UNIONS

The right to strike

WARREN FRIEND discusses a recent decision of the Victorian Court of Appeal.

The American trial lawyer, Clarence Darrow, who spent much of his long legal career working for unions and unionists, had this to say about his first professional experience of the labour injunction:

> The strike was hardly well underway before the railroads applied to the Federal Court to get injunctions against the strikers. Neither then nor since have I ever believed in labour injunctions. Preserving peace is a part of the police power of the State, and men should be left free to strike or not, as they see fit. When violence occurs this is for the Police Department and not for a court of Chancery.[1]

The existence of a right to strike (now regarded as a fundamental human right) has always been circumscribed by the common law, and in particular the use of the labour injunction. Over the last five years, some potentially significant changes have occurred in federal industrial law. Whether these changes bring Australia closer to recognition of the right to strike (and consequently closer to implementing its obligations under the International Covenant on Economic, Social and Cultural Rights (ICSECR))[2] is a question which has been illuminated in a recent Victorian Court of Appeal decision.

The 'labour injunction' may be described as an order by a court prohibiting certain conduct by employees or a union, or less commonly, requiring them to perform certain acts. Frequently, it is sought by an employer on the basis of one of the 'industrial torts' (for example conspiracy, inducement to breach contract, intimidation) or other statutory law remedies (e.g. s.45D *Trade Practices Act 1974* (Cth)). It is usually sought on an urgent basis. In this way the less stringent test applicable to interlocutory injunctions is applied by the court. The applicant (employer) need only show, on the facts alleged, that there is a serious question to be tried. It is not even necessary to show that it is more likely than not that the employer will succeed. Consequently, most of the argument before a court hearing an application for an injunction of this nature often concerns determining where the 'balance of convenience' lies. On the one hand the employer invariably points to economic loss and irreparable damage to its business. The union or employees must rely on their right to take industrial action in breach of contract and their right to free speech (such as they are). In the courts the economic arguments are usually regarded as the more powerful. The court always does have, however, a discretion as to whether or not it will grant relief in the particular case.

An injunction, once granted, usually takes away from employees and unions the one substantial weapon they have in the bargaining process: industrial action. The dispute is then frequently resolved without the real case ever being heard. It is for this reason that Lord Wedderburn said 'Without scrupulous care by the judiciary — and sometimes even with it, the interlocutory labour injunction can become a great engine of oppression against workers and their unions.'[3]

Such injunctions have not historically been the tactic of first resort by employers in Australia. One reason for this is the existence of a compulsory conciliation and arbitration system. Another, flowing from this, is a view which has found expression in the courts — at least on occasions — that a court should not, in the exercise of its discretion, make an order where there is a statutory tribunal equipped to deal with the dispute and in fact dealing with it.[4]

The 1993 amendments to the *Industrial Relations Act 1998* (Cth) altered this general situation in two ways. First, a limited immunity from legal liability in respect of certain industrial action was established. Such industrial action is called protected action. Secondly, a procedure by which a person's right to have resort to the courts was delayed for up to 72 hours was introduced. Before a party to an industrial dispute could commence most types of legal action, it became necessary to obtain a certificate under s.166A of the *Industrial Relations Act* from the Australian Industrial Relations Commission. The former provisions constituted a recognition of the right to strike, or take other industrial action. This at least partially fulfilled Australia's international obligations under the ICESCR.

The protected action provisions of the *Industrial Relations Act* (although not s.166A) were substantially amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). Although the right to take industrial action is preserved, it is hedged about with qualifications and requirements to the extent that it will always be difficult to know whether any particular industrial action is in fact protected. One such requirement, important for present purposes, is that industrial action is not protected if it is engaged in in concert with people who are not 'protected persons' within the meaning of the legislation (s.170MM, *Workplace Relations Act 1996* (Cth)).

These provisions were considered recently by the Victorian Court of Appeal (Phillips, Charles and Batt JJA) in *National Workforce Pty Ltd v Australian Manufacturing Workers Union* (unreported, 6 October 1997). The case involved a dispute between a number of labour hire companies and, initially, three unions (the AMWU, the AWU and the CFMEU). The employers and the unions were engaged in collective bargaining for a new certified agreement under the *Workplace Relations Act*. One union, the AMWU, had served the relevant notices and taken the appropriate steps to enable it to take protected action under the Act. The other two had not. All three unions took industrial action. The employers promptly applied to the Supreme Court for injunctions on the grounds that the unions were inducing people (i.e. their members) to breach their contracts. The matter came on before Harper J at first instance. So far as is relevant, his Honour determined that the AMWU was entitled to take protected action except for the fact that it was engaged in that action in concert with other unions which were not protected. His Honour refused in the exercise of his discretion to grant an injunction against the AMWU (although he did make orders against the other two unions). Two factors were of particular importance in Harper J's decision: first the right to

strike, which was described as 'recognised in International Law [and] recognised as a fundamental element of industrial relations in Australia'. Secondly, his Honour referred to the principle that a court should be reluctant to grant injunctive relief where an industrial dispute is being dealt with by negotiation or by a specialist tribunal (*National Workforce Pty Ltd against AMWU and Ors*, (unreported) Supreme Court of Victoria, Harper J, 15 September 1997, pp.5-6).

The employers faced the difficult task of asking an appellate court to overturn a discretionary decision. They argued, among other things, that Harper J was in error in considering the right to strike as a factor in the exercise of his discretion. The Court of Appeal said:

> It seems clear enough from the conventions to which we were referred that a right to strike is now generally recognised in the civilised world, but equally plainly, as his Honour recognised, it must be accepted in Australia that that right is now 'hedged about with qualifications' according to local legislation — as, indeed, was contemplated by article 8 itself of the International Covenant on Economic, Social and Cultural Rights. [p.19]

The court went on, however, to say that since the right to strike was 'hedged about' in this way in Australia, the concept of the right to strike had no role to play in a court's exercise of its discretion as to whether or not to grant an injunction.[5] The Court said 'that there might otherwise be some generally recognised right to strike quite apart from the Act seems then to be irrelevant' (p.21).

The next point of relevance dealt with by the Court of Appeal, was the operation of s.166A. It was argued both at first instance and on appeal that as the matter was and could be before the Australian Industrial Relations Commission, the Court should refrain from dealing with it and exercise its discretion in favour of the defendants. In rejecting this argument the Court of Appeal held that s.166A actually authorises the bringing of actions in courts even though matters were before the Industrial Relations Commission, and that therefore, the authorities relied on by the defendants were no longer of any relevance (pp.27–8).

In the result the injunction was issued against the AMWU and the appeal succeeded.

It seems, therefore, that we are little closer to recognition of a right to strike than we were ten years ago. It is true that a limited right to industrial action is now recognised in certain circumstances and subject to some preconditions. However, conversely, this legitimisation of some activity combined with the restriction on civil action imposed by s.166A appears to have narrowed the scope for arguing that industrial action ought not to be the subject of a court order. The recognition of the fundamental right to strike, which led Harper J to exercise his discretion in favour of the union, has been turned on its head by the Court of Appeal. Arguably the right to strike has been cut down, at least in the view of Victorian Court of Appeal, as a result of the decision that it can only be recognised in the statutory context, not in the broader context. Accordingly, there is no place to be given in balancing the parties' interests to the right to strike. That 'fundamental human right' is just a statutory permission and cannot be recognised; even when the plaintiff has not proved its case and the court is engaged in an exercise of *balancing* parties' competing interests to achieve a temporary solution.

How significant this decision is remains to be seen. The threat of common law action has always been present in any industrial dispute, even if it is not frequently invoked. Harper J's decision was perhaps a significant recognition of what is acknowledged even by the Victorian Court of Appeal to be a right 'now generally recognised in the civilized world'. By adopting a narrow view of what can be taken into account in such a case, the Court lost the opportunity to affirm what could have been a notable development in human rights in Australia.

Warren Friend is a Melbourne barrister.

References

1. Darrow, Clarence, 'The Story of My Life', Watts and Co. London, 1932, p.60.
2. Australian Treaty Series 5, Article 8(1)(d)1, 1976. The relevant clause was reprinted in Schedule 8 of the *Industrial Relations Act 1988* (Cth).
3. Lord Wedderburn, *The Worker and The Law,* 3rd edn, Penguin Books, 1986, p.686.
4. See for example, *Harry M. Miller Attractions Pty Ltd v Actors and Announcers Equity Association of Australia* [1970] 1 NSWR 614.
5. The Australian Industrial Relations Commission has examined this issue in detail, and concluded that 'If the parliamentary intention was to make all unprotected action a contravention of the Act, it would appear that there would not have been any significant barrier to it doing so... The international recognition of rights to take some forms of industrial action not covered by the immunity conferred by section 170MT could have been among the reasons parliament did not directly prohibit unprotected industrial action generally' (see *Coal and Allied Operations v AFMEPKIU* (1997) 73 IR 311 at 329.)

UNLAWFUL TERMINATION

Redundancy on maternity leave

VANESSA ECKHAUS reviews a decision under the unlawful termination provisions of the *Workplace Relations Act 1996.*[1]

On 2 June 1997 Elizabeth Treadwell, a 21-year-old office clerk, was told she was redundant. At the time she was on maternity leave. She was officially due to return to work in August, but had spent the last two months requesting that she return earlier. Until 2 June, her employer had fobbed off her requests, telling her that there was nothing for her to do at that time, and asking her to put her request in writing. After she did this, she was called to a meeting. She thought she was going to discuss her return to work. Instead she was told that she no longer had a job.

Ms Treadwell brought a claim against her previous employer, ACCO Australia Pty Ltd, under the *Workplace Relations Act 1996.* The matter first went to conciliation at the Australian Industrial Relations Commission (AIRC). The claim was not resolved.

Ms Treadwell then had to make an election between her two legislative options:

(i) to continue in the AIRC under s.170CFA(1), arguing that the termination was harsh, unjust and unreasonable (an 'unfair dismissal'); or

(ii) to take action in the Federal Court under s.170CFA(3) on the basis that the termination occurred for reason of absence on maternity leave (an 'unlawful termination').

It could be difficult to prove that Ms Treadwell's absence on maternity leave was a factor in ACCO's decision to