The Right to Hire and Fire

by

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"[W]e have certainly refused [to have this matter dealt with by conciliation] because Council feel, and as Council's representative I feel too, there is nothing to arbitrate on. Council surely has the right to hire and fire its own employees."[1]
'I have never ever said that the Council has the right to employ who they like."[2]

Introduction

If a breakdown of the causes of strikes were attempted, the right to hire and fire would almost certainly be found to be one of the major causes. Wildcat strikes, at least, find many of the origins in a union grievance over the dismissal of a member. This chapter will attempt to rationalise two perhaps incompatible ideals—the worker's right to work on the one hand, and the employer's right to hire and fire on the other. An attempt will also be made to show how, in New Zealand, the right to hire and fire has been abridged by statute law.

It would appear that the corollary of trade unionism in a democratic society is the restriction of the employer's right to hire and fire.

[1] Evidence of Mr R. S. Graham, Manager Auckland Municipal Abattoir, *Committee of inquiry into the Dispute at the Auckland Municipal Abattoir*—verbatim transcript of evidence, at p. A11.
[2] Evidence of Mr T. P. Kelly, Secretary Auckland Freezing Works and Abattoir Employees' Industrial Union of Workers, *supra,* at p. B6.

Most western countries afford their unions some form of protection (ostensibly under the justification of ensuring the union equal bargaining power), with the result that the closed shop has developed. The idea of the closed shop rests on the broad principle of union security. Narrowly defined, union security officers refers to those measures in labour agreements (whether statutory or negotiated) that require the worker to join the union in order either to gain or to maintain his employment. Basically seven types of union security arrangements are possible.[3]
These are—

1. *The closed shop:* Where this prevails only union members may be employed or a worker must join the union before he can be employed. This is the most stringent type of union security arrangement.
2. *Preferential hiring:* Under this type of provision union members must be employed or preference given so long as union members are available.
3. *Union shop:* This requires all new employees to become members of the union within a certain time, otherwise it is the employer's duty to dismiss them. This equates with the current day unqualified preference clause which is inserted in most, if not all, awards in New Zealand.[4]
4. *Qualified union shop:* This requires a worker to become a member of the union if an existing member is available and qualified to do his work, otherwise he must be dismissed. This equates with the current day qualified preference clause.
5. *Maintenance membership:* Under such a provision workers are not obliged to join a union but, once having joined, they must remain members and cannot resign whilst employed within the jurisdiction of the relevant union. This type of restriction would be found in the union's rules but it is doubtful today that a Registrar of Industrial Unions would allow such a rule to be registered.
6. *Open shop:* The ideal in many respects, where any worker can be freely employed whether a member of a union or not.
7. *Closed non-union shop:* The exact converse of the ordinary closed shop. Here only non union members may be employed.

Although which of the above seven types of security agreement prevails in an industry depends on the strength of the union con cerned (or of the protection given by statute) in reality one would be hard put in most industrialised countries to find examples of the last

[3] A. Szakats, *Trade Unions and the Law* (Wellington, 1968) at 168-171.
[4] As to which, see *post*, p. 9.

three types of agreement. In New Zealand trade unionism has gone from a situation similar to that which holds at the present time, through compulsory unionism, and back to the stage of the union shop at present. In 1936 a substantial change was effected in New Zealand industrial law when what is generally called compulsory unionism was introduced. By section 18 of the amendment to the Industrial Conciliation and Arbitration Act 1925 (passed in that year) the Court of Arbitration was required to insert into every award a provision that "it shall not be lawful for any employer . . . to employ or to continue to employ . . . any adult person who is not for the time being a member of an industrial union" bound by an award. The amendment also provided that every existing industrial agreement should be deemed to include a provision to the like effect. As a corollary the same section provided every person thus obliged to become a member of any union "shall be entitled to become a member of that union on application made in accordance with its rules."

Unionism, some critics have argued, is a personal matter of choice and no worker should be compelled to join what is, in law, a voluntary association. It is not the purpose of this paper to discuss the pros and cons of compulsory unionism, but the question will be asked: given compulsory unionism, does the effect of this oblige the employer to employ only union labour? An employee presumably has the right to work for whomever he wishes, so ought not the converse to be that an employer should have the right to employ whomever he wants? As idealistic as this premise sounds, it is only an ideal, for since 1936 no employer in New Zealand has had such a right.

Compulsory Unionism

Compulsory unionism, in law, had its origins in 1936. Prior to that time it was customary for the Court of Arbitration to insert a preference clause in awards the effect of which was, much like a present day preference clause that union members were to be given preferential employment over others. These provisions, or variations on a common theme, did not all, however, stand up to scrutiny when tested before the Supreme Court.[5] But it did not take until 1936 for the courts to appreciate the industrial realities of the situation and early to acknowledge the existence of the closed shop in New Zealand. In *Taylor and Oakley* v. *Edwards* in 1900 Denniston, J., said in the Supreme Court:[6]

[5] *Magner* v. *Gohns* [1916] N.Z.L.R. 529; and see *infra*.
[6] (1900) 18 N.Z.L.R. 876 at 879 (S.Ct.). See also comments to similar effect by Williams, J., in the Court of Appeal at 887-888 of the same report.

> "Now, undoubtedly a subject, and a principal subject, of late years between employers and employed has been the claim of associated labour to decline to work with unassociated labour. This claim, which has been sometimes conceded, more frequently resisted, has been the subject of extensive and prolonged strikes by the employed, and to lock-outs by the employers."

This, at least, amounted to an early recognition of the fact that trade unionists sought preference in their employment and in order to achieve this the Court of Arbitration permitted the insertion in awards of a form of qualified preference clause which did just what its name implies, give preference to trade union members. Not unexpectedly those who ardently opposed these clauses soon challenged their validity. In the case already cited, *Taylor and Oakley* v. *Edwards*, the Court of Arbitration had inserted in the award governing the Christchurch Plumbers and Gas Fitters Industrial Union of Workers an order or direction that the appellant firm and the other employers bound by the award were to employ members of the named union in preference to non-members, provided there were members of the union as equally qualified as non-members to perform the work and able to undertake it. The appellant firm sought a writ of prohibition in the Supreme Court. Denniston, J., at first instance, upheld the power of the Court of Arbitration to insert such a provision in an award and accordingly refused the writ. Against this refusal the appellants appealed to the Court of Appeal which unanimously affirmed the decision of Deniston, J., that preference to union members was an "industrial matter."[7] Having now settled the question of qualified preference, the courts were later asked to determine whether a clause in an award requiring every non-unionist covered by the award to become and remain a member of the union which had secured the benefit of the clause, was within the powers of the Court of Arbitration to insert in an award. In *Magner* v. *Gohns*[8] the Court of Appeal held that the Court of Arbitration had no such power. In a judgement which Mathieson describes[9] as revealing the "social and political philosophy" of the members of the Court, the Court refused to interpret the Industrial Conciliation and Arbitration Act 1900 as permitting any form of compulsory unionism. The position was, then, that preference to unionists had gained judicial approval but the complementary requirement that non-unionists join the union had not yet gained approval, despite feelings in industry as to its desirability or even necessity.

[7] The Industrial Conciliation and Arbitration Act 1894 was amended when the consolidation Act of 1900 was passed so as to incorporate the decision in the statutory definition of "industrial matters" in s. 2 (e). For a general historiographical discourse, see A. Szakats: "Compulsory Unionism" (1972) 10 Alberta L. R. 313.

[8] *Ibid.*

[9] D. L. Mathieson, *Industrial Law in New Zealand* (Wellington, 1969), vol. 1, at 172.

Although this was the industrial climate at the time, the social climate was not yet in step with it. There was no statutory authority for preference clauses despite the fact that the Court of Appeal had sanctioned the insertion of qualified preference clauses in awards. However, the Court of Appeal stopped short and felt that it would be straining the words of the Act to permit the insertion in awards of unqualified preference clauses. Much of this was a mere reflection of political or social views held at the time and Mathieson's comments are perhaps not without justification. In *Magner* v. *Gohns* Stout, C. J., said:[10]

> "Compulsion [to join a union] is the antithesis to unionism. Unionism imports voluntary action. One might as well speak of 'compulsory volunteering' as 'compulsory unionism'."

Similarly, Herdman, J., in *Butt* v. *Frazer*[11] described compulsory preference as a "flagrant piece of despotism". It is therefore clear that the courts were not prepared to grant to industrial unions a complete and unfettered power to compel workers to join and remain members of a union. Almost by way of placating those who resisted compulsory unionism Herdman, J., said in *Butt* v. *Frazer*,[12] "the door may be partly closed against non-unionists but it is not to be locked and barred against them." Blair, J., in concurring[13] with these comments, drew the important distinction between preference and monopoly. Thus, preference remained legal but compulsion illegal.

The problem, in any event, became largely a matter of legal history when in 1936 legislation provided a means of indirect compulsory unionism by making it unlawful for employers to employ non-unionists. In that year Parliament enacted that in every award the Court of Arbitration must make provision, and that in every industrial agreement there would be deemed to be included a provision, that it should not be lawful to employ adult persons who were not, for the time being, bound by that award or agreement. This then amounted to a legislative sanction of the insertion in awards and agreements of qualified or unqualified preference clauses, producing, in effect, a situation which can be equated with that of compulsory unionism. Thus, the offending provisions in the relevant award which met with judicial disapproval in *Magner* v. *Gohns* had now received the approval of the legislature.

Until 1936, then, unionism in New Zealand was essentially a voluntary matter, a worker joining the relevant union only if he felt that way inclined. Presumably as a reaction against the arbitrary attitude of employers and the helpless position of employees during

[10] *Ibid.*, at 547.
[11] [1929] N.Z.L.R. 636 at 646.
[12] *Ibid.*, at 649.
[13] *Ibid.*, at 656.

the depression years, the Labour Government passed the Industrial Conciliation and Arbitration Amendment Act in 1936. That Act (as subsequently amended by section 37 of the Statutes Amendment Act 1936) provided in subsections one and two of section 18:

> "18 (1) In every award made after the passing of this Act the Court [of Arbitration] shall make provision to the effect that, while the award continues in force, it shall not be lawful for any employer bound thereby to employ or to continue to employ in any position or employment subject to the award any adult person who is not for the time being a member of an industrial union of workers bound by that award or who is not for the time being a member of a trade union . . . bound by that award.
> (2) In every industrial agreement made after the passing of this Act there shall be or be deemed to be included therein a provision to the effect that, while the industrial agreement continues in force, it shall not be lawful for any employer bound thereby to employ or to continue to employ in any position or employment subject to the agreement any adult person who is not for the time being a member of an industrial union of workers bound by that agreement or who is not for the time being a member of a trade union . . . bound by that agreement."

It was essential, however, having provided for compulsory unionism, that every worker have the correlated right to entry into the particular Union. The necessary protection was afforded by section 18(3) of the Industrial Conciliation and Arbitration Amendment Act 1936. As later amended in 1943, this subsection provided that:

> ((18 (3) Every person who is obliged to become a member of any union by the operation of any provision included or deemed to be included in any award or industrial agreement shall be entitled to become a member of that union on application made in accordance with its rules, and in so far as the rules of any union are inconsistent with the provisions of this subsection they shall be null and void. . . ."

These provisions were all then later embodied in section 174 of the consolidating Act of 1954.

Preferential Emplyoment—De Facto Compulsion

This was the position from 1936 down to 1961, when the National Party pledged in its election campaign to end a quarter of a century of compulsory unionism. Accordingly, section 174 was repealed and in 1961 a curious new system of preference clauses was introduced, but which system, as will be seen, was not unlike the earlier position at the turn of the century when the Court of Arbitration sought to include qualified or unqualified preference clauses in awards. The new sections inserted in substitution for section 174 were of a nature that, given the right climate, the apparent reversal of the earlier position of compulsory unionism was effectively nullified. It will be seen that in practice the new sections effected no change at all. In a recent decision of the Court of Appeal, Wild, C. J., (quoting Haslam, J., in the Supreme Court) summarised the effect of these sections as follows:[14]

[14] *Wood* v. *Thomson and The New Zealand Seamen's Industrial Union of Workers* [1972] N.Z.L.R. 53, at 56-57.

"In brief, the qualified preference provision in an award or industrial agreement means that an employer may not continue to employ an adult worker who is not a member of the relevant union if the latter fails to become a member within fourteen days after engagement, provided first that such person has, since engagement, been requested by an officer to join the union, and, second, that there is a member thereof equally qualified and willing for the particular job. An unqualified preference provision may be summarised as a requirement in an award or industrial agreement that an adult worker, who is not a member of the union, shall become such within fourteen days after engagement and shall so remain throughout his employment."

By section 174B, inserted by the 1961 amendment, the Court of Arbitration was empowered to insert an unqualified preference clause if satisfied that either (a) such a course had been agreed to by all the assessors on an enquiry into an industrial dispute by a Council of Conciliation, or (b) not less than 50% of the adult workers who, on making the award, would be bound by it desired to become or remain members of a union that was a party to the award. As to qualified preference, section 174F provided that, "if . . . the Court does not insert an unqualified preference provision . . . the Court shall, unless it sees good reason to the contrary, insert a qualified preference provision." It hardly needs to be said that in all awards or industrial agreements made by the Court since 1961 it has never yet found "any good reason to the contrary." Thus, it will be either an unqualified or a qualified preference provision that the Court inserts in awards or industrial agreements. The field is narrowed even further when it is seen that in practice almost invariably an unqualified preference provision is inserted rather than a qualified preference provision.

It falls to be decided whether the 1961 amendment to the Industrial Conciliation and Arbitration Act 1954 did, in effect, do away with compulsory unionism as the National Party had promised. As had been stated, the amendment provided, in place of compulsory unionism, preferential rights of employment. These rights could take one or two forms, either an unqualified or a qualified preference clause. Although there are two possibilities, they are restricted to one when a perusal of awards and industrial agreements shows that almost without exception they contain an unqualified preference clause. Thus, any worker who is employed in any industry covered by an award, must, if he is not one already, become a member of the relevant union within fourteen days, whether requested or not, and whether he wishes to or not. As no current industrial award or agreement yet examined has been seen to reveal a qualified preference clause, whereby the union must request the worker to join the union, it will be appreciated that there is still no element of choice and the principles of the 1936 amendment still apply.

To ascertain the true effect of such preference clauses it is necessary to understand the sanctions underlying them. Non-compliance with the unqualified preference clause is a breach of award, the result of which is that the employee must be dismissed and is liable to prosecution.[15] The important point, however, is that the union must first request the non-member employee to become a member of the union and only upon refusing to join does the employee open himself to prosecution, notwithstanding that the employee is, under an unqualified preference clause, obliged to become a member of the union without being requested to by the union. If the employee refuses to join the union, the union can then request the employer to dismiss the worker and any employer thereupon refusing to do so himself commits a breach of award and is liable to prosecution.[16] The overall effect of these provisions is that workers have little or no choice in deciding whether or not to join the union.[17]

There are two points that immediately arise. First, workers who refuse to join the union and/or remain members during the currency of their employment must lose their jobs. Secondly, every worker has the right to join the union which covers the field of employment in which he is in.[81] The result from the worker's point of view is that he is obliged to join the union. As Szakats points out:[19]

> "[I]t can definitely be stated, there is no difference between compulsion by statute and unqualified preference by award. Trade union membership is a prerequisite to obtaining and holding nearly every job."

From the employer's point of view the practical effect is that he cannot hire any worker who is not a member of the union, or alternatively who is not legally compelled to join the union upon being employed.[20]

As has been stated,[21] it is almost a universal rule that all industrial awards and agreements contain an unqualified preference clause.[22]

[15] Industrial Conciliation and Arbitration Act 1954, s. 174G (1) (a) (as inserted by s. 2 of the Industrial Conciliation and Arbitration Amendment Act 1961).
[16] *Supra*, s. 174G (1) (b). It must be noted, however, that enforcement of these provisions is very largely up to the unions; s. 174G (2).
[17] Unless exempted from membership; as to which, see *post*, p. 10.
[18] Industrial Conciliation and Arbitration Act 1954, s. 174H.
[19] *Op. cit.*, at 168.
[20] The only possible exception to this is the case where there is no industrial union registered in the particular area of employment, but these instances would be extremely rare.
[21] *Ante*, p. 9.
[22] An analysis of the first volume of (1970) Book of Awards shows that all thirty awards made by the Court of Arbitration included an unqualified preference clause, as did 59 out of 60 industrial agreements (the remaining one contained no provisions relating to preferential employment at all— presumably an oversight). Of seven agreements filed under the Labour Disputes Investigation Act 1913, three contained an unqualified preference clause.

When the statutory provisions relating to the insertion of such clauses are considered it is not difficult to understand why unqualified preference clauses prevail. Section 174B of the Industrial Conciliation and Arbitration Act 1954 provides that the Court of Arbitration shall insert into any award or industrial agreement an unqualified preference clause only if it is satisfied that (a) such a provision has been agreed to by the parties, or (b) not less than 50% of the workers desire to become or to remain members of the union concerned. Effectively, agreement is reached between the parties at the stage of negotiation before a Council of Conciliation; the employer(s) will be induced to accept an unqualified preference provision in the award because of the ease of dealing with unions representing all workers and because it requires only a 50% vote of the workers in favour to obtain it, thus overriding an employer's refusal to accept such a clause.

But the question now arises, is there, in a state of compulsory unionism, with every worker having to belong to a union, a right to hire and fire?

The Right to Hire and Fire

The right to hire, it can be seen, has been severely restricted in that the employer is required to employ workers from a selected group of individuals, namely, trade union members, who almost always will be subject to the dictates of their union officials. At its extreme this means that the employer might be obliged to hire nominated persons and if he seeks further employees he must take those the union gives him without any freedom of choice. This type of situation was that which prevailed until recently with regard to the hiring of seamen being members of the New Zealand Seamen's Industrial Union of Workers. The so-called roster system used operated on the basis that the union would submit a particular seaman for a job whenever an employer sought to engage one.[23] The seaman in question was determined in accordance with a roster system operated by the union and, ostensibly, was a method of ensuring optimum employment of all members without being shore-bound too long. Although the legal effect of such a system is questionable, unless it is embodied in a deed or award or industrial agreement, the salient point remains that it is the employee, or rather the union, who decides who is to be hired, and not the employer.

[23] An informative narrative can be found in the *Report of the Commission of Inquiry into New Zealand Shipping* (1971), chapter 7.

But even if the union does not go to the extent of securing such an entrenched position vis-à-vis the employer, the point remains that the employer has not the choice of whom he may hire, or, if he has some form of choice, it is gradually eroded away by the employee ultimately having to, in time, join the union concerned. The practical result of this, to the employer, is that he has virtually no right to hire, and, it will now be seen, nor may he have any right to fire. Presumably an employer will not be greatly distressed at having to employ a union member (unless under a roster system he must employ a particular individual) but he may be somewhat amazed to find out that once having hired a unionist he cannot fire him. This is reflected in the following statement given in evidence by Mr T. P. Kelly, Secretary of the Auckland Freezing Works and Abattoir Employees' Industrial Union of Workers, when cross-examined by Mr P. Hanna at the Abbatoir Inquiry:[24]

> "[W]hen a dispute exists the union has just as much say as to who will be employed and who will not be employed as the [Abattoir] manager has. The absolute right to hire and fire does not apply in the trade union movement, Mr Chairman. . . . While we agree the right is there in all industrial agreements no employer in this country has the absolute right."

Has the employer, then, any right to dismiss his employees? Most awards and industrial agreements contain a clause relating to termination of employment which provides for the length of notice required to terminate the contract of service within the terms of the award.[25] This is clearly a recognition of the employer's right to fire and the employee's right to terminate lawfully his contract of service. When the contract is so terminated, it is by the unilateral act of either party and need not be for cause. "An employer is not obliged to give a reason for the dismissal when he dismisses an employee for misconduct; *a fortiori* when he dismisses him on proper notice."[26]

But it must be stated that although termination on notice need not be with cause, the termination clause in awards normally preserves the right of the employer at common law to dismiss employees summarily for cause or misconduct.[27] Summary dismissal is dismissal without requisite notice or wages in lieu of notice. Non-summary dismissal, without breaching the contract of service, is effected by giving the worker the requisite notice as provided for in the award, or if the award is silent, then determined according to long-standing common law principles. Alternatively, if the employer seeks to be rid

[24] Evidence of Mr T. P. Kelly, *op. cit.*, at p. A20; see also at p. 86.
[25] See D. L. Mathieson, *op. cit.*, at 42.
[26] *Ibid.*, at 43.
[27] For the leading case on misconduct justifying dismissal, see *Clouston & Co. Ltd.* v. *Corry* [1906] A.C. 122 (P.C., N.Z.).

of the worker instantly and not have him around for the period of his notice, the employer may give the worker wages in lieu of notice, thus lawfully and effectively dismissing the worker "on the spot".

It is interesting to note that when the 1961 amendment to the Industrial Conciliation and Arbitration Act 1954 was introduced, the then Minister of Labour, The Honourable T. P. Shand, drew a distinction between what he called "the closed shop" which meant, he said, taking away the employer's right to hire and fire, and "the union shop" which would now be secured by unqualified preference. This closed shop was to be outlawed.[28] The distinction appears to be semantic and academic, since in practice the unqualified provisions have the effect of creating a closed shop. There is a tendency in latter years for unions to prefer industrial agreements rather than industrial awards, and in such agreements to secure what amounts to a closed shop provision. Clauses such as the following tend to appear in most every award or agreement:

> "It shall not be lawful for the employer to employ or to continue to employ in any position or employment subject to this [award/industrial agreement] any person who is not a member of the union."

Thus, although the spirit of the 1961 amendment may have been to outlaw the closed shop in New Zealand, the attempt effectively failed and the National Party's promise remains unfulfilled. Any employer who engages a worker, not already being a member of the union, knows that within fourteen days that worker must join the union. There is, however, the one salutary point that even if the worker must ultimately join the union, the employer can still (in most cases) hire whomever he wants with the only requirement that the person hired must within fourteen days join the union or be dismissed.

Having stated this, the necessary comcomitant of section 174B is, of course, section 174H, which provides, as earlier shown, that every worker is entitled as of right to be admitted into the union concerned. Section 174H is not without force either, as it has been held[29] that a worker refused admission to the union is entitled to a writ of *mandamus* to compel the union to admit him to membership. However, Wilson, J., in *Armstrong v. Kane*[30] held that section 174H does not go any further than this and confers no indefeasible right on a member to remain a member. Whilst this is undoubtedly correct given the wording of the subsection, the expelled member being unable to avail himself of the extraordinary remedy if he feels that

[28] [1961] N.Z. Parl. Deb., 2347.
[29] *Gillard* v. *McFarlane* [1930] N.Z.L.R. 258 (S.Ct., Adams, J.).
[30] [1964] N.Z.L.R. 369 (S.Ct.).

he has been wrongfully expelled or suspended,[31] can reapply for membership and by virtue of section 174H must be readmitted, provided he is not of general bad character, and was not expelled for this reason. It is always open to a union to provide in its rules that a member, once expelled, cannot apply for readmission, and it is probable that such a rule does not offend against the provisions of section 174H.[32] But what amounts to "bad character" and when a worker has recovered from previous bad character and is entitled to readmission are both difficult questions of fact.

The Right to Work

One point, however, that appears to be overlooked by most commentators but which necessarily arises from a consideration of the right to hire and fire, is the abridgement of the worker's so-called right to work. Whilst it is beyond the scope of this paper to discuss the various aspects of the right to work thesis, a discussion of compulsory unionism would be incomplete without some consideration being given to it in passing. In some American states there exist right to work laws[33] based essentially on an alleged occupational freedom in a democratic society. Many there see the closed shop, or now, more accurately, the preferential employment system, as an abridgement of a worker's basic right to work. It is argued that labour agreements requiring a worker to join a union in order either to acquire or to mantain his employment are bad. As altruistic as such arguments may sound they have fallen into disuse in New Zealand as compulsory unionism has remained the byword. It is, however, interesting to refer here to one English Court of Appeal decision which stands virtually alone in conflict with earlier authority. In *Nagle* v. *Feilden*[34] the Court held that there was such a right, clearly

[31] Provided, of course, that the expulsion or suspension and the hearing (if any) conform to rules of natural justice. There is a wealth of English authority in this field dealing with the question of natural justice and disciplinary tribunals; for one of the most recent decisions, see *Edwards* v. *Society of Graphic and Allied Trades* [1970] 3 W.L.R. 713 (C.A.); [1970] 2 All E.R. 689.

[32] This reads: "Every person who, by virtue of his employment or intended employment, is within the class of which an industrial union of workers is constituted, and who is not of general bad character, shall be entitled to be admitted to membership of the union; and so far as the rules of any union are inconsistent with the provisions of this sub-section they shall be null and void. . . ."

[33] See M. S. Novit, "Right to Work: Before and After" (1969) 12 Business Horizons, 61-68.

[34] [1966] 2 Q.B. 633. See also, *Gillard* v. *McFarlane, ibid; Hardgreaves* v. *Wellington Watersiders' Industrial Union of Workers* [1932] N.Z.L.R. 1211 (S.Ct., Ostler, J.); *Miller* v. *Wellington Federated Seamen's Union Industrial Society of Workers* [1932] G.L.R. 355 (S.Ct., Ostler, J.); *Australian Iron and Steel Ltd.* v. *Australasian Coal and Shale Employeers' Federation* (1957) 1 F.L.R. 54.

recognising that a trade association (similar to, but not the same as, a registered union) could not "arbitrarily and capriciously" refuse to grant a licence to someone who belonged to a particular class—analogous to refusing admission to a union. The Master of the Rolls, Lord Denning, would clearly have based his reasoning on the grounds of public policy.[35] This decision, in effect, equates with section 174B of the Industrial Conciliation and Arbitration Act 1954. Both of these, it is submitted, do amount, albeit rather indirectly and unsatisfactorily, to a recognition of a right to work.[36] Accordingly, it becomes interesting to refer to the apparent paradox that exists today compared with the earlier formative years in trade union history. Older trade unionists would recall the days when belonging to a union often meant the loss of one's job whereas young trade unionists know only that membership is a prerequisite to securing a job.

The Right to Fire

Whilst it must be conceded that there is no absolute right to hire, it is probably true to say that since the 1970 amendment to the Industrial Conciliation and Arbitration Act 1954, there is virtually no right to fire. This was recognised by the Chairman of the Commission of Inquiry into the Abbatoir Dispute, Mr L. G. H. Sinclair, S.M., who stated:[37]

> "It seems to me that while the union [sic: Council] has a right to hire and fire, that is a qualified right and the worker, if he is fired, has some redress [under s. 179] if he is wrongfully dismissed. . . . These men having been told they have been fired are entitled to be told why they were fired. It seems there must be a justification for a dismissal otherwise there would be no rights of redress so I do not think there is any use in Council saying we have the right to hire and hire while there is a right to appeal. If a dismissed man wishes to exercise his statutory right . . . then he has to be re-employed."

The introduction of the personal grievance provisions by section 179 of the Industrial Conciliation and Arbitration Act 1954[38] means that any dismissed worker may have his case heard before a Conciliation Commissioner if he feels he has a personal grievance (as defined). Accordingly, it is argued by trade unionists, an employer can now only dismiss a worker if he has a right to do so. This means that the employee must be guilty of some form of misconduct which would give the employer the right to dismiss him. Clearly, the section prevents arbitrary dismissal but does it extend to prevent an employer dismissing an employee for reasons other than misconduct; for

[35] *Supra*, at 647.
[36] *Pace*, Mathieson, *op. cit.*, at 187.
[37] *Op. cit.*, at p. B38.
[38] As amended by s. 4 of the Industrial Conciliation and Arbitration Amendment Act 1970.

example, because of the employee's redundancy,[39] or the employer's dislike of the particular employee?

It is submitted that the former reason is not within the scope of section 179 but the latter reason is. The section refers to *personal* grievances and defines such as :

> " . . . any grievance that a worker may have against his employer because of a claim that he has been wrongfully dismissed, or that other action by the employer (not being an action of a kind applicable generally to workers of the same class employed by the employer) affects his employment to his disadvantage."[40]

Clearly, a dismissal, demotion, or reduction in wages will be an action that affects the worker to his disadvantage. It remains to be decided what types of such action and in what circumstances it is taken will allow the employee to avail himself of his legal rights under the personal grievance procedure. Dismissal with requisite notice or wages in lieu thereof is not, it is submitted, justified any longer unless the real reason for the dismissal can itself be justified. This appears to be an important statutory addition to the common law position. The new procedure will operate against arbitrary dismissal for no cause. If, as in the first instance quoted above, a worker is dismissed with requisite notice (or wages in lieu) by reason of his redundancy, then the dismissal is justified as this would amount to "action of a kind applicable generally to workers of the same class employed by the employer." If, however, the dismissal was, as in the second instance, because the employer merely did not like the particular employee then this becomes a personal matter and accordingly within the scope of the new section. It could be argued by those who still maintain the employer's right to fire that section 179 does not remove the employer's inherent right to dismiss an employee with requisite notice or wages in lieu without cause. It is submitted that such lawful termination without cause whilst hitherto not actionable at the suit of the aggrieved worker, is now actionable by virtue of section 179. This does not mean to say that the worker is entitled to any damages if he can bring himself within the meaning of the section, but merely that he is thereupon entitled to be re-employed. Mathieson summarises the common law position thus:[41]

> "If the employee is given (say) a week's wages in lieu of notice and dismissed summarily this will discharge the employer's obligation. If he is neither given due notice, or paid wages in lieu, he has an action for wrongful dismissal, unless there was just cause for the dismissal."

[39] The question of redundancy and subsequent dismissal in England has been answered by the passing of the Redundancy Payments Act 1965, although the Act appears to have provoked a wealth of case law.

[40] For a discussion of s. 179 (as amended) in the contect of disputes procedures, see [1971] N.Z.L.J. 180.

[41] *Op. cit.*, at 401. See also *Baker* v. *Denkara Mining Corporation Ltd.* (1903) 20 T.L.R. 37; *Hartley* v. *Harman* (1840) 11 A. & E. 798.

Just cause aside, it can be said that a summary dismissal gives the aggrieved worker no right to any remedy at common law provided he has received the requisite notice or wages in lieu. Such a dismissal is not wrongful or unlawful, but a lawful termination of the contract of employment which obviously does not run to infinity. Most awards in fact provide for termination and prescribe the length of notice to be given in each case. As Mathieson has put it:[42]

> "An employer is not obliged to give a reason for the dismissal when he dismisses an employee for misconduct; *a fortiori* when he dismisses him on proper notice."

Ir having then established that hitherto summary lawful dismissal is not wrongful it can now be stated that since section 179 was amended late in 1970 the previous position has been altered. Although the common law position remains the same, and such a dismissal is still not wrongful, it must be appreciated that section 179 goes beyond the scope of mere wrongful dismissals and includes as a personal grievance ". . . other action by the employer [that to the employee] affects his employment to his disadvantage." As a worker already had common law rights to damages for a mere wrongful dismissal, for example, dismissal without requisite notice or wages in lieu, the legislature surely meant that the "other action" meant something and the words are not mere surplussage. Thus, a summary yet lawful dismissal may well fall within the scope of such other action provided it was not "action of a kind applicable generally to workers of the same class employed by the employer." Therefore, a summary lawful dismissal because of the redundancy of certain members of the workforce will not give rise to any rights to any grievance procedure under section 179.[43] However, a dismissal of one worker merely because the employer does not like him, even if such dismissal was lawfully effected, will give that worker the right under section 179 to have his dismissal dealt with as a personal grievance under the provisions of section 179 (2). The dismissal has become personal and the very wording of section 179 can be seen as a rather far-reaching inroad into the employer's right to fire so that it can almost be said that there is no longer any such right and instead almost a guarantee of perpetual employment. Whilst this may be anathema to many employers it is intrinsic in the new disputes procedure.

Compulsory Unionism and Conscientious Objection

Compulsory unionism, whether or not one agrees with it as a matter of principle, has provided some benefits for unions and

[42] *Ibid.*, at 43; see further at 49.
[43] See G. H. L. Fridman, *The Modern Law of Employment* (London, 1963), at 365n; O. Aikin and J. Read, *Employment, Welmare and Safety at Work* (Harmondsworth, 1971), at 165.

workers. On the one hand, it has brought great financial strength to the unions, and, on the other hand, it has been brought under an award many workers who previously had no protection. Nevertheless compulsory unionism is in a broad sense a breach of an individual's rights. As Hare puts it:[44]

> "It is a civil liberty to have the right to belong to a union; it is no less a civil liberty to have the right to refuse to belong to one. Successful industrial democracy cannot be built on a denial of individual liberty. The compulsion exercised upon unwilling members has caused much hostility to unionism in general."

Given the fact, therefore, that every worker had to belong to a union, it was logical, and indeed necessary, to provide for these dissentients who so strongly held the view that compulsion was tantamount to despotism, or who felt, as Hare put it, that it was a breach of their individual liberty. To cater for such persons section 175 of the Industrial Conciliation and Arbitration Act was enacted. The section first appeared as section 6 of the Industrial Conciliation and Arbitration Amendment Act 1951. As it originally appeared, the section was modelled on those provisions of the Military Training Act 1949 which provided for exemption from military training (then compulsory). The section was later embodied in the 1954 consolidating Act and subsequently amended in 1958, 1961, 1962 and 1967. Throughout the space of the last twenty-one years, the section has been substantially modified and the frequent amendments over the years have provided a much more complex procedure for an applicant to follow in order to gain exemption. However, the provisions still remain little known by most workers. Basically, the section as it now stands allows employees, who would otherwise be required as a condition of their employment, to apply for exemption from union membership on the grounds of "conscientious belief". Originally, from 1951 to 1961 the only grounds that entitled a person to so apply for exemption were religious grounds. By section 3 of the Industrial Conciliation and Arbitration Amendment Act 1961, a new subsection 1 was inserted in section 175 and wherever the word "religious" appeared the word "conscientious" was substituted therefore. The provisions were later further amended in 1967 by an amendment to the Principal Act in that year, which amendment provided by section 8 thereof that a new section 175 be inserted in the Principal Act. Accordingly, section 175 (1) now reads:

> "175 (1) In this section, the expression 'conscientious belief' means any conscientious belief, honestly, sincerely, and personally held whether or not the grounds of the belief are of a religious character and whether or not the belief is part of the doctrine of any religion, religious demonination or sect."

[44] A. E. C. Hare, *Industrial Relations in New Zealand* (Wellington, 1946), at 318.

Any person who genuinely and sincerely believes that he has good grounds for not joining an industrial union when otherwise required, may apply under section 175 (2) to the Registrar of Industrial Unions who shall refer the application to the Conscientious Objection Committee appointed under the Military Training Act 1949.[45] The Committee then gives notice to the applicant and the union concerned (which has a right of being heard) of the time and place of the hearing of the application. At the hearing the Committee may admit and accept such evidence as it thinks fit, whether admissible in a court of law or not.[46] In practice it can be seen that the Committee, like most *ad hoc* bodies, proceeds in a very informal manner and attempts to elicit from the applicant the genuineness and foundation for his or her belief. It is interesting to note that the applicant is afforded some form of privilege or immunity during this time in that he is not required to join the relevant union pending the determination of the Committee.[47] However, if the application is ultimately declined the applicant must, in respect of the period between the date of the application and the date of the Committee's determination, pay to the union concerned such fees and subscriptions as he would have had to pay if he had been a member of the union for that period.[48] Naturally, he must also join and remain a member of the union.

The most important point for consideration in such applications is the applicant's belief which must be "honestly, sincerely, and personally held". At the hearing, the Committee will traverse all relevant matters and the applicant's history in an attempt to extract from him his express reasons for wishing not to join the union. An examination of randomly selected applications reveals that although it is no longer necessary to prove religious grounds, the Committee will look for something along these lines in arriving at its decision. It cannot be gainsaid that a mere objection to trade unionism in general or to paying union fees and levies will not of itself afford valid grounds for securing exemption. This is borne out by the provisions in the Act which require that if the Committee grants an exception from membership to an applicant, that applicant is not thereby exempted also from paying what would have been his union

[45] It can be noted that the section is mandatory: "The Registrar *shall* refer. . . .". Also, it should be noted that the Conscientious Objection Committee being the same as that appointed to hear objections to military service will be dealing with very different persons in each case. The propriety of the same Committee hearing the two very different types of application is questionable.

[46] Industrial Conciliation and Arbitration Act 1954, s. 175C (2) (as inserted by s. 3 of the 1958 amendment).

[47] *Ibid.*, s. 175 (6) (as inserted by s. 8 of the 1967 amendment).

[48] *Ibid.*, s. 175 (7).

fees but instead he must pay into the Consolidated Revenue Account an amount equal to the subscription fees otherwise payable to the union.[49]

Brief mention may here be made of the basis for conscientious objection.[50] As has been stated above, it is no longer necessary to prove "religious grounds" in order to gain exemption, although the case studies reveal that the applicant's reasons, in order to qualify as a "conscientious belief" must come close to religious or similar convictions. In order to convince the Committee of the genuineness of his belief, the applicant must show that his or her whole way of life is directed against voluntary associations such as trade unions, that the applicant does not believe in forming associations or liaisons with other persons or groups—which must of course mean that the applicant is not prepared to join other associations such as the local public library. The applicant must also know what he or she is objecting about and not merely object or refuse to conform by joining, nor just harbour a dislike of trade unions in general or their methods. It can briefly be said that, if an applicant can establish that he belongs to one of those religious groups which does not permit voluntary association with outside groups, he or she will in all probability succeed in any application for exemption. Otherwise the applicant must show very convincing grounds for being granted exemption, which will not lightly be given.[51] If an applicant merely dislikes trade unions and objects to having to belong to one for no reason other than on principle, it can safely be said that his application will be ill-fated and never succeed. It can also be mentioned in passing that the Court of Arbitration has held *ex necessitate* that the conscientious objection provisions pertain only to workers and an employer, no matter how genuine and sincere his belief, cannot apply for exemption from having to employ union labour.[52]

A certificate of exemption, once granted, usually extends to cover a period of only one year from the date of the application. The Registrar of Industrial Union has, however, power to extend the period from year to year on demand that each year's further subscription be paid into the Consolidated Revenue Account.[53] Any

[49] *Ibid.*, s. 175 (10). Brief mention can be made of the policy of some unions of permitting the worker to make a voluntary contribution to the union's benevolent fund without the obligation of becoming a union member or having to seek a certificate of exemption.

[50] It is simpler, for the sake of clarity, to refer here only briefly to the indicia necessary for gaining exemption.

[51] It is difficult to summarise the cases where an applicant will be granted exemption; it is felt that the point is best answered by reference to the figures reproduced in the appendix.

[52] *in re Taranaki and Wellington Butchers* (1962) 62 B.A. 366 (Ct. Arb., Tyndall, J.).

[53] Industrial Conciliation and Arbitration Act 1954, s. 175 (11).

certificate that has not been extended or renewed before expiry lapses. But the Registrar may, within three years, issue a new certificate in the same terms as the original one "if he is satisfied that the original circumstances in relation to which exemption was granted remain substantially unchanged."[54] This covers also retrospective extension of a certificate where one has not been renewed before expiry.

An unsuccessful applicant does have certain but very limited rights of appeal. Section 175C (7)[55] provides that the determination of the Committee shall be "final and conclusive". This is not absolute, however, as there are two provisos to the section. After the 1967 amendment to the Principal Act, it was provided that rehearing of the application could take place and the Registrar "may apply to the Conscientious Objection Committee to have the application reheard" in the first case where the Registrar is of opinion that any determination may have been procured by fraud or was made in error or secondly where new and material evidence is available.[55] Of necessity this ground must rarely arise. The second proviso is of considerable importance though. It is convenient here to set it out in full:[56]

> "175 (9) If any person who has been granted exemption from union membership subsequently changes his occupation to one that would, but for the exemption, require him to belong to a different union to that to which he would have been required to belong if his application had been declined, and that different union was not represented at the hearing of the application for exemption or at any subsequent rehearing of the application, that union may apply to the Registrar for a rehearing or further rehearing of the application on the ground that new and material evidence is available; and the Registrar shall refer every such application to the Committee."[57]

The effect of this subsection is that of the exempted employee at any time changes his occupation so as to fall within the jurisdiction of a different union (but not necessarily change his type of employment) that union may apply to the Registrar for a rehearing of the application. Although one may well wonder how this situation can constitute new and material evidence, it accords generally with the overall bias in favour of unions that can be detected throughout the entire conscientious objection procedure. Undoubtedly, the applicant's reasons

[54] *Ibid.*, s. 175 (13).
[55] *Ibid.*, s. 175C (8) (as inserted by s. 9 of the 1967 amendment). Presumably the "new and material evidence" referred to in the subsection must satisfy the requirements of Rule 276 (e) of the Code of Civil Procedure; see *Dragicevich* v. *Martinovich* [1969] N.Z.L.R. 306 (C.A.).
[56] Industrial Conciliation and Arbitration Act 1954, s. 175C (9).
[57] It is of interest to note in passing comment that on the first ground (s. 175C (8)) the Registrar has a discretion whether or not to refer the matter to the Committee. The first ground is the one that relates to an application for rehearing the unsuccessful applicant. On the second ground it is mandatory that the Registrar refer the application to the Committee. This ground relates to applications for rehearing from a union.

for seeking exemption will remain unchanged so the only change will be the change of occupation. Presumably, then, the committee must once again go through the sifting process to determine the genuineness of his application as the new union will want the benefit and opportunity of being able to cross-examine the applicant. It is submitted that this right vested in another union that later comes into the picture is an abuse of the right to reopen the earlier hearing. Surely any new and material evidence that may come to light can only relate to the applicant's belief to be at all relevant to the hearing or rehearing. As the hearing is to determine the genuineness of the applicant's belief a change of occupation can by no means affect the applicant's belief, particularly as the applicant need not change his employment but merely his type of work so as to fall within the jurisdiction of another union, without even changing employers. In a country where one job may be governed by a number of unions the difficulties this will create are obvious.

The sections of conscientious objection also provide[58] that any certificate of exemption issued to any person shall, during its currency, permit the employment of that person in any position or employment as if he were a member of the union to which he would, but for the exemption, have to belong. Whilst this subsection does appear to have been inserted *ex abundante cautela,* it is perhaps desirable to have legislative sanction behind any certificate of exemption so that the union or employer concerned is compelled to recognise any certificate of exemption granted to an employee. But it does not follow that the union cannot, if it so chooses, take retaliatory action to vindicate its position in respect of an employee who has been granted exemption and who the union probably feels is taking a ride on the backs of his or her fellow employees who must belong to the union. All that section 175 (14) does is to remove the effect of the preference clause in the relevant award and thus entitle the exempted employee to gain employment.

This can be seen to raise two immediate problems: first, has the exempted employee any remedy against a union that subsequent to his gaining exemption campaigns successfully to have him removed by being lawfully dismissed; secondly, does the employee share the benefits of the award secured and the spoils of any strike action by the union to which he objects to joining?

As far as retaliatory action is concerned there is probably little an employee can do if the union "suggests" to the employer that the union did not appreciate the employee's application for exemption and would the employer please dismiss him or the union will go out

[58] Industrial Conciliation and Arbitration Act 1954, s. 175 (14).

on strike. If the employer then lawfully terminates the employee's contract of employment by giving him the requisite notice or wages in lieu thereof there is little that the employee can do about it as the termination has been lawful and in accordance with the employee's terms of employment. The aggrieved employee may have two courses open to him however. He can possibly sue for tortious interference with contractual relations and intimidation,[59] and can also maintain a complaint under the personal grievance provisions provided for by section 179 (as amended). It would be interesting to see the fate of such an application under section 179 if the employee had been dismissed as a result of threatened job action by the union. Section 179 is presumably aimed at providing the employee with a remedy against an employer who has arbitrarily dismissed him, but there is no reason why it should not apply in the above case also. There is a further possibility that if the union did act, through its officers, to secure an exempted employee's dismissal that such action would be in breach of the spirit of section 175 (14) and it remains to be seen if such retaliatory action by a union could be considered contempt of court rendering the officers of the union liable to a writ of attachment.[60] The problem is, however, of academic interest only. It is unlikely that such retaliatory action would be taken as it appears that most employees who seek exemption all work together in one job so that the whole workforce comprises exempted personnel, and no exemption is granted merely because the worker dislikes the union. The odd-man-out in the workforce who seeks and gains exemption appears to be the exception and the great number of exempted workers are those who belong to some religious sect, the employer and all the employees belonging to the same sect.

The second problem is not, however, as academic as the first. The position of the exempted employee as regards the relevant industrial award comes up for consideration in two areas: can the employee insist on the rights and privileges afforded by the award, and is the employee bound by the dictates of the union concerned? The latter point will be considered separately. It would probably be correct to assume that, despite his exemption, an employee is nevertheless entitled to all other benefits, privileges and immunities that flow from the award. The matter does not seem to have reached the courts and the commentators do not refer to it at all, but it can be

[59] Although the termination has been lawful, there has been tortious interference with contractual relations and an action might well lie for procuring such termination. An employee's remedies in the field of the so-called economic torts is beyond the scope of this paper.

[60] The Conscientious Objection Committee is not, of course, a court of law: *quaere*, can there then be any contempt? See also Rule 384 of the Code of Civil Procedure, and *Morris* v. *Wellington City* [1969] N.Z.L.R. 1038 (S.Ct., Wild, C. J., and McGregor, J.).

said that all the exemption under section 175 of the Industrial Conciliation and Arbitration Act 1954 does is to grant the employee concerned exemption from having to join the union, that is, it renders the preference clause inoperative, but in no way affects the validity or standing of the remainder of the award. There is no reason to suppose that the rest of the award does not remain in full force, subject to any suitable modification where the context requires.[61]

Conscientious objectors have been criticised by some[62] as taking a free ride on the backs of their fellow employees who must join the union. This objection, whilst possibly quite valid in the early formative days of trade unions (but long before exemption provisions existed), is now largely, if not wholly irrelevant to the issue. Today, when most trade unions are well capable of standing on their own two feet and bargain freely with employers or employers' associations, it is no argument to say that a handful of conscientious objectors detract from the union's strength. And as the exempted employee must pay the equivalent of his fees into the Consolidated Revenue Account it cannot be said that the employee is getting a free deal out of the award the union subsequently settles with the employer. There is the point, however, that the employee is gaining the benefit of the union's bargaining power in securing for its members, and, necessarily, the exempted persons, the best conditions of employment and the best wages which are all later embodied in the award made by the Court of Arbitration. But the point remains that today unions bargain not so much on corporate strength but rather on their ability to strike (whether one exists in law or not) and to call out their members.

At this point it becomes necessary to consider the position of the exempted employee vis-à-vis the union when a strike or other job action is instituted. Those whose beliefs are so strongly held that they feel compelled to seek exemption from trade union membership would probably feel equally uneasy about going on strike. But industrial realities show that strikes frequently do occur and the problem must from time to time arise, what happens to the exempted employee(s) when the union calls a strike. All the union members are, of course, obliged to strike if the union calls one or a secret ballot vote decides that a strike is to take place. The exempted employee, not being a member of the union, is not obliged to strike, nor can he be considered a blackleg if he does not support the striking workers. But what if the exempted employee then reports

[61] For example, the employee will not of course be a "union member" nor will interview or stop-work clauses apply.

[62] Comments to this effect can be found in most of the texts. It is a generally held feeling amongst trade unionists that conscientious objectors are anything from parasites to oddballs.

for work on the day of the strike, with the employer in the invidious position of having an employee offering him his services in return for pay and the employer bound to employ him and pay him but at the risk of provoking more trouble with the union. This problem can be acute and is by no means academic as it happened recently during a strike called by the Boilermakers' Union. It seems doubtful that the exempted employee who offered himself for work would receive much sympathy from the employer in view of the employee's perhaps moral obligation not to work,[63] rather than work, against the sympathies of his fellow employees, yet gain the benefits of any pay increases or other privileges that the union might extract from the employer as a result of the strike. This point then can be seen as one reason why employers are distrustful or wary of employing conscientious objectors as they can be, through no fault of their own, the origin of trouble. There is also the feeling commonly held by many employers that anyone who persists in gaining exemption from compulsory unionism, might well be some sort of fanatic or troublemaker. So, for from recognising an individual's right to protect himself and his personal freedom and beliefs, the climate is not at all favourable to the conscientious objector.

The conclusion one is bound to reach is that right from the outset the objector starts from behind scratch. Even if he is aware of the provisions for objecting (and it appears that they are little known amongst employees), he will nevertheless have a difficult task convincing the Committee of the genuineness of his belief. It almost goes without saying that any application which does not reveal at least a semi-religious or personal objection to having to join a voluntary association will have virtually failed almost before it is heard. However, it must be conceded that (as the statistics reveal) over 2,000 certificates of exemption have been issued since 1954, the union's benevolent fund of a sum equivalent to one year's union fees without requiring the worker to join the union at the same time.[64] It is also probably fair to say that those who persist in their applications are those whose beliefs (religious or other) are strong enough from only 2,700 applications. Whilst it is true that this amounts to a 75% rate of successful applications, it is submitted that this figure tends to be misleading as to the true position. It appears that very few people are even aware of the conscientious objection provisions and most workers tacitly accept what they believe to be a situation of compulsory unionism. For those few who do find out about the procedure many are no doubt overawed by it, especially when they know

[63] The word "strike" is presumably inappropriate here as the employee not a member of the union and therefore cannot go on strike.

that they will be confronted by the union concerned at the hearing of the application. Accordingly, they decide that it is not worth the trouble and expense, particularly if they fall within the jurisdiction of a union that will accept from them a voluntary contribution to the union's benevolent fund of a sum equivalent to one year's union fees without requiring the worker to join the union at the same time.[64] It is also probably fair to say that those who persist in their applications are those whose beliefs (religious or other) are strong enough to secure for themselves exemption. It must be further added that of all those who seek exemption, half do so on religious grounds, and nearly all of these, as might be expected, are successful. Religious affiliation is undoubtedly the strongest factor behind most successful applications. But what the figures for successful applications do not reveal are the numbers who would have applied and desire exemption but because of mere ignorance of the provisions do not apply.

[64] *Supra*, n. 49.

APPENDIX

EXEMPTION FROM UNION MEMBERSHIP ON GROUNDS OF CONSCIENTIOUS BELIEF

1.

Section 175 of the Industrial Conciliation and Arbitration Act 1954 (as amended) provides:

> "175 (1) In this section the expression "Conscientious belief" means any conscientious belief honestly, sincerely, and personally held, whether or not the grounds of the belief are of a religious characters, and whether or not the belief is part of the doctrine of any religion, religious denomination or sect.
>
> (2) Any person who is required to become or to remain a member of an industrial union and who objects to becoming or remaining a member on the grounds of conscientious belief may apply to the Registrar of Industrial Unions for a certificate of exemption from union membership."

Applications received, pending and disposed of are as follows:—

	Year ended 31 March 1971	Since 1 October 1954
Total applications received	159	2,700
Certificates of exemption granted	89	2,032
Applications for exemption declined	37	228
Applications withdrawn or struck out	36	444
Applications pending	94	—

2.

Grounds of applications (1st July 1970 - 31st March 1971)

(a) *Religious*		
(i) Exclusive Brethren	22	
(ii) Seventh Day Adventist	18	
(iii) Other Religions	25	
	—	65
(b) *Other grounds*	26	
	—	26
		—
		91
		—

3.

Occupations (relating to union concerned) of Applicants
(1st July 1970 - 31st March 1971)

Clerical workers	23	
Engineering industry	13	
Shop assistants	9	
Storemen and packers	7	
Drivers	6	
Electrical workers	5	
Carpet manufacturing	5	
Labourers	4	
Clothing trade	4	
Timber workers	1	
Printing industry	1	
Others	13	
	—	91
		—