. 495; Taff Vale Railway Co. v/s Amalgamated Society [1901] A.C. 426; Rookes v/s Barnard [1964] A.C. 1129. In the United States, note: Clayton Act 1914 (38 Stat. 731, 738); Norris- LaGuardia Act 1932 (47 Stat. 70, 73); Commonwealth v/s Hunt, 4 Metcalf 111 (Mass. 1842); Vegelahn v/s Guntner, 167

---

1 Williams Truax v. Michael Corrigan 66 Law.Edn. 311; 257 U.S. 254, Mr. Justice Brandeis, in his dissenting judgment, has given a very illuminating account of the history and progress of the trade union movement in the United States, in England and the Colonies.

2 Herman Miles Levy: The Role of the Law in the United States and England in Protecting the Worker From Discharge and Discrimination: The International and Comparative Law Quarterly, Vol. 18, No. 3 (Jul., 1969), pp. 558-617

Mass. 492 (1896). For description of this period in U.S. history, see Gregory, C. O., Labor and the Law (W. W. Norton & Co., New York, 1946) pp. 52-199 etc.[3]

The same arguments may be said partly true and partly irrelevant for Indian legislature and the judiciary. It becomes important here to have a detailed case law studied with respect to India and other countries.

In the context of "unfair labour practice" under Labour Law, the Supreme Court has observed "But, where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the Tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice".[4]

Accordingly, in several cases, the punishment of dismissal imposed on workmen by their employers have been quashed on the ground that the same is grossly disproportionate to the nature of the charges held proved against the workman concerned.[5]

Unfair Labour Practice vis-à-vis Administrative Actions

In Akbar Badruddin,[6] fine imposed on an importer for importing some banned item was held to be "extremely harsh, excessive and unreasonable".

Union of India v/s G. Ganayutham,[7]The respondent who was working as the superintendent of Central Excise was subjected to the punishment of withholding of 50% of the pension and 50% of gratuity. A writ petition was filed in the High Court which was later moved to the Administrative Tribunal. The Tribunal holding the punishment too severe reduced the same. The matter then came before The Supreme Court by way of appeal. The Court set aside the order of the Tribunal and restored the

---

3 Footnote to reference given in footnote 1

4 Hind Construction & Engineering Co. Ltd. v. Their Workmen, AIR 1965 SC 917 :1965 (1) LLJ 462.

5 Union of India v. G. Gangayuthan, AIR 1997 SC 3387 : 1997 SCC (L&S) 1806 : JT 1997 (7) SC 572; Om Kumar v. Union of India, AIR 2000 SC 3689 : 2001 (1) SLR 299 : Union of India v. R.K. Sharma, AIR 1991 SC 3953.

6 Akbar Badruddin v. Collector of Customs, (1990) 2 SCC 203, 220 :AIR 1990 SC 1579

7 AIR 1997 SC 3387, at 3396

original punishment saying that the punishment was not 'irrational' according to the Wednesbury test. The Court observed: "In such a situation, unless the court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to Wednesbury or CCSU norms, the punishment cannot be quashed."[8]

Indian Oil: This proposition has been reiterated by the Supreme Court in **Indian Oil Corporation v/s Ashok Kumar Arora**.[9]The Court has observed in that case : "In such a situation, unless the court/tribunal opines in its secondary role that the administrator was, on the material before him, irrational according to Wednesbury or CCSU norms, the punishment cannot be quashed".

Apparel Export Promotion Council v/s A.K. Chopra[10]: The respondent after an inquiry was found guilty of sexually harassing a female employee. Consequently, his service was terminated. In a writ petition filed in the High Court, his punishment was reduced by the court. The Supreme Court took exception to the High Court's interference with the award of the punishment in the instant case with the following observation :"Even in so far imposition of penalty is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty". Accordingly in the instant case, the Supreme Court set aside the order of the High Court and restored the punishment of removal from service of the respondent imposed by the disciplinary authority.[11]

Satish: After an inquiry into the conduct of the respondent, certain charges of misconduct were held proved against him. Consequently, he was awarded the punishment of removal from service. The Labour Court characterising the punishment to be excessive reduced the same. The Supreme Court quashed the Labour Court's order and restored the order passed by the disciplinary authority.[12] The Court

---

8 Union of India v. G. Ganayutham, AIR 1997 SC 3387, at 3396 : 1997 SCC (L&S) 1806

9 (1997) 3 SCC 72 :AIR 1997 SC 1030.

10 AIR 1999 SC 625, at 630

11 Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625, at 630 :(1999) 1 SCC 759 : 1999 (1) LLJ 962

12 U.P. State Road Transport Corporation v. Subash Chandra Sharma, AIR 2000 SC 1163 :(2000) 3 SCC 324 : 2000 (1) LLJ 1117.

observed :[13] "It could not be said that the punishment awarded to the respondent was in any way "shockingly disproportionate" to the nature of the charge found proved against him".

In **C.M.D. United Commercial Bank v/s P.C. Kakkar Disciplinary proceedings**[14] were initiated against an employee of a statutory bank. It was alleged that he had committed several acts of misconduct while functioning as the Assistant Manager of a Branch of the Bank. He was placed under suspension and proceedings initiated against him under the Rules of Conduct of the Bank. Several charges were found to be established against him and the punishment of dismissal was imposed on him. In a writ petition, the High Court held the punishment to be excessive and reduced it to a loss of 75% of salary. The matter then came in appeal before the Supreme Court. The Court considered at length in C.M.D. **United Commercial Bank v. P.C. Kakkar**,[15]the question of scope of judicial review of disciplinary punishments. The Court referred to its earlier decision in **Om Kumar and others v. Union of India**[16]and held that where punishments in disciplinary cases are challenged as arbitrary vis-à-vis Art. 14 of the Constitution the court would act as a secondary reviewer. The question before the court would be whether the administrative order is "rational" or "reasonable" according to the Wednesbury test. On this question, the Court observed : "The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary."[17]In the instant case, it has not been contended that any fundamental freedom has been affected. The court should not interfere with the administrator's decision imposing punishment unless "it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was defiance of logic or moral standards". "Unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the

---

13 ibid
14 AIR 2003 SC 1571
15 AIR 2003 SC 1571 :2003 (2) LLJ 181 : (2003) 4 SCC 364.
16 AIR 2000 SC 3689 : 2000 LIC 304.
17 AIR 2003 SC 1571, at 1576 :2003 (2) LLJ 181 : (2003) 4 SCC 364.

court./tribunal, there is no scope for interference. When the court feels that the punishment is "shockingly disproportionate", it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law. Also, in the normal course, if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed. In the instant case, the proceedings commenced in 1981. He was placed under suspension from 1983 to 1988, and was superannuated in 2002. He was acquitted in a criminal case. In these peculiar circumstances of the case, the Supreme Court sent the matter back to the High Court for fresh consideration only on the question of punishment aspect.

In **Hoti Lal**,[18] the service of a bus conductor in U.P. State Road Transport Corporation was terminated as he was found to carry ticketless passengers in the bus. The High Court quashed the punishment of termination on the ground that the punishment was "not commensurate with the gravity of the charge."On appeal, the Supreme Court reversed the High Court. The Supreme Court emphasized that the court or tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment was not commensurate with the proven charges. The scope for interference in this area is very limited and is restricted to exceptional cases. In the instant case, the High Court advanced no reasons whatsoever as to why it considered the punishment disproportionate. The Court observed further in this connection : "If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands."[19]

Dev Singh v/s Punjab Tourism Development Corporation[20]is one case where the Supreme Court did interfere with the punishment of dismissal imposed on the appellant. The Court found the punishment "too harsh" "totally disproportionate to the misconduct alleged" and which "certainly shocks our judicial conscience."After

---

18 Regional Manager, U.P. SRTC v. HotiLal, (2003) 3 SCC 605.

19 Regional Manager, U.P.S.R.T.C. v. Hotilal, (2003) 3 SCC 605, 614 :2003 (2) LLJ 267 : AIR 2003 SC 1462.

20 AIR 2003 SC 3712 :2003 (3) LLJ 823 : (2003) 8 SCC 9.

reviewing the relevant cases,[21]the Supreme Court has restated the position as follows :".... a court sitting in appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion or penalty, however, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief...."[22]

Mineral Development This principle has also been applied to areas other than the award of disciplinary punishments to government employees by disciplinary authorities. For example, in Mineral Development,[23]the Supreme Court condemned a government order cancelling the licence of the petitioner company saying that "the contraventions alleged, even if true, appeal to be trivial for the drastic action taken by the State". Again, the Court said in the instant case : "... it is obvious that the license affecting rights of great magnitude was cancelled to say the least, for trivial reasons."

Rajesh[24] furnishes an example of application of the principle of proportionality to an area other than that of punishments. In Rajesh, applications were invited by **Central Bureau Of Investigation** for filling up 134 posts of constables. The selection process consists of a written examination and a viva voce test. There were some allegations of favouritism and nepotism while conducting the physical efficiency test; there were also some irregularities committed during the written examination. As a result thereof, the entire selection list was cancelled. This was challenged in the High Court through a writ petition. The High Court after reviewing the various reports and the entire process categorically rejected the allegations of nepotism and favouritism. The Court also ruled that there was no justification for cancelling the entire list when the impact of irregularities in the evaluation on merits could be identified specifically. On a reconsideration of the entire record, the court found that only 31 specific candidates were selected undeservedly. The High Court allowed the writ petition. On appeal the Supreme Court upheld the High Court. The Court ruled that when only 31 cases were tainted, there was hardly any justification in law to deny appointments to the other selected candidates whose selection was not

---

21 Bhagat Ram v. State of H.P., AIR 1983 SC 454 :(1983) 2 SCC 442
22 AIR 2003 SC 3712 at 3713 :2003 (3) LLJ 823 : (2003) 8 SCC 9.
23 Mineral Development Ltd. v. State of Bihar, AIR 1960 SC 468 :1960 (2) SCR 609.
24 Union of India v. Rajesh PU, Puthuvalnikathu, (2003) 7 SCC 285 :AIR 2003 SC 4222.

vitiated in any manner. The Court observed on this aspect of the case :[25]"Applying a unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard, of relevancies and allowing to be carried away by irrelevancies, giving a complete go-by to contextual considerations throwing to the winds the principle of proportionality in going farther than what was strictly and reasonably to meet the situation. In short, the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational."An aspect of the principle of proportionality is that the Administration ought not to make an order harsher than what the need of the situation demand. It is to be noted that the court has not invoked the Wednesbury test in the instant case. The use of the term 'irrational' seems to be in a sense somewhat wider than the Wednesbury test. In the instant case, the Supreme Court is very nearly playing the role of a primary reviewer.[26]

Journey through Judiciary: It is, as has, already been mentioned that Indian Courts have not lagged behind far from the observation as contemplated by Justice Brandeis.

It would be convenient for the observation to have a detailed look on the judgments and the observations made by the Indian Judiciary.

---

[25] Union of India v. Rajesh PU, Puthuvalnikathu, (2003) 7 SCC 285 at 289-90 :AIR 2003 SC 4222 : 2003 LIC 2653.

[26] On the present-day thinking on the viability of the Wednesbury test, see, infra, under "legitimate Expectation". JAIN, Indian Constitutional Law, 1147-1152. M.P. Jain Administrative Law

(I) Supreme Court Verdicts:

1. The Chartered Bank, Bombay V/s. The Chartered Bank Employees

AIR 1960 SC 919

Facts of the case are as the system of working in the cash department of the appellant Bank was that there was a Chief Cashier and there were about thirty Assistant Cashiers under him. The Chief Cashier had to give security for the work of the cash department; the Assistant Cashiers were employed upon being introduced by the Chief Cashier who guaranteed each such employee. There was long standing practice in the Bank that at the end of the day when the cash was locked up under the supervision of the Chief Cashier, all the assistant cashiers had to be present so that the cash could be checked before being locked up. In spite of reminders C, an Assistant Cashier, had been leaving the Bank without the permission of the Chief Cashier for some time before the cash was checked and locked up. The Chief Cashier reported the matter to the management, with drew his guarantee in respect of C and stated that unless the services of C were dispensed with his conduct would affect the security of the cash department.

The Bank terminated the services of C in accordance with the provisions of para. 522(1) of the All India Industrial Tribunal (Bank Disputes) Award, 1953, without holding any enquiry against C. The Industrial Tribunal to which the dispute was referred held that this was in fact and in reality a case of termination of services for misconduct and the Bank ought to have followed the procedure laid down in para. 521 of the Bank Award for taking disciplinary action, that the termination of service was illegal and improper and that C was entitled to reinstatement with full back wages and other benefits

Finally the Judgment was delivered by honorable Judges Sh. K.N. Wanchoo, Sh. P.B. Gajendragadkar and Sh. K.C. Das Gupta that the services of the Assistant Cashier were properly terminated by the Bank. There was no doubt that an employer could not dispense with the services of a permanent employee by mere notice and claim that the industrial tribunal had no jurisdiction to inquire into the circumstances of such termination. Even in a case of this kind the requirement of

bona fides was essential and if the termination of service was a colourable exercise of the power or as a result of victimisation or unfair labour practice the tribunal had jurisdiction to interfere. Where the termination of service was capricious, arbitrary or

Unnecessarily harsh that may be cogent evidence of victimisation or unfair labour practice. In the present case the security of the Bank was involved and if the Bank decided that it would not go into the squabble between the Chief Cashier and C and would use para. 522(1) of the Bank Award to terminate the services of C it could not be said the Bank was exercising its power under para. 522(1) in a. colourable manner. It was not necessary that in every case where there was an allegation of misconduct the procedure under para. 521 for taking disciplinary action should be followed.

In my opinion, it may be submitted that, it may be observed from the judgment cited above that initially judiciary was slightly averse to play a proactive part in developing labour jurisprudence. The opinion expressed by the court reflects that the employers were having privilege over employees.

2. Hind Construction & Engineering Co. Ltd. V/s. Their Workmen

AIR 1965 SC 917

Facts of the case in brief are as the Labour and Industrial - quantum of punishment - eleven workmen absent on 02.01.1961 - holiday according to established practice - company declared 02.01.1961 to be working day - workers dismissed for being absent - enquiry recommended dismissal of only eight - Tribunal observed eleven workers went on strike - dismissal on this ground not justified and issued directions of reinstatement - reference made regarding eleven workers - appeal by special leave against award by Tribunal - Government entitled to treat dispute as undivided - Tribunal to interfere with quantum of punishment only in exceptional circumstances - Apex Court held, interference justified in present case as punishment awarded severe and out of proportion.

Finally the Judgement was delivered by honorable Judges Sh. Hidayatullah , Sh. K.N. Wanchoo and Sh. P.B. Gajendragadkar as:

1. This is an appeal by special leave against the award of the Second Industrial Tribunal, West Bengal dated May 4, 1962 by which the Tribunal set aside the dismissal of eleven workmen employed by the appellant Company and ordered their reinstatement with all back wages except wages for January 2, 1961.

2. The appellant Company carries on activity as engineers and contractors in different parts of West Bengal. It had at Sukchar a store yard and at the relevant time it employed 30 workmen at Sukchar of whom 11 were permanent and the remaining temporary. We are concerned with the dismissal of the permanent workmen from January 2, 1961. According to the practice of the appellant Company fourteen days were holidays in each year. They included the 1st of January. Whenever a holiday fell on a Sunday the usual practice was to make the following day a holiday and that is how the dispute arose over the 2nd of January which followed a Sunday in 1961. The case of the Union, in short, was that the eleven workmen did not attend work on 2nd of January treating it as a holiday while the case of the appellant Company was that they had been expressly told that owing to pressure of work 2nd January was to be working day and a holiday in lieu would be given on another subsequent day. In view of their absence they were given a charge-sheet and after enquiry, were ordered to be dismissed. Before the enquiry they were placed under suspension and at the instance of the Union a reference was made to the Labour Officer for conciliation. The conciliation failed because the appellant Company did not appear. A reference was made to the Labour Tribunal by the Government of West Bengal on April 21, 1961 of the following issue :

   "Whether the dismissal of the following workmen is justified; what relief, if any, they are entitled to. . .

3. Assuming for a moment, that three workmen were warned and taken back, the employer knew very well that they could not join in view of the intervention

of the Union. On the whole, therefore, though we emphasise again that a Tribunal should not interfere with the kind or severity of punishment except in very extraordinary circumstances, we think that interference was justified in this case because the punishment was not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed.

The appeal was dismissed.

In my opinion, it may be submitted that, the court emphasised again that a tribunal should not interfere with the kind or severity of punishment except in very extraordinary circumstances, we think that interference was justified in this case because the punishment was not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed.

3. The Premier Automobiles Ltd. V/s. Kamlekar Shantaram Wadke of Bombay and Others

AIR 1975 SC 2238

Subject: Labour and Industrial - jurisdiction - Sections 9, 80 and Order 1 Rule 8 of CPC, 1908 - incentive scheme introduced by appellant - scheme was further altered on regularisation of 27 temporary workers

Facts of the in brief are as the suit instituted in Civil Court by union on behalf of members and non-members of union - Civil Court granted decree of injunction restraining appellant from implementing terms of altered scheme - appeal challenging jurisdiction of Civil Court for entertaining suit filed by union - source of rights of workers who were non-members of union was different from workers who were members of union - representative suit on their behalf not maintainable - union sought Order of injunction in Civil Court - suit for permanent injunction not maintainable as Civil Court had no jurisdiction to grant relief.

Termination of contract - company terminated contract under Section 19 (2) - termination not accepted by union of workers - remedy available to workers was to raise industrial dispute - suit instituted in Civil Court not maintainable.

Finally the Judgement was delivered by honorable Judges Sh.N.L. Untwwalia, Sh. A. Aligiriswami and P.K. Goswami as

1. These two appeals filed by special leave of this Court have been heard together because an important question of law as to the jurisdiction of the Civil Court to entertain the suits of the kinds filed in the two cases is common. Mr. Vimadalal, learned Counsel for the appellant company in Civil Appeal No. 922 of 197S followed by Mr. Nariman, appearing for respondents 3 to 6 and Mr. A. K. Sen, learned Counsel for the appellant company in Civil Appeal No. 2317 of 1972 argued in support of the ouster of the jurisdiction of the Civil Court Mr. Sorabjee, appearing on behalf of the plaintiff respondents 1 and 2 vehemently combated the proposition. He was followed by Mr. Som Nath Iyer, learned Counsel for the respondent Union in Civil Appeal No. 2317 of 1972. We shall proceed to state the facts of Civil Appeal No. 922 of 1973 first, discuss the point of jurisdiction as also the other points involved in that appeal and then briefly refer to the facts of the other case.

2. The appellant company carries on a big industry and owns several plants. One such plant is situated at Kurla, Bombay. In this plant there is a department known as Motor Production Department. The dispute relates to the workmen of this department. There seem to be three groups of workmen in the department aforesaid. One group was represented by Engineering Mazdoor Sabha here in after called the Sabha Union which is a registered Trade Union and was once a recognized union of the workmen of the appellant company. Respondents 1 and 2 who instituted the suit in question in the City Civil Court at Bombay are members of this union. Later on the Sabha Union was derecognized and another registered Trade Union known as Association of Engineering workers hereinafter called the Association Union-was recognised by the appellant company. This Association Union, respondent No. 3, was impleaded as defendant No. 2 in the action. Besides the members of these two unions, there are certain workmen who are members of neither.

3. An incentive scheme providing for certain incentive payments to the workmen of the Motor Production Department was introduced by the appellant company in pursuance of agreements entered from time to time between the company

and the Sabha Union. The last of such agreements executed between them was dated the 31st December, 1966. It appears that at the time of the execution of the last agreement there were 425 workmen in the department broadly speaking the incentive scheme was to make extra payments at the rate of 3.5 per cent over the basic production of 650 units upto the target of 900 on every extra production of 25 units. In other words, the workmen were to get 35 percent. More if they produced 900 units in a month of 25 working days. The next target fixed was 1250 units payable at the rate of 4 per cent, per 25 units. In other words, the workmen were to get 35 per cent + 56 per cent total 91 per cent more if they reached the production target of 1250 per month. It further appears that after the recognition of the Association Union, 27 more persons who were previously learners were taken in as regular temporary employees in the Motor Production Department on and from 1st September, 1970. The strength of the workmen thus according to the case of the appellant and respondent No. 3 went up from 425 to 452, naturally necessitating the revision of the norm and target figures of the incentive scheme. Some sort of arrangement was arrived at between the company and the Association Union which led to a protest by the Sabha Union in October, 1970. Eventually a definite settlement in writing was arrived at between the appellant and respondent No. 3 on the 9th of January, 1971 making the settlement effective from 1-9-1970. The norm figure of 650 units was raised to 725 and the first and the second target figures were raised from 900 to 975 and 1250 to 1325 respectively. The rates of incentive payment at 3.5 per cent in the first target and 4 per cent in the second target were retained. Thus the maximum incentive payment of 91 per cent was kept unaltered. Broadly speaking, therefore, the increase of 75 units at every stage of the production was attributable to the addition of the strength of 27 workmen in the Motor Production Department. The members of the Sabha Union, however, felt aggrieved by this, because, they thought the 27 newly added workmen were merely learners and could not be eligible for being taken in the pool of the incentive scheme. It would adversely affect the incentive payments which were to be made to the existing 425 workmen. According to the case of respondents 1 and 2 they for the first time learnt about the intention of the company to bring about a change in the service conditions when the altered scheme was put on the Notice Board on

the 15th March, 71. The two workmen who were the members of the Sabha Union rushed to the court and instituted their plaint on the 8th April, 1971 in the City Civil Court at Bombay seeking the permission of the court to institute the suit in a representative capacity under Order I, Rule 8 of the CPC-hereinafter called the Code-representing the workmen who were members of the Sabha Union as also those who were neither its members nor members of the Association Union. On an objection being raised subsequently respondents 4 to 6 were added as defendants 3 to 5 to represent the 27 disputed workmen.

4. Respondents 1 and 2 in their plaint chiefly based their claim on the Memorandum of Settlement dated the 31st December, 1966 which on being acted upon had become a condition of service not only of the members of the Sabha Union but also of others who were not its members. Their assertion was that the other settlement arrived at between the company and the Association Union under Section 18(1) of the Industrial Disputes Act, 1947-hereinafter referred to as the Act-Was not binding on those workmen who were not its members. They attacked the second agreement as having been arrived at without following the mandatory requirement of Section 9A of the Act. The first relief claimed in the suit was that the settlement dated the 9th January, 1971 was not binding on the plaintiffs and other concerned daily rated and monthly rated workmen of the Motor Production Department who were not members of the Association Union. The second relief was to ask for a decree of permanent injunction to restrain the appellant from enforcing or implementing the terms of the impugned settlement dated the 9th January, 1971. The appellant company and the other defendant respondents filed their written statements and contested the suit. They asserted that all the workmen of the Motor Production Department had impliedly accepted and acted upon the new settlement. They challenged the jurisdiction of the Civil Court to entertain the suit in relation to the dispute which was an industrial dispute and further asserted that in any view of the matter no decree for permanent injunction could be made.

5. The Trial Court framed several issues for trial but curiously enough dropped many issues as not surviving in view of the stand taken on behalf of the

plaintiffs' counsel at the time of the trial of the suit. It was conceded on their behalf, and rightly too, that the agreement dated the 31st December, 1966 was a settlement under Section 18(1) of the Act. it could be binding only on the members of the Sabha Union and not on others. But since the suit was filed on behalf of the non-members also who were not members of either Union and in a representative capacity the main basis of the suit being the agreement dated the 31st December, 1966 was given up, and it was stated on behalf of the plaintiffs that they did not wish to enforce that agreement. Hence many issues, according to the learned Trial Judge did not survive for discussion and were dropped. One such issue was issue No. 7 in relation to the requirement of the notice under Section 9A of the Act for effecting any change in the agreement dated the 31st December, 1966. Treating the incentive payments made on and from the year 1966 till 1970 as implied terms of conditions of service, the Trial Judge seems to have come to the conclusion that the change effected in January, 1971 was detrimental to and against the interests of the workmen. Due to some technical reasons the first relief of declaration was not granted. But holding that the court had jurisdiction to try the suit as it was a suit of a "Civil nature for enforcement of rights of common and general law and consequently there is no question of the reliefs being claimed under the Industrial Disputes Act", it granted a sort of conditional decree of injunction restraining the appellant from enforcing or implementing the terms of agreement of the 9th January, 1971 against the workmen of its Motor Production Department who are not members of the Association Union. The injunction, however, was not to operate in regard to any workmen who in writing accepted the terms of the impugned agreement or after the appellant took steps in accordance with law to make the agreement binding on workmen other than those who are not members of the Association Union. The decree for injunction was also to cease to be operative if the appellant gave any notice of change under Section 9A of the Act on expiry of 3 months after the expiry of 21 days notice given under the said provisions of law.

6. The company filed an appeal in the Bombay High Court to challenge the decision of the City Civil Court. The learned single Judge of the High Court who heard the appeal following his decision in the Civil Revision filed by the

other company which is appellant in the other appeal, sustained the jurisdiction of the Civil Court to entertain the suit and did not feel persuaded to interfere with it on merits. The company took the matter in a letters patent appeal but it met the same fate before a Division Bench of the High Court. On grant of special leave, the present appeal was filed.

7. The foremost and perhaps the only point, undoubtedly a vexed one, which falls for our determination is whether on the facts and in the circumstances of this case the Civil Court had jurisdiction to entertain the suit filed by respondents 1 and 2 against the appellant and respondents 3 to 6. Various English and Indian authorities were cited on the point on either side at the Bar and we shall endeavour to answer the question of law on appreciation of many such authorities. It may not be necessary to refer to all. Before we do so, we may very briefly refer to the relevant provisions of the Act.

8. The object of the Act, as its preamble indicates, is to make provision for the investigation and settlement of industrial disputes, which' means adjudication of such disputes also. The Act envisages collective bargaining, contracts between Union representing the workmen and the management, a matter which is outside the realm of the common law or the Indian Law of contract. The expression "industrial dispute" is defined in Section 2(k) to say that:

"Industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;

Section 2(p) gives the definition of the word "settlement" thus:

"settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer;"

Chapter II provides for the authorities under the Act, namely, for Constitution of the Works Committee, Boards of Conciliation, Courts of Inquiry, Labour Courts, Tribunals and National Tribunals as also for appointment of Conciliation Officers. Different kinds of authorities having very varied and extensive powers in the matter of settlement and adjudication of industrial disputes have been constituted. Since the time of the earliest decisions of the Federal Court and the Supreme Court of India it has been recognized fully well that the powers of the authorities deciding industrial disputes under the Act are very extensive-much wider than the powers of a Civil Court while adjudicating a dispute which may be an industrial dispute. The Labour Courts and the Tribunals to whom industrial disputes are referred by the appropriate governments under Section 10 can create new contracts, lay down new industrial policy for industrial peace, order reinstatement of dismissed workmen which ordinarily a Civil Court could not do. The procedure of raising an industrial dispute starts with the submission of a charter of demands by the, workmen concerned. The Conciliation Officer can be and is often made to intervene in the matter first. He starts conciliation proceedings under Section 12. If a settlement is arrived at during the course of the conciliation proceeding, it becomes binding on all workmen under Section 18(3) of the Act If there is a failure of conciliation, the appropriate government is required to make a reference under Section 10(1) of the Act. The award published under Section 17(1) becomes final and cannot be called in question by any court in any manner whatsoever as provided in Sub-section (2). Section 18(1) of the Act says:

A settlement arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

Section 19(2) makes provision for terminating a settlement and provides that it shall continue to be binding until then. Section 29 provides for penalty for breach of settlement or award. The residuary punishing section for contravention of any provisions of the Act or the Rules made there under is Section 31(2). The conditions of service applicable to workmen cannot be

changed to their prejudice in regard to any matter connected with the dispute during the pendency of any conciliation proceeding or any proceeding before the Labour Court or the Tribunal as provided in Section 33(1)(a). Section 33C(1) provides for recovery of on money due from an employer. The scope of Sub-section (2) as to the power of the Labour Court for the purpose of determination of the amount due is much wider than the power of Government under Sub-section (1).

9. It would thus be seen that through the intervention of the appropriate government, of course not directly, very extensive machinery has been provided for settlement and adjudication of industrial disputes. But since an individual aggrieved cannot approach the Tribunal or the Labour Court directly for the redress of his grievance without the intervention of the government, it is legitimate to take the view that the remedy provided under the Act is not such as to completely oust the jurisdiction of the Civil Court for trial of industrial disputes. If the dispute is not an industrial dispute within the meaning of Section 2(k) or within the meaning of Section 2A of the Act, it is obvious that there is no provision for adjudication of such disputes under the Act. Civil Courts will be the proper forum. But where the industrial dispute is for the purpose of enforcing any right, obligation or liability under the general law or the common law and not a right, obligation- or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the Civil Court. It is plain that he can't have both. He has to choose the one or the other. But we shall presently show that the Civil Court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement of certain right or liability created only under the Act. In that event Civil Court will have no jurisdiction even to grant a decree of injunction to prevent the threatened injury on account of the alleged breach of contract if the contract is one which is recognized by and enforceable under the Act alone.

10. In Doe v/s Bridges (1831) 1 B & Ad. 847 are the famous and oft quoted words of Lord Tenterden, C.J. saying:

Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

This passage was cited with approval by the Earl of Halsbury, L. C in Pasmore v/s The Oswald twistle Urban District Council 1898 AC 387 and by Lord Simonds at p. 407 in the case of Cutler v/s Wands worth Stadium Ltd. 1949 AC 398. Classic enunciation of the law and classification of the cases in three classes was done by Wilies. J. "with the precision which' distinguished the utterances of that most accomplished lawyer, in the case of Wolverhampton New Waterworks Co. v/s Hawkesford" (1859) 6 C. B. 336 (vide the speech of Viscount Haldane at page 391 in the case of Neville v/s London "Express," Newspaper, Ltd. 1919 AC 368. The classes are enumerated thus:

There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re- enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it.... "With respect to that class it has always been held, that the party must adopt the form of remedy given by the statute.

11. The judgment of the Court of Appeal which was affirmed by the House of Lords in Pasmore's case 1898 AC 387 is reported in Peebles v/s The Oswald twistle Urban District Council. (1897) 1 QB 625. It was pointed out that the duty of a local authority, under Section 15 of the Public Health Act, 1875 to make such sewers as may be necessary for effectually draining their district for the purposes of the Act, cannot be enforced by action for a mandamus, the only remedy for neglect of the duty being that given by Section 299 of the Act by complaint to the Local Government Board. Lord Esher M. R. pointed out

that the liability to make sewers was imposed by the statute. There was no such liability before it The case, therefore, comes within the canon of construction that if a new obligation is imposed by statute, and in the same statute a remedy is provided for non fulfillment of the obligation, that is the only remedy. Lopes, L. J. further succinctly pointed out that Section 15 did not create any duty towards any particular individual, and Section 299 gives a specific remedy for the benefit of the locality at large. Thus, it should be noticed, that the obligation imposed by the statute did not result in creation of any right in favour of any particular individual. Earl of Halsbury, L. C. pointed out in his speech at page 394:

The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law." The matter would be different if the obligation imposed under the statute brings into existence a right in favour of an individual but provides no remedy for its enforcement. Supposing after providing for awarding of certain compensation in Chapter VA of the Act there was no provision made in it like Section 10 or Section 33C the mere penal provision for violation of the obligation engrafted in Section 29 or Section 31 would not have been sufficient to oust the jurisdiction of the Civil Court for enforcement of the individual right created under Chapter VA.

12. The decision of the House of Lords in, the case of Barraclough v/s Brown[27] is very much to the point. The special statute under consideration there gave a right to recover expenses in a court of Summary Jurisdiction from a person who was not otherwise liable at common law. It was held that there was no right to come to the High Court for a declaration that the applicant had a right to recover the expenses in a court of Summary Jurisdiction. He could take proceedings only in the latter court. Lord Herschell after referring to the right conferred under the statute "to recover such expenses from the owner of such vessel in a court of summary jurisdiction" said at page 620:

[27] 1897 AC 615

I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right

Lord Watson said at page 622:

The right and the remedy are given unoflatu, and the one cannot be dissociated from the other.

In other words if a statute confers a right and in the same breath provides for a remedy for enforcement of such right the remedy provided by the statute is an exclusive one. But as noticed by Lord Simonds in Cutler v/s Wandsworth Stadium Ltd.[28] from the earlier English cases, the scope and purpose of a statute and in particular for whose benefit it is intended has got to be considered. If a statute:

intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. there arises at common law: a correlative right in those persons who may be injured by its contravention.

Such a type of case was under consideration before Lord Goddard, C.J. in the case of Solomons v/s R. Gertzenstein Ltd. [29]. Lord Denning M. R. relied upon the principles enunciated by Lord Tenterden in Doe v/s Bridges[30] approved in Pasmore's case 1898 AC 387 in the case of Southwark London Borough Council v/s Williams. (1971) 1 Ch 734. The celebrated and learned Master of the Rolls said at page 743:

Likewise here in the case of temporary accommodation for those in need. It cannot have been intended by Parliament that every person who was in need of temporary accommodation should be able to sue the local authority for it: or to take the law into his own hands for the purpose.

---

28 1949 AC 398
29 (1954) 2 WLR 823
30 (1831) 1 B & Ad 847

13. Mr. Sorabjee endeavoured to take his case out of the well established and succinctly enunciated principles of law by the English courts on two grounds:

(1) That the remedy provided under the Act is no remedy in the eye of law. It is a misnomer. Reference to the Labour Court or an Industrial Tribunal for adjudication of the industrial dispute was dependent upon the exercise of the power of the Government under Section 10(1).It did not confer any right on the suitor.

(2) Even if the Civil Court had no jurisdiction to entertain a suit for enforcement of a right created under the Act, as in England, courts in India also could make an order or decree for injunction to prevent the threatened injury on breach of the right

14. We do not find much force in either of the contentions. It is no doubt true that the remedy provided under the Act under Section 33C, on the facts and in the circumstances of this case involving disputes in relation to the two settlements arrived at between the management and the workmen, was not the appropriate remedy. It is also true that it was not open to the workmen concerned to approach the Labour Court or the Tribunal directly for adjudication of the dispute. It is further well established on the authorities of this Court that the Government under certain circumstances even on the ground of expediency (vide State of Bombay v/s K. P. Krishnan MANU/SC/0199/1960 : (1960)IILLJ592SC : MANU/SC/0199/1960 : (1960)IILLJ592SC and Bombay Union of Journalists v/s The State of Bombay MANU/SC/0135/1963 : (1964)ILLJ351SC can refuse to make a reference. If the refusal is not sustainable in law, appropriate directions can be issued by the High Court in exercise of its writ jurisdiction. But it does not follow from all this that the remedy provided under the Act is a misnomer. Reference of industrial disputes for adjudication in exercise of the power of the Government under Section 10(1) is so common that it is difficult to call the remedy a misnomer or insufficient or inadequate for the purpose of enforcement of the right or liability created under the Act. The remedy suffers from some handicap but is well compensated on the making of the reference by the wide powers of the Labour Court or the Tribunal. The handicap leads only to this conclusion that

for adjudication of an industrial dispute in connection with a right or obligation under the general or common law and not created under the Act, the remedy is not exclusive. It is alternative. But surely for the enforcement of a right or an obligation under the Act the remedy provided un oflatu in it is the exclusive remedy. The legislature in its wisdom did not think it fit and proper to provide a very easy and smooth remedy for enforcement of the rights and obligations created under the Act. Persons wishing the enjoyment of such rights and wanting its enforcement must rest content to secure the remedy provided by the Act The possibility that the Government may not ultimately refer an industrial dispute under Section 10 on the ground of expediency is not a relevant consideration in this regard.

15. Mr. Sorabjee very emphatically relied upon the judgment of Farwell, J. in the case of Stevens v/s Chown (1901) 1 Ch 894 in support of his submission that even if a suit could not lie in a civil court for enforcement of the right, still the remedy of injunction by a suit was not lost The learned Judge at page 903 in the first instance pointed out that the case before him fell within the first of the three classes enumerated by Willes, J. in the case of Wolverhampton [31]. On the true construction of the Act under consideration it was opined that it had simply re-enacted the old common law right to the market But then the learned Judge proceeded to say at page 904 that the remedy in Chancery, as a separate remedy, was wider than the old common law remedy. Says the learned Judge further at page 904:

In my opinion, there was nothing to prevent the old Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy-subject only to this, that the right so created was such a right as the Court under its original jurisdiction would take cognizance of.

On a close scrutiny, however, it would be noticed that the principle of separate remedy only for the purpose of injunction available in a court of Chancery,

[31] (1859) 6 CB 336

which was kept intact even after the Judicature Act of 1873 is not applicable in India. Historically the Chancery Court had assumed certain special jurisdiction under its original jurisdiction to take cognizance of a special kind of right even though the common law court may not have such jurisdiction. In India under Section 9 of the Code, the Courts have subject to certain restrictions, jurisdiction to try suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. There are no different systems of civil courts for enforcement of different kinds of rights. In the instant case taking cognizance of a suit in relation to an industrial dispute for the enforcement of any kind of right is not expressly barred. But if it relates to the enforcement of a right created under the Act, as stated above, by necessary intendment, the jurisdiction of the Civil Courts is barred. That being so, in India, it is barred for all purposes, except in regard to matters which will be alluded to hereinafter. The position will be further clear on reference to the quotation from the decision of Lord Turner in the judgment of Farwell, J. at pages 904 and 905 from the case of Emperor of Austria v/s. Day [32]. The great Master of Equity in relation to the remedy in the Chancery Court said:

I do not agree to the proposition, that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law...It is plain therefore, that, in the opinion of Lord Redesdale, who was pre-eminently distinguished for his knowledge of the principles of this Court, the jurisdiction of the Court is not limited to cases in which there is a right at law.

It will bear repetition to say that the jurisdiction of the Civil Court in India is limited to cases in which there is a right at law, that is to say, a right to be pursued in such Court.

16. The distinction afore-mentioned also finds ample support from the speech of Lord Davey in Barraclough v/s. Brown[33] the noble and learned Lord has pointed out that the power of the Court of Chancery to make declarations of right without giving consequential relief was introduced by Section 50 of the

[32] (1861) 3 D. F. & J. 217
[33] 1897 AC 615

Chancery Procedure Act, 1852. After some decisions of the English courts some additional words were introduced in order to "enlarge the power of the Court to make declarations in cases where from the nature or the circumstances of the case no substantive relief could be given by the Court." When we proceed to deal with certain decisions of the Privy Council and of this Court in relation to a taxing statute it will be pointed out under what circumstances an action in a Civil Court can lie to challenge the decisions of the taxing authorities. If the proposed action of the taxing authority is of a kind which when taken would be amenable to be challenged in a Civil Court the remedy for the relief of injunction to prevent the action would also lie but not otherwise. As for example, in accordance with the majority decisions of this Court in the case of K. S. Venkataraman & Co. v/s. State of Madras MANU/SC/0293/1965 : [1966]60ITR112(SC) : MANU/SC/0293/1965 : [1966]60ITR112(SC) if tax is imposed under a provision of the statute which is ultra vires, the imposition can only be challenged by pursuing a remedy in a Civil Court or in High Court. Suppose a case where a proceeding is initiated by issuance of a notice for imposing a tax on a person under a provision of law which is ultra vires, a suit for injunction would lie to prevent the threatened action. But a suit, unlike the remedy in a Chancery Court, merely for the purpose of injunction would not lie to prevent an action which when completed cannot be challenged in a Civil Court.

17. Reliance was also placed on behalf of the contesting respondents on the case of Carlton Illustrators v/s. Coleman & Co. Limited[34] . The plaintiff also asks for an injunction to prevent the future commission of breaches of this statutory enactment. It was argued, though not very strenuously, that the only remedy was the recovery of the penalty. I think that this case comes within the rule that, where there is a statutory enactment in favour of a person and there is a penalty for the breach of the statutory enactment which goes to the person aggrieved, in such a case the penalty is the only remedy for the breach. That principle, however, only applies to remedies for the breach which has been committed, and an injunction is not a remedy for the past breach, but is a means for preventing further breaches.

---

[34] (1911) 1 KB 771

18. Reliance was also placed on behalf of the contesting respondents on the decision of the House of Lords in PYX Granite Co. Ltd. v/s. Ministry of Housing and Local Government[35]but the decision is of no help to them. Viscount Simonds at pages 286 and 287 has said with reference to the Act of 1947 which was under consideration before the House that the Act provides a person with another remedy and then the question posed is-"Is it. Then, an alternative or an exclusive remedy?" Answer given is:

There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away. And it appears to me that the case would be unarguable but for the fact that in Barraclough v/s. Brown (supra) upon a consideration of the statute there under review it was held that the new statutory remedy was exclusive. But that case differs vitally from the present case.

The well-known distinction is brought about in these terms:

The appellant company is given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not unoflatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect. There is, in my opinion, nothing in Barraclough v/s. Brown[36] which denies them that remedy, if it is otherwise appropriate.

19. Mr. Sorabjee cited the case of Duches of Argyll v/s. Duke of Argyll (1967) 1 Ch 302 to strengthen his argument further in support of the dicta of Farwell. J. in the case of Stevens v/s Chown. (1901) Ch 894. But we think the very relevant and pertinent distinction pointed out by us above has again been missed by the learned Counsel. The special jurisdiction of the Court of Chancery is further emphasised in a passage quoted with approval at page 345 of the report from the judgment of North, J. in the case of Pollard v/s

[35] 1960 AC 260
[36] 1897 AC 615

Photographic Company. (1889) 40 Ch D 345. It is worthwhile to quote a portion of that passage which reads thus:

But it is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence, as was pointed out by Lord Cotton-hem in Prince Albert v/s Strange-(1849) 1 H. & T. 1 .

Ungood Thomas, J. has thereafter said at page 345:

But these were cases dealing not with interlocutory injunctions but with final injunctions and it was the practice of the Court of Chancery to exercise a jurisdiction, which was not limited to the considerations governing final injunctions, for the purpose of granting interlocutory injunctions pending the trial of a legal right

No such thing is permissible in India. As far back as 1952 it was pointed out by this Court in the case of The State of Orissa v/s Madan Gopal Rungta 1952 SCR 28 :[37] that the High Court cannot make a direction under Article 226 of the Constitution for the purpose of granting interim relief only pending the institution of a suit merely because the suit could not be instituted until after the expiry of 60 days from the date of a notice under Section 80 of the Code. Much less it can be so done by a Civil Court.

20. Mr. Sorabjee very strongly relied upon the Full Bench decision of the Lahore High Court in Municipal Committee, Montgomery v/s. Master Sant Singh[38] in support of the plaintiff-respondent's right to have an order of injunction in this case. But a passage occurring at p. 380 col. 1 negatives his contentions and squarely supports the distinction drawn by us above. The passage runs thus:

If therefore a demand made by a Committee is not authorised by the Act and the person affected thereby objects to the payment on 'the ground that in

[37] [1952]1SCR28
[38] AIR 1949 Lah 377

making the demand the Committee was exercising a jurisdiction not vested in it by law, it can, by no stretch of language, be said that he is objecting to his liability to be taxed under the Act. Any special piece of legislation may provide special remedies arising there from and may debar a subject from having recourse to any other remedies, but that bar will be confined to matters covered by the legislation and not to any extraneous matter.

21. We now proceed to consider the cases creating special liability, mostly tax liability, and providing for procedures and remedies for determination of the amount of tax and relief against the assessment of such liability. In the well-known decision of the Privy Council Secretary of State, v/s Mask and Co. MANU/PR/0022/1940 Lord Thankerton delivering the judgment of the Board alluded to the third class of cases to be found in the judgment of Willes. J. in Wolverhamptons' case. (1859) 6 CB 336. The order of the Collector of Customs passed on the appeal under Section 188 of the Sea Customs Act, 1878 was held to be an order within his exclusive jurisdiction excluding the jurisdiction of the Court to challenge it. The other well-known decision of the Privy Council is the case of Raleigh Investment Co. Ltd. v/s Governor General in Council 74 Ind App 50 : AIR 1947 PC 78. Both the decisions aforesaid were noticed by Gajendragadkar, J. as he then was, delivering the judgment on behalf of the Constitution Bench of this Court in Firm of Illuri Subbayya Chetty and Sons v/s The State of Andhra Pradesh. MANU/SC/0211/1963 : [1963]50 ITR 93 (SC) MANU/ SC/ 0211/ 1963 : [1963]50 ITR 93 (SC) . At page 763 (of SCR) : at p. 326 of AIR the circumstances under which the decision of the taxing authority under the Madras General Sales Tax Act. 1939 could be challenged in a Civil Court were pointed out in these terms:

Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think. be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority

in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute. In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on the merits, the decision of the assessing authority was wrong, cannot be the subject-matter of a suit because Section 18-A clearly bars such a claim in the civil courts.

It would be noticed on appreciation of the above dicta that the issue to be tried in the suit instituted in a civil court to challenge the decision of the taxing authorities is quite distinct and different from the one which is within their exclusive jurisdiction. The issues in the two proceedings are different and exclusive in their respective spheres. Many authorities were reviewed by Subba Rao, J. as he then was in the case of Firm Seth Radha Kishan v/s The Administrator. Municipal Committee, Ludhiana MANU/SC/0187/1963 : [1964]2SCR273 : MANU/SC/0187/1963 : [1964]2SCR273 including the principles enunciated by Willes. J. in Wolverhampton's case (1859) 6 CB 336. The decision of the Full Bench of the Lahore High Court (supra) was also referred, and the final principle enunciated is to be found at page 284 in these terms:

Under Section 9 of the CPC the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil Courts. The statute may specifically provide for ousting the jurisdiction of civil Courts; even if there was no such Specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the said remedy could be had.

Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a. statute, even if its order is, expressly or by necessary implication. made final. if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.

The principles aforesaid were reiterated in the decision of this Court in Bharat Kala Bhandar Ltd. v/s Municipal Committee, Dhamangaon MANU/SC/0267/1965 : [1966] 59 ITR 73 (SC) : MANU/SC/0267/1965 : [1966] 59 ITR 73 (SC) albeit the learned Judges by 3: 2 differed in the application of the principle to the facts of the case.

22. The unanimous decision of a Bench of 7 Judges of this Court was given by Gajendragadkar, C.J. in the case of Kamala" Mills Ltd. v/s State of Bombay MANU/SC/0291/1965 : [1965]57 ITR 643 (SC) : MANU/SC/0291/1965 : [1965] 57 ITR 643 (SC) . The decision of the House of Lords in the case of PYX Granite Co. Ltd. 1960 AC 260 was referred to at page 81 after referring to the decisions of the Privy Council in the case of Mask &Co :MANU/PR/0022/1940 and the principles were reiterated at page 82. A doubt which was being cast in the full application of the ratio of the Privy Council in Raleigh Investment Co.'s case : AIR 1947 PC 78 was crystallised in the majority decision of Subba Rao, J. in the case of K. S. Venkataraman & Co. v/s State of Madras : MANU/SC/0293/1965 : [1966]60ITR112(SC) (supra). The minority decision of Shah, J. was to the contrary. The majority view made a departure from the dicta of the Privy Council in case of a challenge to assessment of tax made under ultra vires provisions .of the law. The decision of this Court in State of Kerala v/s RamaswamiIyer & Sons MANU/SC/0220/1966 : [1966]61ITR187(SC) :MANU/SC/0220/1966 : [1966]61ITR187(SC) is again in connection with the challenge to sales tax assessment by institution of a suit in civil Court. Mitter, J. reviewed many decisions of this Court in the case of Pabbojan Tea Co. Ltd. etc. v/s The Deputy Commissioner, Lakhimpur etc. MANU/SC/0231/1967 : (1967)IILLJ 872 SC : MANU/SC/0231/1967 : (1967)IILLJ872SC a case arising out of a challenge to the orders of the authority under the Minimum Wages Act. Sub-

section (6) of Section 20 of the Act was held not to exclude the jurisdiction of the Civil Court when the order of the authority is challenged on the ground of non-applicability of the Act to a certain class of workers. Hidayatullah. C.J. delivering the judgment on behalf of Constitution Bench of this Court took pains to discuss many authorities in the case of Dhulabhai v/s The State of Madhya Pradesh MANU/SC/0157/1968 : [1968]3 SCR 662 : MANU/SC/0157/1968 : [1968]3 SCR 662 , culled out as many as 7 propositions of law at pages 682 and 683. But the principles enunciated were relevant to find out the jurisdiction of the Civil Court and its scope to challenge the assessments made under a taxing statute. Nothing contrary to what we have said above is to be found in any of the 7 principles enunciated by the learned Chief Justice. The case of Union of India v/s A. V/S Narasimhalu MANU/SC/0166/1969 : 1983(13)ELT 1534 (SC) was again in regard to exclusion of jurisdiction of the civil Court in a suit to challenge an order under Section 188 of the Sea Customs Act. 1878.

23. It may be concluded that, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated as below:

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created Under the Act. then the only remedy available to the suitor is to get an adjudication under the Act.

(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute. as the case may be.

24. We may, however, in relation to principle 2 stated above hasten to add that there will hardly be a dispute which will be an industrial dispute within the meaning of Section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Such a contingency, for example, may arise in regard to the dismissal of an unsponsored workman which in view of the provision of law contained in Section 2A of the Act will be an industrial dispute even though it may otherwise be an individual dispute. Civil Courts, therefore, will have hardly an occasion to deal with the, type of cases falling under principle 2. Cases of industrial disputes by and large, almost invariably, are bound to be covered by principle 3 stated above.

25. Some of the decisions of the High Courts in India cited at the Bar may now be briefly noticed. They fall in one category or the other and have expressed divergent views. Those which have taken any view contrary to the one expressed by us above must be deemed to have been overruled in that regard and those falling in line with our views are being affirmed.

26. In the case of Krishnan v/s East India Distilleries and Sugar Factories, Ltd. Nellikuppam MANU/TN/0178/1963 : AIR1964Mad81 the learned single Judge of the Madras High Court has held that the jurisdiction of the Civil Court is ousted impliedly to try a case which could form subject-matter of an industrial dispute collectively between the workmen and their employer. One of us (Alagiriswami, J.) as a Judge of the Madras High Court in the case of Madura Mills Co. Ltd. v/s Guruvammal (1967) 2 LLJ 397 has pointed out that the Act creates a special machinery under Section 33C(2) to enforce specially created rights. The parties could not, therefore, approach the ordinary civil court. We affirm the aforesaid two decisions of the Madras High Court. A single Judge of the Mysore High Court took the same view in the case of Nippani Electricity Company (Private) Ltd. v/s Bhimarao Laxman PatilI LLJ 268 : 1968 Lab IC 1571 and a Bench of the Bombay High Court in the

Pigment Lakes and Chemical Mfg. Co. (P) Ltd. v/s Sitaram Kashiram Konde71 Bom LR 452 : 1970 Lab IC 115 held that the jurisdiction of the civil court to deal with matters mentioned in Chapter VA read with Schedules 2 to 4 to the Act is impliedly barred. Similar opinion was expressed by a learned single Judge of the Kerala High Court in the case of Nanoo Asan Madhavan v/s State of Kerala MANU/KE/0096/1969 : (1970)ILLJ 272 Ker . A learned single Judge of the Calcutta High Court seems to have taken a somewhat different view in the case of Bidyut Kumar Chatterjee v/s Commissioners for the Port of Calcutta II LLJ 148 : 1970 Lab IC 708. The ratio of the case in so far as it goes against the principles enunciated by us is not correct. We approve what has been said by a Bench of the Calcutta High Court in the case of Austin Distributors Pvt. Ltd. v/s Nil Kumar Das 1970 Lab IC 323 that a suit for recovery of damages for wrongful dismissal, on the grounds which are clearly entertainable in civil court, would lie in that court even though a special remedy is provided in the Act in respect of that matter. This would be so on the footing that the dismissal was in violation of the contract of service recognized under the general law. More or less to the same effect is the view taken by a learned single Judge of the Mysore High Court in the case of Syndicate Bank v/s Vincent Robert Lobo MANU/KA/0020/1971 : (1971)IILLJ46Kant : (1971) Lab IC 1055. It is not necessary to refer to some unreported decisions of the Bombay High Court taking one view or the other.

27. Applying the principles aforementioned to the facts of the instant case, it is clear that what the plaintiff-respondents wanted to prevent was, by and large, threatened breach of their right which flowed from the agreement dated the 31st December, 1968 entered into between the Sabha Union and the Company. Such a collective agreement is recognized and creates a right in favour of the members of the Union only under Section 18(1) of the Act and not under the general law of contract. Withdrawal of the claim based upon the said agreement by their learned Counsel in the Trial Court had no effect on the question of its jurisdiction to try the suit. In so far as the suit was filed in a representative capacity on behalf of the members of the Sabha Union by two of its members under Order 1, Rule 8 of the Code it was clearly a suit in relation to the exercise of right created under the Act. In their case it was not

permissible to fall back upon the allegedly implied terms and conditions of service. The source of their right was the agreement entered from time to time under Section 18(1) of the Act culminating in the agreement dated the 31st Dec, 1966. It is reasonable to take the view that even the workmen who were not members of the Sabha Union but were given the benefit of incentive payments under the said agreement were so given because they tacitly agreed to be bound by the said agreement. Even accepting that in their case it had assumed the character of an implied term of contract of service, the alternative claim made in paragraph 8 of the plaint as being a condition of service otherwise, can be referable to the claim of the non-members only. The source of their right in that event was different and a representative suit on their behalf by the two plaintiffs could not be maintained. The numerous persons must have the same interest in one suit instituted under Order I, Rule 8 of the Code. Persons having different interests cannot be so represented. The better and more reasonable view, therefore, to take is that all workmen represented by the two plaintiffs sought an order of injunction in the civil court to prevent an injury which was proposed to be caused to them in relation to their right under the Act. Hence a suit for a decree for permanent injunction was not maintainable in the civil court as it had no jurisdiction to grant the relief or even a temporary relief.

28. Although the issue as to the non-compliance with the requirements of Section 9-A of the Act was dropped, the learned Trial Judge seems to have found that the proposed change in the conditions of service was adverse to the interests of the workmen. Whether it was so or not is a matter of debate. But one thing was apparent that both the agreements could not be simultaneously given effect to. It was impracticable-almost impossible to do so. The result of the order of injunction made by the Trial Court was that workmen represented by the two plaintiffs were to get incentive payments in accordance with the scheme embodied in the agreement dated the 31st December, 1966 ignoring the addition to the strength of the workmen of the Motor Production Department in the shape of the 27 persons. On the other hand the members of the Association Union who had entered into the second agreement dated the 9th January, 1971 were to get their incentive payments in accordance with that

agreement taking into account the contribution made in the matter of production by the newly added 27 persons. On the face of it, it was an attempt to put two swords in one sheath. That it was not only difficult but almost impossible to do so was conceded on all hands, including Mr. Sorabjee, learned Counsel for the plaintiff-respondents. Apart from the question of jurisdiction the decree for injunction was not sustainable on this account too. The dispute could well be decided from all aspects in a reference under the Act.

29. One more difficulty in the way of the sustainability of the order of injunction may also be indicated. Temporary injunction can be granted under Sub-section (1) of Section 37 of the Specific Relief Act, 1963 but a decree for perpetual injunction is made under Sub-section (2). Grant of perpetual injunction is subject to the provision contained in Chapter 8. Under Section 38(1) a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour irrespective of the fact whether the obligation arises at common law, under a contract or under a special statute (subject to the point of jurisdiction). But Sub-section (2) provides that when any such obligation arises out of contract the courts shall be guided by the rules and provisions contained in Chapter 2. Section 14(1)(c) occurring in that Chapter says that a contract which is in its nature determinable cannot be specifically enforced. The contract in question embodied in the written agreement dated the 31st December, 1966 was in its nature determinable under Section 19(2) of the Act or could be varied by following the procedure under Section 9A. Section 41(a) of the Specific Relief Act says that an in junction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Section 42 providing an exception to this is not attracted in this case. The decree or order of injunction made therein, therefore, is not sustainable on this account too.

30. We now proceed to briefly state the facts of Civil Appeal No. 2317/1972. During the pendency of an industrial dispute in I. T. No. 139 of 1965, 46 workmen of the appellant company were sought to be dismissed and an application for according approval to the dismissal was made under

Section33(2) of the Act. On 14-3-1968 a settlement was reached between the Engineering Mazdoor Sabha Union, plaintiff No. 1, the same Sabha Union as in the other case, and the company. A written agreement was executed according to which the parties agreed to refer 'their cases to a Board of Arbitrators consisting of 3 persons. During the pendency of the arbitration the 46 workmen were to remain suspended from work till its decision. They were to be paid from the date of resumption of work by the other workmen, 50 per cent, of their wages which they would have normally earned had they not been so suspended. On 14-11-1971 the appellant company served a notice on the union, plaintiff No. 1 in writing seeking to terminate the settlement in accordance with Section 19(2) of the Act. Thereupon the union and two of their members instituted the suit on 14-12-1971 challenging, the action of the company on several grounds and praying for an order of injunction to restrain the company from committing a breach of the agreement dated the 14th March, 1968 including the breach as regards the payment of 50 per cent, wages to the 46 workmen. It may be stated that the company's nominee on the Board of Arbitrators had withdrawn. A prayer, therefore, was made in the plaint to direct the company to appoint its nominee in place of Mr. Karnik who had withdrawn. The company asked the City Civil Court of Bombay, where the suit was instituted, to decide the question of jurisdiction of the court to entertain the suit as a preliminary issue. The court held against the company. It went up in revision before the Bombay High Court. The same learned Judge sitting singly who later on decided the other case upheld the jurisdiction of the civil court to try the suit. The company filed this appeal by special leave.

31. On the facts of this case it is all the more clear that the civil court has no jurisdiction to try- it. The manner of voluntary reference of industrial disputes to arbitration is provided in Section 10A of the Act. The reference to arbitration has to be on the basis of a written agreement between the employer and the workmen. As provided in Sub-section (5) nothing in the Arbitration Act, 1940 shall apply to arbitrations under Section 10A of the Act. There is no provision in the Act to compel a party to the agreement to nominate another arbitrator if its nominee has withdrawn from arbitration. The company had terminated the agreement dated the 14th March, 1968 under Section 19(2) of

the Act. On the authority of this Court in South Indian Bank Ltd. v/s A. R. Chacko MANU/SC/0175/1963 : (1964)ILLJ19SC : MANU/SC/0175/1963 : (1964)ILLJ19SC Mr. Iyer endeavoured to argue that in spite of the termination of the agreement it still continued to be in force. Apart from the fact that the decision of this Court was with reference to the termination of the award under Section 19, it is clear that the termination of the agreement in this case was not accepted by the union. It sought to challenge it by the institution of a suit. It is clear that the suit was in relation to the enforcement of a right created under the Act. The remedy in Civil Court was barred. The only remedy available to the workmen concerned was the raising of an industrial dispute. It was actually raised, and, as a matter of fact, shortly after the institution of the suit the disputes were referred by the Government to the Industrial Tribunal in I. T. Number 33 of 1972 on the 25th January, 1972.

32. For the reasons stated above both the appeals are allowed, the judgments and orders of the courts below are set aside. But in the circumstances we shall make no order as to costs in either of the appeals.

In about to discuss the territorial jurisdiction

Where unfair labour practice on the part of the employer is alleged by the employee on account of his transfer from one place to another, the actual adoption of unfair labour practice would be at the place from where the employee is either sought to be transferred or at the place to which he is sought to be transferred. It cannot, by any stretch of imagination, be said to have resulted at the place from where the order of transfer is merely issued. It is not the issuance of the order but the consequence of the order issued that would result in unfair labour practice. Being so, in case of alleged harassment consequent to the transfer resulting into unfair labour practice to the employee can result either at the place where the employee had been working prior to the issuance of the order or at the place where he is actually transferred under such order. The cause of action on account of alleged unfair labour practice would arise only at one of these two places and not at any third place. [8]

When, however, the employer had no establishment at Mumbai and the employee was appointed there merely to ascertain the possibility of organising the operations of the employer there in a big way, but the same could not materialise and the employee was transferred and directed to report for his duties at Delhi, it was held that it could not be said that the unfair labour practice could result at any place other than Delhi from where his employment was controlled. [9]

In Eastern Coalfields Ltd. v/s Kalyan Banerjee , [10] the employee was employed at Mugma area in the District of Dhanbad, State of Jharkhand and his services were terminated at Mugma, but he filed the Writ Petition in the Calcutta High Court. The Apex Court held that since the entire cause of action arose within the State of Jharkhand, the sole fact that the head office of the Company was situated in the State of West Bengal would not by itself confer jurisdiction upon the High Court of Calcutta.

S.25-U.Penalty for committing unfair labour practices.—

Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

Although the name of the Commission for Conciliation, mediation and arbitration often appears on judgments in this Court, this matter is one of the few occurrences where the Commission for Conciliation, mediation and arbitration has actually come before this Court not in capacity as body responsible for dispute resolution, but as the employer itself. It is rather a unique experience. This being said, the applicant, as an employee of the Commission for Conciliation, mediation and arbitration (being the current first respondent), has brought an urgent application in terms of which the applicant seeks to challenge his suspension by the first respondent. The applicant is seeking final relief, in the form of an order declaring that his suspension by the first respondents was invalid and an unfair labour practice. The applicant then seeks consequential relief in the form of an order that his suspension be set aside with immediate effect pending the finalization of possible disciplinary proceedings against him.

In my opinion it is submitted that, the case was basically related to the jurisdiction of the court having power to try the case. Since mala fide transfers also fall under the term 'unfair labour practice', the question was whether the case may be filed before the court where the employee has been transferred or from where the employee has been transferred.

The case was of importance that at least it became well established and beyond doubt a principle that unfair labour practice also includes the transfer of en employee without reasonable reasons.

4. B.R. Singh and others V/s. Union of India and Others

AIR 1990 SC 1989

Subject : Constitution - termination - Labour Law, Sections 2, 10, 10 (3), 10A, 10A (4A), 22, 23 and 24 of Industrial Disputes Act, 1947, Articles 19 (1) and 32 of Constitution of India, Section 8 of Trade Unions Act, 1926, Rule 32 of Trade Fair Authority of India Employees (Conduct, Discipline and Appeal) Rules, 1977 and Sections 87 and 113 of Motor Vehicles Act, 1939 - action of Trade Fair Authority of India (TFAI) terminating services of petitioners challenged - labour union had called for strike on account of non-fulfillment of certain promises by management - striking employees who did not sign on undertaking terminated - labour union officials also dismissed - demand of labourers genuine - right to form associations and fundamental right under Article 19 (1) (c) - bargaining power of workers would be reduced if trade unions if it is not permitted to demonstrate - union acted in haste - desirable to restore peace - mala fide cannot be imputed to TFAI - reinstatement ordered.

Facts of the case are as it is unfortunate that a public sector bank like the Petitioner Bank should file a suit not only for claiming damages, for loss of reputation but also seeking for a prior restraint on the trade union in publishing hand bills, posters and putting up placards. It is seen from the contents of the posters that it was only an appeal to the Bank for taking action. By no stretch of imagination, that can be said to be violating the orders of this Court. On the other hand, specific instances were pointed out to the Chief General Manager to take appropriate action. Instead of taking action on the grievances projected by the trade Union, the Bank represented by its

Assistant General Manager had filed the suit. In fact under the State Bank of India Act, its only the Bank represented by its Board of Directors can represent the Bank, though there may be possibility of delegated power entrusted to its subordinate officers. When the higher level officers were asked to take action on the subordinates, certainly it would not amount to defaming the bank. In any event, the injunction is only to prevent the Respondents from pasting posters and circulating handbills or in any other manner defaming and affecting the image of the bank. The image of the bank cannot be confused with the officers at the lower level committing fraud, misconduct, embezzlement. Certainly when a Trade Union finds that action is not being taken, they can take the issue to the public and the grievance projected is no way amount to defaming the bank. An employee working in a public sector bank also owes public duty when public funds were frittered away or misappropriated.

Judgment : A Division Bench of the Delhi High Court in S.D. Sharma v/s Trade Fair Authority of India and others reported in MANU/DE/0521/1984 : 1985 II LJ 193 recognized the right of the working class to hold demonstration in shouting slogans and in paragraph 28, it was held as follows:

28... It is possible that during the course of speech or demonstration some kind of slogans which may not be very proper may have been raised. But then this country recognizes the holding of demonstration an though one may not be very happy that sometimes demonstrations may use a language which is not very polite one cannot also ignore that in the heat of movement and when mass of people are raising slogans in support of their demands and more so when they feel that for over two years the demands have not been fulfilled it is possible that some kind of harsh words and slogans may have been raised. But all this is a far cry from the charge which had necessarily tube proved before the Petitioner can be held guilty these slogans and that their action was subversive of discipline. One or two slogans even if touching on the border of permissive parameters cannot be torn out of their context and considered in isolation. In order to appreciate the impact of any slogan the total overall picture must be kept in view and when we look at the picture it is peaceful meeting of the employees held in dignified manner raising their demands no doubt also shouting slogans, but mostly in support of their Union and demands.

Infect, a trade union has been given power to demonstrate and it includes various forms of protest. It has been recognized as a recognized mode of redress. The Supreme Court in B.R. Singhand Others v/s Union of India and Others. in dealing with the case of public sector employment vide its judgment reported in MANU/SC/0001/1990 : , in paragraph 16 had observed as follows:

16... The right to demonstrate and, therefore, the right to strike is an important weapon in the armory of the workers. This right has been recognized by almost all democratic countries. Though not raised to the high pedestal of fundamental right, it is recognized as mode of redress for resolving the grievances of workers.

Publishing posters and distributing hand bills is a means to ventilate the grievances of the employees and free speech in our country is recognized as a fundamental right under Article 19(1) of the Constitution subject to reasonable restriction.

16. However, the suit is yet to be tried and any further finding given herein may affect the suit itself. These findings are rendered only for the purpose of disposing of the contempt petition. This Court dissatisfied with the explanations offered by the Respondents. Moreover, Respondents 2 and 3 are no longer holding office in the Trade Union.

In my opinion it is submitted that, it may be observed that the court were still sensitive with respect to the apprehensions raised by employers. The courts were cautious enough to cover this freedom under Article 19 of Indian Constitution.

5. Tata Memorial Hospital Workers Union v/s Tata Memorial Centre and Anothers

(2010) 8 SCC 480

The facts of the case are as the appeal was directed against the judgment and order of a Division Bench of the Bombay High Court dated 10.2.2009 in Appeal No. 133 of 2002 arising out of Writ Petition No. 2148 of 2001, whereby the Division Bench has held that for the first respondent establishment, the Central Government was the `appropriate government' for the purposes of application of Section 2(3) of

the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (hereinafter referred to as the M.R.T.U. and P.U.L.P. Act) read with Section 2(a) of the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D. Act). The Division Bench has held that the State Government was not the `appropriate government' for this purpose. Consequently the Applications concerned in the present matter filed under the MRTU and PULP Act, namely the Application of the second respondent for cancellation of the status of the applicant as the recognized union under respondent No. 1, and Application for substitution of second respondent in place of the appellant, as the recognized union, were held to be non- maintainable. The appellant is aggrieved by the finding that the State Government is not the appropriate government and that the MRTU and PULP Act has no application to the first respondent establishment. It will result into automatic denial of its status as the recognized union under the MRTU and PULP Act and also into denial of the remedies available to the appellant and to the employees, of the first respondent, (against unfair labour practices, if any) and hence this appeal by special leave. The right of the appellant to represent the employees of the first respondent (numbering over 1300) is thus, at stake.

The appellant was a Trade Union, registered under the Trade Unions Act, 1926 and the employees of the first respondent are its members. It is already registered under Chapter III of the above referred MRTU and PULP Act as the recognized union for the employees under the first respondent by an order passed way back on 2.12.1985 by the Industrial Court, Mumbai. Respondent No. 2 `Tata Memorial Hospital Kamgar Sanghatana' (i.e. workers association) is another trade union functioning under the first respondent. By filing Application MRTU No. 15 of 1994 before the Industrial Court, Mumbai, the respondent No. 2 sought cancellation of the recognition of the appellant union under Section 13 of the MRTU and PULP Act. Thereafter by filing another Application MRTU No. 16 of 1994, the second respondent sought its own recognition in place of the appellant union under Section 14 of the MRTU and PULP Act. Both these Applications Nos. 15 and 16 of 1994 were heard together. Oral and documentary evidence was led by parties. The report of the Investigating officer appointed for the verification of the membership of the two trade unions was considered. The first respondent in its written statement raised an objection to the maintainability of these proceedings under MRTU and

PULP Act by submitting that the `appropriate government' for the first respondent was the Central Government and not the State Government, and hence, the proceedings under the MRTU and PULP, were not maintainable.

Held : Finally the judgment was delivered by honorable judges Sh. Altamas Kabir, Sh. Cyriac Joseph and Sh. H.L. Gokhale, that, State Government was an appropriate government for recognition of autonomous body. Therefore, Order passed by Division Bench of Bombay High Court was set aside and order passed by Industrial Court as confirmed by Single Judge, was restored . Appeal allowed.

In my opinion it is submitted that, until the present litigation, neither the Central Government nor the Dorabji Tata Trust or even the Governing Council of the first respondent ever disputed the application of the MRTU and PULP Act to the first respondent establishment. Hence the judgment was appropriate one in the eyes of law.

6. Empire Industries Ltd. V/s. State of Maharashtra and Others

AIR 2010 SC 1389.

The facts of the case in brief are as the appellant, which is a public limited company incorporated under the Companies Act, 1956 sought to challenge the order dated September 23, 1992 issued by the Government of Maharashtra in exercise of the powers conferred by Sub-section (3) of Section 10 of the Industrial Disputes Act, 1947 (for short 'the Act') prohibiting continuance of the lock-out in its factory, Garlick Engineering at Ambernath, Thane. The appellant first challenged this order before the Bombay High Court in Writ Petition No. 6051/1995. The writ petition was dismissed by a learned single judge of the court by judgment and order dated February 9, 2001. Against the judgment of the single judge, the appellant preferred an internal court appeal (LPA No. 70 of 2001) which too was dismissed by a division bench of the court by judgment and order dated April 1, 2005. The appellant then brought the matter in appeal before Supreme Court.

Held: Finally the judgment was delivered by honorable judges Sh. Aftab Alam and Sh. Balbir Singh Chauhan, stating that that it is not open to management to make demand/proposal for retrenchment of workmen and disregarding provisions of

Act ask government to refer demand/dispute under Section 10(1) to tribunal for adjudication, Only demand raised by management regarding imposition of ceiling on dearness allowance was already referred to Industrial Tribunal. Appropriate government was fully competent and empowered to issue impugned order prohibiting closure of factory. There was no illegality or infirmity in closure notice. Hence, appeal was dismissed.

In my opinion it is submitted that, here was no dispute on the basis of any demand raised by the appellant in regard to retrenchment of any workers in the factory, Garlick Engineering. Secondly, and more importantly, any retrenchment of worker(s) can only be effected by following the provisions laid down under the Act and the Rules.

7. Mahindra and Mahindra Ltd. V/s. Avinash Dhaniram ji Kamble

(2010) 2 SCC 233

The facts of the case are as the complaints sought declaration of unfair labour practices on the part of the employer under Items 5, 6, 9 and 10 of Schedule IV of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices, Act, 1971 (for short MRTU & PULP Act"), the Industrial Court, Maharashtra (Nagpur Bench) Nagpur, in its order dated March 19, 2003 held that complaints were not maintainable under Item 6 of Schedule IV to the MRTU & PULP Act. The Industrial Court also held that the complaints were liable to be rejected in so far as it related to Items 5 & 10 of Schedule IV but as regards the unfair labour practice under Item No. 9 of Schedule IV, although relief was granted by the Industrial Court to 149 temporary workmen who had completed 240 days of continuous service, no relief was granted to the present respondents as they have not completed 240 days of continuous service as required under the Model Standing Orders. The Industrial Court, in its order, in respect of the present respondents held "From the evidence adduced by the complainants in all other complaints it appears that in all 58 complainants have not at all completed 240 days working during the entire period they were in the employment of the respondent. The list of these complainants is at Ex.101. Hence, their confirmation in service as per Clause 4-C of the Model Standing Orders does not arise."

Held: Finally the judgment was delivered by honorable judges Sh.Tarun Chatterjee, Sh. R.M. Lodha and Sh. Balbir Singh Chauhan, observing "Industrial Court recorded a categorical finding of fact in respect of the Respondents that they had never completed 240 days of continuous service - But the single Judge as well as the Division Bench, however, treated the gaps between diverse spells of employment as part of continuous service on the ground that these were due to involuntary unemployment - Matter remanded back to High Court for fresh hearing."

In my opinion it is submitted that, the matter would have been decided on merits instead of remanding back to the inferior court.

8. Raymond Ltd. and Anothers. V/s. Tukaram Tanaji Mandhare and Anothers

(2011) 3 SCC 752

The facts of the case in brief are as the Petitioners filed complaints under Section 28 read with items 1 (a)(b), (d) and (f) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the MRTU and PULP Act), before the Industrial Court/Labour Court for certain reliefs claiming that they are employees of the Respondent company. The Respondent company in all these writ petitions has disputed the status of the employees and has contended in its written statement that there is no relationship of employer employee with any of the Petitioners. The company has contended that the complainants were employed through the contractors and that the issue regarding maintainability of the complaints would have to be decided by the court. During the pendency of these complaints, the judgments in the case of *Vividh Kamgar Sabha v/s Kalyani Steel Ltd.*MANU/SC/0012/2001 : (2001) 2 SCC 381 and in the case of *Cipla Ltd. v/s Maharashtra General Kamgar Union* (2001) 3 SCC 101 were pronounced by the this Court, and relying upon these decisions, an application was made by the Respondent company before the court that the complaints were liable to be dismissed as there was no employer employee relationship between it and the complainants. The Industrial Court/Labour Court upheld the preliminary objection raised by the Respondent company by holding that the judgments in Kalyani Steel Ltd. and Cipla Ltd. (supra) were applicable to the facts

involved in the complaints and, therefore, the complaints deserve to be dismissed. The complaints were accordingly dismissed.

Thereafter the Petitioners filed the present writ petitions challenging the dismissal of the complaints. In the meantime by its judgment in *Sarva Shramik Sangh v/s Indian Smelting and Refining Co. Ltd.* MANU/SC/0840/2003 : (2003) 10 SCC 455 this Court has reiterated the view taken in Kalyani Steel Ltd. (supra) and Cipla Ltd. (supra).

The learned single Judge before whom the writ petitions came up for hearing noted that all these cases decided by the this Court were in respect of industries governed by the Industrial Disputes Act, 1947, whereas the present petition relates to an industry covered by the provisions of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as the BIR Act). The learned single Judge noted that in the case of *Dattatraya Kashinath and Ors. v/s Chhatrapati Sahakari Sakhar Karkhana Ltd. and Others.* MANU/MH/0267/1995 : 1996 II LLJ 169 and in *Sakhar Kamgar Union v/s Shri Chhatrapati Rajaram Sahakari Sakhar Karkhana Ltd. and Ors.* 1996 II CLR 67 Srikrishna J., as he then was, had held that a conjoint reading of Section 3(5) of the MRTU and PULP Act and Sections 3(13) and 3(14) of the BIR Act would indicate that even a person employed through a contractor in an industry governed by the BIR Act is regarded as an employee under the MRTU and PULP Act and the complaint filed by such an employee is maintainable under the MRTU and PULP Act. The learned single Judge however, felt that another learned single Judge of this Court (Khandeparkar J.) in *Nagraj Gowda and Ors. v/s Tata Hydro Electric Power Supply Co. Ltd. Bombay and Ors.* 2003 III CLR 358had expressed a contrary view considering the judgments of the this Court in Kalyani Steel Ltd, Cipla Ltd. (supra) and Sarva Shramik Sangh (supra) as also the judgment of the Division Bench of this Court in the case of *Hindustan Coca Cola Bottling Pvt. Ltd. v/s Bharatiya Kamgar Sena* 2001 III CLR 1025. The learned single Judge therefore decided to make a reference to a larger Bench in view of the conflicting decisions of the learned single Judges of the High Court.

Question of law:

1) Whether a person who is employed by a contractor who undertakes contracts for the execution of any of the whole of the work or any part of the work which is ordinarily work of the undertaking is an employee within the meaning of Section 3(5) of the MRTU and PULP Act?

2) Whether a complaint filed under the MRTU and PULP Act by an employee as defined under Section 3(13) of the Bombay Industrial Relations Act, is maintainable although no direct relationship of employer employee exists between him and the principal employer?

3) Whether a complaint filed under the MRTU and PULP Act by employees under Section 3(13) of the BIR Act can be dismissed if the employer claims that they are not his direct employees but are employed through a contractor, in view of the judgments of the Supreme Court in *Cipla* , *Kalyani Steels Ltd.* and *Sarva Shramik Sangh v/s. Indian Smelting and Refining Co. Ltd.*

Held: Finally the judgment was delivered honorable judges Sh. Markandey Katju and Smt. Gyan Sudha Misra, JJ. stating that if the question is of such importance, the matter should be referred to the larger bench.

9. Siemens Ltd. and Anothers V/s. Siemens Employees Union and Anothers

AIR 2012 SC 175 and [2011(131) FLR 1100]

The facts of the case are as this case is based upon sections 26, 27 and 28 of the Maharashtra Recognition of Trade Unions and prevention of Unfair Trade Practices Act 1971. Speaking words of section 26, 27 and 28 of the Maharashtra Recognition of Trade Unions and prevention of Unfair Trade Practices Act 1971. This has also concern with Article 136 Constitution of India, 1950 which relates with Special Jurisdiction of the Supreme Court of India.

Finally The judgment was delivered by honorable judges Sh. D.K. Jain and Sh. Ashok Kumar Ganguly as:

The Appeal was preferred from the judgment of Bombay High Court. The Siemens Public Limited Company was registered at Mumbai and was engaged in the business of the manufacturing switchgears, switchboards, motors etc.

There were about 2200 employees in the factory. Whereas the respondent was registered trade Union of the workers employed by the appellant Siemens Limited Company.

In 2007, The Trade Union preferred an appeal under section 28 of the the Maharashtra Recognition of Trade Unions and prevention of Unfair Trade Practices Act 1971 for unfair practices.

Prior to this the Labour Court Thane decided the case against the company stating that the management has committed unfair labour practices.

Later the appellant company challenged the decision of the labour Court before the Bombay High Court. The learned Judge of the High Court held that the Tribunal Labour Court had rightly held that the company amounted unfair labour practices as per section 27 of the Maharashtra Act, 1971.

The appellant company again challenged the judgment of the single judge before the Division bench of the Bombay High Court. The Division bench affirmed the decision of the learned single judge stating that the job of workman with some additional work is considered a violation of clause 7.

The agreement done in the year 1980 which is I consonance with section 9-A of the Industrial Disputes Act, 1947.

Hence, under Article 136 of the Constitution of India, 1950, special leave to appeal was finally submitted before the Hon'ble Supreme Court of India.

Ashok Desai, P. v/s Anaokar, Arun R. Pedunkar and V.N. raghupathy learned advocates appeared and argued the sace on behf of the appellants. K.K. venugopal, Benet D. Costa, Nitin S. Tambewekar B.S. Sai Rohit B., K. Rajeev and Ms. Mukti Choudhary learned Advocates appeared and argued the case.

The Special leave to appeal was granted by Justice Ashok Kumar Ganguly. Mr. K.K. Venugopal learned Senior Counsel appeared on behalf of the respondent Union.

The impugned notification dated 3rd May 2007 wherein applications were incited to appear for a selection process to undergo a two year long period as on 'Officer Trainee'. This training was held in the fields of manufacturing, quality inspection and testing logistics and technical sales order execution. The notification also stated that after the successful completion of the said two years, the trainees were to be designated as 'Junior Executive Officers'. The case of the respondent Trade Union is that though the designation of 'Junior Executive officers' was that of an officer belonging to the management with negligible content of managerial work, it was urged that the job description of a 'Junior Executive officer' was same as that of a workman, with little additional duties. Finally the Junior Executive Officers of the factory were now to do the very same work that had always been done by the workmen.

In my opinion It was submitted that, the conditions of service of the workmen as some vacancies available for workmen in the switch board unit were to be reserved for officers from the management cadre. Resultantly there would have been a reduction in the job opportunities for workers.

10. Rajasthan State Road Transport Corporation and Anothers V/s. Satya Prakash

(2013) 9 SCC 232

The facts of the in brief case are as the Respondent was working as a bus conductor on daily wages under the Appellant-Rajasthan State Road Transport Corporation ("S.T. Corporation" for short) from 8th May, 1987 with a daily wage of Rs. 20/- per day. His appointment was for a period of three months only though it appears that it was continued for a little while more. It was alleged that during this short period also there were instances of his misbehaviour with the staff, of using abusive language, and coming to office in drunken state. An F.I.R. was also lodged against him. It so transpired that when he was on duty on 10th October, 1987, on the

route from Sirohi to Jodhpur, his bus was checked by a flying squad led by the Judicial Magistrate, Transport. It was found that there were 20 passengers traveling in that bus. The Respondent had collected the fare from all of them. However, three and half tickets were found to have been issued less. In view thereof a Departmental enquiry was conducted against him. The Respondent did not appear therein despite notices. Appellant led the necessary evidence, and the inquiry officer held that the charge was proved. The Respondent was, therefore, directed to be dismissed from service by the order passed by the Divisional Manager, Jodhpur with effect from 20th November, 1987.

Finally the judgment was delivered by honorable judges H.L. Gokhale and Ranjan Gogoi, that No order shall be passed without following procedure prescribed by law and hence the appeal was set-aside the judgment and order rendered by the Division Bench of the Rajasthan High Court in D.B. Special Appeal (Writ) No. 1093 of 2005, dismissing the appeal filed by the Appellants against the judgment and order dated 19th July, 2005, rendered by a learned Single Judge of that High Court in Civil Writ Petition No. 3933 of 2009, confirming the award dated 3.12.2002 rendered by the Industrial Tribunal, Jaipur in Case No. I.T. No. 41 of 1994.

In my opinion it is submitted that, this finding will relate back and the employer employee relationship between the parties will be deemed to have ended from the date of the dismissal order passed by the Appellant.

11. Bajaj Auto Limited V/s. Rajendra Kumar Jagannath Kathar and Others

(2013) 5 SCC 691

The facts of the case in brief are as the Appellant-company is engaged in manufacturing of two-wheelers and three-wheelers and it has factories at Akurdi (Pune District) and Waluj (Aurangabad District). The Respondents, who were engaged as Welders, Fitters, Turners, Mechanics, Grinders, Helpers, etc., initiated an action against the Appellant-company under Section 28 of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (for short "the 1971 Act") before the Industrial Court, Aurangabad, seeking a declaration that there has been unfair labour practices under items 5, 6 and 9 of Schedule IV of

the 1971 Act on the foundation that though they were engaged in the year 1990, yet in every year, they were offered employment for seven months each year and after the expiry of the said period, their services used to be terminated and the said practice continued till they filed the complaints in 1997, 1998 and 1999. Seventeen of them also filed a separate complaint in the year 2003 for providing work to them as they were kept outside the factory premises without work. It was alleged that because of this unfair labour practice, none of them could complete 240 days in employment in any corresponding year to make them eligible to earn the status and privilege of permanent employees. It was contended before the Industrial Court that in the year 1996, the employer, in order to improve work culture, used multi-skill and multi-operational system and thereby the employees termed as multi-skill operators were required to undertake various jobs, but the employer, by taking recourse to unfair labour practice, saw to it that their services were terminated immediately after the expiry of seven months. In this backdrop, they were deprived of the status under Clause 4-C of the Model Standing Orders as appended to Schedule I-A of the Industrial Employment (Standing Orders) Act, 1945 (for short "the 1945 Act").

Finally the Judgement was delivered by honorable Judges Sh. K.S. Panicker Radhakrishnan and Sh. Dipak Misra, that observing "Unfair labour practice, in its very essence, is contrary to just and fair dealing by both the employer and the employee" .

In my opinion it is submitted that it was noticeable from the judgment of the Industrial Court, the complainants were silent spectators when the earlier group of cases was tried and the matter travelled to the Supreme Court.

12. Tata Iron and Steel Company Ltd. V/s. State of Jharkhand and Others

(2014) 1 SCC 536

The facts of the case are as the Appellant before was M/s. Tata Iron and Steel Company Limited (rechristened as Tata Steel Ltd.). Apart from manufacturing steel, its core business, the Appellant Company was having cement division as well. In the era of globalization, liberalization and also because of economic compulsions, the Appellant decided to follow the policy of disinvestment. Persuaded by these

considerations it sold its cement division to Lafarge India Pvt. Ltd (hereinafter to be referred as 'M/s. Lafarge') vide Business Transfer Agreement (BTA) dated 9.3.1999 which was to be effected from 1.11.1999. This agreement, *inter alia* provided that M/s. Lafarge would take over the company personnel, including, in terms of Section 25FF of the Industrial Disputes Act, 1947. It was on the condition that:

(a) The services of the company personnel shall not be or deemed to be interrupted by such transfer.

(b) The terms and conditions of service applicable to the company personnel after such transfer are not in any way less favourable to the company personnel than those applicable to them immediately before the transfer.

(c) The purchaser is, under the terms of transfer herein, legally liable to pay to the company personnel in the event of their retrenchment, compensation on the basis that services have been continued and have not been interrupted by the transfer of business.

The decision to hive off and transfer the cement division by the Appellant to M/s Lafarge was communicated to the employees of the cement division as well. According to the Appellant, consequent upon this agreement, with the transfer of business, the employees working in the cement division were also taken over by M/s Lafarge and M/s Lafarge issued them fresh letters of appointments. These included Respondent Nos. 8-82 herein who started working with M/s Lafarge.

The workers were not satisfied with the working conditions in M/s. Lafarge. They submitted a statement of demand to the Appellant on 15.9.2003, stating *inter alia* that they were directed to work with M/s. Lafarge without taking their consent. As per these Respondents/employees, impression given to them was that they would work in different departments in M/s. Lafarge for some days for smooth functioning of that establishment, which was a part of the Appellant organization and thereafter they would be posted back to the parent department. They had obeyed these orders faithfully believing in the said representation. However, the concerned employees were not given all the benefits by M/s Lafarge which they were enjoying in their parent department. Thus, the demand was made to take them back with the Appellant

company. The company did not pay any heed to this demand. These employees approached the Deputy Labour Commissioner, Jamshedpur, raising their grievances and requesting to resolve the dispute.

Held: Finally the judgment was delivered by honorable judges Sh. K.S. Panicker Radhakrishnan and Sh. Arjan Kumar Sikri, observing "It becomes the bounden duty of the appropriate Government to make the reference appropriately which is reflective of the real/exact nature of "dispute" between the parties. In the instant case, the bone of contention is as to whether the respondent workmen were simply transferred by the appellant to M/s. Lafarge or their services were taken over by M/s. Lafarge and they became the employees of the M/s. Lafarge. Second incidental question which would follow there from would be as to whether they have right to join back the services with the appellant in case their service conditions including salary etc."

In my opinion it is submitted that, it is the duty of appropriate Government to make reference appropriately which is reflective of real/ exact nature of "dispute" between parties, for interest of justice.

(II) Decisions of various High Courts in the Country:

13. Govt. Of Tamil Nadu V/s. Tamil Nadu Race Course General

(1993) ILLJ 977 Mad

Facts of that case in brief are as "Labour Commissioner to give and finding, after going through all the relevant records which are with the appellants or with the 2nd respondent herein and after hearing the parties and in the light of this judgment regarding the scheme to be adopted for regularisation. After the above said finding is submitted to this Court, a proper scheme could be framed for regularisation in the interest of both the parties by this Court.

Finally the Judgment was delivered by honorable Judges Sh. M Punchhi and Sh. Y. Dayal that, These two writ appeals arise out of the same judgment dated September 20, 1991 of Bakthavatsalam, J. in W.P. No. 15392 of 1989. The writ petitioner, Tamil Nadu Race course General Employees Union is the appellant in W.A. No. 1187 of 1990. The 1st respondent in the writ petition, viz., the Government of Tamil Nadu, represented by the custodian, Department of racing, is the appellant in W.A. No. 1053 of 1990. The Writ petitioner is the 1st respondent in W.A. 1053 of 1990 and the above said Government is the 1st respondent in W.A. No. 1187 of 1990. The Committee of Management, represented by its Chairman, Race Course, Madras, which was the 2nd respondents in the writ petition is also so in both the appeals.

The writ petition is for mandamus, directing the said Government "to regularise the services of the race day employees after providing employment to all its race day employees as per the practice until October 1989, on all race and intervene betting days without giving deliberate breaks and without engaging outsiders."

The main allegation in the supporting affidavit to the writ petition are as follows. - The Madras Race Club had been taken over by the above said Government under the Madras Race Club (Acquisition and Transfer of Undertaking) Act, 1986. Out of about 3000 employees of the Race Club, 300 administrative staff alone are permanent and the remaining workers including the members of the writ petition-Union, who are about 850 in number are employed for years, originally under the

private employer and now by the Government on daily wage basis with absolutely no security of employment and their jobs are selling tickets, collecting money, accounting etc. Due to mala fide and unfair practice, the above said Government is denying work to the daily wagers on the pretext that no work is available and thereby the Government only victimises the daily wagers and deprives them of their legitimate right of security of employment and other benefits. The members of the writ-petitioners Union raised an industrial dispute in this regard. The questions of revision of wages and certain other conditions of employment only were referred to the Industrial Tribunal in I.B. No. 76 of 1989. The workers had been repeatedly demanding regularisation of their services. However, deliberate breaks had been given to the daily wagers. The daily wagers had been continuously employed for 20-25 days in a month and had to work 8 to 12 hours a day. They are employed on all days when races are held in Madras or on days of intervene betting. Suddenly in November, 1989 the Government refused to give employment to hundreds of workers on some days on the ground that those days are inter-venue betting only. The Government has also employed strangers to the establishment to the extent of nearly 200 persons. The Custodian only informed the said employees that he was directed by the Committee of Management not to give employment to them on all days and to give work only by rotation and to ensure that the work load is allotted to them in such a way that the race day employees should not claim permanency in the department. The Committee of Management also has passed a resolution to that effect on November 21, 1989. The said resolution also directs that the above said employees are to be engaged only on the days of races, but not on inter-venue betting also. The said employees were used to be employed on days of inter-venue betting also. The members of the petitioner-Union do not have any record of their service since, when new identity cards were given, the old ones were taken back. Every year they are asked to make an application in forms with certain conditions. The conditions there in are one sided and unreasonable and they offend Arts. 14, 16 and 21 of the Constitution of India. The Government takes disciplinary action against the members of the Union and this fact shows that they are continuously employed. Before take over by the Government, the management had imposed the condition that the race day employees must have attended at least 80% of the races, failing which they would not be engaged in future.

The allegations in the counter-affidavit are mainly as follows :- The members of the writ petitioners-Union are given jobs on the racing days and during inter-venue betting in the after-noon on a part-time basis. Most of them are employed elsewhere. They are given jobs on turn basis in order to accommodate all of them equality. When suddenly the members of the petitioner-Union went on all illegal strike on the ground that they should be given employment on all days of racing not on rotation basis and irrespective of work load and monetary turn over, the Government was forced to employ a few new employees to carry out and conduct part of its operations to satisfy the racing public. The members of the petitioner-Union are given job on rotation for 15 days in a month only in the afternoon on the racing days. The demand of the members of the petitioner-Union for regularisation cannot be met by the Government when it is not in need of so many on a permanent basis. Those employees who already have a regular job elsewhere are employed distinctly with the understanding that they would be employed on the basis of hire on day-to-day part time casual, without creating any right. The conditions of service are agreed to by the said employees in the declaration signed by them. It is denied that the members of the petitioner Union have been continuously working for 20-25 days and 8 to 12 hours a day. The employees are required to work only for about 5 hours a day. While the number of employees required on Madras race days will be more, the number of employees required on inter-venue betting days depends on the center in which betting is conducted and in relation to the turnover in each centre. It is not true that all the employees are employed on all days. Turn system has been in vogue from time immemorial. The Custodian had explained to them that it is not possible for the management to employ all the employees on all racing days. 80% attendance on the allotted days of work on the turn duty basis is insisted because many employees come to work only on holidays and not on working days. There is no unfair labour practice.

Conclusions in subordinate courts:

On the above said rival contentions, and the available materials, the learned Judge came to the following conclusions:-

(1) When considering the above said resolution passed by the Committee of Management, there is an attempt to refuse deliberately to engage the members of the petitioner-Union continuously. Such a practice in unfair labour practice.

(2) In the present case, no questions of continuous employment arises, but only seasonal.

(3) Though "all" the members of the petitioners-Union could not be regularised, it is reasonable to hold that a scheme should be evolved by which the "employees" of the petitioner-Union should be taken in.

(4) This Court cannot go into the question as to how many workers are there and for how long they are engaged as these are questions of facts, which have to be gone into. So, I do no think it is possible for this Court to enter into facts, and decide the issues, besides how the said scheme should be formulated."

Reasons for preferring appeal the Government has preferred the above said appeal W.A. No. 1053 of 1990, aggrieved by the decision of the learned judge that a Scheme should be evolved for the above said regularisation. The writ petitioner has filed the other writ appeal W.A. No. 1187 of 1990 mainly on the grounds (1) that the learned Judge has failed to lay down norms as laid down by the Supreme Court, while directing framing of a scheme for the above said regularisation, (2) that the learned Judge ought to have directed the respondent not to employ the persons who were engaged for the first time in 1989, without first providing employment to the members of the petitioner-Union according to seniority, (3) and that the engagement of such new persons violate Section 25(G) and (H) of the Industrial Disputes Act, 1947 and Article 14 of the Constitution of India.

It is settled law that to employ workmen as casuals and continue them as such for years with the object of depriving them of the status and privileges of permanent workmen is unfair labour practice, (Vide Section 2(ra) of the industrial Disputes act, 1947 read with Item 1(10) of the Fifth Schedule of the said Act.) In H. D. Singh v/s Reserve Bank of India 1986 - I - LLJ - 127, we also find that the Supreme Court has observed as follows at page 132 :

"The confidential circular directed the officers that workmen like the appellant should not be engaged continuously but should as far as possible, be offered work on rotation basis and the case that the appellant is a badli worker has to be characterised

as unfair labour practice. The Fifth Schedule to the Industrial Disputes Act contains a list of unfair labour practices as defined in Section 2(ra), Item 10 reads as follows :

To employ workmen as 'badlis', or temporaries and to continue them as such for years, with the object of depriving them of the status and privilege of permanent workmen.

We have no option but to observe that the bank, in this case has indulged in methods amounting to unfair labour practice. The plea that the appellant was a badly workers also has to fail. We thought it necessary to refer to the factual details in the case only to show our concern at the manner in which the employer in this case, The Reserve Bank of India, who should set a model for the other employers being a prestigious institution, behave towards its employees. It must have been him helpless condition and abject poverty that forced the appellant to accept a job on Rs. 3 per day. Still see how he has been treated. We will not be far from truth if we say that the bank has deliberately indulged in unhealthy labour practice by rotating employee like the appellant to deny them benefit under the Industrial Law."

It is also well-known that Article 39(d), one of the Directive Principle of State, Policy enunciated in Part IV of the Constitution, states that the State shall, in particular, direct its policy towards securing that "there is equal pay for equal work for both men and women" and that article 42 of the same Part IV also stipulates that "the State shall make provision for securing just and humane condition of work ..." and that Article 14 coming under the "Fundamental Rights" Chapter of the Constitution of India states that the State shall not deny to any person equality before the law. The Supreme Court has also observed in Dharwad Dist. P.W.D.L.D.W.E. Association v/s State of Karnataka 1991 - II - LLJ - 318 and even in the earlier decisions like Randhir Singh v/s Union of India, 1982 - I - LLJ - 344 that, construing Articles 14 and 16 of the Constitution on India in the light of the Preamble and Articles 39(d), the principle "equal pay for equal work" is deducible from those Articles. Further, the said which dealt with daily-rated employees in varies Government Establishment, quoted with approval the following observation of the Supreme Court in the earlier decision in Daily Rated Casual Labour Employed under P. & T. Department through Bhartiya Dak Tar Mazdoor Manch v/s Union of India, 1988 - I - LLJ - 370 at 375-376 "Of those rights the questions of security of work is of

utmost importance. If a persons does not have the feeling that he belongs to an organisation engaged in production he will not put forward his best effort to produce more. That sense of belonging arises only when he feels that he will not be turned out of employment the next day at the whim of the management. It is for this reason it is being repeatedly observed by those who are in charge of economic affairs of the countries in different part of the world that as far as possible security of work should be assured to the employees so that they may contribute to the maximisation of production. It is again for this reason that management and the Governmental agencies in particular should not allow workers to remain as casual labourers or temporary employees for an unreasonably long period of time ..."

After quoting the above passage and certain other passage from other decisions, the Supreme Court in the above referred 1991 - II - LLJ - 318 concluded as follows at page 323 :

"We have referred to several proceedings all rendered within the current decade - to emphasise upon the feature that equal pay for equal work and providing security for service by regularising casual employment within a reasonable period have been unanimously accepted by this Court as a constitution goal to our socialistic policy. Article 141 of the Constitution provides how the decisions of this Court are to be treated and we do not think there is any need to remind the instrumentalities of the State, be it of the Centre or the State or the public sector, that the constitution-makers wanted them to be bound by what this Court said by way of interpreting the law."

From the above said passages, it is clear that there is a greater responsibility on the Government Agencies in not allowing the workers to remain as casual labourers for an unreasonably long period of time. Further, it is also clear from the above said passages that the questions of security of work is of utmost importance of the workers. These two aspects were also very much emphasised in the present case by the learned counsel for the Writ petitioner-Union.

15. Further, in Surinder Singh v/s. Engineer-in-Chief, C.P.W.D., [39] it has been observed as follows at page 404 :

[39] 1986 - I - LLJ - 403

"The Central Government, the State Governments and likewise, all public sector under takings are expected to function like model and enlightened employers and arguments such as those which were advanced before us that the principle of equal pay for equal work is an abstract doctrine which cannot be enforced in a Court of law should ill-come from the Mouths of the State Undertakings."

In Dhirendra Chamoli v/s. State of U.P. 1986 [40]the following observation is significant:-

"The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of services as other Class IV employees, cannot provides as escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution. This article declares that there shall be equality before the law and equal protection of the law and implicit in it is the further principle that there must be equal pay for work if equal value ... it makes no difference whether they are appointed in sanctioned posts or not. So long as they are performing the same duties, they must receive the same salary and conditions of service as Class IV employees."

In the present case also, it was stressed by the learned counsel for the Government that the above said employees accepted the employment with the conditions mentioned in their application for casual employment. One such condition is the said employees could be "stopped (from work) at any time without notice, it being distinctly understood that the engagement is on the basis of hire on day-to-day casual basis without creating any right to be hired on future racedays/intervenue betting days." But, as the Supreme Court observed, the acceptance to the above said condition or any other similar conditions "cannot provide escape" to the Government "to avoid mandate of equality enshrined inn Article 14 of the Constitution."

B. R. Singh v/s. Union of India 1989 - II - LLJ - 591 which was to some extent similar to the present case, dealt with the case of the casual workers, employed by the Trade Fair Authority of India and working in the periodical exhibitions conducted by the said authority in Delhi. In that case also, there was a strike by the said workers,

[40] I - LLJ - 134 at 135-136

demanding regularisation of the service and the authority refused work to them after strike and the Supreme Court directed the said authority to give them work and also directed to complete regularisation process within three months. Likewise in Bhagwati Prasad v/s D.S.M. Devt. Corporation, (1990 - I - LLJ - 320) also, the Supreme Court directed regularisation in respect of daily, rated workman of a public sector corporation, viz., Delhi State Mineral Development Corporation. There, the Supreme Court observed as follows at page 322 :

"Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective post on the ground that they lack the prescribed educational qualifications. In our view, three years' experience, ignoring artificial break in service for short period/periods created by the respondents, in the circumstance, would be sufficient for confirmation. If there is a gap of more than three months between the period of termination and re-appointment that period may be excluded in the computation of three years period. Since the petitioners before us satisfy the requirements of three years'. Service as calculated above, we direct that 40 of the senior-most workmen should be regularised with immediate effect and the remaining 118 petitioners should be regularised in a phased manner, before April 1, 1991 and promotion to the next higher post according to the standing orders."

It should be noted here that even where there is a gap of more than three months between the period of termination and re-appointment that period should be excluded in the computation of the above said that three year period. Further, it is emphasised therein that all artificial breaks in service should be ignored.

Viewed in the background of the above referred to decisions of the highest Court, it would be but proper that we also in the present case, direct regularisation of the members of the writ petitioner - Union to the justified extent, taking into account, all the relevant factors. No doubt, in his regard, two main objections were raised by the learned counsel for the Government. One is, that this writ petition involves disputes questions of facts as mentioned by the learned judge himself, who heard writ petition, the other objection is that in all above said Supreme Court decisions there was a continuous employment of the casual workers concerned therein.

Taking the second objection first, it cannot be said that in all the above referred to Supreme Court decision, there was a continuous employment of casual labourers. In fact, in the above referred to 1986 - I - LLJ - 127 the Supreme Court directed regularisation of employment of the appellant (daily or casual workers) before it, even though on facts it found that he was actually working only for a continuous period of 240 days in a year. After going through the relevant affidavits therein, the Supreme Court came to the following factual conclusion at pages 131-132.

"In the absence of any evidence to the contrary, we have necessarily to draw the inference that the appellant's case that he had worked for more than 240 days from July 1975 to July 1976, is true. Striking off the name of the appellant under these circumstances is clearly termination of his service and the dispute in this case therefore squarely comes within Section 2A of the Industrial Disputes Act ...."

..... In this case, for example, the bank should have treated the appellant as a regular hand in List II."

Therefore, even in such a case, the Supreme Court has held that concerned employee should be treated as regular employee. Further, the Supreme Court also observed that no contradict the appellant's case, the 1st respondent-Bank did not produce its records its records and that though the appellant wanted the relevant records to be filed, they would not produce. That is why the workmen's claim was accepted by the Supreme Court in the said case. In the present case also, the Contention of the learned Counsel for the writ petitioner-Union is that if only the relevant wage register and other records for the period prior to October, 1989 were produced by the Government, it would have shown the extent of the continuity of the employment of the above said employees. In the present case, the statement produced by the Government relates to periods only after April 1, 1990. So, the relevant earlier records must be seen to arrive at a conclusion which would be fair and reasonable to both the parties in the regularisation process. Further, according to the learned Counsel for the writ petitioner-Union, most of above said employees have been working in the Madras Race club for a period ranging between 10 to 30 years as shown by the "list of race day employees with details" filed by the writ petitioner Union. She also submitted that only an insignificant portion of the above said

employees were working elsewhere. Further in that connection, she also points Jubilee Tailoring House v/s. C.I. of shops and Estts,[41]:

"A person can be servant of more than one employer. A servant need not be under the exclusive control of one master. He can be employed under more than one employer (See "The Modern Law of Employment" By G. H. L. Frid man, P. 18 and Patwardhan Tailors, Poona v/s. Their workmen[42]."

On the other hand, the learned counsel for the Government drew our attention to the following, passage in the Supreme Court decision in Pyarchand v/s. Omkar Laxman[43]

"The general rule in respect of relationship of master and servant is that a subsisting contract of service with one master is a bar to service with any other master unless the contract otherwise provides or the master consents."

But, the said passage itself suggests that if the contract otherwise provides or the master consents, there may not be any prohibition to have dual employers. In the present case, admittedly in the application for employment of any of the above said employees, who worked elsewhere, a letter of consent is obtained from the other employer concerned. Anyway, we make it clear that the contemplated regularisation need not cover any of the above said employees who were working with another employer as on October, 1989 or earlier. Now, in implementing the regularisation process, we may state that the extent of regularisation, would also depend on the seniority of each of the above said employees. In this connection, we may also point out the observation of the Supreme Court in Inder Pal Yadav v/s. Union of India, 1985 - II - 406 which also involved casual labourers employed on Railways projects and where also regularisation was directed. In that connection, their Lordships observed as follows (p. 409) "To avoid violation of Article 14, the scientific and equitable way of implementing the scheme is for the Railway Administration to prepare, a list of project casual labour with reference to each division of each railway and then start absorbing those with the longest service. If in the process any adjustments are necessary, the same must be done. In giving this direction, we are

41 1973 - II - LLJ - 495 (SC) : at p. 504
42 (1960 - I - LLJ - 772, at 726)
43 1970 - I - LLJ - 492 at P. 495 :

considerably influenced by the statutory recognition of a principle well known in industrial jurisprudence that the men with longest service shall have priority over those who have joined later on."

The law on the subjects is clearly laid down in Babu bhai v/s. Nand lal,[44] :-

"The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition. If, however, on consideration of the nature of the controversy, the High Court decides, as in the present case, that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect.

Further Mukti Morcha v/s. Union of India, [45] no doubt with reference to jurisdiction of the Supreme Court under Articles 32 the Constitution of India, initially it was observed as follows at p. 574 (of LIC) :-

"If the Supreme Court were to adopt a passive approach and decline to intervene in such a case because relevant material has not been produced before it by the party seeking its intervention, the fundamental rights would remain merely a teasing illusion so far as the poor and disadvantaged sections of the community are concerned. It is for this reason that the Supreme Court has evolved the practice of appointing commission for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of the society."

---

44 1975 SCR (2) 71
45 (1984 Lab IC 560)

The Supreme Court in the said decision has further observed even with regard to Articles 226 jurisdiction as follows :-

"We may point out that what we have said above regard to the exercise of jurisdiction by the Supreme Court under Art. 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Articles 226. In fact, the jurisdiction of the High Court under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental right."

In the light of the above referred to observations of Supreme Court and in the high of several of Supreme Court and in the light of several factual materials, placed before us by both the parties regarding (i) the days on the which races are held at Madras in a year, (ii) the days on intervenue battings go on in Madras in respect of races that take place in all other centres in India, like Calcutta, Bombay, Bangalore, Ooty, Hyderabad, etc., (iii) different race events that take place in Madras and other centres like Jackpot, win and place, etc., and other relevant details given in the counter affidavit dated February 10, 1991, filed by the Secretary in the Department of Racing of the Government in C.M.P. No. 16128 of 1991 in W.A. No. 1187 of 1990, we think that a direction must be given for further investigation of the facts, fully, so as to formulate just and reasonable regularisation of the above said employees to the extent possible and without prejudicing the business interest of the Government in running the races.

In case, the Government is not coming forward to express it agreement as stated above, we propose to direct the Labour Commissioner to give and finding, after going through all the relevant records which are with the appellants or with the 2nd respondent herein and after hearing the parties and in the light of this judgment regarding the scheme to be adopted for regularisation. After the above said finding is

submitted to this Court, a proper scheme could be framed for regularisation in the interest of both the parties by this Court.

So, initially we direct the Government to let us know whether, in the light of the finding in this judgment, it is agreeable to regularisation of the above said employees in a just manner, Post the writ Appeal for further orders on January 10, 1992.

In my opinion it is submitted that, it may be pointed out that what the Supreme Court has said in the exercise of jurisdiction by the Supreme Court under Art. 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Articles 226. In fact, the jurisdiction of the High Court under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental right.

14. District Transport Officer V/s. S. Kunchan

ILR 2009 (3) Kerala 808

Facts of the case in brief are as where a term of settlement, to which an instrumentality of a State is a party, provides for treating casual service also as part of regular service for all intents and purposes, then it will only be appropriate to treat only such casual service, rendered by a person, who has already been advised by the Commission for regular appointment against the post in question as part of regular service. Any other kind of casual service would only be casual service, that cannot be considered as synonymous with regular service. We hold that the contrary principle laid down in Idicula does not lay down the correct law.

Finally the Judgment was delivered by honorable Judges Sh. V. Giri and Sh. C.T. Ravi kumar that, the issues that have been formulated for consideration by the Full Bench can be, as a matter of convenience, encapsulated as hereunder:

Whether the service as a daily wage employee rendered by a person, at the instance of the employer, after he has been selected for regular appointment by the Public Service Commission {for short "the Commission"} and duly advised in that regard, can be taken as qualifying service for the purpose of pension and other retirement benefits? (2) As a corollary, does the service rendered as a daily wage employee or a casual employee in an organization, where the Kerala Service Rules have been adopted for all relevant purposes, in circumstances other than what is mentioned in Issue No.1 above, be eligible to be treated as qualifying service for the purpose of pension?

In my opinion it is submitted that, the contrary principle laid down in Idicula does not lay down the correct law. It is also submitted that the principle laid down in Idicula in the year 2005 would have been accepted and applied by the Corporation in the case of several hundreds of employees who have retired after 1.3.1997. We make it clear that where the retirement benefits of such persons have already been computed and worked out by applying the principles in Idicula, the same shall not reopened to the detriment of the employee concerned on the basis of this judgment.

15. Adarsh Gupta V/s State of Haryana

AIR 2010 (124) FLR 844

Subject: The Government, at this stage when it proposes to take the action, does not itself have the power to impose any penalty; it is always left in the hands of the judiciary. In this case, it shall be the Judicial Magistrate who shall decide whether it is a fit case to take cognizance of the case and issue summons and if it chooses to issue summons to decide whether the offence has been committed against the persons who are accused

The facts of the case are as the above writ petition and a batch of 70 other cases involve a common question, namely, the validity of the notices issued by the

Government of Haryana through the Secretary to Government, Labour Department to two named individuals purporting to represent the Management as liable for prosecution under Section 25-U for violation of Section 25-T of the Industrial Disputes Act, 1947. The prosecution notices which are impugned in the writ petitions germinated from individual complaints of about 70 workmen against the Management when they were served with orders of transfer from the place where, the factory was situate, namely, at Gharaunda District Karnal to Phusgarh Road where, according to the workmen, no unit of factory had been as yet established. Mala fides of the action, according to the workmen were seen from the fact that they were deliberately transferred after their plea to the government to close down some units was turned down, to a place where there was not even a manufacturing unit and the orders issued by the Management to constituted 'unfair labour practice'.

The Government had issued show cause notices to one Adarsh Gupta, who was shown as “occupier” of the factory in relation to certain manufacturing units of the factory. Another person was Adarsh Gupta who had not been issued with any notice at all but the impugned orders had been issued against the above named two individuals as 'occupiers' of the manufacturing units. The Government received objections only from Adarsh Gupta but still proceeded to issue the impugned orders. The impugned orders could be seen as stereo typed in that they say that in exercise of the powers conferred under Section 32 and 34 of the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act')., the Governor of Haryana authorized the Labour Commissioner to lodge a complaint against the two named private individuals referred to above under Section 25-T read with Section 25-U of the Act in the Court of the Magistrate Ist class, Karnal.

Grounds of Challenge:

The notices are challenged in this batch of 70 writ petitions on common grounds viz. (i) The Government did not have any power to determine whether the particular act complained of constituted 'unfair labour practice'. Without adjudication and finding by the Labour Court that the action complained of by the workmen against the Management constitute unfair labour practice, the Government itself cannot arrive at such a conclusion and launch a proceeding; (ii) Adarsh Gupta who is petitioner in several petitions had no doubt been served with show cause notices but

the action taken by the Government deciding to launch a prosecution without considering the objections given by him that he was not an “occupier” of the Units from where some workmen had been transferred and without considering his objection that he had not transferred any workmen at all, was the result of a complete non- application of mind of the Government and hence vitiated. (iii) As regards Adarsh Gupta though he was a Director of the Company, no notice at all had been issued to him personally and the order without any proper notice constituted violation of principles of natural justice and hence not justified.

The attempt to prosecute was an extraordinary power which could not be exercised in a cavalier fashion for alleged wrongs committed by the Company without ascertaining the actual personnel who was responsible for the decision made on behalf of the Company.

It should be noted that the impugned orders themselves did not impose any penalty. It is the first stage taking a decision for setting criminal process in motion. At this stage, no one is found guilty. The details of the wrong attributed to the respective private individuals, though form the basis for the complaint, are not put on record. The trial has not commenced nor is any charge sheet levied. It is at this stage that all the petitioners have resorted to the writ petitions that the batch of writ petitions have been filed at the instance of the two named individuals.

Non-maintainability of writ petition, as perceived by State.

To the argument of the learned counsel on behalf of the petitioners that the Government itself does not have power to take action or decide that the acts complained of constituted unfair labour practice, learned counsel for the State points out that the unfair labour practice is defined under Section 2 (ra) as meaning any practice specified in the 5th Schedule and the 5th Schedule includes, the acts, inter alia, in entry 7 “to transfer a workman mala fide from one place to another, under the guise of following management policy”. According to learned counsel appearing for the State submits that the Government could not have referred the matter for adjudication under Section 10 in view of the fact that the transfer per se would not qualify for reference since only matters pertaining to 3rd Schedule could be adjudicated under Section 10 (i) proviso, of the Act. . He would submit that an '

Industrial dispute' under Section 2-K could not to be adjudicated since all the complaints have originated not through the union but by individual workmen whose right to seek for adjudication stems only under Section 2-A and it applies only to issues of discharge, dismissal and retrenchment etc. and it would not be possible even for the individual workman to seek for adjudication on a subject mentioned in Schedule V.

V/S Complaint of unfair labour practice could originate even from an individual workman.

In view, the fact that individuals cannot seek for references for any matter other than issues of discharge/dismissal as found under Section 2-A itself contains an answer to the query whether the issue of 'unfair labour practice' could be decided only by a Court and whether it would be incompetent for the Government to make such a prima facie inference before deciding to take action for prosecution. In a similar fashion if we must see that the definition of 'Industrial dispute' under Section 2-K contains a larger scope for an enquiry relating to a dispute between employees and hence confined only to a dispute espoused through a Union, it would lead to an absurd consequence of a complaint of unfair labour practice being unavailable to an individual workman. Sections 25-T and U could not be seen in a restrictive sense as enabling only the union to seek for adjudication through reference and disabling any individual workman to complain of unfair trade practice. VI Prima Facie finding of unfair labour practice is the only pre-requisite- No final proof necessary at the stage of complaint.

The power exercises under Section 32 and 34 is after coming to a prima facie conclusion that there is ' unfair labour practice' The respective Sections do not stipulate any one authority to be exclusive for determining this question, as it does not state anywhere that this finding could be rendered by the Labour Court on a reference from the Government. If the Section 25-T itself prohibits 'unfair labour practice' and Section 32 provides that if an offence is committed by a Company, every Director, Manager, Secretary or other Officer concerned with the Management shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. It means that power of adjudication does not reside even with the Government any more than obtaining relevant information in order to take

further proceedings provided under Section 34 of the Act. Section 34 of the Act provides thus:

Cognizance of offences: (1) No Court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, save on complaint made by or under the authority of the appropriate Government.

No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act."

The Delhi High Court held through its decision in Tarlok Chand V/s. National Industrial Development Corpn. Ltd.[46]" that a relief under Article 226 of the Constitution cannot be availed to consider whether the Management had been guilty of unfair labour practice. The Delhi High Court was dealing with a case of a workman's complaint against the Management that it was guilty of unfair labour practice and the Court had held that the appropriate remedy would be to seek a reference. In this case, a reference is not sought by either the workman or the Management and the Government had taken a prima facie decision that there had been an offence committed. Most importantly, the Government, at this stage when it proposes to take the action, does not itself have the power to impose any penalty; it is always left in the hands of the judiciary. In this case, it shall be the Judicial Magistrate who shall decide whether it is a fit case to take cognizance of the case and issue summons and if it chooses to issue summons to decide whether the offence has been committed against the persons who are accused."

Finally the Judgment was delivered by honorable Judge Sh. K. Kannan that, the complaint of want of notices or solid proof against the persons against whom the orders are issued are quite unnecessary at this stage. The intervention as sought for through writ is impermissible and unwarranted. The writ petitions are dismissed. No costs.

In my opinion it is submitted that, if the decision is gone through carefully, it may be observed that the court did not touch the principles regarding deciding unfair

[46] 1994 (4) SCT 745

labour practices, rather the court did not find the case mentioned above, fitting to the situation required for declaring it as unfair labour practice

16. The Executive Engineer, PWD, Pune and Anothers V/s. S.P. Rokade

(2013) I LLJ 171 Bom

The facts of the case are as the Executive Engineer, Public Works Department, Pune, through the State of Maharashtra have challenged the common order dated 18 January 1999 passed by the Industrial Court, Pune, thereby reversed the order passed by the Labour Court, Pune. The operative part of the common order is as under:

"ORDER

1. The Revision Applications 96 to 108 of 1998 are allowed.

2. The order passed by the Third Labour Court, Pune, in Complaints (ULP) Nos. 114 to 124, 129 and 130 of 1995 dt. 491998 is hereby quashed and set aside.

3. It is hereby declared that the respondent-department has committed unfair labour practice under Item 1 of Schedule IV of the Act in terminating the services of the complainants. Hence, the respondent department is directed to cease and desist from indulging in such unfair labour practices.

4. The respondent dept. is further directed to reinstate the complainants in their original posts with continuity o service, within one month from the date of this order and pay them 1/3rd backwages from the date of termination till the date of reinstatement.

5. No order as to costs."

On 7 April 1999, this Court has admitted all the Writ Petitions. No interim relief was granted. This Court, on Civil Applications filed by the Petitioners, has passed the following order on 12 April 2001. "P.C. Heard learned Counsel. Civil Application disposed of in the following terms:-

1. The order dated 18th January, 1999 passed by the Industrial Court, Pune, directing the reinstatement and back wages of the Respondent No.1 shall stand stayed subject to the following conditions:

(a) That the Petitioner shall deposit the wages of the Respondent No.1 at the rate of wages last drawn by him during the pendency of Writ Petition on month to month basis before the Industrial Court. The said amount on deposit shall be paid to the Respondent No.1 on the principle analogous to Section 17B of the Industrial Disputes Act and the same shall not be recoverable.

(b) The petitioner shall make the aforesaid payment from the date of filing of the petition. The aforesaid shall be deposited within a period of 6 weeks from today. In case of default on the part of the petitioner to deposit the arrears of the payment as well as the amount mentioned in clause (a) above, the stay granted to reinstatement shall stand vacated in case of three clear defaults.

(c) The Respondent No.1 shall file an affidavit in this Court about his gainful employment/unemployment within a period of two week from today. The filing of the affidavit shall be condition precedent for granting benefits as contemplated under clauses (a) and (b) above. Civil Application disposed of accordingly. Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Sheristedar/P.A. of this Court."

A Division Bench of this Court by order dated 9 December 2003 did not entertain the Letters Patent Appeal against this order. The Petitioners did not raise further challenge to the said order passed by the Division Bench. The order dated 12 April 2001 therefore, has attained finality. Therefore, the amount so deposited and received by the Respondents, pursuant to the said order, are not recoverable now.

The learned Labour Court, while rejecting all 13 claims, held that the Petitioners Respondents did not engage any unfair labour practice by orally terminating the services w.e.f. 10 February 1995. The Respondents, therefore,

preferred the Revision Applications. All the Revision Applications arose out of common order, those were consolidated and ultimately after reconsidering the material on record reversed the findings as recorded above. The Petitioners preferred separate Revisions.

Finally the judgment was delivered by honorable judge Sh. Anoop Mohta that, "Complainants were entitled to reinstatement with continuity of service and all consequential benefits except back wages - Petitions so far as order passed by Industrial Court regarding reinstatement and continuity of service with related consequential benefits dismissed and so far as one-third back wages were concerned Complainants were not entitled for any back wages and to that extent impugned order set aside"

In my opinion it is submitted that, there was perversity in the order passed by the Labour Court, which was also contrary to the evidence and the material placed on record.

17. The Municipal Council Jintur V/s. Shri Sunder Namdeo Khillare

(2013) IILLJ 706 Bom.

The facts of the case are as **t**he case of the complainants was that they were workmen of petitioner-municipal council, which is an industry and they were appointed by the municipal Council on various dates in the year, 1994. Since their appointment, they are working continuously and they had completed more than 240 days in each calendar year. They are being paid salary as per minimum wages and their work is satisfactory and the work is available throughout the year. It is submitted that the work of the complainants is of permanent nature and the petitioner herein with an object to deprive them from getting benefits of permanency, they are not made permanent and thus, the present petitioner is engaged in unfair labour practice under Item 6 of Schedule IV of the said Act.

Held: Finally the judgment was delivered by honorable judge Sh. S.S. Shinde that, "the view taken by the Industrial Court is a plausible and reasonable view. The view taken is not perverse, in any manner, rather it is in consonance with the material

placed on record. The respondents-complainants are working for more than 17-18 years with the petitioner and the benefit granted by the Industrial Court to them directing the petitioner to regularize their services is the most appropriate direction in the given set of the facts and circumstances of the case. Therefore, for the reasons aforesaid, no interference is called for in the impugned judgments and orders of the Industrial Court. Hence, the petitions are devoid of any merits and the same stand dismissed."

In my opinion it is submitted that, the judgment did not required to be changed and the verdict is appropriate and reasonable in consonance of law.

18. The Chief Executive Officer V/s. Vaijinath, The Chief General Manager, The Government of Maharashtra and The Chairman

(2013)IIILLJ266Bom.

The facts of the case are as the respondent No. 1 were the original complainants before the Industrial Court. They filed the complaints stating therein that the complainants are working as a Clerk since 15.09.2001, 1.11.1988, 1.1.1997, 1.6.1989, 31.12.1998, and 1.10.2000, respectively in the office of the present petitioner-original respondent No. 1 and respondent 4. They are getting monthly salary of Rs. 3500/-. The petitioner herein and respondents 2 to 3 had passed a resolution No. 4 on 29.5.2004, but they had not absorbed the complainants on the posts of Group Secretary and committed unfair labour practice. In the beginning, the complainants were paid monthly salary of Rs. 500/-, and now they are getting Rs. 3500/- per month. The complainants-present respondent No. 1 completed the various courses of like LDC, GDC, M.A. of Maharashtra Rajya Sahakari Sangh Maryadit, Pune and they are working as Group Secretaries in the respective Vividh Karyakari Sahakari Society Ltd.-respondent No. 4.

Held: Finally the judgment was delivered by honorable judge Sh. S.S. Shinde that, Industrial Court has rightly held that Complainants and other similarly situated persons were working for years together on posts of Group Secretary and doing all duties and performing obligations of said post and petitioner-employer had deprived them from getting permanency benefits and petitioner had indulged in unfair labour

practices as defined in various Items of Schedule IV of said Act - Earlier policy of Government not to appoint persons on permanent basis as Group Secretaries had been given up and on contrary, concerned societies were given liberty to appoint employees already working on posts of Group Secretary and to make them permanent and absorb in employment .Therefore, impugned judgments and orders passed by Industrial Court deserved no interference. Petitions rejected.

In my opinion it is submitted that, from the authoritative pronouncement of the Supreme Court in case of Casteribe Rajya P. Karmchari Sanghatana that power of Industrial and Labour Court u/s. 30 of the Act did not call for adjudication or consideration before the constitution Bench in the case of Uma devi (supra) and did not denude the Industrial or Labour Court of their statutory power under Section 30 r/w Section 32 of the said Act to order permanency of workers, who have been victims of unfair labour practice on part of employer under Item 6 of Schedule IV of the Act.

19. Dombivli Nagari Sahakar Bank Ltd. V/s. Lahu Keshav Rewale

(2014) III LLJ 607 Bom

The facts of the case are as the Petitioner challenges the order passed by the Industrial Court Thane, rejecting the Revision application filed by the Petitioners against the order passed by Labour Court Ahmednagar. The Labour Court has directed the Petitioners to allow the Respondent to resume his duties on his previous posts temporarily during the pendency of the complaint till the disposal of the main complaint on merits. The Respondent was employed by the Petitioner Bank as a peon on 18 September 1992. On 30 March 2008, he was promoted to the post of junior clerk. The Respondent is the secretary of the employees' union of the Petitioners. The Petitioners have in its employment about 532 employees. The union of which the Respondent is General Secretary is the only Union in the Petitioners-bank. It is the case of the Respondent, that the Respondent was initially moved from Mumbai to Jalgaon to prevent his activities as a union member. It was his case that various demands of the workmen are pending with the Petitioners and to intimidate the Union, the Petitioners carried out certain transfers. According to the Respondent, he tried to unionise grievances against the Petitioners management and therefore the Petitioners

wanted to ensure that his union activities come to an end. A show-cause notice came to be issued to the Respondent on 13 November 2011. The show cause notice stated that, on 23 September 2011, the Respondent had taken leading role in campaigning of distribution of forms and letters in respect of Union deductions, distributed printed forms to hold a meeting of staff members and these activities were carried out while on duty and in the bank premises without permission of the superiors. This according to the Petitioners amounted to misconduct. It was also alleged in the show-cause notice that the Respondent addressed a representation to the Minister for Co-operation and this was also considered as one of the misconducts.

Finally the judgment was delivered by honorable judge Sh. N.M. Jamdar that, "If prima facie, factual position on record show that without holding an inquiry a Secretary of the Union who has been serving for 22 years has been sought to be dismissed with complete disregard to the rules, which mandate holding of an inquiry on charges which are not very serious, there is no reason to interfere with the concurrent finding, the Petition is accordingly rejected. It is clarified that all observations made above are prima facie and the complaint will be decided on its own merits."

In my opinion it is submitted that, balance of convenience is concerned there was no charge that the respondent has committed misappropriation or that mere presence of the respondent is detrimental. Balance of convenience was clearly in favor of the Respondent.

(III) The Decisions of the Various Courts of the Foreign Countries

REPUBLIC OF SOUTH AFRICA

20. THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG SIZWE MORGAN MAYABA V/s. COMMISSION FOR CONCILIATION, MEDIATION

J 2204 / 2014

The facts of the case in brief are as interdict application – principles stated – application of principles to matter – issue of clear right and alternative remedy Jurisdiction – Labour Court does have jurisdiction to consider urgent application to uplift suspension – issue is whether it is competent for the Labour Court to do so – exceptional and compelling reasons required Unfair suspension – whether suspension unfair – basis of the right – right to fair suspension determined by LRA – cannot rely on implied term in contract – right to fairness applied only in process under the LRA Unfair suspension – whether suspension unlawful – no general right to be heard or to be provided with reasons or information prior to suspension – suspension precautionary measure and not discipline Alternative remedy – statutory prescribed dispute resolution process – this process must be followed – departure from process should only be entertained in exceptional circumstances Interdict – no clear right shown and existence of proper alternative remedy –application dismissed.

Finally the judgment delivered by honorable judge Snyman that, Although the name of the Commission for Conciliation, mediation and arbitration often appears on judgments in this Court, this matter is one of the few occurrences where the Commission for Conciliation, mediation and arbitration has actually come before this Court not in capacity as body responsible for dispute resolution, but as the employer itself. It is rather a unique experience. This being said, the applicant, as an employee of the Commission for Conciliation, mediation and arbitration (being the current first respondent), has brought an urgent application in terms of which the applicant seeks to challenge his suspension by the first respondent. The applicant is seeking final relief, in the form of an order declaring that his suspension by the first respondents was invalid and an unfair labour practice. The applicant then seeks consequential

relief in the form of an order that his suspension be set aside with immediate effect pending the finalization of possible disciplinary proceedings against him.

The applicant, in his notice of motion, has also asked for a mandamus against the first respondent, in which he seeks an order to enroll the applicant's unfair labour practice dispute and unfair discrimination disputes that he referred to the Commission for Conciliation, mediation and arbitration for conciliation in terms of the LRA, on 15 August 2014, for hearing within the 30 day conciliation time limit prescribed by the LRA. The applicant brought this part of the application because the Commission for Conciliation, mediation and arbitration only enrolled conciliation on 9 October 2014 in respect of these disputes. However, and having regard to the fact that this matter only came before this Court on 18 September 2014, the 30 day time limit has in any event already passed. MrMalatsi, representing the applicant, conceded that this relief is no longer competent, and the applicant no longer persists with the same. I shall accordingly not consider this issue. The applicant has also sought a mandamus in the form of an order that any disciplinary proceedings against him must not be allowed to proceed until the other employees of the first respondent mentioned in the forensic report relating to this matter are also 'fairly suspended'. Although Mr Malatsi conceded that the relief sought in this paragraph has no foundation in law, he did not abandon the same, and consequently I shall deal with this relief sought as well in this judgment.

As touched on above, these are motion proceedings in which final relief is sought. The consequence is that in the case of any factual disputes, these factual disputes must be resolved on the basis of the principles enunciated in Plascon Evans Paints v Van Riebeeck Paints.[47] In Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another [48]this test was articulated as follows:

'The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honouredrules ….are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to

[47] 1984 (3) SA 623 (A) at 634E-635C ; See also Jooste v Staatspresident en Andere 1988 (4) SA 224 (A) at

[48] 259C – 263D; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at paras 26 – 27

oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncredit worthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis thatit obviously stands to be rejected. 'A proper consideration of the affidavits in this matter fortunately reveals that very little facts are in dispute. Most of the factual matrix giving rise to this application are either undisputed, or common cause. The disputes however arise in the context of what inferences should be drawn from these facts. In my view, nothing the respondents have said in their answering affidavit can be considered to be bald or fictitious or implausible or lacking in genuineness. The issues raised by the respondents in the answering affidavit are properly raised, with the necessary particularity. There is no basis or reason for me to reject anything said in the answering affidavit. I thus intend to determine this matter on the basis of the admitted (common cause) facts as ascertained from the founding affidavit, the answering affidavit and the replying affidavit, and as far as the disputed facts and inferences are concerned, on what is stated in the respondents' answering affidavit. On this basis, I will set out the background facts hereunder.

As a final introductory comment, and because this matter concerns the granting of final relief, the applicant must satisfy three essential requirements which must all be shown to exist, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.

21. Setlogelo V/s. Setlogelo, 1914 AD 221

And

V & A Waterfront Properties (Pty) Ltd and Another V/s. Helicopter & Marine Services (Pty) Ltd and Others

2006 (1) SA 252 (SCA)

In addition, to the earlier decisions above-mentioned cases have also settled the law relating to unfair labour practice in South Africa. been done. This court however is not in the business of ensuring that an employee's reputation should not be tarnished. If so, it will open the flood gates and this court will be inundated with many such applications.'I fully agree with this reasoning. I conclude with the following reference to what the 46 See Section 1(d)(iv) of the LRA which provides that one of the primary objects of the LRA is 'the effective resolution of labour disputes.47 (2009) 30 ILJ 2766 (LC) at para 17.29Court said in Dladla v Council of Mbombela Local Municipality and Another (2):In my view, the applicant's image and reputation cannot be the basis upon which this court can overturn the suspension.'

Considering all of the above, I conclude that the applicant failed to establish the existence of a clear right. In short, the applicant has no right to fairness in terms of his contract of employment. The applicant has illustrated no exceptional circumstances or compelling considerations of urgency justifying intervention by this Court. There is simply no reason why the applicant cannot pursue his allegation of unfair suspension in the normal course, and as prescribed by the LRA. The applicant's application must fail for this reason alone alternative remedy

I will however nonetheless consider the issue of an alternative remedy. Based on what I have already referred to above, the applicant certainly has a suitable alternative remedy. I wish to refer to three judgments just to illustrate the point. In Biyase v Sisonke District Municipality and Another49 the Court held: 'The applicant specifically disavows any reliance on an unfair labour practice in the form of unfair suspension as contemplated by s 186(2)(b) of the Labour Relations Act. Had he relied

on that provision, he may have had an alternative remedy by referring an unfair labour practice dispute to the relevant bargaining council in terms of s 191 of the LRA.' Similarly in Lebu v Maquassi Hills Local Municipality (1)50 the Court said: 'As I have pointed out, the applicant does not allege an unfair labour practice in the form of unfair suspension as contemplated by section 186(2)(b) of the Labour Relations Act. Had that been the case, he would have had an alternative remedy by referring an unfair labour practice dispute to the relevant bargaining council in terms of s 191 of the LRA.' And finally in Nyathi v/s. Special Investigating Unit the Court said: 'It must again be emphasized that the applicant is not challenging the fairnessof the suspension in these proceedings. It is trite law that the Commission for Conciliation, mediation and arbitration is vested with the jurisdiction to decide that issue.' The applicant has stated that he has deliberately not referred an unfair suspension dispute to the Commission for Conciliation, mediation and arbitration, in essence because he says has lost faith in the Commission for Conciliation, mediation and arbitration. The applicant states that the Commission for Conciliation, mediation and arbitration deliberately did not schedule the conciliations pursuant to his two dispute referrals on 15 August 2014, so as to prejudice him and support his suspension. I find no merit in these contentions. The first respondent has explained that LRA matters concerning its employees are dealt with by and transferred to its national office, and not dealt with in one of the regions, which is what happened in this case. In any event, the applicant had already received, on his own version, the conciliation set downs on 8 September 2014, which is consistent with this explanation of the respondents. Also, and considering the applicant was suspended on 1 September 2014 already, scheduling his disputes for conciliation on 9 October 2014 only, could have no impact at all on his suspension. I may also mention that the fact that conciliation does not take place within 30 days can have no impact at all on any case of the applicant. In fact, and after 30 days, he accrues the right to forthwith pursue the dispute by way of either arbitration or adjudication, as the case may be. The applicant is seeking to attribute untoward motive to the respondents where none exists. In my view, the above contentions of the applicants were nothing more than a deliberate design in the current matter to avoid the Commission for Conciliation, mediation and arbitration dispute resolution processes. This approach of the applicant, as I have said, in unfounded in fact.

What the applicant is thus in my view doing, and respectfully using the words of Wallis AJA in McKenzie52 was to bring a case '…. in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer'. This Court should be astute in considering what constitutes the true basis for the challenge by an applicant of a suspension so as to not '…. allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment.'current matter, the case of the applicant is really one of alleged unfairness, and as such, the statutory prescribed alternative remedy in terms of the LRA must apply.[50] This leaves only one issue to consider. Mr Malatsi submitted that the Commission for Conciliation, mediation and arbitration is not like any other employer. Mr Malatsi stated that because of the nature of the functions of the Commission for Conciliation, mediation and arbitration, and its role in the employment dispute resolution environment, it should be held to higher standards than all other employers. In a nutshell, the contention of Mr Malatsi was that all the legal principles that apply to all other employers, as set out above, cannot apply to the Commission for Conciliation, mediation and arbitration, and because of its nature, everything the Commission for Conciliation, mediation and arbitration does vis-à-vis its employees must be automatically infused with fairness. This same motivation was also advanced by Mr Malatsi for the applicant asking this Court to determine his suspension as an unfair labour practice rather than the Commission for Conciliation, mediation and arbitration. Mr Makapane for the respondents refuted these contentions. He submitted that there is a clear distinction between the Commission for Conciliation, mediation and arbitration as an employer of its own personnel and the Commission for Conciliation, mediation and arbitration as statutory dispute resolution body in terms of the LRA. Mr Makapne submitted that the Commission for Conciliation, mediation and arbitration as employer of its own personnel is just like any other employer. Mr Makapne further added that the Commission for Conciliation, mediation and arbitration would in any event in its dispute resolution functions with regard to the actual disputes pursued by the applicant in terms of the LRA, to the Commission for Conciliation, mediation and arbitration, use an independent panel it had approved for such very purposes (meaning dealing with employment disputes of its own employees.

I have already said that I think much of the applicant's case with regard to his alleged concerns about the partiality and mala fides of the Commission for Conciliation, mediation and arbitration is that of a deliberate design to suit his purposes in this application, rather than a genuine concern. In fact, and using the applicant's own reasoning, if any employer is able to rise above internal considerations and mala fides, it would be the Commission for Conciliation, mediation and arbitration. Therefore there is no reason not to accept that the Commission for Conciliation, mediation and arbitration will properly deal with any dispute the applicant may wish to submit to it, in its capacity as dispute resolution forum in terms of the LRA, and I accept that it would ensure fairness by using this independent panel referred to. I also agree with Mr Makapane's contentions that a clear distinction must be drawn between the Commission for Conciliation, mediation and arbitration as employer on the one hand, and the Commission for Conciliation, mediation and arbitration as dispute resolution functionary in terms of the LRA on the other. In my view, the Commission for Conciliation, mediation and arbitration has two distinctive parts. The first part relates fulfilling the functions bestowed on it by virtue of the LRA, through commissioners. The second part is that in order to effectively and properly provide these functions, there must be a proper support structure. The vast array of commissioners and dispute cases spread across the entire country in a number of offices and regional offices must be managed, administered and supported. Infrastructure must be provided, controlled and managed. As to this second part, this is no different to the functions of any other employer managing, administering and controlling its business. If I may describe it simply – the business of the Commission for Conciliation, mediation and arbitration is dispute resolution through commissioners, and it manages such business using its own employees such as the applicant just like any other employer.

22. Zimema V/s. Commission for Conciliation, Mediation and Arbitration

The Court dealt with disciplinary proceedings by the Commission for Conciliation, mediation and arbitration against its national registrar at the time. The employee in that case sought an order from the Labour Court in terms of section158(1)(a) (iii) authorizing him to approach the Labour Court directly and not use the statutory dispute resolution processes under the LRA which would take him to

the Commission for Conciliation, mediation and arbitration. He contended that referring the dispute to the Commission for Conciliation, mediation and arbitration for conciliation and arbitration was inappropriate and prejudicial, because the very body that decided that he was guilty of the misconduct would deal with his dispute, and he was also concerned that the process would be interfered with by the Director of the Commission for Conciliation, mediation and arbitration. The Court deal with these contentions as follows in refusing to grant the applicant in that case the order sought:'Although the applicant may have valid concerns about referring the dispute for conciliation and perhaps arbitration to the very body that dismissed him, it is a 'knowledgeable outsider' who will deal with the question of conciliation and arbitration and not the Director of the Commission for Conciliation, mediation and arbitration. "The Court in Zimema in fact concluded that the dispute resolution process in section 191 remained peremptory. I agree with this reasoning. It is a manifestation of the separation of the two parts of the Commission for Conciliation, mediation and arbitration. The fact is that any commissioner dealing with the matter is a 'knowledge outsider', especially considering the use of the independent panel referred to. As an illustration that a dismissed employee of the Commission for Conciliation, mediation and arbitration can still receive relief and succeed in his or her case, Mr Makapane also referred to Maepe v Commission for Conciliation, Mediation and Arbitration and Another where a dismissed convening senior commissioner of the Commission for Conciliation, mediation and arbitration was found to have been unfairly dismissed. The simple fact is that the applicant cannot pre-judge what may happen at the Commission for Conciliation, mediation and arbitration. He must follow the process prescribed by law.

If the Commission for Conciliation, mediation and arbitration does provide him with justice, where it is shown to be deserved, the applicant has recourse to the Labour Court and possibly Labour Appeal Court as well. The applicant has also mentioned that some of the employees implicated in the audit report were not suspended as he was. The problem with the applicant's case in this regard is, simply, that he actually made out no case. He did not identify these employees and he provided no factual foundation for any conclusion that these employees are in fact equally responsible and comparable to him but was not suspended. The applicant, so to speak, not only did not compare apples with apples, but in fact conducted no proper

comparison at all. In any event, suspension as I have said is not discipline and this issue can be competently raised in any disciplinary proceedings against the applicant on the basis of a defense of inconsistency.

Therefore, I conclude that the applicant has proper alternative remedies available to him. He has the statutory dispute resolution process actually prescribed by the LRA where the issue of the fairness of his suspension, coupled with proper consequential relief, can be adequately addressed. The applicant also had the disciplinary proceedings (if instituted) in which he can ask for any information he may need to properly conduct his case, and then properly state his case and raise any defenses he wants, including that of inconsistency. The applicant has accordingly also not satisfied the interdict requirement of the absence of a suitable alternative remedy.

Concluding remarks

I remain concerned with the plethora of cases that come before the Labour Court brought by senior employees in the public sector to challenge their suspensions on an urgent basis, which in essence amount to bypassing the prescribed dispute resolution processes in the LRA for such kind of disputes. I fully align myself with thefollowing statements made by the Court in Mosiane v Tlokwe City Council:

‘A worrying trend is developing in this court in the last year or so where this court's roll is clogged with urgent applications. Some applicants approach this court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this court with fanciful arguments about why this court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this court will grant them relief on an urgent basis.

All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the

procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the Commission for Conciliation, mediation and arbitration or to the relevant bargaining councils and then approach this court for the necessary relief.'

In Gradwell, the Court in fact expressed its doubts whether the Labour Court would be competent or have jurisdiction to grant final declaratory relief in declaring a suspension unfair, where the Court said:58 'I am therefore of the view that the judge a quo ought not to have exercised his discretion to grant the declarator. I doubt also whether he had the legal competence to do so. Without the benefit of legal argument, however, I hesitate to pronounce on the jurisdictional question whether the existence of the arbitration remedy precludes relief in the form of a declarator in all cases.' I in the past dealt with this issue on the basis of having heard detailed legal argument on an opposed basis by two parties, in the judgment of Robert Madzonga v Mobile Telephone Networks (Pty) Ltd59where I said:

'The issue is not one of jurisdiction. It is one of competence. As I have set out above, the Labour Court will by virtue of the provisions of Section 158(1) of the LRA always have jurisdiction to interdict any form of disciplinary proceedings or grant interim relief. ….

The above authorities make it clear that the issue of the alternative remedy of the referral of the dispute to the Commission for Conciliation, mediation and arbitration or bargaining council, and this remedy is actually prescribed by law, is an important consideration mitigating against not granting relief in urgent applications concerning the uplifting of suspensions. In my view the issue is actually more than just the existence of an alternative remedy. The simple reason for this is that the alternative remedy is not just an available alternative remedy but a statutory prescribed alternative remedy. This is where the issue of competence comes in. The primary consideration must always be that proper effect be given to the clear terms of the statute, and for the Labour Court to entertain this issue would be contrary to the dispute resolution process clearly prescribed by such statute which should only be done with great circumspection and reluctance. In my view, and as a matter of principle, the Labour Court should only entertain urgent applications to declare suspensions unfair or unlawful or invalid on the basis of interim relief pending the

final determination of the issue in the proper prescribed forum, and even then compelling considerations of urgency and exceptional circumstances have to be shown by an applicant for such relief. Whether or not compelling considerations of urgency and exceptional circumstances exist is a call the Court has to make on a case by case basis on the facts of the matter.' In the light of all the above, the applicant has failed to establish the existence of a clear right. The applicant has also failed to show that he has no suitable alternative remedy. The applicant has not referred a suspension dispute to the Commission for Conciliation, mediation and arbitration, when the actual challenge of such suspension is firmly founded in fairness. The applicant has shown no exceptional circumstances or compelling considerations of urgency to exist, which would justify intervention by this Court. The applicant's application must thus fail.

This then only leaves the issue of costs. The applicant has elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. The applicant was legally assisted from the outset, and clearly knew he could and should pursue his dispute to the Commission for Conciliation, mediation and arbitration. The applicant in my view designed his case so as to try and avoid the application of the provisions of the LRA, despite still wanting to rely on the general principle of fairness before the Labour Court. Added to this, the bulk of the annexure to the applicant's founding affidavit and replying affidavit are close on 200 pages of irrelevant documents. Volume does not create merit. There is accordingly simply no reason why costs should not follow the result in this matter.

United States of America

23. National Labor Relations Board v/s United Steelworkers of America, CIO

357 U.S. 357

This case involve the question whether, in the circumstances, it was an unfair labor practice within the meaning of § 8(a)(1) of the National Labor Relations Act, as amended, for an employer to enforce an otherwise valid rule forbidding employees to engage in pro-union solicitation during working hours or to distribute literature in the employer's plant when the employer was engaging in anti-union solicitation and was

committing other acts which constituted unfair labor practices. In one case, the employer's anti-union campaign was so conducted as to constitute an unfair labor practice. In neither case was it shown that the employees or the union had requested the employer to make an exception to permit pro-union solicitation or that the no-solicitation rule actually diminished the ability of the labor organization involved to carry its messages to the employees.

Final Judgment delivered by honorable judges: the records in these cases furnish no basis for findings that enforcement of the no-solicitation rules constituted unfair labor practices.

In another instance an employee for a major homebuilder believed he was improperly denied overtime pay because he and other employees were misclassified as supervisors. He wanted to join with the others to file a collective claim with an arbitrator. But the builder said its arbitration policy, which employees were required to sign, only allowed for individual claims. The Board found that the policy was unlawful because it denied the employees their right to engage in concerted activity by filing jointly.

Michael Cuda worked as a “superintendent” for D.R. Horton, Inc., a builder with operations in 20 states. Like a growing number of employers, Horton required workers to agree in writing to submit any future claims against it to a professional arbitrator outside the court system. The Horton agreement had an additional condition, that claims could only be made on an individual basis. Cuda signed the agreement in 2006.

Two years later, Cuda notified Horton that he planned to seek arbitration on the job classification issue on behalf of himself and all other superintendents. The company rejected the idea, citing its arbitration policy. Cuda then filed an Unfair Labor Practice charge with the NLRB, claiming Horton's policy violated the labor law's protection of joint activity. Following an investigation, the regional director issued a complaint on behalf of the NLRB General Counsel, which brought the case to a hearing before an administrative law judge. In January 2011, the judge ruled that the arbitration policy was unlawful in that it deprived employees of the right to file charges with the NLRB.

That decision was appealed to the Board, and the case drew significant interest from groups representing employees and employers, a dozen of which filed amicus briefs with the Board. (All briefs and other public documents are available through this case page.

In January 2012, a two-member majority of the then three-member Board ruled in favor of Cuda, finding the policy was unlawful not only because it precluded NLRB charges but also because it precluded joint claims of any kind. The decision, which requires Horton to rescind or revise the agreement, discussed at length the relationship between federal labor law and the Federal Arbitration Act of 1925. The Board also emphasized that the ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims.[49]

A supervisor at a dental association was fired after she refused to divulge the names of employees who had anonymously signed a petition protesting top management. The Board found the discharge was unlawful because she had rightfully refused to violate federal labor law by punishing concerted activity. In a settlement, the supervisor and another former employee waived reinstatement in exchange for $900,000 in lost wages and benefits.

Eleven employees of the Texas Dental Association, which represents more than 7,000 dentists in the state, signed a petition that complained about unfair treatment by top management at the Austin headquarters. The employees signed the petition using aliases and delivered it to association delegates at an annual meeting.

The delegates declined to investigate, and, after the meeting, the executive director of the association set about trying to learn who had written the petition. A forensic examination of office equipment found a fragment of the petition on the computer of employee Nathan C., who was immediately fired. The association's general manager, Barbara L., was also fired after she refused to divulge the names of others involved.

[49] Deerfield Beach, FL

Barbara and Nathan filed charges with the Ft. Worth regional offices of the NLRB, which investigated and issued a complaint alleging that both firings were unlawful because they were predicated on protected concerted activity.

The case was heard by an NLRB Administrative Law Judge, who ruled that both terminations were illegal. The ruling was upheld by the National Labor Relations Board in Washington, and was then appealed to the Fifth Circuit Court of Appeals.

While the case was pending, however, the parties reached a settlement under which both employees waived reinstatement, but were awarded $900,000 in payment for lost wages and benefits.[50]

Canada

24. Supreme Court of Canada found Wal-Mart Closure an Unfair Labour Practice

The Supreme Court of Canada has issued a decision concluding that a Quebec Wal-Mart's closure amounted to an unfair labour practice under Quebec's *Labour Code*.

Wal-Mart opened a store in Jonquiere, Quebec in 2001. In 2004, the United Food & Commercial Workers' Union was certified to represent the store's employees. After a number of months of unsuccessful bargaining, the Union applied for appointment of an arbitrator to settle the dispute. A week later, Wal-Mart informed the Minister of Employment that it intended to close its establishment for business reasons, and followed through on this plan in April 2005.

Following the store's closure, the Union brought a series of complaints against Wal-Mart and alleged that the decision to close was grounded in anti-union sentiment. The Union alleged that the dismissal of the employees was a violation of the *Code* and, more specifically, the statutory freeze provision prohibiting alteration of conditions of employment during collective bargaining.

---

[50] Austin Texas

An arbitrator held that Wal-Mart was not able to establish the closure was made in the "ordinary course of business", and concluded the termination of all employees during this period violated the *Code*. The Quebec Court of Appeal subsequently overturned the arbitrator's decision, finding the provision preventing the alteration of conditions of employment did not apply to an employer's right to close its business.

The Supreme Court of Canada restored the arbitrator's decision. An important consideration for the Supreme Court was the arbitrator's finding that sufficient evidence established Wal-Mart's decision was not consistent with its past practices, nor with those of a reasonable employer in the same circumstances. Examples included the store having met all performance objectives up to the time of closure, and bonuses being promised prior to the bargaining dispute. Having made such findings, the Supreme Court affirmed the arbitrators view that the decision to close the store was not exempt from the *Code* provision at issue.

The Supreme Court remitted the matter to the original arbitrator to determine the appropriate remedy. It remains to be seen what remedy will be awarded to the Union and the former employees of the closed store. No Labour Relations Board or arbitrator has ever ordered an employer to re-open a closed operation, so any remedy will likely focus on monetary damages.

While labour legislation in jurisdictions across Canada does not prohibit employers from closing unionized operations for valid business reasons, closures can be challenged on the basis of anti-union sentiment motivating, in whole or in part, the closure. While it will only be unusual cases where such a challenge is made, this case represents a reminder that employers need to be prepared to justify any such closure on the basis of valid and demonstrable business reasons.

Random Reflection:

25. FCW v/s Premium Brands Operating GP Inc.

[2009] Alta.L.R.B.R. LD-004

SUMMARY: In late 2008 employees of Premium Brands in Calgary, Alberta applied to decertify the UFCW. The union filed Unfair Labour Practices charges.

The employer's memo contained information about LabourWatch. The union did not expressly complain about the LabourWatch content. The decision allowed the vote to be counted but said nothing about LabourWatch. It merely reproduced the employer's memo including the LabourWatch section. The vote was in favour of decertification.

BACKGROUND:

Premium operated a fresh meat and warehouse distribution facility in Calgary, Alberta with approximately 48 employees - 25 in the United Food and Commercial Workers bargaining unit. Premium also operated a similar facility in Edmonton that was union-free.The Calgary employees filed for decertification in November of 2008.. The Board held the vote on December 9, 2008 and sealed the ballot box pending the determination of the union's complaint.

The union's complaint related to the posting of four documents in the workplace on the days prior to the vote. One of the postings was a memo from the employer. This memo referred to other documents such as the benefits under the Collective Agreement, benefits for non-union employees at the Edmonton facility and the Edmonton Employee Handbook, all of which were posted along with the employer's memo. At the bottom of the memo from the employer was contact information for the Labour Board and for LabourWatch.

Though a number of the union's concerns were found to be valid, no reference was made to the employer's referral to LabourWatch and the Board ultimately, in January 2009, ordered the ballot box opened and the votes counted.

In my opinon it is submitted that, of interest, while the Board had concern with some aspects of the employer's communications, it did rule that the employer's comparison of the collective agreement to the non-unionized employees was accurate and was not unlawful.

26. Hubner et al. v/s United Food and Commercial Workers, Local 247 Certain Employees -and- United Food and Commercial Workers Union, Local 247

SUMMARY : In 2007, members of the United Food and Commercial Workers Union, Local 247, requested that their union produce copies of its financial statements for the years 2001 to 2006. The employees had become concerned about the manner in which the UFCW was handling its finances. When the UFCW declined, the bargaining unit members applied to the BC Labour Relations Board for an order compelling the Union to do so.

27. Michael Nolin v/s Wal-Mart, UFCW, Certain Employees et al.

British Columbia LRB No. B123/2006 52968 and 53378

SUMMARY: This BCLRB decision deals with a UFCW certification drive at a Wal-Mart store in Dawson Creek, BC. The UFCW filed unfair labour practice complaints against Wal-Mart, some Wal-Mart employees and a lawyer, Michael Nolin from Saskatchewan.

After Nolin's father, a Wal-Mart employee, expressed concerns about union organizing tactics, Nolin began acting for some Wal-Mart employees before the Saskatchewan Board. Last year he was contacted by a Dawson Creek employee to whom he subsequently wrote a letter.

In its May 30th decision, the BCLRB reviewed the letter written by Michael Nolin that incorrectly explains BC labour law and makes a number of statements about the UFCW and about Wal-Mart. Nolin's letter contained references to both www.labourwatch.com as well as Members for Democracy (MfD) - a union reform website run by current and former UFCW members.

In its decision, while the Board quoted extensively from Nolin's letter, when it came to the websites the Board simply wrote that the letter "urged employees to visit the two websites," without actually naming either Labour Watch or MfD. The Board also omitted any reference to the four Labour Watch FAQs attached to Nolin's letter claiming that Nolin's letter "repeated information found on two websites". Having now reviewed the letter, this statement in the decision is not at all accurate. The letter refers to the many pages of attachments downloaded from the websites. The Board only acknowledged that Nolin's letter was sent "with some other documents."

In addition to filing a complaint against Nolin, the Union also filed a complaint against some Wal-Mart employees who the UFCW alleged distributed the Nolin letter and attachments at a meeting in the home of a Wal-Mart employee. The meeting was attended by Union supporters and opponents who held a discussion on unionization.

Describing the meeting as "relaxed," the Board dismissed the Union's complaint in finding that no employee acted in a coercive or intimidating fashion by distributing Nolin's letter at this meeting. They also noted that the employees never distributed the letter at the Wal-Mart store.

The Board cleared Wal-Mart of any wrong-doing as well in rejecting the complaints filed by the UFCW.

However, the Board found that Nolin contravened the Labour Code as a result of statements made in the letter to the Wal-Mart employees. For example, Nolin made allegations about UFCW organizing tactics that he had not looked into. He also asserted to the employees that if they unionized their store might close.

The Board found some of Nolin's statements to be coercive and intimidating. Nolin and his law firm were ordered to pay to have the decision mailed to the homes of all current Wal-Mart employees in the Dawson Creek store and for a subsequent UFCW mailing.

Labour Watch emerged from the Board's decision unscathed but also unannounced. This is the third case in a row that a Labour Board has heard evidence

and occasionally complaints against Labour Watch – and in dismissing the union complaints – the Board failed to acknowledge our name.

28. Saskatchewan LRB No. 181-04 & 227-04

SUMMARY: An employee of Varsity Common Garden Market, a grocery store operated by a Sobey's franchisee, made an application for decertification in 2004. The United Food and Commercial Workers (UFCW) complained that the applicant employee in Saskatoon had used Labour Watch to understand decertification and to find a lawyer listed on the website to help her. It was the first time we are aware that a Board heard such complaints and evidence about the use of the Labour Watch website under oath during a decertification hearing. The Board found no employer interference and ordered that a vote take place on April 25, 2005.

The union continued the fight against the employee's democratic vote and statutory right of decertification. First they sought reconsideration of the April 6, 2005 decision. The vote was sealed pending the outcome of a Union reconsideration application and a Union Objection to Vote application. In September of 2005, the Board dismissed the Union's reconsideration application (LRB File 181-04 & 227-04).In October of 2005, the Board dismissed the Union's objections to the April 25 vote and ordered the vote counted (LRB File 227-04).When the vote was finally counted, the employees had voted to be union-free again.

This BC LRB decision discusses the use of Labour Watch during an organizing drive as a result of the employer referring employees to the site in a memo. It is the first decision that we are aware of and became available. The decisions held that “nothing turns on the content of the site alone in this case”.

The bottom line is that our content fared very, very well. We have provided the excerpts below that deal with Labour Watch. We can find only positive outcomes in reading the parts of this decision that relate to us. This is even more significant given that the totality of the employer’s conduct was held to be “some of the worst and most egregious acts” possible. Our content was, appropriately, not tarnished at all by the Board’s findings regarding the employer’s conduct, in spite of the Union’s claims at the hearing. The Board ordered a remedial certification for the totality of

conduct driven by the termination of three employees, all organizers and one of their friends. The only issue we note with the decision is that the Vice Chair said that we do not "apparently offer instructions on how to obtain union representation". It is very likely that the Vice Chair may not have seen the first two paragraphs of the Introduction to Labour Watch in our About Us section where we commend the excellent union websites that employees can go to if they want a union, and link them to a section of our website that contains links to the Canadian Labour Congress and every provincial Federation of Labour in Canada. We do not duplicate what is already well done, just provide what is either not available or augment what is incomplete online.

As indicated out the outset, The Brick admitted on August 30 before the Board that the dismissals were unlawful contrary to Sections 5(1), 6(3)(a) and 6(3)(b) of the Code. This admission and the Board's declarations and orders were published in BCLRB No. B287/2002. That decision was ordered to be distributed to all employees who had received the initial bulletin of August 29, 2002. The Brick attached a covering letter to the Board's decision indicating, among other things, that as an employer, it was limited to what it could say to employees. The Brick gave the dates of the continuation of the Board hearing and invited employees to visit a website: www.labourwatch.com for more information about unionization. The Brick also invited employees to visit Local 15's website if they so chose.

Local 15 contended that www.labourwatch.com was a virulent anti-union website. It invited me to take judicial notice of its contents and draw appropriate inferences. Local 15 led no evidence about the website's contents. The Brick denied that the website was anti-union. It said that it contained strictly neutral information and invited me to visit the site.

Summary: " it offers countervailing information to what employees might reasonably expect trade union organizers or representatives to disseminate during an organizing campaign. For example, as contended by Local 15, it offers detailed instructions on how to revoke union membership and how to initiate a decertification application in each jurisdiction in Canada. It does not apparently offer instructions on how to obtain union representation. I will comment more on this website below, but I can say at this point that nothing turns on the content of the site alone in this case.

I have more difficulty concluding that the memo distributed to employees on August 29 was intimidating or coercive. I have no trouble concluding that it was misleading and disingenuous. By that time The Brick knew it was going to face a hearing at the Board and that its chances of success regarding the dismissals was slim to none, yet it continued not only to profess its innocence, but to appoint itself as a defender of the employees right to vote having by its own admitted actions jeopardized that right in the first place. I suppose that one could say the audacity of such a pronouncement reflects a "nothing can stop us" attitude which, as argued by Local 15, was inherently intimidating. Local 15 also argued that I draw just such a conclusion in view of the memo attached to the Board's previous decision directing employees to the www.labourwatch.com website. While the information on the website is neutral from the perspective of conveying information which is readily available in the Code, the Regulations and the Board Rules, or from the Labour Board's Information Officer it is not pristine in its neutrality from the perspective that it is apparently limited to offering a countervailing view to what information an organizing union may be prepared to give employees.

Does such a reference then disclose an employer's hidden displeasure with the activities of its employees seeking union representation and is it therefore coercive or is it protected by the amended Section 8? Whether either memo alone amounts to improper conduct is not something I need to decide in this case. It is sufficient in the present circumstances to conclude, as I do, that The Brick's other conduct overall taken together with and in the context of the admitted improper four dismissals amounts to the most egregious conduct consisting of intimidation, coercion and interference that an employer can engage in during an organizing drive short of closing the business altogether. As such, I find The Brick has in total violated Sections 5(1), 6(1), 6(3)(a), 6(3)(b), 6(3)(d) and 9 of the Code by engaging in unfair labour practices.

28. THE BRICK WAREHOUSE CORPORATION v/s OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 15

BCLRB No. B309/2002

APPEARANCES: The following oral reasons were rendered on September 17, 2002. Further to the Board's memorandum to the labour relations community on July 9, 1997 regarding oral decisions, at the time of rendering the decision I reserved the right to edit the decision should a request for reasons be made. That right has been exercised sparingly in the following, which basically remains a transcription of the oral reasons. There are no substantive differences between the oral and written reasons.

I. NATURE OF APPLICATION

1 Local 15 has applied pursuant to Sections 5, 6(1), 6(3)(a), 6(3)(d), 9, 14, 133 and 143 of the Labour Relations Code alleging that The Brick has committed a number of unfair labour practices. The largest portion of Local 15's complaint concerns the dismissal from employment of Brenda Komick, Matt McAdams, Kimberley Duck and Ben Morphy.

2 At a hearing held on August 30, 2002, The Brick admitted that it dismissed Komick, McAdams, Duck and Morphy contrary to Sections 5(1), 6(3)(a) and 6(3)(b) of the Code for having exercised their rights under the Code, for proposing to become or seeking to induce others to become a member or officer of a trade union or for participating in the promotion, formation or administration of a trade union, and all without proper cause while Local 15 was conducting a certification campaign amongst employees of The Brick.

3 The admission was made with prejudice allowing Local 15 to rely on it to make out the balance of its case seeking among other remedies, remedial certification.

4 In recorded the admission and The Brick's offer to reinstate the dismissed employees as well as to make them whole. As a result, I ordered their reinstatement and ordered that they be made whole for any wages and benefits

lost as a result of The Brick's admitted unlawful termination of their employment. I also ordered The Brick to cease and desist from committing any further unfair labour practices in breach of the Code. I ordered that the Board's decision be posted and distributed to certain employees of The Brick.

5 This decision addresses the balance of Local 15's complains and the additional remedies sought.

II. PRELIMINARY MATTER

6 Before addressing the balance of Local 15's application, I turn to deal with an application filed by The Brick alleging that Local 15 had breached Section 7(1) of the Code because its organizer Morphy approached numerous employees at the workplace

During their working hours without The Brick's permission and attempted to persuade them to join the Union. The Brick also alleged that Morphy informed some employees that 80 to 85% of the other employees had already signed union membership cards. The Brick said that Morphy told employees Nick Hanz and Heather Lewis that if he signed up 45% of the employees in the proposed bargaining unit, Local 15 would attend and speak to the employees. The Brick asked the Board to investigate what Morphy told employees during his organizing efforts.

7 The Brick gave me a copy of this application at the commencement of the continuation hearing into Local 15's complaints. I was asked by The Brick to consolidate its application with that of Local 15 and to hear the matters together. I declined. The Brick now requests that I record the reasons for refusing to consolidate.

8 The reason, which I gave at the time, was that to my knowledge The Brick's application had not yet been processed by the Registry and had not been assigned to me for adjudication. I advised The Brick that I was not prepared to delay the hearing into Local 15's complaints in order to accommodate the consolidation process. However, The Brick was permitted to lead evidence

regarding the substance of its complaint insofar as it may have been relevant to adjudicating Local 15's application. Such evidence was led by The Brick.

9 At the time that I was handed the application by The Brick, I also advised The Brick that its complaint that Morphy had advised employees that he had already signed up 80 to 85% of other employees was without merit for the reasons given by the Board in T. Jordan Inc., BCLRB No. B51/96.

10 The evidence elicited by The Brick in cross-examination of Morphy confirmed that Morphy told most people that if they signed a card Local 15 would attend and talk to them. Heather Lewis, an employee in the office at The Brick, testified that Morphy told her she had a right to vote and that signing a card meant a representative of Local 15 would come and speak to the employees.

11 In cross-examination, The Brick named a number of individuals to whom Morphy made the alleged remarks about Local 15 attending to talk to employees. None of these were called to testify.

12 The Brick's application has now been assigned to me for adjudication and, at the same time, The Brick has now applied to withdraw its application alleging a breach of Section 7. The Brick says that the evidence in the hearing disclosed that its store manager was aware of the organizing occurring on company time and did not order it stopped. Consequently, The Brick said it now had doubts as to whether it would be successful in its application. However, The Brick continues to request that the Board assign a Special Investigating Officer to investigate what Morphy told employees. Local 15 opposes the request for an investigation and submits that the request should be summarily dismissed.

13 Having heard the evidence, I agree with The Brick's assessment and I have decided to grant the request for a withdrawal of The Brick's application alleging a breach of Section 7 of the Code. However, I decline to order an investigation into Morphy's conduct for the following reasons. First, the allegations about Morphy telling employees that 80 to 85% had already joined the Union are meaningless even if true for the reasons set out in T. Jordan Inc.,

supra. If employees choose to sign membership cards for such an insignificant reason as to go along with their peers, they deserve the consequences of such ill-considered decision-making. Second, with regard to the allegation of the Union coming out to talk to employees if 45% or more sign cards, Morphy has already admitted as much in his testimony. An investigation will not improve on that admission.

14 It is also obvious from the cross-examination that The Brick heard from a number of employees about what Morphy had said to them. However, there are no particulars of any other alleged statements either provided by The Brick or elicited from Morphy or other witnesses by The Brick during the hearing which would provide a basis for a further investigation.

15 In the present circumstances, an investigation in my view would be a waste of Board resources. For those reasons, the request to withdraw the application is granted and the request for an investigation is denied.

III. BACKGROUND

16 The Brick operates a furniture warehouse store in Coquitlam among other locations. The store is managed by Robert Kliss. Kliss reports to the Regional Manager Craig Wensel. Kliss has four managers reporting to him: two operations managers and two sales managers. The sales managers are Robert Duchek and Roger Baker. At the material time when the Local 15 organizing first began RakeshChetal was a manager in training. The employees involved in this matter are commissioned sales personnel whose job it is to sell furniture, mattresses and appliances.

17 From the employees' perspective there were a number of problems at the store. Morphy testified that employees were being treated unfairly; they were being "yelled at and coerced and pushed around". In particular, the problems revolved around the perceived preferential treatment of Chetal, the employee and salesperson who was the manager in training. Chetal in turn took to treating his fellow salespersons aggressively and unfairly. Morphy's other complaints were directed at sales manager Ducheck. Other witnesses

confirmed that Chetal was behaving in an aggressive manner and this was causing problems in the store. The result was that the employees were unhappy.

18 This state of affairs had subsisted for some time before the Local 15 organizing campaign began. Employees had discussed their unhappiness amongst themselves and with Morphy who took it upon himself to contact Local 15 some time around mid July. As a result Local 15 began its sign up campaign. Morphy, Duck and Komick were the employee organizers.

19 I accept that there was an initial surge of interest in Local 15. Between July 25 and July 28, eleven membership cards were signed. The proposed bargaining unit was described to be approximately 38 employees.

20 While this initial drive was occurring, the store manager, Kliss, received a telephone call on July 25 from corporate sales telling him that he had a problem on the floor. Kliss was advised that union organizing was occurring. According to Kliss, the information had originated from McAdams who had spoken to someone in corporate sales about a possible position. Kliss spoke to Chetal who advised Kliss that he knew nothing about a union drive. Kliss then directed Chetal to see what he could find out.

21 Several events then occurred in close succession over the few days following. Chetal approached Morphy about the union on at least two occasions and a confrontation occurred. Chetal wanted to know how many cards had been signed and spoke out aggressively against the union.

22 As well, Morphy and Kliss had several meetings. Kliss put the meetings as taking place July 26, 27, and 28 with there being two meetings on the 28th. Morphy put the meetings later on July 30, 31, August 3, 4 and 5. Although Morphy gave five dates he testified that only four meetings took place. I prefer Kliss's recollection as to the dates because I conclude from the context of the discussions and Wensel's subsequent involvement that the meetings occurred before Wensel returned from vacation. He returned on July 29, 2002.

23 There was also a dispute in the evidence as to who initiated the meetings. Morphy claimed that he was directed by Kliss to meet while Kliss testified that Morphy attended voluntarily at his own instance.

24 From the context of the conversation that took place in the first meeting on July 26, 2002, and Chetal's involvement at Kliss's direction the day before, I conclude that Morphy initiated that meeting. Morphy told Kliss that Chetal was telling people that he, Morphy, was organizing a union. I conclude that Morphy became concerned and decided to confront Kliss as a result of that information. Morphy wanted to know if he was going to lose his job. Kliss in turn questioned Morphy about the organizing. I find that Kliss assured Morphy that his job was not in jeopardy. Morphy denied any involvement. Kliss became emotional, telling Morphy that employees were free to speak to him about their concerns.

25 According to Kliss, there was a subsequent meeting the next day, Saturday, July 27. Kliss said he had received complaints from employees who said they felt threatened and harassed by Morphy's organizing. From that context I conclude that Kliss initiated the meeting in order to address what he perceived to be other employees' concerns. According to Kliss, during that meeting Morphy identified Chetal as the problem and source of “everyone's dissatisfaction”. Morphy confirmed he was signing people up. Kliss wanted to know why Morphy was organizing on such a busy day but did not tell him to stop.

26 That Saturday Kliss interviewed 15 to 18 staff asking them whether they had any issues. Kliss testified that he never asked them whether they signed union membership cards.

27 Kliss spoke with Morphy again on Sunday, July 28, 2002. Komick was present during that conversation. Morphy testified that Kliss said, “If the union comes in the store will be shut”. Kliss denied threatening to close the store. Both Morphy and Kliss agree that Kliss expressed concern for his own job on the Sunday and said that if the union comes in Kliss “would not be part of it”

so employees would have to deal with another manager. According to Kliss this conversation occurred at a second meeting that day.

28 Given that both Morphy and Kliss agreed that Kliss expressed concern for his job and that employees would have to deal with another manager or someone else if the union came in, I conclude no threat to close the store was made by Kliss. Such a threat would have been inconsistent with these agreed remarks and the subsequent concern shown by employees over Kliss's job. Kliss admitted becoming very emotional during that meeting. Kliss wanted to address the problems in the store. Kliss also advised that the union drive issue was too big for him to handle and that he was going to go to Wensel about all of it.

29 According to Morphy, Kliss also wanted to know who was supporting Local 15 and who had signed cards. Kliss said that Morphy told him that he had signed 21 members. Morphy testified that all he told Kliss was that he had signed enough. Nothing turns on this particular discrepancy.

30 Kliss also testified that he had heard from another employee that Morphy told her that if Chetal became aggressive or threatened anyone again, he would submit the cards which he had gathered to Local 15. Morphy confirmed that he had made such a statement to this other employee.

31 According to Morphy there was at least one more meeting during which Kliss proposed that employees become part of an advisory committee to assist store management to address problems in the store. Kliss confirmed making such a suggestion.

32 Wensel returned from vacation on July 29, 2002 and was apprised of the events which had occurred at the store. On July 30 Wensel had lunch with employees of the store. The lunch was paid for by Wensel and employees were required to attend. The employees assumed that the lunch was an opportunity to discuss store problems, in particular an opportunity to express concern over Kliss's job. Wensel refused to engage in these discussions except to say that no one had to fear for their jobs. He told employees that he did no

want to discuss problems at this time, but that employees could talk to him about their concerns at any time. He then proceeded to talk about his vacation. I accept that this lunch was an unusual event; such an event never before having happened.

33 Kliss testified that management began to address employee concerns. According to Kliss, Chetal's manager-in-training status was terminated, although Morphy, McAdams and Duck insisted in their evidence that Chetal continued to exercise management functions. Cindy Nelson, a sales consultant, testified that problems with Chetal had been addressed two to three weeks before the terminations of Morphy, Duck, Komick and McAdams which occurred on August 20 and 21. Morphy confirmed that sometime in early August he had approached Kliss and told him he was impressed with the changes Kliss had made so far. I find that in the first part of August management did indeed to some degree address the problems identified to Kliss by Morphy.

34 I also find that from July 28, when the last substantive meeting between Kliss and Morphy occurred, until approximately mid-August, Local 15's organizing drive appeared to have stalled. Then there was a renewed interest with four additional cards being signed on August 16, 17 and 18. Morphy testified that five other employees told him they had signed cards but refused to turn them over to him as a result of the dismissals which occurred on August 20 and 21.

35 On August 20, 2002 Komick, Duck and McAdams were dismissed. All were told that the company was moving in a different direction and that they would not be moving with it. On August 21, 2002 the same fate befell Morphy.

36 On Thursday, August 29, 2002, The Brick distributed a bulletin to employees in which it offered to reinstate Morphy, Duck, Komick and McAdams while professing its innocence insofar as any violation of the Code was concerned. In that bulletin, The Brick went on to assure employees that it would do everything in its power to ensure that a union was not imposed on them, i.e., that is that the Board not grant the remedial certification.

37 As indicated out the outset, The Brick admitted on August 30 before the Board that the dismissals were unlawful contrary to Sections 5(1), 6(3)(a) and 6(3)(b) of the Code. This admission and the Board's declarations and orders were published in BCLRB No. B287/2002. That decision was ordered to be distributed to all employees who had received the initial bulletin of August 29, 2002. The Brick attached a covering letter to the Board's decision indicating, among other things, that as an employer, it was limited to what it could say to employees. The Brick gave the dates of the continuation of the Board hearing and invited employees to visit a website: www.labourwatch.com for more information about unionization. The Brick also invited employees to visit Local 15's website if they so chose.

38 Local 15 contended that www.labourwatch.com was a virulent anti-union website. It invited me to take judicial notice of its contents and draw appropriate inferences. Local 15 led no evidence about the website's contents. The Brick denied that the website was anti-union. It said that it contained strictly neutral information and invited me to visit the site.

39 I did view the site at the invitation of both parties and find that it offers countervailing information to what employees might reasonably expect trade union organizers or representatives to disseminate during an organizing campaign. For example, as contended by Local 15, it offers detailed instructions on how to revoke union membership and how to initiate a decertification application in each jurisdiction in Canada. It does not apparently offer instructions on how to obtain union representation. I will comment more on this website below, but I can say at this point that nothing turns on the content of the site alone in this case.

40 Finally, McAdams testified that upon his return to work after reinstatement, the atmosphere in the store was uncomfortable although management did not give him any problems. Morphy testified that since he was fired, other employees would not speak to him.

41 I may also refer to other facts and evidence as the analysis unfolds.

IV. THE ISSUES

42 The issues left for me to decide in this case are whether the dismissals violated any other sections of the Code as alleged - namely Sections 6(1), 6(3)(d), and 9; and whether any of the other matters described in testimony that occurred during the meetings, and the meetings themselves, the bulletins distributed by The Brick and the lunch with Wensel and other employer conduct amount to unfair labour practices. Finally, I must decide what the appropriate remedies, if any, in addition to the reinstatements and cease and desist order ought to be. In particular, I must address Local 15's request for remedial certification. V.

Finally the decision was delivered by Hon'ble Board of V.A. Pylypchuk, Vice-Chair, Keith J. Murray and Chris E. Leenheer, for The Brick Allan E. Black, Q.C.

I/we begin by observing that the dismissals of Morphy, Duck, Komick and McAdams, three of whom were union organizers, was one of the most egregious acts that an employer can commit during an organizing drive. I have no hesitation in concluding that these dismissals were intended to squelch the renewed interest in Local 15 which had manifested itself about mid-August. I also find they were intended to have and did have an intimidating effect on members of the potential bargaining unit. I note in particular that the dismissal of McAdams resulted from the simple fact that he was an acquaintance of Duck, one of the organizers. As McAdams testified, he was not even interested in the Union. However, his friendship with Duck was enough to make him a target. I conclude that the dismissals were intended to coerce employees to refrain from becoming members of Local 15 and I accept Morphy's evidence that in at least five cases, The Brick successfully achieved that goal.

The Brick led evidence suggesting that the dismissed employees were to some degree poor sales performers. The Brick's theory in leading this evidence was that other employees would not be intimidated or coerced because they would rationalize the dismissals as being a product of poor performance and not anti-union animus. In other words, because other employees might conclude that the dismissals were some how justified based on performance, the coercive and intimidating effect would be

dissipated or diluted. However, no evidence was led to establish that any other employees knew of any performance concerns regarding any of the dismissed employees. Moreover, after examining the evidence provided by The Brick in support of its contention that performance was of some concern, I concluded that the evidence charitably put was incredibly thin.

McAdams testified that he was a high salesman when he was dismissed. The documents show that the amount of sales he wrote for the1 ½ months that he worked at the Coquitlam store put him within easy reach of claiming a spot in the top five over the long term. The complaint against him seemed to have been that he came to work hung over one day because he had gotten drunk after having ended his relationship with a girlfriend. He was excused from working at his request, but nonetheless remained for a sales meeting.

A document was introduced showing that Komick had given some improvement targets to meet in writing. Yet she stood seventh overall in year to date sales.

Duck had only been with the store since some time in April but was situated roughly in the middle of the pack of salespersons. She had won a trip to Italy as a result of sales of Italian leather furniture which qualified her for a draw to win the trip. Parenthetically, that trip was taken away from her when she was dismissed.

Finally, Morphy's sales placed him roughly 13th overall, also roughly in the middle of the pack. Morphy agreed that he had been given a choice to be laid-off or to go part-time, because his sales had fallen below expectation. However, that event had transpired before he was dismissed on August 21 and I find it was unconnected to the dismissal.

Another complaint raised by The Brick was that Morphy had fallen down drunk on the job on one occasion, but no discipline was ever meted out for that event. Morphy testified that he was ill and collapsed as a result of nerves and stress and was rushed to the hospital. I give all of this evidence little weight and dismiss The Brick's contention that somehow this material would ameliorate the impact on other employees of the wrongful dismissal of the Local 15 organizers. I therefore conclude

that in dismissing Morphy, Duck, Komick and McAdams The Brick violated Sections 6(1), 6(3)(d) and 9 of the Code in addition to the sections which The Brick admitted violating.

I now turn to consider whether the content of the discussions between Morphy and Kliss and other conduct by The Brick amounts to a violation of the Code by The Brick. I note that neither party expressly addressed whether the facts of this case fell to be decided under the amended Section 8 which went into effect July 30, 2002 or under Section 8 as it previously stood. Section 8 currently reads:

Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

Section 8 previously read:

Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

While arguably the amended Section 8 broadens the scope of permissible free speech, the matter was neither argued nor is it necessary for me to decide at this juncture. What remains clear is that the intimidation and coercion continue to fall outside the scope of any permissible free speech. Coercion is defined in Cardinal Transportation B.C. Incorporated and Ed Klassen Pontiac Buick GMC (1994) Ltd., BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95), (1997), 34 CLRBR (2d) 1 ("Cardinal Klassen") as "any effort by an employer to invoke some form of force, threat, undue pressure or compulsion for the purpose of controlling or influencing an employee's freedom of association": (para. 212). Moreover, the Board in that case stated that the line for permissible communication "is clearly crossed when an employer seeks to illicit from employees (either individually or collectively) an indication as to whether they have signed membership cards or otherwise support the union": (para. 203).

Both of these aspects continue to apply: the first because it is expressly coercive and thus prohibited, and the second because it is more than an expression of opinion or views, but rather is inquisitorial in the notorious tradition of the word and is implicitly coercive.

I find that some of the conduct and contents of the discussions meet this test and thus run afoul of Sections 6(1), 6(3)(d) and 9 of the Code and cannot be saved by Section 8 - amended or not. I also point out that it is improper under Section 6(3)(d) "to seek by…a promise… to induce an employee to refrain from becoming or continuing to be a member…of a trade union".

First, I find that the inquiries made by Kliss directly as well as through Chetal fall outside the permissible expression of views. The inquiries were intended to identify union supporters, a matter which the Code expressly protects from employers. As pointed out in numerous cases of the Board, employees are vulnerable when they seek to organize and employer attempts to discover which employees support unionization are inherently intimidating.

There was disagreement between Local 15 and The Brick whether at the material time Chetal was a manager as a result of his manager-in-training status. The Brick claimed he remained an employee within the meaning of the Code. Moreover, The Brick said that his status had changed when his training was terminated. Local 15 argued that he performed management duties. Alternatively, Local 15 submitted that the resolution of that issue was unnecessary because it was clear that Chetal was acting on The Brick's behalf at Kliss's behest.

I agree with the latter proposition. The Code prohibits a person acting on behalf of an employer from engaging in prohibitive conduct. The Brick in this case must bear responsibility for Chetal's actions given that Kliss sent him to discover what was going on.

Further, I find that Kliss inappropriately intruded into the organizing campaign by offering to address employee issues and by offering to create an employee advisory committee. While I find that Kliss was in part genuinely motivated by a desire to rectify problems which he had either ignored too long or of which he had

been unaware, I infer from the circumstances he was also motivated by a desire to make the union problem go away. While Kliss did not expressly say that he would do these things if employees did not unionize, I find Kliss's promises to address the problems identified by employees and offering an advisory committee role and The Brick's acting on those promises to some extent in the circumstances of the organizing drive amounts to a violation of Section 6(3)(d) of the Code. I also conclude that while Kliss was genuinely upset at the thought that his employees were unhappy, he must have realized by mid-August, if not earlier, that events had overtaken his ability to do much to reverse matters at that point. Moreover, the conduct of Wensel in dismissing the four employees put Kliss in an untenable situation. I conclude that Kliss was perhaps initially of the view that unionization was being used by the employees to leverage changes in the workplace (and certainly Morphy may have left such an impression with at least one other employee). It was clear by mid-August when interest in Local 15 did not wane but picked up again, that there was more to it than simple leveraging by a group of aggressive sales persons. I find that this in turn prompted Wensel to act against the organizers. The Brick has already admitted that action to have been improperly motivated by anti-union animus.

The lunch meeting held by Wensel on July 30, 2002 is alleged by Local 15 to be improper and to constitute an unfair labour practice. The Brick argues that it is entirely innocent. In assessing such events the Board must always be mindful of the overall context in which they occur and that employers rarely advertise their actions as being anti-union (despite The Brick's later admission in this case of improper conduct relating to the dismissals). Taken alone, at another time and in another context, the lunch, which was an unusual one-off event, might well be seen as innocent. However, in this context, in these circumstances, and at that time and place, I find that the activities of Wensel in mandating the lunch and then controlling the conversation to carry a subtle message that The Brick has power over the lives of its employees. Again, standing alone and absent other conduct such a subtle message may not carry a sufficient degree of intimidation, but in view of what transpired later I find that it was intended to be coercive and intimidating.

I have more difficulty concluding that the memo distributed to employees on August 29 was intimidating or coercive. I have no trouble concluding that it was

Misleading and disingenuous. By that time The Brick knew it was going to face a hearing at the Board and that its chances of success regarding the dismissals was slim to none, yet it continued not only to profess its innocence, but to appoint itself as a defender of the employees' right to vote having by its own admitted actions jeopardized that right in the first place. I suppose that one could say the audacity of such a pronouncement reflects a "nothing can stop us" attitude which, as argued by Local 15, was inherently intimidating. Local 15 also argued that I draw just such a conclusion in view of the memo attached to the Board's previous decision directing employees to the www.labourwatch.com website. While the information on the website is neutral from the perspective of conveying information which is readily available in the Code, the Regulations and the Board Rules, or from the Labour Board's Information Officer it is not pristine in its neutrality from the perspective that it is apparently limited to offering a countervailing view to what information an organizing union may be prepared to give employees.

Does such a reference then disclose an employer's hidden displeasure with the activities of its employees seeking union representation and is it therefore coercive or is it protected by the amended Section 8? Whether either memo alone amounts to improper conduct is not something I need to decide in this case. It is sufficient in the present circumstances to conclude, as I do, that The Brick's other conduct overall taken together with and in the context of the admitted improper four dismissals amounts to the most egregious conduct consisting of intimidation, coercion and interference that an employer can engage in during an organizing drive short of closing the business altogether. As such, I find The Brick has in total violated Sections 5(1), 6(1), 6(3)(a), 6(3)(b), 6(3)(d) and 9 of the Code by engaging in unfair labour practices.

VI. REMEDY

What then is the appropriate remedy? I note that Kliss has expressed regret for The Brick's conduct in dismissing the employees, and some of the evidence reflected a genuine effort on his part to put matters behind him. I accept that Kliss is largely well intentioned. However, a remedy under the Code is not about punishment; it is about undoing the harm done and putting Local 15 and the employees in the position

they would have been in but for The Brick's conduct. It is in this context that I turn to consider Local 15's request for remedial certification.

The test to be applied is set out in Section 14(4)(f) of the Code and asks the Board to determine whether, but for the employer's unlawful conduct it is more probable than not that a union would have achieved the requisite majority support. This test requires me to predict an outcome based on a number of interrelated factors whose weight and focus will vary depending on the circumstances of the case: B.C. Garment Factory Ltd., BCLRB No. B401/97. These factors are:

(a) The level of membership support prior to and subsequent to the employer's unfair labour practice;

(b) The seriousness of the employer interference and reasonable effect (assessed objectively) of that interference on employees;

(c) The specific nature of the employer and employees;

(d) The point or stage in the organizational drive of the employer's interference;

(e) The 'totality of the conduct' of the employer; and

(f) If less than a majority of employees are members of the trade union whether there is adequate or sufficient support to conduct collective bargaining (i.e., negotiation, representation, etc.) (para. 26)

In B.C. Garment, the Board said that the first five factors relate to the impact upon or momentum of the organizing drive directly relevant to the but for test established in Section 14(4)(f). The last factor injects an element of discretion for the Board to determine the appropriateness of the remedy if the but for test is met: (para. 27).

This is a difficult test to apply and requires the adjudicator to draw inferences of what is likely to have transpired but for the events which did in fact take place. There is no set pattern or formula for making this determination and there are many

variables which affect the nature and progress of each organizing drive. As a result, the analysis must reflect the consideration of the totality of the circumstances.

I am satisfied in this case that Local 15 had achieved sufficient support for a vote and likely would have carried the vote. I reach that conclusion for the following reasons. First, The Brick made an issue of what Morphy told employees in order to argue that support was conditional and therefore not reliable. I reject that argument. An identical statement as that made by Morphy was considered by the Board in Kelowna Electroplating Ltd., BCLRB No. B234/95, and was found not to constitute a misrepresentation and thus not to equivocate the membership cards.

I accept Morphy's testimony that some employees had signed cards but refused to deliver them in light of dismissals which occurred. Given the level of support which already existed and the renewed momentum in mid-August I find that Morphy's testimony is credible. It is consistent with the state of affairs at the time and in that place.

Further, had Local 15 been given a fair opportunity to build on that support I conclude that more probably than not it would have carried the vote. I reach that conclusion because of the continued level of interest in Local 15 even after Kliss had addressed employee issues regarding Chetal in early August. I also reach that conclusion based on the fact that The Brick resorted to such desperate and draconian measures immediately upon the increased level of union activity in mid-August. That Reaction leads to a powerful inference that Local 15 was marching towards success. I therefore find that Local 15 was closing in on success in its drive and, but for The Brick's conduct, would have achieved it.

Further, unlike the case in, but in the words of, B.C. Garment, supra, The Brick's conduct in the culmination of its attempts to foreclose unionization reached a degree of exceptional severity. Union organizers were unlawfully dismissed and one person was targeted by virtue of his association with one of the organizers. That sent a deeply chilling and powerful message to other employees.

The Brick's approach to the unionization effort seemed to be a combination of carrot and stick. Initially, promises of addressing problems, an employee advisory

committee and only mild forms of intimidation were employed. When that failed to stop interest in Local 15 over the longer term, some of the worst and most egregious acts were ultimately committed which put all of The Brick's conduct in the most negative light possible.

What effect would this have on employees? The Brick argued that these employees are all sophisticated, aggressive sales people who could handle pressure. I accept that initially they stood up well to The Brick's interference -- that is, the inquiries and the promises, and indeed, there was some indication that they were perhaps leveraging some changes themselves. Certainly Morphy gave that indication to at least one other employee. Had that been the sum total of The Brick's conduct, then remedial certification would have been out of the question.

The Brick argued that this workforce was not particularly vulnerable; in fact, it said, they are sophisticated and aggressive salespersons. In BC Garment, supra, the fact that there was a vulnerable workforce was considered a factor to measure the effect of not so serious employer conduct upon employees. However, when it comes to conduct of exceptional severity, I find sophistication or aggressiveness are no barrier to vulnerability. That was clearly demonstrated in this case. Thus, with regard to the character and makeup of the workforce, I find in light of the severity of The Brick's conduct it is a non-factor in this case.

Given that I accept Morphy's testimony that five employees who signed cards refused to deliver them and given that Morphy testified that employees would no longer speak to him and McAdams testified that the atmosphere was strained after their return to the workplace, I find objectively that The Brick's conduct overall and the dismissals in particular had a serious chilling effect on Local 15's organizing drive. It was stopped cold in its tracks.

Finally, I find that the totality of The Brick's conduct reflects anti-union animus and attitude towards accepting employee freedom to choose union representation. The Brick's conduct is more than sufficient to undermine employee free choice to the point where meaningful and significant remedy is required.

I am satisfied that the test has been met in this case.

I now turn to the last test or factor which requires the Board to exercise some discretion deciding whether to grant remedial certification. The Brick has argued that if a lesser remedy would undo the harm the Board should exercise its discretion to apply that lesser remedy. Indeed, The Brick suggested that it is Board policy to take such an approach: Cardinal Klassen, supra, para. 328. Local 15 has argued that a lesser remedy will not undo the harm done. It said if remedial certification cannot issue in a case like this then when would it ever issue?

First, the last factor is directed at ensuring that remedial certification is not an empty remedy or nothing more than a prelude to decertification. Lengthy delay between the time of application and the decision combined with a high turnover of employees may portend such an outcome. In this case, there is virtually no delay and despite there being a turnover in the workforce from time-to-time, the present group of supporters still remains employed. I am therefore satisfied that remedial certification would not be an empty remedy and that there is a sufficient amount of support to give collective bargaining a fair opportunity.

What then of The Brick's argument for a lesser remedy. I considered whether it might be appropriate in these circumstances. I also considered Local 15's submission that lesser remedies such as meetings and extended campaigns have little effect in undoing the harm caused by an employer unfair labour practices. I also thought about whether such an argument made by Local 15 is nothing more than a design to extract a remedial certification from the Board. I also turn my mind to the question of whether the amended Section 8 ostensibly giving employers greater latitude in free speech may have the unintended effect of off-setting the effectiveness of lesser remedies, such as union-held meetings, which the Board might otherwise have been inclined to order consistent with Cardinal Klassen, para. 328. However, in the end I concluded that it was not necessary to resolve any of these issues.

I find that in the circumstances of this case the conduct of dismissing four employees, three of whom were organizers, as well as all of the other matters taken in context of those dismissals amount to such exceptionally severe conduct of interference, intimidation and coercion so as to make remedial certification the only realistic remedy.

A remedy must be proportional to the harm caused, the conduct engaged in, and sufficiently effective to undo its consequences: Cardinal Klassen, paras. 321, 332, and 334. In this case I find that only remedial certification will achieve that goal.

I therefore order that a Certification be issued to Local 15 to represent a bargaining unit of employees of The Brick at Coquitlam. As a result of The Brick's request for clarification, I leave it to the parties to draft an appropriate bargaining unit description reflecting the unit of approximately 38 employees identified during the hearing. I further order that any collective agreement negotiated by the parties be submitted to the employees for ratification.

I decline to order the reimbursement of Local 15's organizing expenses as it has effectively now achieved what it set out to do when organizing began.

I further order that a copy of this decision be posted and distributed to employees as was the previous decision, but this time without comment or attachments.

Finally, Local 15 requested that the order reinstating the four employees contained in the previous decision be issued by the Board in the form of a formal order. That request is granted, a formal order will be prepared and delivered to the parties.

29. ONTARIO LABOUR RELATIONS BOARD

0019-10-R John Moretti, Applicant v/s Universal Workers Union, Labourers' International Union of North America Local 183, Responding Party v/s Moretti

The fact in brief are as :

1. This is an application for termination of bargaining rights under s.63 of the Labour Relations Act, 1995 ("the Act").

2. The application filing date was April 6, 2010.

3. The issues in the case are the following. Was the applicant, Mr. John Moretti, performing bargaining unit work for most of his working day on April 6, 2010? If so, was Mr. John Moretti an employee in the bargaining unit, or managerial and so excluded under s.1 (3)(b) of the Act? If Mr. John Moretti was an employee, was the termination application initiated by his employer, Moretti Carpentry Construction ("the Company"), as contemplated in s.63 (16) of the Act?

4. The answers to these three questions are the following. Mr. John Moretti was performing bargaining unit work for most of the day on April 6, 2010. He was an employee and not managerial. The application was brought entirely by the applicant. There was no involvement by Moretti Carpentry Construction. Therefore s.63(16) is not engaged.

5. My reasons for these conclusions follow, after a brief description of the relevant facts.

6. Mr. John Moretti is the younger brother of the owner of Moretti Carpentry Construction, Mr. Marc Moretti. Mr. Marc Moretti established Moretti Carpentry Construction in 1997. He is the sole proprietor. He operates in the residential framing business of the construction industry, doing custom home framing. Mr. John Moretti, a carpenter and framer, has worked for Moretti Carpentry Construction since 2000. Although Moretti Carpentry Construction has had other employees, Mr. John Moretti has been its only long-term, regular employee.

7. Mr. Marc Moretti entered into a voluntary recognition agreement with the Union in 2005. Mr. John Moretti then became a member of the Union. He was re-initiated into the Union in September 2009, after a period of time during which contributions had not been made by Moretti Carpentry Construction to the Union.[51]Bargaining unit work on the application filing date?

8. On April 6, 2010, Mr. John Moretti worked with his brother, Marc, on a house at 100 Cheltenham. He worked for 5½ hours that day, starting at 10:00 a.m.

[51] 2011 CanLII 34956 (ON LRB)

There was some suggestion by the Union that carpentry work was complete at 100 Cheltenham by April 6, 2010 and that Mr. John Moretti could not have been doing carpentry work then. No evidence was presented to support this suggestion.

9. The evidence by Mr. John Moretti and Mr. Marc Moretti was convincingly that the work done was that of the bargaining unit. Once the structure was built, there was a change order. Included in the change order was a requirement to convert three regular doors into pocket doors. Mr. John Moretti did this work on the application filing date. Two of the three pocket doors were load bearing. Mr. John Moretti had to expand the headers that supported the load above. This involved taking out the old headers and putting in bigger headers in two of the three doors. This work falls within the work of the Union's bargaining unit. Mr. John Moretti therefore performed bargaining unit work for most of the day on the application filing date.

Was Mr. John Moretti an employee?

10. Mr. John Moretti has no authority to hire, discipline or fire employees. He has no authority to supervise the other employees. He does no estimating or costing. He enters into no contracts on behalf of Moretti Carpentry Construction. He has no contact with the clients or general contractors. He does not generate new business. He does not invoice clients of the Company. He has no authority to buy tools or materials for the Company, nor does he. He has no Company vehicle or other Company property. He has no Company credit card. All of these functions are Mr. Marc Moretti's.

11. The supervisor of the work is Mr. Marc Moretti, the proprietor of Moretti Carpentry Construction. He is mostly on the tools himself.

12. Mr. John Moretti owns his own tools. He works only as a carpenter on work assigned to him by his brother. He does not set his own hours. He works the hours required of him by his brother. He gets paid by the hour for the hours he works. He does not set his wage rate. He does not share in the profits. He has no financial stake in the business.

13. I conclude from the above that Mr. John Moretti was an employee of Moretti Carpentry Construction, not an owner, nor a supervisor or manager as contemplated in s.1(3)(b) of the Act.

Did the Employer initiate the application?

14. In the period prior to the application, there were three other employees, one long-term, like Mr. John Moretti, the other two short-term and relatively unqualified (one of them a brotherin- law to John and Marc). The other long-term employee had told Mr. Marc Moretti that he wanted to leave to study to become a firefighter. Framing work was the means to his saving enough money to be able to go to school. His desire to return to school coincided with the end of a large project. The business did not have sufficient other work available to continue to hire him and the other two employees. Towards the end of the project, Mr. Marc Moretti decided to layoff these employees and keep Mr. John Moretti. He gave them notice of this intention and, on April 1, 2010, they were laid-off. This left Mr. John Moretti as the only Company's employee. [52]

15. Union counsel suggests I should draw an inference that the layoff and the notice of it were both to assist Mr. John Moretti to bring the application. There is no evidence to support this. There is no evidence that the notice to the other employees of their layoff was anything other than to give them as much warning as possible. The layoff was genuine, occasioned by a loss of work by the Employer; the notice was generous to those affected. Mr. Marc Moretti had work for one other person besides himself so he decided to keep his brother and to lay-off the others.

16. Mr. John Moretti decided a long time before he brought the termination application that he wanted to do so. He felt he didn't need a union to represent him and that he could readily make his own employment arrangements with his brother. He researched how to do so. He found Labour Watch on the internet. It is a website designed, in part, to assist unionized employees to terminate the bargaining rights of the union that represents them. The site gave

[52] 2011 CanLII 34956 (ON LRB)

Mr. John Moretti a detailed explanation of what he had to do to terminate the Union's bargaining rights. He learnt of the open period and of bringing an application before the Board. He also contacted Labour Watch. He was given advice that guided him through the process. He waited for an opportune time to bring the application within the open period, which occurred once the other employees had been laid-off.

17. While, over the period of Mr. John Moretti's employment by Moretti Carpentry Construction, the two brothers discussed the Company's relationship with the Union, the decision to terminate bargaining rights was that of the applicant. Mr. John Moretti states he did not discuss his plan to terminate the bargaining rights of the Union with his brother. Mr. Marc Moretti confirms this. There is no circumstantial evidence that puts their evidence in serious doubt.

18. Mr. John Moretti decided to bring the application on April 6, 2010. He had previously obtained the necessary forms from the Board and he had completed them. It was raining that day and he and Marc could not start work. While waiting for the rain to stop, he saw it as a convenient opportunity to file the application. He informed Marc he had to do something and he left. He went to the Board and filed the application. He returned to the worksite and served a copy on his brother. He then worked from 10:00 a.m. for the rest of the day.

19. The Union asks me to draw a series of inferences from the relationship between the brothers, from their mutuality, that Mr. Marc Moretti must have been involved in the formulation of the decision to bring the termination application. The evidence does not support those inferences. On the contrary, Mr. John Moretti struck me as an independent minded person who decided that he himself did not want the Union to represent him any longer. He researched the matter himself and, with the help of Labour Watch, he sought to accomplish his objective. I find that his brother, Mr. Marc Moretti, played no role in the decision.

Disposition

20. Employer counsel and Union counsel referred to a number of cases: Ellis Glass and Mirror Ltd., [2008] O.L.R.D. No. 2855; Romano Custom Home Framing, [2007] O.L.R.D. No. 4515; S & S Glass & Aluminum, (1993) Ltd., [2002] O.L.R.D. No. 1303; Lunardo Plumbing Inc., [2011] O.L.R.D. No. 1601; Tenaquip Ltd., [1997] OLRB Rep. July/August 742; Bytown Electrical Services Ltd., [1996] OLRB Rep. September/October 721; Delta-Rae Homes, a Division of 1138319 Ontario Inc., [2007] O.L.R.D. No. 1637; A-1 Superior Paving and Concrete Works Company Inc., [2010] O.L.R.D. No. 117; Ellis Glass and Mirror Ltd., [2006] O.L.R.D. No. 3007; Communications, Energy and Paperworkers Union of Canada, [1995] O.L.R.D. No. 2011 CanLII 34956 (ON LRB)

    These cases set out the principles to be applied in cases of this sort. The determination is, of course, fact specific. On the facts of this case there has been no employer initiation.

21. In the result, there is no basis to the Union's s.63(16) complaint. The ballot box has been sealed. The Registrar is directed to open the ballot box and to determine the outcome of the ballot.

Different views on benefit claims under the unfair labour practice jurisdiction of the Commission for Conciliation, mediation and arbitration Johanette Rheeder

The Labour Courts and arbitrators have long wrestled with the question of what constitutes a "benefit" in terms of section 186(2) (b). The definition of an unfair labour practice is contained in section 186(2) (a) of the Labour Relations Act (LRA) and constitutes a precise definition of an unfair labour practice. Therefore, any claim for an unfair labour practice must be covered by the definition, failing which it will not be an unfair labour practice and will not fall within the jurisdiction of the Commission for Conciliation, mediation and arbitration.

In terms of this section "'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving; (a)

the unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) or the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) or a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 on account of the employee having made a protected disclosure defined in that Act."

The question, as to whether a claim for benefits constitutes an unfair labour practice or not, has a specific jurisdictional implication for the applicant employee. It is only when a dispute relates to a "benefit" that the Commission for Conciliation, mediation and arbitration would have jurisdiction to determine the dispute through conciliation and arbitration. If the dispute relates to "remuneration", for instance, the Commission for Conciliation, mediation and arbitration would be deprived of jurisdiction as remuneration does not fall under the definition of "benefit" for the purpose of an unfair labour practice.

A question that has often been asked is whether a performance bonus or an acting allowance falls within the definition of a benefit for the purpose of section 186(2)(a)? The essence of the earlier cases in the Labour Court was that a benefit for the purposes of an unfair labour practice was something other than remuneration. The earlier approach of the Labour Court was a narrow approach, effectively limiting the kinds of disputes that could be referred to the Commission for Conciliation, mediation and arbitration for arbitration. Initially, the prevailing view was that a benefit is an existing right derived from a contract, collective agreement or statute. This view was based on the distinction between "disputes of right" and "disputes of interest", the former of which may be resolved by arbitration or litigation, and the latter of which must be resolved by industrial action. Put differently, a court or the Commission for Conciliation, mediation and arbitration can only

enforce existing rights of employees, not the interests employees may claim to have. Those interests can only be enforced by way of collective bargaining - such as wage negotiations. The individual employee who has an interest in some benefit such as an increase, a bonus or an acting allowance, but who cannot convince the Commission for Conciliation, mediation and arbitration that it is an existing right, only has the avenue of consultation available to him or her to convince the employer to grant this benefit. If the employer refuses, the single employee, who cannot strike, has two options, accept it or find another job! Collectively, employees can bargain for the right.

From recent decisions, it seems that the Labour Court is widening its approach. In IMATU obo Verster v Umhlathuze Municipality & others (2011) 20 LC 1.11.7 and [2011] 9 BLLR 882 (LC), the Court noted that the sole issue before the court was whether the arbitrator's decision that an acting allowance did not constitute a benefit was right or wrong. The court considered various previous cases and found what the brief review of the case law and academic commentary reveals is; "that there has been a shift in the conceptualisation of the ambit of the unfair labour practice claim, at least in relation to the notion that a prerequisite for bringing such a claim is proof of a pre-existing right". It is more than that found the court.

The court in Verster looked at the finding in Protekon Private Limited v/s Commission for Conciliation, Mediation and Arbitration and others (2005) 14 LC 6.7.1 where the court also sought to delineate two distinct classes of benefit that might be claimed under the unfair labour practice jurisdiction, namely, contractual and statutory based benefits which an employer fails to comply with, and discretionary benefits provided by an employer. The court found:

"It follows from this that there are at least two instances in which employer's conduct in relation to the provision of benefits may be subjected to scrutiny by the Commission for Conciliation, mediation and arbitration under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee in

relation to the provision of an employment benefit. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit."

In the Verster case the court found that once this conceptual hurdle has been overcome, it stands to reason that a dispute over an acting allowance, in which an employee is claiming that the employer granted to him or others the benefit in similar circumstances on other occasions, and then later unfairly refused to confer the benefit on the occasion in question, will constitute an unfair labour practice, therefore the employer unfairly executed his judgment or prerogative. In this case, the claim did not amount to a demand to make the benefit obligatory in the future. The latter claim, found the court, would properly be the subject-matter of collective bargaining – therefore not an unfair labour practice. The court found that, in adopting the view of an acting allowance that he did, the arbitrator did not consider the later developments in the law. Had he done so he would have taken a broader view of his jurisdiction to determine the dispute before him and would not have dismissed the employee's claim so easily.

In South African Post Office Ltd v/s. Commission for Conciliation, Mediation and Arbitration and others[53]the court went back to the more conservative approach to require a perquisite right in contract or law. The issue of acting allowance was again considered by the Labour Court in this case. The employee was employed as an operational manager from 1 July 2003 and claimed an acting allowance. The employer had a policy relating to "acting in higher positions". The Post Office raised two points in limine. It contended that the dispute was not about benefits but remuneration; and that it was about four and a half years late, and was not accompanied by any condonation application. The employee has claimed an acting allowance on numerous occasions since April 2006. It was only approved once in April 2006. Subsequent to that date, no further acting allowances were granted by a general manager, as contemplated by the policy. With respect to the first point in limine, the Commissioner found that the payment of an acting

[53] (2012) 21 LC 1.1.4 and [2012] 11 BLLR 1183 (LC)

allowance constituted a "benefit" and that it could be dealt with at arbitration as an unfair labour practice.

The court looked at various previous cases such as Northern Cape Provincial Administration v/s. Hambidge NO and others[54] and SA Chemical Workers Union v/s. Longmile/Unitred[55] to determine the definition of salary or wage:

"A salary or wage or payment in kind is an essential element in a contract of service.... The definition of 'remuneration' read with the definition of 'employee' in section 213 of the Act makes this clear. 'Remuneration' in section 213 means: 'any payment in money or kind or both in money and in kind . . .' remuneration is anessentialia of a contract of employment. Other rights or advantages or benefits accruing to an employee by agreement are termed naturalia to distinguish them from the essentialia of the contract of employment. Some naturalia are the subject of individual or collective bargaining, others are conferred by law. In my view a benefit may be part of the naturalia. It is not part of the essentialia. 'Remuneration is different from 'benefits'. A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.'

The court found that in the instant case the employee wanted to be paid for acting in the higher position; one carrying more responsibility. It certainly seems fair that she should be so paid. However, a claim that an employer has acted unfairly by not paying the higher rate cannot be said to concern a benefit even if its receipt would be beneficial to the employee. It is essentially a claim or a complaint that the complainant has not been paid more for a certain period for carrying extra responsibilities. It is a salary or wage issue. It is not about a benefit. It is about a matter of mutual interest as it ventured beyond the policy. The interpretation by the Commissioner is

---

54 [1999] 7 BLLR 698 (LC) at paras [12]–[17

55 (1999) 20 ILJ 244 (CCMA) at 248–253

wrong in law. It was central to her decision. She did not have jurisdiction to entertain the dispute and to decide it in the way she did."

The court accepted that a dissenting view was recently expressed by Lagrange J in IMATU obo Verster v/s. Umhlathuze Municipality and others, but found that the learned Judge in the Verster case did not refer to G4S Security Services v/s. NASGAWU and Others: Unreported[56], where the LAC confirmed the approach taken in HOSPERSA and another v/s. Northern Cape Provincial Administration[57] per Mogoeng AJA (as he then was), which stated that in order for the respondents to bring a successful claim under Item 2(1)(b) of Schedule 7, they have to show that they have a right arising ex contractu or ex lege. It is only then that, having established the right, the Commissioner would have jurisdiction to entertain the dispute as a dispute of right.

The court found itself bound by the LAC and found that the employee in the present case has not established a right to an acting allowance ex contractu or ex lege beyond the initial three-month period in 2006. In seeking to establish a further entitlement to an acting allowance, the employee has strayed into the realm of a dispute of interest. In these circumstances, the Commissioner had no jurisdiction to entertain an unfair labour practice dispute in terms of section 186(2)(b) of the Labour Relations Act.

---

56 (case no DA 3/08), 26 November 2009

57 (2000) 21 ILJ 1066 (LAC) [also reported at [2000] JOL 6301 (LAC) – Ed] at para [12]

CHAPTER-7

CONCLUSION AND SUGGESTIONS

The development and growth of in the dimensions of economic and finance, suggest that the Gross Domestic Product's vital part is service sector. Second effective is industry and lastly it is agriculture, at least in the developing countries. The problem in our hand is relating to the service and industrial sector. It has been observed during the result that court, legislatures, organisations and other international organisations such has International Monetary Fund etc. have worked to define and to arrest the psychology of unfair labour practice.

The researcher has divided the entire study in following parts

Introductory part deals with the unfair labour practice. It involves the historical development of labour practice. In this chapter the researcher has been gone throw Chinese, German, African, Norway and Indian origin of labour laws. The researcher has described about research methodology and objective of the research.

Chapter 1:- Evolution and Conceptual Perception of Industrial Relations. In this chapter Historical background, evolution and development of labour management relations are studied and analysed.

Chapter 2 :- Employers Unfair Discharge, Dismissal, Retrenchment and Terminations. In this chapter some specific provisions of grounds of discharge, rule for wrongful dismissal or discharge and the procedure when an employee refuges to accept the charge sheet.

Chapter 3:- Workmen and Trade Union Unfair Labour Practices. The central and state legislations relating to labour management relations and unfair labour practice are discussed in this chapter.

Chapter 4 :- Remedial Measures under the Industrial Disputes Act. In this chapter some specific provisions of Industrial Disputes Act, 1947 and curative measures under this Act.

Chapter 5:- Remedial Measures in U.S.A. and U.K. Remedial Measures relating to Unfair Labour Practices and Labour Management Relations Constitutional and Global Trends.

Chapter 6 :- Judicial Pronouncements. Judicial response on labour victimization is discussed in this chapter.

Chapter 7:- Conclusions and Suggestions. In this chapter the conclusion of the study is drawn, anomalies have been pointed out and some important suggestions are given.

In The Chartered Bank, Bombay v/s. The Chartered Bank Employees[1],Supreme Court in the year 1960 held**,** **"**the services of the assistant cashier were properly terminated by the Bank. There was no doubt that an employer could not dispense with the services of a permanent employee by mere notice and claim that the industrial tribunal had no jurisdiction to inquire into the circumstances of such termination. Even in a case of this kind the requirement of bona fides was essential and if the termination of service was a colourable exercise of the power or as a result of victimisation or unfair labour practice the tribunal had jurisdiction to interfere. Where the termination of service was capricious, arbitrary or unnecessarily harsh that may be cogent evidence of victimisation or unfair labour practice. In the present case the security of the Bank was involved and if the Bank decided that it would not go into the squabble between the Chief Cashier and C and would use para. 522(1) of the Bank Award to terminate the services of C it could not be said the Bank was exercising its power under para. 522(1) in a colourable manner. It was not necessary that in every case where there was an allegation of misconduct the procedure under para. 521 for taking disciplinary action should be followed."

It may be observed from the judgment that initially the scope of unfair labour practice was not wide enough and court were slightly careful in deciding the activities as unfair trade practice.

[1] AIR 1960 SC 919, 1960 SCR (3) 441.

In Hind Construction & Engineering Co. Ltd. v. Their Workmen[2]in 1965 the court held, "eleven workmen absent on 02.01.1961 - holiday according to established practice - company declared 02.01.1961 to be working day - workers dismissed for being absent - enquiry recommended dismissal of only eight - Tribunal observed eleven workers went on strike - dismissal on this ground not justified and issued directions of reinstatement - reference made regarding eleven workers - appeal by special leave against award by Tribunal - Government entitled to treat dispute as undivided - Tribunal to interfere with quantum of punishment only in exceptional circumstances - Apex Court held, interference justified in present case as punishment awarded severe and out of proportion."

In B.R. Singh and others etc. etc. Vs. Union of India and others[3]in the year 1989 the Court held, "action of Trade Fair Authority of India terminating services of petitioners challenged - labour union had called for strike on account of non-fulfillment of certain promises by management - striking employees who did not sign on undertaking terminated - labour union officials also dismissed - demand of labourers genuine - right to form associations and fundamental right under Article 19 (1) (c) - bargaining power of workers would be reduced if trade unions if it is not permitted to demonstrate - union acted in haste - desirable to restore peace - mala fide cannot be imputed to Trade Fair Authority of India - reinstatement ordered."

In Govt. Of Tamil Nadu v. Tamil Nadu Race Course General,[4] the Court held, "Labour Commissioner to give and finding, after going through all the relevant records which are with the appellants or with the second respondent herein and after hearing the parties and in the light of this judgment regarding the scheme to be adopted for regularisation. After the above said finding is submitted to this Court, a proper scheme could be framed for regularisation in the interest of both the parties by this Court."

It may be said that following may be considered as unfair labour practice.[5]

(1) To discharge or dismiss employees:—

---

2 AIR1965SC917, [1965(10)FLR165], (1965)ILLJ462SC, [1965]2SCR85
3 1989 SCC (4) 710
4 (1993) ILLJ 977 Mad
5 Royal Commission

(a) by way of victimisation;

(b) not in good faith but in the colourable exercise of the employer's rights;

(c) by falsely implicating an employee in a criminal case on false evidence or on concocted evidence;

(d) for patently false reasons;

(e) on untrue or trumped up allegations of absence without leave;

(f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;

(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of the service of the employees, so as to amount to shockingly disproportionate punishment;

(h) to avoid payment of statutory dues.

(2) To abolish the work being done by the employees and to give such work to contractors as a measure of breaking a strike.

(3) To transfer an employee malafide from one place to another under the guise of following management policy.

(4) To insist upon individual employees, who were on legal strike, to sign a good conduct-bond as a pre-condition to allowing them to resume work.

(5) To show favouritism or partiality to one set of workers, regardless of merit.

(6) To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workers.

(7) To encroach upon contractual, statutory, or legal rights of the other party, by either party.

Few historically and legally important terms and Acts

Iron Clad Document: In the 1870s, a written agreement containing a pledge not to join a union was commonly referred to as the "Infamous Document". This strengthens the belief that American employers in their resort to individual contracts were consciously following English precedents. This anti-union pledge was also called an "iron clad document", and from this time until the close of the 19th century "iron-clad" was the customary name for the non-union promise.

Yellow Dog Contract: This is an agreement between an employer and an employee in which the employee agrees, as a condition of employment, not to be a member of a labor union. In the United States, such contracts were, until the 1930s, widely used by employers to prevent the formation of unions, most often by permitting employers to take legal action against union organizers. In 1932, yellow-dog contracts were outlawed in the United States under the Norris-LaGuardia Act.

It is important to note the minority judgment in Coppage v/s. Kansas, 236 U.S. 1 (1915) delivered by Justice Holmes. He held, "I think the judgment should be affirmed. In present conditions, a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. *Holden v. Hardy*, 169 U. S. 366, 169 U. S. 397; *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549, 219 U. S. 570. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair v. United States*, 208 U. S. 161, and *Lochner v. New York*, 198 U. S. 45, should be overruled. I have stated my grounds in those cases, and think it unnecessary to add others that I think exist. See further *Vegelahn v. Guntner*, 167 Mass. 92, 104, 108; *Plant v. Woods*, 176 Mass. 492, 505. I still entertain the opinions expressed by me in Massachusetts."[6]This minority judgment opened the doors for some sort of relief against unfair labour practice.

Norris–La Guardia Act: The Norris–La Guardia Act known as the Anti-Injunction Bill, was a 1932 United States federal lawthat banned yellow-dog contracts, barred the federal courts from issuing injunctions against nonviolent labor disputes, and created a positive right of noninterference by employers against workers joining trade unions. The common title comes from the names of the sponsors of the legislation: Senator George W. Norris of Nebraska and Representative Fiorello H. La Guardia of New York, both Republicans.[7]

Taft-Hartley Labor Act: Taft-Hartley Labor Act, 1947, passed by the U.S.

[6] Wikipedia: http://en.wikipedia.org/wiki/Coppage_v._Kansas
[7] http://en.wikipedia.org/wiki/Norris–La_Guardia_Act

Congress, officially known as the Labor-Management Relations Act. Sponsored by Senator Robert Alphonso Taft and Representative Fred Allan Hartley, the act qualified or amended much of the National Labor Relations (Wagner) Act of 1935, the federal law regulating labor relations of enterprises engaged in interstate commerce, and it nullified parts of the Federal Anti-Injunction (Norris-LaGuardia) Act of 1932. The act established control of labor disputes on a new basis by enlarging the National Labor Relations Board and providing that the union or the employer must, before terminating a collective-bargaining agreement, serve notice on the other party and on a government mediation service. The government was empowered to obtain an 80-day injunction against any strike that it deemed a peril to national health or safety. The act also prohibited jurisdictional strikes (dispute between two unions over which should act as the bargaining agent for the employees) and secondary boycotts (boycott against an already organized company doing business with another company that a union is trying to organize), declared that it did not extend protection to workers on wildcat strikes, outlawed the closed shop, and permitted the union shop only on a vote of a majority of the employees. Most of the collective-bargaining provisions were retained, with the extra provision that a union before using the facilities of the National Labor Relations Board must file with the United States Dept. of Labor financial reports and affidavits that union officers are not Communists. The Act also forbade unions to contribute to political campaigns. Although President Truman vetoed the Act, it was passed over his veto. Federal courts have upheld major provisions of the act with the exception of the clauses about political expenditures. Attempts to repeal it have been unsuccessful, but the Landrum-Griffin Act 1959, amended some features of the Taft-Hartle Labor Act.[8]

No employer shall dismiss any employee from his employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award. Penalty: Twenty Pounds was awarded.[9]

It has been observed that in the United States National Labour Relation Act 1935 mandates following definition and procedure.

---

[8] http://www.infoplease.com/encyclopedia/business/taft-hartley-labor-act.html

[9] Commonwealth Conciliation and Arbitration Act 1904 (Cth) s 9(1)

Definition of "unfair labor practice" National Labor Relations Board has the authority to investigate and remedy unfair labor practices, which are defined in Section 8 of the Act. In broad terms, the National Labor Relations Board makes it unlawful for an employer to:

- interfere with two or more employees acting in concert to protect rights provided for in the Act, whether or not a union exists
- to dominate or interfere with the formation or administration of a labor organization
- to discriminate against an employee from engaging in concerted or union activities or refraining from them
- to discriminate against an employee for filing charges with National Labor Relations Boardor taking part in any National Labor Relations Board proceedings
- to refuse to bargain with the union that is the lawful representative of its employees

The Act similarly bars unions from:

- restraining or coercing employees in the exercise of their rights or an employer in the choice of its bargaining representative
- causing an employer to discriminate against an employee
- refusing to bargain with the employer of the employees it represents
- engaging in certain types of secondary boycotts
- requiring excessive dues
- engaging in featherbedding (requiring an employer to pay for unneeded workers)
- picketing for recognition for more than thirty days without petitioning for an election
- entering into "hot cargo" agreements (refusing to handle goods from an anti-union employer)
- striking or picketing a health care establishment without giving the required notice

Applying this general language to the real world requires, in the words of

Supreme Court Justice Felix Frankfurter, "distinctions more nice than obvious". The substantive law applied by the National Labor Relations Board is described elsewhere under specific headings devoted to particular topics.

Not every unfair act amounts to an unfair labor practice; as an example, failing to pay an individual worker overtime pay for hours worked in excess of forty hours in a week might be a violation of the Fair Labor Standards Act, but it is unlikely to amount to an unfair labor practice as well. Similarly, a violation of a collective bargaining agreement, standing alone, may not constitute an unfair labor practice unless the employer has not only violated the contract but repudiated all or part of it.

Filing of a charge

While the employees of the National Labor Relations Board may assist individuals in filing charges, the employees of National Labor Relations Board cannot file charges on their own. Under the Act, "any person" (except an employee of the Board) may file a charge with the National Labor Relations Board.

Such charges must be filed and served within six months of the events that constitute the basis of the charge. This deadline may be extended in some cases, e.g., if the party fraudulently conceals its violations of the law. Charges may also be amended if done so within six months of the alleged violation.

Investigation and processing of the charge

The General Counsel of the National Labor Relations Board is responsible for investigating unfair labor practice charges and making the decision whether to issue a complaint. This job is delegated to the Regional Director of the region of the National Labor Relations Board in which the charge has been filed; the Regional Director in turn assigns it to an employee of the region. It is the responsibility of the charging party to identify the witnesses who can support its charge; should it fail to do so the Regional Director will typically dismiss the charge.

The Regional Director generally seeks to reach a decision as to whether to issue a complaint or to dismiss the charge within thirty days of the filing of the charge. The Region may also ask the charging party to amend its charge to eliminate

unsupported claims in an otherwise meritorious charge or to add new claims uncovered by the Region in the course of its investigation.

A party unsatisfied with the Regional Director's decision to dismiss its charge can appeal the dismissal to the office of the General Counsel. The General Counsel's decision to dismiss a charge is not subject to further appeal and cannot be challenged in court.

If the issues raised by an unfair labor practice charge could also be resolved through the grievance and arbitration procedure of the collective bargaining agreement covering these employees, then the General Counsel may defer the case to arbitration. In those cases the General Counsel does not dismiss the charge, but holds it in abeyance while the parties to the contract arbitrate their contractual dispute.

Issuance of complaint and settlement

If the Region finds merit in the charge it will file a formal complaint setting out the violations of the law allegedly committed by the respondent. While the Act requires that the original unfair labor practice be filed within six months, there is no comparable statute of limitations for issuance of a complaint. The complaint may also be amended in some circumstances to include other alleged violations of the Act not specified in an unfair labor practice charge.

The Region will usually renew its attempts to settle the matter after it has made the decision to issue complaint but before it has actually done so. It can settle unfair labor practice charges unilaterally, i.e., without the agreement of the charging party.

The Board draws a distinction between formal and informal settlements, i.e., those that call for issuance of a formal Board order and those that do not. A party unhappy with the Regional Director's settlement of its unfair labor practice charges can appeal a formal settlement to the Board itself, which must approve any formal settlement in any case, but can only appeal an informal settlement to the General Counsel.

The Board will set aside an informal settlement agreement if the employer

violates the agreement or commits other violations of the Act after the agreement. The Board can, by contrast, enforce a formal settlement like any other Board order by petitioning the Court of Appeals for an order enforcing it.

The Board will also accept non-Board settlements, in which the charging party withdraws its charge in return for promises from the other side. The Board is not, however, obliged to accept the parties' settlement agreement or to allow withdrawal of the charge.

Interim Injunctive Relief:

If the General Counsel believes that there is cause to issue complaint, then he can seek injunctive relief from a federal district court under Section 10(j) of the Act. Injunctive relief is usually ordered when necessary to preserve the status quo pending the Board's decision on the complaint or to prevent employees from suffering irreparable harm. Any injunction lapses once National Labor Relations Board issues its decision.

The General Counsel does not have to prove that the allegations in the complaint are well-founded, but only that he has some evidence, together with an arguable legal theory, to support his claims. Even so, the General Counsel rarely uses this power to seek relief while complaints are pending, other than in secondary boycott cases, in which the Act commands the General Counsel to seek injunctive relief.

Hearing and decision

If the case is not settled following issuance of a complaint, then the case will proceed to hearing before an Administrative Law Judge of National Labor Relations Board. The Regional Director has the power to issue subpoenas for use by any party prior to the hearing; the Administrative Law Judge has that power once the hearing commences. The hearing is governed by the same rules of evidence that would apply in a federal court trial.

The General Counsel functions as the prosecutor in these proceedings. Just as only the General Counsel can decide whether to issue a complaint, the General

Counsel has exclusive authority to decide what charges to pursue. Interested parties may, however, intervene in these proceedings to present evidence or offer alternative theories in support of the charges that the General Counsel has alleged and to seek additional or different remedies than those that the General Counsel has proposed.

The Administrative Law Judge issues a recommended decision, which becomes final if not appealed to the National Labor Relations Board. While the Administrative Law Judge's credibility determinations are ordinarily given great weight by the Board, they are not binding on it. The Board likewise is free to substitute its own view of the law for that of the Administrative Law Judge and frequently reverses its own precedents.

Review by the Courts

A party that is aggrieved by a decision of National Labor Relations Boardcan seek review by petitioning in the Court of Appeals. The Act gives parties a good deal of latitude as to which court they want to hear their case: either the Circuit in which the hearing was held or the Circuit Court of Appeals for the District of Columbia or any Circuit in which one of the parties against whom the complaint was brought resides or does business. National Labor Relations Board, as a matter of policy, only petitions in the Circuit in which the hearing was held.

National Labor Relations Board’s decisions are not self-executing: it must seek court enforcement in order to force a recalcitrant party to comply with its orders. The Court of Appeal reviews the Board's decision to determine if it is supported by substantial evidence and based on a correct view of the law.

While the courts are obligated in theory to give deference to National Labor Relations Board’s interpretation of the Act, they do not always do so. The court may direct the National Labor Relations Board to reconsider its decision or reverse it outright if it is convinced that the Board is in error. The court may also reverse Board actions that it considers to be an abuse of National Labor Relations Board’s discretion, typically in the choice of remedies to be applied.

Any aggrieved party may also ask the Supreme Court to review a decision of

the Court of Appeals. Such review by the Supreme Court is, however, discretionary and rarely granted.

Compliance

If the Court of Appeals enforces the Board's order then the case will return to the Region for it to monitor the respondent's compliance. In those cases in which the Board's order requires payment of backpay, the Region will commence compliance proceedings if it is not able to resolve all disputes over the amount of backpay. These compliance proceedings are also held before an Administrative Law Judge, based on the compliance specification filed by the Region. The same procedural rights apply in these proceedings as in the earlier proceedings on the merits of the charge.[10]

This concept originated in the United States as a "handy description for a clutch of statutory torts designed to curb employer action against trade unions organizing. The phrase was imported into South Africa, in a different context, at a time of political upheaval. The concept was introduced into the South African labour law dispensation as a result of recommendations of the Wiehahn Commission. The first definition of unfair labour practice to be found in legislation was a very openended and non-specific definition. An "unfair labour practice" was defined as "any labour practice that in the opinion of the Industrial Court is an unfair labour practice". This obviously gave the Industrial Court enormous leeway and 'amounted to a licence to legislate'. [11]

Suggestions:

As for suggestions, the most important is to look towards the constitution of India. Part IV of Indian Constitution provides Directive Principles of the State Policy.

1. Article 38 provides, "38. State to secure a social order for the promotion of welfare of the people.
2. Article38(1)provides The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of

[10] National Labor Relation Act
[11] http://upetd.up.ac.za/thesis/available/etd-11082005-42503/unrestricted/08chapter8.pdf

the national life.

3. Article38(2)provides The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

4. Article39providescertain principles of policy to be followed by the **State**.-The State shall, in particular, direct its policy towards securing-

   a. that the citizens, men and women equally, have the right to an adequate means of livelihood;

   b. that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

   c. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

   d. that there is equal pay for equal work for both men and women;

   e. that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

   f. that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

5. If the article mentioned above are invoked properly, unfair labour practice can be tackled with a valid, legal and legitimate means.

6. It is pertinent to mention here the following passage from the Article,[12] "The elimination of intention or fault does not remove the philosophical difficulties created by the prohibition on unfair discrimination: two problems remain. The first is to decide which differential treatment constitutes discrimination. The second is to decide on what basis discrimination can be held to be unfair. It is necessary to decide the first question because otherwise any form of inequality potentially falls within the net of the anti-discrimination clause. Not all forms

[12] http://www.labourguide.co.za/general/1510-unfair-labour-practices

of inequality amount to discrimination. That some people are born cleverer or stronger than others does not mean that the others are discriminated against because the cleverer or the stronger use their wiles or their strength to gain advantages. Discrimination arises only when some are favoured over others by persons with the power to confer advantages. It is, therefore, a social concept. Society permits some forms of discrimination because they are considered legitimate, either because people are permitted to compete for advantages by using the strengths with which they are endowed by nature or because the denial of advantages is considered to be in the interests of those discriminated against – and of society. Wage discrimination is generally considered permissible for the former reason. In an ideal world, paying an accountant more than a sweeper would not be regarded as discrimination because there would be nothing other than natural ability or the capacity for work to prevent the sweeper from being an accountant. It is only when people are or have been prevented from exercising their natural talents in order to compete for advantages that differentiation becomes discrimination in the pejorative sense."

7. This is why, in *Bayete Security*, the Court required the applicant to prove that there was something other than the fact that he was black and his higher-paid colleague white before it was prepared to conclude that the differences in their wages amounted to discrimination. This is also why the legislature stated that discrimination is impermissible only when it is exercised against an employee on any arbitrary *ground*, including, but not limited to, those set out in item 2(1)(a).

8. A ground, in this context, means the reason why the person is discriminated against. Once intention is excluded, the "reason" for discrimination is the attribute which, objectively considered, explains why a person is relatively disadvantaged. So, there must be a causal connection between the possession of that attribute, on the one hand, and the relative disadvantage, on the other. The Court recognised this in *Golden Arrow*, and also the need for another limitation. As Landman J observed:

9. "It is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of

the discrimination. Discrimination on a particular 'ground' means that the ground is the *reason* for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different race is not discrimination on the ground of race unless the difference of race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less [than] MrBeneke's salary *because of* his race." (Court's emphasis.)

10. In yet other words, an applicant under item 2(1)(a) must prove that the reason he was discriminated against was impermissible, and that he was discriminated against for *that* reason and no other. The legislature stated that employers may not discriminate against their employees on "arbitrary grounds", and provided a long list of grounds considered by it to be arbitrary. Item 2(1)(a) specifically stated, however, that the examples of listed impermissible grounds must not be considered closed. Other "arbitrary grounds" may, therefore, be conceivable.

11. **Different distinction:**The question is"how far should the net be spread?" The Constitutional Court has already indicated that arbitrary grounds under the similar provision in the Constitution should be limited to grounds which, objectively considered, are "based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner" (see *Harksen v Lane NO* 1998 (1) SA 300 (CC)). In other words, whether discrimination is considered to be on an arbitrary ground – and, therefore, impermissible – depends *either* upon the reason the victim was discriminated against *or* on the effect of the discrimination.

12. This distinction is difficult to grasp. The attributes or characteristics mentioned in the anti-discrimination clause in the Constitution and in item 2(1)(a) cannot, in themselves, "have the potential to impair human dignity" – quite the reverse. It is not the characteristic that impairs human dignity but the manner in which its possessor is treated because he or she possesses that characteristic. It can, accordingly, only be the *effect* of the discrimination that impairs human dignity. The legislature appears to be saying that inequality that arises because of some arbitrary characteristic is unfair, which, as the

Court said in *Harksen*'s case, is the next question.

13. In *Golden Arrow*, the Court did not have to deal with the scope of the expression "arbitrary grounds". Had Louw alleged that he was paid less than Beneke simply because there was no rational basis for the differential, the Court would have had to wrestle with the problem of whether the employer's mere failure adequately to justify the difference in the two men's salaries rendered it arbitrary and accordingly unfair. However, Louw's case was based on the contention that he was paid less than Beneke*because of his (Louw's) race*, and he asked the Court to infer from the absence of a rational justification for the difference in salaries that it was race that accounted for the difference. This led the Court back to the question of causation. Landman J noted that, in this regard, the English courts relied on the standard legal test for causation – namely, the *sine qua non* or "but for" test: would the complainant have received the same treatment but for his or her race, sex, religion, belief, etc? However, as Landman J noted, the test does not go far enough for the purposes of South African discrimination law, which raises the question of whether an impermissible ground must, as the learned judge put it, "be the sole cause of the discrimination or whether it is enough that it be a cause".

14. Landman J identified three possible approaches to this question. The first is to determine whether *"any* contamination by impermissible unfair discrimination is sufficient to find that the act or omission complained of is caused or attributable to it". The second is to find that there has been "contamination" only if the contamination is *material*. The third is to find that there is unfair discrimination "to the extent that the discrimination in the case under investigation is caused or contaminated by it". By "contaminate", the learned judge clearly meant "cause" in the sense that contamination by arsenic causes food to be poisoned. According to the first test, the person who has caused the death of another by adding arsenic to the latter's food will be liable for murder, irrespective of how miniscule the quantity of the poison. According to the second test, liability will follow only if the arsenic added was sufficient in *itself* to cause death. According to the third, the poisoner will be guilty of murder, but his or her penalty will be determined by the amount of arsenic added. In other words, the degree of contamination affects not the decision as to whether murder (or unfair discrimination) has been committed, but the

sentence (or remedy) that is called for. Landman J, while accepting the third approach, described the exercise as "akin to an attempt to unscramble an omelette".He is, with respect, correct. Take MrLouw as an example. He is a member of an historically disadvantaged group. He entered the employment of Golden Arrow at a time when, to the extent that apartheid made it more difficult for people of colour to get jobs, the company could have exploited the situation, whether consciously or not, by paying him less. Similarly, Beneke might have earned a salary higher than he would otherwise have done in his previous job had it not been for the advantage then conferred by his skin colour. Once those imponderables are factored into the equation, it follows that race must have played *some* role in the difference between the salaries of Louw and Beneke.

15. The problem, however, is that no value can be attached to these factors because they are imponderables. On the "but for" test, unless Louw could show that the company did, in fact, consciously exploit his race, he could not prove that his being black was a *sine qua non* for the salary differential. On the "material contamination" test, Louw would have to prove that his race was at least a significant factor in bringing about the salary disparity. On the proportionality test, the Court would have been left with the difficult (some would say impossible) task of assigning a weight to race and the factors on which the company relied, such as market forces, skills levels, experience, responsibility, and so on.

16. The Court left these philosophical issues at that point and turned to more familiar legal territory – the onus of proof. According to South African law, the onus rests on a person who claims something in a court of law to prove that he or she is entitled to such a claim, unless the other party sets up a special defence, in which case the onus in respect of that defence rests upon the other party. Sensing the difficulty of discharging the onus in the traditional way, the applicant's representative sought again to persuade the Court that American jurisprudence provided the answer. He cited *McDonnell Douglas Corp v Green* 411 US 792 in which it was held that the onus in unfair dismissal claims unfolded in three stages: first, the employee is required to establish a *prima facie* case; secondly, the employer must offer "a legitimate non-discriminatory reason" for its action (or omission); thirdly, the employee

"must then prove that this supposedly legitimate non-discriminatory reason" was a pretext to mask an illegal motive". As Landman J noted – with respect, correctly – there is little point to relying on a burden of proof designed ultimately to prove the existence of a prohibited "motive" in cases involving a statute that imposes strict liability. In South African law, the onus in civil cases is merely an instrument for deciding whether the plaintiff's version is more plausible than that of the respondent. This much is true. However, the problem in unfair discrimination cases remains. What exactly must the plaintiff prove? The answer is not to be found in *Golden Arrow* because the applicant tripped on the first hurdle: proving that his job (buyer) and that of Beneke (warehouse supervisor) were of equal value. The Court found that Louw had failed to discharge the onus in this regard. It was, accordingly, unnecessary to "delve into the reasons, causes or motivation for the difference in wages" because, even if the difference was attributable to race discrimination, race discrimination had not been proven.

17. That should have been the end of the matter. However, the applicant raised a few additional arguments that the Court deemed worthy of consideration. The first was that, even if, objectively considered, the jobs of Louw and Beneke were not of equal value, they were at least considered to be so by the company, as was demonstrated by the fact that, when he was promoted from buyer to warehouse supervisor, Beneke did not receive a salary increase. The Court rejected this contention because there was no evidence to support the inference that the two jobs were of equal value "in the eyes of Golden Arrow".

18. Another issue raised by the applicant was whether an inference of racial discrimination could be drawn from the difference in salary and its alleged "disproportionality" when seen in relation to the value of the two jobs. The Court accepted that, if this were so, the company's failure to close the gap to a size proportionate to the respective values of the two jobs might constitute unfair discrimination. However, Landman J disposed of this allegation in the following terms:"In order to consider drawing any appropriate inference one needs to know what was 'proportional' i.e. what did the employer objectively or subjectively regard as appropriate wages for its buyer and its warehouse manager. I have Golden Arrow's view. I do not have evidence of another appropriate wage."

19. In any event, the Court added, even if the difference in salaries was disproportionate, an inference of racial discrimination could not be drawn from this fact alone. Thus ended Mr Louw's case.

20. However, in closing, the Court opened a door through which others might pass. It did so with this observation: "A South African jury of reasonable men and women would, I think, find that Mr Louw has been subjected to discrimination at an early stage of his career. This court may take judicial knowledge of a system of institutionalised racial discrimination which also permeated the world of employment and influenced the levels of jobs and the rate of pay. The threshold salary, if there was discrimination, would dog an employee for years."

21. In *Golden Arrow*, the Court considered itself precluded from taking into account the system of institutional discrimination that prevailed at the time of Louw's appointment because he had chosen to base his case on the principle of equal pay for equal work and the alleged disproportionality between his salary and that of Beneke. However, leaving aside the question of whether Louw's claim was not, in fact, broad enough to encompass historical or point-of-entry discrimination, it is worth considering whether it would have made a difference to the outcome. In Louw's case, probably not. It appears that there was no evidence before the Court from which it could conclude that Louw's salary at the time of the commencement of his employment with Golden Arrow was deflated because of his race or, if it was permissible to conclude from general statistics that it must have been, by how much. Louw would still have been obliged to link himself to a comparator. The only one available was, apparently, Beneke. Louw would, therefore, still have been confronted with the hurdle of proving that Beneke's job was, in fact, comparable to his own, which, on the evidence presented, he failed to do. This does not mean, however, that, where an historically disadvantaged black (or female) employee can prove that, at the time he (or she) commenced employment, his (or her) employer paid blacks (or women) lower salaries than it paid whites (or males) *as a matter of policy*, and that the effect of the disparity has resulted in whites' (or males') earning more for equivalent work than blacks (or women), the disadvantaged black or women employees will not have a claim. On the contrary, they must clearly succeed in these circumstances.*Golden Arrow* may

well be the precursor to more wage discrimination claims, which will henceforth be pursued under the Employment Equity Act 1998. Although section 6 of the Employment Equity1998 Act is drafted in terms similar to the repealed item 2(1)(a) of Schedule 7 to the LabourRelations Act 1995, it may well make things easier for the employee. Although the Employment Equity Act 1998retains the concept of direct and indirect discrimination and eliminates the generic adjective "arbitrary" before "grounds", that Act makes employers liable, not for unfair acts or omissions, but for "employment policies or practices" that unfairly discriminate against employees. Employment policies and practices are in turn defined as including recruitment procedures, advertising and selection criteria, appointments and the appointment process, *job classification and job grading, remuneration, employment benefits and terms and conditions of employment, job assignments*, training and development, and promotion. Furthermore, the Employment Equity Act 1998 places the burden of proving fairness on employers "whenever unfair discrimination is *alleged*" (note – not "proved"). The only indication in the Act that income differentials *per se* are not intended to be dealt with by way of unfair discrimination claims is a separate provision (section 27) that empowers the Minister to prescribe steps to be taken by designated employers to reduce "disproportionate" income differentials "progressively". However, the general spirit of the Employment Equity Act 1998suggests that MrLouw might well have profited had he waited to bring his action under that Act(italics supplied).

22. In *Co-operative Worker Association & another v Petroleum Oil & Gas Co-operative of SA & others [2007] 1 BLLR 55 (LC),* the facts were as follows: During negotiations between various entities which ultimately formed the first respondent, the applicant trade unions referred a dispute to the Commission for Conciliation, Mediation and Arbitration. This resulted in the conclusion of a collective agreement which was binding on the second applicant union, the Independent Democratic Employees Association, which at the time had 33 members among the 1300 employees employed by Petrol SA. One of the terms of the collective agreement was that the actual cost of the employees' medical aid contributions would be consolidated into the employees' total remuneration package, and that these employees could then choose how they

wished to spend that portion of their remuneration. Employees with dependent spouses or children thus benefited significantly more than employees without dependents. The Independent Democratic Employees Association complained that the result was that employees doing the same work were paid different rates solely on the basis of their family responsibility, and that this constituted unjustified and unfair discrimination.

23. The Court noted that the **United Nations Universal Declaration of Human Rights** 1948 acknowledges both the right to found a family and the right to equal pay for equal work. The charter also declares invalid the termination of employment on the grounds of family responsibility. The Employment Equity Act 1998 defines family responsibility as "the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need care and support". That definition clearly indicates who is protected. It is also clear that the Act recognises that employees with dependents need additional protection to place them on an equal footing with those without. Responsibility for protecting employees with family responsibilities cannot rest on the State alone. In this case, the employer was shouldering some of that responsibility by providing additional remuneration for employees with dependents. This is not only endorsed, but encouraged by international law.At best for the applicants, their case rested on a formal conception of equality. Employees with dependents were paid additional remuneration not because they were favoured, but to avoid them being disadvantaged. Moreover, the differentiation did not affect the dignity of employees without dependents.

24. The Court held further that any attempt to deprive employees of negotiated benefits would not only be unfair, but also unlawful and run counter to the principles of fair collective bargaining.[13]

25. Conciliation officers:-Among the other suggestions for improving the effectiveness of conciliation officers are: (i) prescribing proper qualifications for a conciliation officer and improving his quality by proper selection and training; (ii) enhancing his status appropriately for dealing with persons who appear before him; (iii) giving additional powers to the conciliator; and (iv)

---

[13] ibid

keeping him above political interference. While (i) is a general point which runs throughout the administration, (ii) is a matter for a body like the Pay Commission the appointment of which we have recommended for Central Government employees.1 No direct evidence of the effect of (iii) and (iv) on the officers' efficiency is available and yet it would be prudent to recognise opinion evidence in this regard and give satisfaction to parties on these points.

26. Conciliation Machinery :Conciliation machinery, in order to be free from other influences and should be part of the Industrial Relations Commission which we are recommending. This will introduce important structural, functional and procedural changes in the working of the machinery as it exists today. The independent character of the 'Commission will inspire greater confidence in the conciliation officers. This will also, in due course, improve the attitude of the parties towards the working of the conciliation machinery. We expect the parties will be more willing to extend their co-operation to the conciliation machinery as now proposed and working independently of the normal labour administration. Apart from this basic change in the set-up of the conciliation machinery, there is need for certain other measures to enable the officers of the machinery to function effectively. Among these are (i) proper selection of. personnel, (ii) adequate pre-job training and (iii) periodic in-service training through refresher courses, seminars and conferences and for most of these, there is a good measure of support in the evidence.

27. Voluntary Arbitration:-Voluntary arbitration as a method of resolving industrial conflicts came into prominence with the advocacy by Mahatma Gandhi of its application to the settlement of disputes in the textile industry in Ahmedabad. The Bombay Industrial Dispute Act 1938 and the Bombay Industrial Relations Act 1946 recognised voluntary arbitration along with the machinery set up by the State for composing differences between employers and workers. The policies recommended in the Plans specifically mention voluntary arbitration. The Industrial Dispute Act 1947 was amended to make a provision.“The reasons for refusal to agree to arbitration must be fully explained by the parties concerned in each case and the matter brought up for consideration by the implementation machinery concerned."

28. “The problem of labour law has become the problem of an entire economic order. A renovation of labour law is no longer possible without a renewal of

that economic order ... The social requirements of labour law are no longer compatible with the individual character of the economic system."[14]

29. As part of a set of individual freedoms, freedom of association is also linked with the right to free speech. When workers group together, voice acquires a different quality of expression. This voice has greater impact and power and is more able to face other powerful voices such as capital and the State. From this, we can see the relevance and effect of restricting the locus of voice to individual rather than collective mechanisms as a means of controlling labour power. [15]

Finally it is suggested that the Constitutional Provisions, if invoked and made applicable judiciously, it would be for the benefits of the labour laws and the labour class. Since employer-employee relationship always appears to be in conflict between Capitalism and Socialism, it would be pertinent to remove this fallacious argument. It must be noted that the conflict can never be in the interest of any of the class. Whosoever wins, nations loses, whosoever dominates, harmony gets faded.

[14] Hugo Sinzheimer, 'Die Krisis des Arbeitsrechts' (1933)
[15] ibid

BIBLIOGRAPHY

(1) BOOKS

- Anand Prakash, Law Relating to Trade Unions and Trade Disputes, The Indian Legal System, Journal of Indian, Law Institute. (1978).
- Andrew Hacker, Anarchism, International Encyclopaedia of the Social Sciences vol. 1. (1968).
- Aparna Raj, Industrial relations India: Issues, Institutions and outlook, (2003)
- Arthur M. Ross, Settlement of Industrial Disputes, International Encyclopedia of Social Sciences vol. 8 (1968).
- Ashton, Iron and Steel in the Industrial Revolution (1924).
- Aspinall, The Early English Trade Unions, (1949).
- Asquith, Trade Union Law for Laymen, (1927).
- Barow, British Trade Unions. (1947).
- Bell, Trade Unionism, (1907).
- Bennet, England from Caucer to Caxton, (1928).
- C.K. Johri, Dr., International Encyclopaedia for Labour Law and Labour Relations vol.6 (India, 1980).
- C.M. Chaudhary and Arvind Jain, Labour Legislation in India, Indus Valley, Jaipur, (2002)
- Carew, Anthony, Democracy and Government in European Trade Unions, George Allen and Unwin Ltd., London, (1976).
- Chakraverti, Suranjan, Law of Employer Victimisation, Law Book Company, Allahabad, (1973).
- Chopra, D.S., Outlines of Labour Law, N.M. Tripathi Pvt. Ltd. Bombay, (1974).
- Citerine, The Trade Union Movements of Great Britain (1906).
- Commons & Andrews, Principles of Labour Legislation, (1927).
- Commons, History of Labour in the United States vol. 1 (1918).
- Commons, John R., Labour Movement (V. 7-8, 1957).

- D.S. Chundawat, Industrial tensions and conflict in India, (2001)
- Dhyani S.N., Industrial Relations Systems, Printwell Publishers, Jaipur, (1988).
- Dhyani, S.N., Crisis in Indian Industrial Relations. N.P.H., New Delhi, (1984).
- Dhyani, S.N., Trade Union and Right to Strike, S. Chand New Delhi, (1970).
- Edwards, The Evolution of Finance Capitalism (1938).
- Fieldman & W. Marere, Labour Commitment and Social Change in Developing Areas (1950).
- Freedman, History of the Norman Conquest of England, vol. 1 (1870).
- Freund, Otton Kohn, Labour and the Law, Stevans & Sons, London, (1977).
- Goswami, V.G., Labour and Industrial Laws, Central Law Agency, Allahabad, (1996).
- Granville Austin, The Indian Constitution, Cornerstone of a Nation, Clarenden Press Oxford, (1966).
- Gupta Prem Sagar, Short History of All India Trade Union Congress, AITUC Publications, (1980).
- Gyanchand, Dr., Judicial Control of Labour Tribunals, (1983).
- Herbert Broom, Legal Maxims, Universal Book Trades Delhi, Indian Economy Reprint (1993).
- Hobson, The Evolution of Modern Capitalism (1906).
- Holdsworth, History of the English Law (1923).
- Justice Brandeis, In Truax v. Carrigan 257 US 312, (1921).
- Justice M.B. Higgins, New Province for Law and Order (1922).
- K.D. Srivastav, Law relating to trade unions and unfair labour practices, Eastern Book Co. Lucknow (2003)
- K.N. Srivastava, Industrial Peace and Labour in India (1954).
- K.N. Subramaniam, Labour Managernent Relations in India (1967).
- K.W. Weddembom, The Worker and The Law, Panguin Books (1968).
- Karnik, V.B., Indian Labour Problems and Prospects, Minerva Associate Publications, New Delhi, (1974).

- Kothari, G.M., Labour Demands and their Adjudications, N.M. Tripathi Pvt. Ltd., Bombay, (1977).
- Malhotra, L.C., Law and Practice Relating to Industrial Adjudications, The Universal Book Agency, Allahabad, (1967).
- Malhotra, O.P., Industrial Disputes (N.M. Tripathi Pvt. Ltd., Bombay, (1985).
- Manga, M.L., Industrial Relations and Labour Laws in India, Deep and Deep Publications, New Delhi, (1984).
- Mills Sz. Brown, From the Wagner Act to Talf-Hartley (1950).
- Misra S.N., Labour and Industrial Laws, Central Law Agency, Allahabad, (1996).
- Morris D. Forkosch, A Treatise on Labour Law, The Bobbs-Merrill Co. Inc. Kansas City, New York, (1965).
- Mukherjee, Radhakamal, The Indian Working Class, Asia Publishing House, Bombay, (1956).
- Mukhtar, Ahmad, State in Relation to every Labour, Methodost Publication House, Madras, (1930).
- N.K. Jetli, India, Economic reforms and Labour policy, (2004)
- Neel J. Smelser, Sociology, Prentice-Hall of India P. Ltd., New Delhi (1993).
- O.P. Malhotra, The Law of Industrial Disputes, vol. 1 and 2 Universal Law Publishing Co. P. Ltd. Delhi (1998).
- Petro, S., The Labour Policy of the free society, Ronald Press Co., New York, (1957).
- Pillai, K.M., Labour and Industrial Laws, Allahabad Law Agency, Allahabad, (1991).
- R. Dutt, Economic History of India Under Early British Rule,(1950).
- Rao Prasada, Strikes in India, Ravi & Brothers, Hyderabad, (1972).
- Robert C. Benjamin, Towards Industrial Democracy, Atlantic Institute of National Affairs, London, (1979).
- S. K. Bhatia, Constructive Industrial Relation and labour laws, (2003)
- Salin, Just Price, Encyclopaedia of Social Science vol. 8 (1937).
- Sawant S.R., Industrial Jurisprudence, N.M. Tripathi Pvt. Ltd. Bombay, (1961).

- Sarma, A. M., Industrial Relations, Himalaya Publishing House, Bombay, (1984).
- Sen, Sukomal, Working class of India, K. P. Baghchi & Co. Calcutta, (1977).
- Shrivastava, K.D., Law Relating to Trade Unions and Unfair Labour Practices in India, Eastern Book Company, Lucknow, (1994).
- Srivastava, K.N., Industrial Peace and Labour in India, Kitab Mahal, Allahabad, (1954).
- Tarrow, Lockner Versus New York, A Political Analysis & Labour History, (1964).
- Vaid, K.N., State and Labour in India, Asia Publishing House, Bombay, (1967).
- Vera M. Dean, New Patterns of Democracy, Oxford University Press Bombay, (1959).
- Witte, Early American Labour Cases, 35 Yale L.J. (1926).
- William B. Gould IV, Labored Relations: Law, Politics, and the NLRB, MIT Press, (2001)

(2) REPORTS & JOURNALS

- Report of the Second National Commission on Labour (2002).
- The Law Commission of India, 122nd Report (1987).
- Indian Labour year Book (1985).
- Sanat Mehta Committee Report (1982).
- The Maharashtra Committee on Unfair Labour Practices Report (1969).
- Report of the National Commission on Labour (1969).
- The National Labour Relations Board, Twenty-Fourth, Annual Report (1960).
- The Report of the Select Committee 1947.
- The National Labour Relations Board, Third Annual Report (1938),
- The Royal Commission on Labour, Report (1931).
- The Report of the Select Committee 1925.
- All India Reporter
- Supreme Court Journal.

- Labour Law Journal.
- Labour and Industrial Cases
- Factory Law Report.
- Supreme Court Labour and Services Digest.

(3) NEWS PAPERS

1. The Hindu
2. The Times of India
3. The Indian Express
4. The Hindustan Times
5. The Rajasthan Patrika
6. The Danik Bhaskar

(4) DICTIONARIES

1. Bakshi's : The Law Lexicon
2. Govt. of India-Ministry of Law and Justice : Legal Glossary
3. P. Ramanatha Aiyer : The Law Lexicon
4. P. Ramanatha Aiyer : Concise Law Dictionary
5. Sachdeva's Legal Glossary
6. Webster's Universal Dictionary and The Sources
7. Wharton's Law Lexicon

(5) WEBSITES

1. www.ilidelhi.org
2. www.indiancourts.nic.in
3. www.judgment.co.in
4. www.lawcommissionofindia.nic.in
5. www.lawresearch.com
6. www.manputra.com
7. www.supremecourtofindia.nic.in
8. www.supremecourtcases.com