HARDER v. N.Z. TRAMWAYS (ADMIN.) pt 1

Set I

BETWEEN CHRISTOPHER LLOYD HARDER of Auckland, Law Student

Plaintiff

AND [illegible]

Hearing: 28th April, 1977

Counsel: Harrison for Plaintiff
Curry for Defendant

Judgment: 28th April, 1977

ORAL JUDGMENT OF CHILWELL, J.

The hearing of this application for interlocutory relief has taken some two days. I should really give more considered thought to the excellent arguments which have been put to me but unfortunately time does not permit as the matter is one of considerable public importance.

I congratulate Counsel for their industry and for their assistance which has enabled me to fill some 35 pages of my Minute Book with detailed legal argument. I do not say that in criticism of Counsel, but in order to demonstrate the difficulty of the issues involved.

I will not attempt in this Judgment to deal with every argument put to me by Counsel. However, I would not like Counsel to think it discourteous of me if I fail to deal with all arguments. It is simply this, that the lateness of the hour and the importance of the matter generally is such that the parties will have to accept such Judgment as falls from me at this moment.

In recent years in England the Courts have taken a more liberal attitude towards the granting of interim relief in a proper case and towards the perennial problem

In American Cyanamid Co. v. Ethicon Ltd (1975) A.C. 396, the House of Lords reinstituted a principle which had tended to be forgotten and that is this, that when a Court is considering an application for an interim injunction the main issue is to ascertain whether there is a serious question to be tried. It is not part of the Court's function at this stage to minutely examine the facts or the legal position for the very good reason that if the Court were now to do so my judgment could well embarrass the Judge whose task it will be to determine the substantive application.

On the topic of locus standi there have been two important decisions of the English Court of Appeal, the effect of which is to unshackle the procedural difficulties of the past and to make it more readily available for a Plaintiff to be heard by the Court provided, of course, that he brings to the Court a matter worthy of the Court's attention. I refer to the Attorney-General (on the relation of McWhirter) v. Independent Broadcasting Authority (1973) 1 All E.R. 689, and to Gouriet v. Union of Post Office Workers 1977 2 W.L.R. 310.

In the present case the Plaintiff comes before the Court for urgent relief. He is a citizen who is concerned that the law is being flouted and that nobody appears to be taking steps to see that it is enforced. A similar case arose recently when, in 1976, a Mr. Fitzgerald considered that the law was being flouted so far as the New Zealand Superannuation Act 1974 was concerned. As a citizen, Mr. Fitzgerald asked the Court to declare that no less a person than the Prime Minister had acted illegally, and such a declaration was made. Mr. Fitzgerald's financial interest in the case was approximately $1 per week, or roughly $26 by the time the matter came up for hearing.

It appears from the affidavits that the Defendant Union has been in negotiation with the Local Authorities Public Passenger Transport Association for a period of some

15 - 18 months. As at today I understand that these negotiations are still proceeding. They are taking place under the provisions of the Industrial Relations Act 1973.

The Union apparently became dissatisfied with progress. Accordingly, on the 23rd March of this year a letter was delivered by officials on behalf of the Union to the Auckland Regional Authority and I quote from the affidavit in that respect -

> "...notifying the Authority that there would be a 48 hour stoppage on the 6th and 7th April 1977 and on Thursday and Friday for every week thereafter for an indefinite period."

I think the affidavit contains an error as to dates. The dates should probably read the 7th and 8th April, these being the Thursday and Friday of the first full week of this month.

It appears that there was no stoppage on the 7th and 8th April, but there was a stoppage for a period of 48 hours last week, that is Thursday the 21st and Friday the 22nd April.

It appears from the affidavit that negotiations continued after the Notice of the 23rd March had been given and I draw the inference on the evidence available to me at the moment that the Union, having become dissatisfied a second time, decided and did authorise and see to it that there was a 48 hour stoppage last week.

In respect of last week's stoppage a telegram was sent by the Union to the Secretary of the Local Authorities Public Passenger Transport Association. No point is taken of the fact of service upon the Secretary, it having been agreed by all concerned that Notice to him would be sufficient. This telegram was sent on Friday 15th April. A copy of the telegram has not been made available, but a press account of its contents has been made available and this has not been disputed by the Union. In this press report Mr Stubbs

said, and I quote:

> "The telegram would give the employers seven days' notice that bus drivers in Auckland, Wellington, Christchurch and Dunedin would begin 48 hour strikes from midnight next Wednesday.
>
> The strikes would continue for 48 hours starting every Thursday morning for an indefinite period, Mr.Stubbs said.
>
> He agreed that the strike notice was less than required but he said it was enough."

In this country, in respect of essential industries as described in the First Schedule of the Act, the right to strike is controlled. The industry in question is an essential industry. So far as I am aware there is no definition of essential industry, but it does not require much commonsense to appreciate that they are industries essential to the wellbeing of the citizens of this country.

The relevant part of s.125, which restricts strikes, states the position in pretty clear terms, s-s.(1)(a) states:

> "(1) Every person commits an offence and shall be liable on conviction by the Industrial Court to a fine not exceeding $150 who, being a worker employed in any of the industries to which this section applies, -
>
> (a) Strikes without that worker or his union on his behalf having given to the worker's employer, within one month before the date of commencement of the strike, not less than 14 days' notice in writing, signed by him or on his behalf by his union of his intention to strike."

The next section is s-s.(5) which states:

> "(5) Every person who incites, instigates, aids or abets any offence against this section, or who incites, instigates, or assists any person who has struck or locked out in breach of this section to continue to be a party to the strike or lockout, commits an offence and shall be liable on conviction by the Industrial Court -
>
> (d) If a union, association, or employer, to a fine not exceeding $1,500."

I interpolate here to observe that by s.144 of the Act prosecution for offences against s.125 can only take place in the Industrial Court.

Mr. Curry, for the Union, submitted that there was a creature known as a 'rolling strike' which, as I understand it, would fit the information given in the letter and telegram to which I have referred. Mr. Curry contended that whichever of the Notices is valid, the Notice is of a continuing strike situation, that situation being that the workers will carry on normal work except on Thursdays and Fridays when their labour will be withheld for a period of 48 hours commencing at midnight of the preceding Wednesday. Nothing in the Act refers to a rolling strike. If it was the intention of the Union to give notice intended to indicate a state of continual quasi strike, then all I can say is that whoever came to that conclusion lacked commonsense and failed properly to interpret the very clear words of s.125 and s.123. S.123 defines strike. This definition is an all embracing one and whatever the word might mean in trade union lore, or in standard dictionaries, the only meaning which is relevant is that contained in the Act.

S.123 reads as follows:

"123.(1) In this Act the term 'strike' means the act of any number of workers who are or have been in the employment of the same employer or of different employers -

(a) In discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or

(b) In breaking their contracts of service; or

(c) In refusing or failing after any such discontinuance to resume or return to their employment; or

(d) In refusing or failing to accept engagement for any work in which they are usually employed; or

(e) In reducing their normal output or their normal rate of work -

the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers; but does not include a stopwork meeting authorised by an employer.

(2) In this Act the expression 'to strike' means to become a party to a strike."

On the facts of this case as presented to me at the moment, what happened last week was that on each day on which a particular worker was required to work, he performed his duties in accordance with the terms of his employment, but when it came to Thursday and Friday each worker failed to accept engagement for work in which he was usually employed. He could also be said to have reduced the normal performance of his work if his work is looked at from a weekly point of view, and he also reduced his normal output although, perhaps, output is not quite germane to the driving of vehicles. When he did these things he did them on Thursday and Friday but not on the other days.

Accordingly I reject the argument that a strike can be something which is, for want of better language, on again off again. In my judgment it is fallacious to say of a person engaged in this type of rolling strike that he is on strike all the time. One can imagine the eyebrows of the Judge of the Industrial Court raising somewhat if the worker were being prosecuted for striking last Monday when in fact he worked the whole of last Monday. That only has to be stated to demonstrate the fallacy in the argument that a strike under this section comprehends nothing more than the days when services are withheld either wholly or partially.

Before leaving the definition I observe that to strike means to become a party to a strike. That section is complementary with s-s.(5) of s.125 relating to inciting, etc. Accordingly when the men struck the Union was a party to it and by statute it also struck.

I turn now to the first notice given by letter of the 23rd March, 1977. It was clearly an invalid notice in respect of the stoppage which did not, in fact, take place on the 6th and 7th (or 7th and 8th) April. S.125 specifically says that not less than 14 days' notice in writing must be given before the date of commencement of the strike. The law as to computation of time is clearly stated in Vol.37 Halsbury's Laws of England, para.166, and I quote:

> "When a period is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed has the benefit of the entire period, and accordingly in computing it the day from which it runs as well as the day on which it expires must be excluded and the act cannot be done before midnight of that day."

i.e. the last day referred to, and such an interpretation is more commonly adopted where words such as "not less than" are used, as is the case in this section.

The passage which I have recited from Halsbury has recently been adopted by the learned Chief Justice in a not dissimilar fact situation. I refer to Attorney-General Ex Relatione Graham Maiden Limited v. Northcote Borough (1972) N.Z.L.R.510, 514.

Adverting to the letter of the 23rd March, one must therefore exclude the 23rd March. The fourteenth day is Thursday, the 7th April, so one must exclude that date up to midnight on Thursday 7th. If I assume that the affidavit is incorrect and that the notice was intended for a 40 hour stoppage on the 7th April, then clearly the notice was invalid as not complying with the 14 day requirement.

It follows that it was also invalid if the affidavit is correct where it refers to the 6th and 7th April. Even if the notice were valid in respect of that particular week, the rest of it is invalid so far as subsequent weeks are

~~correct [illegible] the notice [illegible] not sufficient to~~

concerned. It will be recollected that the notice purported to go on to say:

> "... and on Thursday and Friday for every week thereafter for an indefinite period."

In my judgment such a notice is, as it says on its face, indefinite and quite contrary to the clear wording of s.125 which requires the statement of the date of the commencement of the strike.

There has been some doubt as to whether the second notice cancels out the first, or as to whether I can infer from the fact that no stoppage took place in the first week of April and that the parties were continuing negotiating, that the Union had withdrawn its notice. I incline to the view as a matter of inference from the evidence as it stands at the moment that the latter position is the correct position, if for no other reason than the statement of Mr. Stubbs attributed to him in the newspaper where he agreed that the second notice was less than required. I find it unnecessary, however, to rule upon this matter, and it may well be more appropriate to leave it for the trial of the substantive action. Having already ruled that the first notice was entirely invalid, then the Union can rely only on the second notice for the purpose of this interim hearing.

Now the second notice of the 15th of April suffers from the same vice as the first. On this occasion the period was very much less than 14 days and insofar as that notice purports to refer to Thursday and Friday of last week, it is in my judgment invalid. It will be recollected that the telegram is purported to have intimated that the strikes would continue for 48 hours starting every Thursday morning for an indefinite period. That notice, insofar as it may relate to Thursday and Friday of this week or to Thursday and Friday of next week or any subsequent week is, in my

comply with the clear wording of s.129.

In ruling as I have done I have gone further than is required and, perhaps, than I should have, but I have done so because it demonstrates the strength of the Plaintiff's contention. It is not just a question of there being a serious question to be tried, but as it seems to me there is a very strong prime facie case indeed for saying that both notices are invalid.

Well then, what is the effect of the notice or notices being invalid? The effect is that the strikes last Thursday and Friday and today and, if one takes place tomorrow, tomorrow's, are illegal. The giving of a proper notice is a condition precedent to the right to strike. Proper notice not having been given, every worker engaged in the strike has committed an offence and is liable to a fine not exceeding $150.

One imagines that probably prosecution before the Industrial Court will not take place, but if it does I ask the members to reflect upon the attitude of Mr. Stubbs where he told the press that he knew that the notice was less than required. It is not for me to advise members but I hope he has sufficient money if they decide to follow him up.

However, not only has each worker committed an offence, but so has the Union. It has struck. That strike is illegal. One therefore comes to this point, that here is an essential industry disrupted by an illegal strike. Mr.Harder is not particularly impressed with the situation. He has apparently been following the press statements from time to time outlining the progress of negotiations. On the 21st April, that is last Wednesday, the Minister of Labour was asked in a television interview if he was contemplating taking any legal action against the Defendant and he declined to comment.

Mr.Harder said to himself - I am a member of the public. I use the Auckland Regional Authority buses, I have to use

them from time to time. Why am I precluded from using buses for two days last week, perhaps two days this week and perhaps subsequently when what they are doing is illegal. And he in fact says I am not satisfied that the Minister is taking the matter sufficiently seriously, and so he has come to Court. He came here as a matter of urgency. He filed his writ on Friday last and, at the same time, he filed this motion for interim relief. He had the motion set down at the earliest possible time having regard to the rules. The case was called before me yesterday, it being the first day upon which the case could have been called having regard to the rules. As I have observed, it has taken two days to deal with.

In his statement of claim Mr. Harder has raised two causes of action. In the first cause of action he maintains that as a member of the public he has a right to approach this Court in order to see that the law is enforced. In his second cause of action he says that under s.125 of the Act the Union owes him a statutory duty not to strike illegally. I have suffered financial loss and if this continues to go on I will continue to suffer financial loss and, furthermore, I have suffered and will continue to suffer inconvenience and distress.

This is simply an action based on statutory tort. He says that he is a Law Student. Accordingly he is obliged to attend regular classes at the University. In particular he has to be there on Thursdays and Fridays. He has an eight month old son who accompanies him and is looked after during the day at the University creche. By arrangement with his wife he looks after the little boy on Thursdays and Fridays. There being no buses last Thursday or Friday he took a taxi. On the 21st April his return taxi fares amounted to $7.45. I do not know what the return bus fare is, but if it were a dollar it can be seen that he has had

$6 which he would not have had to pay had the Union not been on strike illegally.

So far as the first cause of action is concerned, it is clear law as laid down by the Court of Appeal in England that notwithstanding that a statute provides a remedy such as here by way of prosecution, this Court nevertheless has power to enforce obedience to the law by way of injunction whereby it is just and convenient to do so. The authority I cite is Attorney-General v. Chaudry and Anor (1971)3 All E.R. 938. Having regard to that authority and the other authorities referred to in the Judgment of Mr. Justice Plowman and in the Judgment of their Lordships on Appeal, the decision of Mr. Justice Turner in the New Zealand Dairy Factory's case (1959) N.Z.L.R. 910 must be considered suspect, and accordingly I decline to follow it insofar as it purports to lay down as an immutable proposition that there is no remedy outside this present Act which I accept is a special code relating to Industrial Relations.

However, there is a procedural difficulty in Mr. Harder's way. So far as his first cause of action is concerned, prime facie the Attorney-General should have commenced the action at least by way of a relator action. But Mr. Harder says I have not had time to obtain the Attorney-General's fiat. These things cannot be hurried so far as the Attorney-General is concerned. His affidavit discloses that he instructed his Solicitor on Wednesday of last week. His Solicitor obtained a copy of the somewhat cumbersome procedure which has to be followed in order to obtain the Attorney-General's fiat and I do not propose to detail the steps required to be taken. I know from my own experience that they take time, and rightly so. Indeed, Mr. Bridger of Crown Counsel appeared out of courtesy to the Court. He informed me that it could take two days from yesterday before the fiat might become available. If that time factor was adhered to there would still be further delay with the paper work required.

I would not like anything that emanates from me tonight to be taken as in any way critical of the procedure of the Crown Law Office. I intend no criticism. The procedure adopted is proper and is necessary, but it does take time.

Well, what was Mr. Harder to do? Was he to wait until the fiat had been obtained when it was fairly clear that there was an illegal strike to be held today and tomorrow? I repeat that this is an application for an interim injunction. The law is such now in England that a person such as Mr. Harder, seeking an interim injunction, may do so without the fiat of the Attorney-General provided, in my judgment, that he has demonstrated that he intends to do what he can to obtain the fiat. This principle recently adopted by the Court of Appeal in England is really but an extension of the principle of preserving the status quo. Mr. Harder says to this Court preserve the status quo long enough for me to do my best to obtain the Attorney-General's fiat.

In the past, in my judgment, there have been unwarranted restrictions placed upon a Plaintiff in this situation. It is refreshing to find that the Court of Appeal in England has adopted a more enlightened view and I believe that to be the law in New Zealand and, for one, would express grave disappointment were it not so.

If Mr. Harder is not able to obtain the fiat that is not the end of the matter because the law is, and has been for a long time, that as a private individual he can maintain an action in his own name if he can point to a statutory provision which is for his protection and which is being interfered with, or if he suffers particular damage over and above that suffered by the general public through infringement of a public right.

It is not really necessary for me to determine these matters in view of my judgment with regard to preserving the status quo so far as the Attorney-General's fiat is concerned

However, I indicate the view that I do not accept Mr. Curry's submission that the Act vests no rights in the public. In my judgment the whole object of the creation of offences is to prohibit the offending act for the public well-being. Parliament has seen fit to make it an offence to strike unless the proper notice is given. No-one but a churl would suggest that that offence provision was not intended to be in the public interest. Every person is under a duty to the public to obey the law. Each member of the public has the right to expect that his neighbour will obey the law.

In my judgment Mr. Harder, as with every other citizen, has the right to expect that strikes will be legal and there is a corresponding duty upon the worker and the Union to ensure that they are legal. It follows that there has been an infringement of a public right. In my judgment this statutory provision is for the protection of the public, including Mr. Harder. If Mr. Fitzgerald suffered particular damage in the failure of a superannuationfund to contribute a dollar a week towards his superannuation, I find it hard to believe that one could say that Mr. Harder, now faced with paying $14 a week for taxis, is not suffering particular damage.

Hence, so far as the first cause of action is concerned it is my judgment that Mr. Harder has sufficient standing to seek relief from this Court.

As far as the second cause of action is concerned, I think it would be wrong of me to express a view concerning the interpretation of the whole of the Act with a view to deciding whether or not breach of s.125 creates a statutory tort. That matter requires considerable legal research and if this matter does proceed to a final hearing it ought properly be left to the trial Judge, unfettered by opinions from me. All that need be said is that it is certainly a serious question to be tried and no-one can be certain of the answer.

Accordingly, in view of theprinciple enunciated in the

Ethicon case, I have come to the conclusion that Mr. Harder has a worthwhile case to argue and he is able to show personal pecuniary loss.

So far as both causes of action are concerned, Mr. Harder is prime facie entitled to relief.

I turn now to the next matter requiring consideration and that is the balance of convenience. Where, as here, the strike appears to be clearly illegal it is hard to advance any arguments in favour of the Union in terms of convenience. Mr. Curry has quite properly put to me that the Union and the Employers Association have been in negotiation for a long time. He asked me to infer, and I think I can properly infer that while they have not reached agreement they are not at daggers drawn and that they are prepared to go on negotiating. That being so, Mr. Curry persuasively submits that this Court should not interfere because the Court might upset the delicate balance which exists between the parties reaching agreement or failing so to do. In my judgment that would be a powerful argument were not it for the element of illegality. Why should any citizen suffer and have daily before his notice illegal activity and be told that it is more convenient to let it go on because otherwise certain repercussions may follow?

I would like to think that the citizens of this country have more respect for the law than that sort of argument. In my judgment the balance of convenience clearly requires that Mr. Harder be offered some relief.

Mr. Curry has put to me something which is always a concern of this Court in this difficult field of industrial relations. It is well known that in this field Unions in particular resent any interference by this Court. It is for that reason that the Act does provide a specific code. I have already held that the code and, in particular, s.144 does not oust the jurisdiction of this Court in this type of action for certain relief, and if authority is needed

I follow and adopt the opinion of Mr. Justice Speight in Pete's Towing Services Limited v. Northern Industrial Union of Workers (1970) N.Z.L.R.33, 54, where he said:

> "When questions of fact and law arise for determination in a matter which is properly before the superior Court, it must have jurisdiction to decide all such matters as are relevant to the matter before it unless there is a clear statutory provision preventing it from doing so."

S.144 is not, in my judgment, couched in such clear language.

This Court is not unmindful of the different views held by some and particularly some in the Unions as to what to them ought to be the limited role of this Court. This Court does not like the spectacle which can arise when people dig their toes in of an injunction being breached and the consequent attachment proceedings which follow. The matter is entirely one within my discretion. The present 48 hour stoppage is already under way. I think the Court would be lacking in commonsens e to restrain tomorrow's stop work. However, I am prepared to make a declaration so far as tomorrow is concerned. Before I announce my final judgment I express the opinion that this Court in a proper case has the power to make an interim declaration. In my judgment this power stems from Ss. 2 and 11 of the Declaratory Judgments Act 1908.

There is also judicial comment suggestive that such a power exists in England and I refer to McWhirter's case and Gouriet's case to which reference has already been made. If that be the law inEngland, I see no reason why it should not be the law here.

On principle I can see no reason why a Plaintiff who has a proper claim should not be able to ask this Court for a declaration of right, even though it be of a temporary type and couched in careful language. In my judgment the law has thus far progressed that relief by way of interim declaration is an alternative and in some cases may be concurrent with the granting of an interim injunction.

Turning now to the statement of claim and motion for relief. I declare that the withdrawal of labour on Thursday 21st April, 1977 and Friday 22nd April, 1977 was, on the state of the evidence as it is before me at the moment, an unlawful strike on the part of the Defendant and each and every employee who withdrew labour. This declaration is of an interim nature based on the limited evidence before me and is subject to further order of this Court.

I make the same declaration in respect of the withdrawal of labour today and the withdrawal of labour which is intended for tomorrow.

Finally, I order that pending the trial of this action an interim injunction do issue against the Defendant restraining it from inciting, instigating, aiding or abetting any future offences by its members against the provisions of s.125 of the Industrial Relations Act 1973 pending final resolution of the Defendant's current award negotiations with the Local Authorities Public Passenger Transport Association, and further restraining it from inciting, instigating or assisting any of its members who have struck in breach of the said section to continue to be party to such strike pending the final resolution of the said award negotiations.

I direct that that interim injunction do lie in Court until Monday of next week, the 2nd May.

The effect of what I have done is to declare last week's strike and this week's strike illegal. I leave it to the good sense of the Union to decide what it should do so far as tomorrow is concerned. The injunction purposely lies in Court so that it will not effectively operate until it is uplifted on Monday.

As to costs, I fix the Plaintiff's costs in the sum of $400, plus disbursements as fixed by the Registrar. However, the Plaintiff is not to have these costs until the final determination of this action one way or another.

I accordingly, having fixed the figure, reserve the Plaintiff's right to receive costs.

Just to clarify the position, I reserve the right of both parties to argue the question of costs, it being my intention merely to fix what I consider the appropriate figure at this stage because it may well be that if it goes to trial it is heard by another Judge.

W. Macdonald J.