* SOME ASPECTS OF THE INDUSTRIAL RELATIONS ACT, 1971

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The Industrial Relations Act, 1971 is long and complex and impossible to deal with in any adequate fashion in the space of an hour or so. After discussions with two of your colleagues it seemed that four matters might have some direct relevance to the insurance field and an attempt is made to say something helpful about each of them. The four matters are - the new rights given by the Act to workers; unfair dismissal; the sole bargaining agent; the definition of an independent organisation of workers

THE RIGHTS OF THE WORKERS

The rights concern the employee-employer relationship and are rights given to an employee against his employer. They give no rights to the employee against anyone else. Thus, if an organisation of workers puts pressure on an employer to act in breach of a worker's rights, then the worker's remedy will not be against the real culprit, the organisation of workers, but against the employer alone - but, as justice requires, the employer in such circumstances can claim against the organisation of workers the whole of the compensation which he may have to pay to the employee and may recover the whole of it or part of it, depending on the circumstances of the case. In essence, an organisation of workers is a body concerned with the regulation of relations between worker and employer: if it is registered, it (and it alone) is called a trade union; unregistered it is not in the future (in law at least) entitled to the name, and will go under the clumsy title of "unregistered organisation of workers".

The rights themselves mainly concern being a member of a trade union, or not being a member of a trade union or other organisation of workers. Every employee has the right to be a member of a trade union, but no right (at least no right giving rise to any remedy under the Act) to belong to an unregistered organisation of workers. On the other hand, an employee has a right not to belong to a trade union AND a right not to belong to an unregistered organisation of workers. The contrast marks the distinction which the Act draws with much rigidity between those on the Register and those not on it. For those who register it reserves its best gifts.

In addition, an employee has the right- again, it is against his employer - to take part in the activities of his union at what are called in the Act appropriate times, by which is meant times during working hours on which the employer agrees, otherwise times outside working hours. It should be added that a worker has other rights as a member of an organisation of workers, but there is no time to deal with them here.

* This is a summary of a talk given to the Association on 24th November 1971. Mr. Harvey is the author of "Harvey on Industrial Relations" published by Butterworths.

An employer must not deter a worker from exercising rights now being dealt with though he is permitted to encourage (but not to do any more than encourage) an employee to join a trade union: he would be unwise to encourage him to join an unregistered organisation of workers for fear that encouragement might turn into deterrence from exercising the right not to belong.

An employer must not dismiss, or penalise, or otherwise discriminate against an employee or refuse to engage him because he exercises or seeks to exercise any of these rights.

If an employer does any of these things he will be guilty of an unfair industrial practice and may be held liable in proceedings before an industrial tribunal to pay what the Act calls compensation, up to £4,160. It is interesting to note that an employer may in consequence be made liable for failing to employ a man, a new concept in the law, by virtue of which a liability arises between employer and potential employee which has no connection with a contractual relationship and equally has no element of tort - that species of civil right which is not a contractual right and the breach of which may give rise to an award of damages.

The effect of all this is that it outlaws the post-entry closed shop: the pre-entry closed shop (where in effect a man must be a member of or approved by an organisation of workers before he can be taken into employment) is specifically outlawed by another provision of the Act.

MODIFICATION OF WORKER'S RIGHTS

However, a modified form of the post-entry closed shop is allowed, in the agency shop and in the approved closed shop.

In the agency shop, which can come into existence by agreement between employer and trade union or by virtue of an application to the Industrial Court, every worker must be a member of a trade union or if not, pay sums equivalent to union dues to the trade union, or, if his conscience forbids him to do that, to a charity. In the approved closed shop only the man with a genuine conscientious objection is entitled not to be a member of a trade union. This type of shop can only come into being on application to the Industrial Court and then only when most stringent conditions are fulfilled. Equity and the Seamen's Union are thought to be the only likely candidates.

Only the trade union can have the benefit of the agency shop or of the approved closed shop. The unregistered organisation of workers is not entitled to the advantages which these types of modified closed shop provide. In effect, an organisation of workers not registered will be unable in future lawfully to insist on or to operate any type of closed shop, modified or otherwise.

UNFAIR DISMISSAL

In the past the only right an employee had was to receive notice of dismissal according to what was reasonable in the circumstances of his employment or to the terms of his contract of employment. If he was not given proper notice, then he was said to be wrongfully dismissed and he had the right to wages or salary in lieu, which in most cases would be a relatively small amount. He had no right to anything else. Thus, a man employed for thirty years with an excellent record of service could be dismissed without notice in circumstances manifestly unjust and he might be entitled to receive no more than a months wages, say £100: if he received proper notice, he would be entitled to nothing at all. The position had been modified to some extent by the Contracts of Employment Act 1963 and the Redundancy Payments Act 1965.

Now a revolutionary change is made. In all concerns employing more than four people the position (in the main) will in future be that if an employee is dismissed in circumstances which are held to be unfair he will be entitled to receive compensation up to a sum of £4,160. Whether he receives no notice at all or proper notice will be virtually irrelevant.

The way it will work is this: an employee takes the matter before an industrial tribunal and proves that he was dismissed; this shifts the burden of proof on to the employer who must then establish that he had a good reason justifying the employee's dismissal, such as misconduct or lack of proper qualifications or redundancy or the like: if he fails to do this he fails in the proceedings and will have to pay up. However, even if he does establish a good reason, the employer must go on and establish that in all the circumstances it was reasonable for him to have relied upon this reason as justifying the dismissal, and this matter will be determined in accordance with "equity and the substantial merits of the case". I have attempted to simplify the very complicated (perhaps almost confusing) provisions of the Act. Very loosely they could be summarised by saying that the employer must show that he had a good reason for dismissing the employee and that it was fair for him, in all the circumstances of the case, to have acted upon it. It remains to be seen how these vague tests will be applied by industrial tribunals and, on appeal, by the Industrial Court.

If the employer establishes that he acted fairly, that is an end of the matter; if he fails, the industrial tribunal must go on to consider the amount of compensation (up to £4,160) which it will award to the dismissed employee. The test it will apply is what is just and equitable in the circumstances having regard to actual loss and the employee's failure or otherwise to mitigate his loss by seeking other suitable employment.

If an organisation of workers (say) has forced the employer to dismiss the employee, the employer will be entitled to recover the whole or part of the compensation he has to pay from the organisation.

SOLE BARGAINING AGENCIES

The Act makes provision for a procedure (which is dizzyingly complicated) at the end of which an order may be made by the Industrial Court that a particular trade union or panel of trade unions (called 'a sole bargaining agent') shall have exclusive rights to negotiate on behalf of a specified group of employees called a bargaining unit. Such an order will not be made unless a ballot is taken and shows that it is desired by fifty per cent or more of the workers entitled to vote in the ballot. Only a trade union or panel of trade unions can be named in such an order; an organisation of workers not registered cannot be the beneficiary of such an order, though it may be that on examination of the matter by the Commission for Industrial Relations (who assist the Industrial Court in this procedure) they may recommend that such an organisation should be recognised as a sole bargaining agent and, though the Court will not give effect by an order to such a recommendation unless the organisation does register, it would be open to the employer himself to act on it and to give exclusive bargaining rights to the unregistered organisation.

The essential point from the workers point of view about a sole bargaining agent, whether occupying that privileged position by virtue of an order of the Court or by virtue of an agreement made by the employer, whether made BEFORE OR AFTER the Act came into force, is that IT CAN BE CHALLENGED IF ONE FIFTH OR TWO-FIFTHS (IN THE CASE OF AN ORDER) OF THE MEMBERS AFFECTED BY THE ARRANGEMENT INDICATE IN WRITING THAT THEY DESIRE THAT IT SHOULD BE CHALLENGED. When that happens a ballot must be held among the relevant workers and if a majority of those voting decide that the sole bargaining agent, whenever or however the agent achieved that position, should no longer represent them, then the employer is under an obligation to refuse to give exclusive bargaining rights to the agent in the future. This introduces an important element of democracy into a field where in the past some have considered that too little weight has been given to the views of those affected by a decision as to who shall have the exclusive rights to represent them.

WHAT IS AN INDEPENDENT ORGANISATION OF WORKERS

The definition given in Section 61 of the Act is: "an organisation of workers means an organisation (whether permanent or temporary), which ..... consists wholly or mainly of workers of one or more descriptions and is an organisation whose principal objects include the regulation of relations between workers of that description or those descriptions and employers or organisations of employers". This definition plainly includes the kind of staff association which is found in the insurance industry.

If an organisation is to be eligible for registration and so to enjoy the advantages and immunities which the Act confers, it must fulfil two further conditions in that it must be independent and must have the power without the concurrence of any parent organisation to alter its own rules and to control the application of its own property and funds. It is easy to determine when the second condition has been fulfilled; not so easy to say when an organisation is independent.

Section 167(1) says, inter alia, that 'independent' in relation to an organisation of workers means not under the domination or control of an employer or of one or more organisations of employers.

Whether 'domination' or 'control' exists must always be a question of fact. One can give obvious instances one way and the other: thus a staff association (for instance) which could have its decisions vetoed by management would plainly be under the domination and control of the employer; but the fact that the officers of the association were given facilities, such as a room and time off and use of a telephone, to enable them to carry out their work would not mean that the association was not independent because the Code of Industrial Practice itself recommends that facilities of this kind should be provided for trade union officials; nor would the fact (and this is very obvious) that the officers were employed by the employer or had pension rights in relation to that employment.

It is for the Registrar to decide whether or not an organisation of workers is independent; if he decides that it is not, then the organisation has a right of appeal to the Industrial Court and from there to the Court of Appeal and ultimately to the House of Lords. If, however, the Registrar does decide that an organisation is independent and does in consequence enter its name on the Register, his decision cannot be challenged by anyone, at least not by virtue of any procedure available under the provisions of the Industrial Relations Act 1971. It is possible that some interested party - another organisation of workers, say, operating in the same field - could make application to the High Court and seek a declaration that the decision of the Registrar was wrong. Any such application would have to face many difficulties and would have very doubtful prospects of success.

Of course, there is nothing to stop representations being made to the Registrar BEFORE he makes a decision, and the Registrar would, no doubt, consider them and would give an opportunity to those whom they concerned of considering them.

At question-time Mr. Hugh Cockerell (who chaired the meeting) raised a point on insuring against the liabilities (e.g. to pay compensation for unfair dismissal) to which the Act may give rise and stated that it seemed most unlikely that the liability was of the kind against which insurance would be available. The audience were asked to give their minds to the problem.