THE INDUSTRIAL INJUNCTION

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Certain countries, notably the United States of America, are familiar with the use of the equity injunction in industrial disputes. In such cases the attempt has been made to pay at least lip service to the learning concerning the highly discretionary character of this historic remedy. Australia has, however, evolved an injunction wielded exclusively by industrial arbitration tribunals and owing its formal origin to statute. It is the purpose of this article to say something about this remedy and the question of its relationship to the traditional injunction of the ordinary Courts.

The use of the equity injunction in industrial disputes in British and Australian Courts of general jurisdiction has no remarkable history. Nor has there been a wide area of application. Possibly this may be merely fortuitous. On the other hand, the use of the "labor injunction"[1] in the United States formed one very distinctive phase in the relationships of capital and labour in that country. The characteristics of such use of the injunction, characteristics which led to its abolition in labour disputes in Federal Courts in 1931, were that in the first place it appeared to be used merely in defence of "property" without any proper inquiry as to whether any legal rights had been invaded or were threatened with invasion, and secondly it was issued in the vast majority of cases *ex parte*. The second characteristic undoubtedly helped to produce the first, because a nice analysis of the liability factor is unlikely from a judge dealing hurriedly with an application for an interim injunction based on allegations of "irreparable injury" unless the Court acted quickly. If the interim injunction was granted that was usually an end of the matter as the action was rarely proceeded with.

Apart from the case of *Springhead Spinning Co. v. Riley*[2] there was never any sign of a parallel development in Britain. The decisions which have attracted all the limelight, *viz.*, *Allen v. Flood*, *Quinn v. Leathem* and *Crofter Hand Woven Harris Tweed Co. v. Veitch*,[3] are essentially claims for damages. When injunctions have been granted, they have issued merely to give more complete relief in a situation where a cause of action in tort was

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1 Although it was so termed the injunction was in concept the ordinary equity injunction and was issued by Courts possessing ordinary civil jurisdiction, not Courts possessing special jurisdiction in industrial matters.

2 (1868) L.R. 6 Eq. 551.

3 [1898] A.C. 1; [1901] A.C. 495 and [1942] A.C. 435 respectively.

recognized as clearly existing. It is true that injunctions against picketing were granted in *Lyons v. Wilkins*,[4] but this was either because the picketing was a public nuisance and actionable on a tort basis[5] or because it was conceived of as a criminal offence, *viz.*, an unlawful "watching and besetting" under the English *Conspiracy and Protection of Property Act*, 1875.[6]

In Australia a similar pattern has been maintained. There have been injunctions granted by the ordinary Courts in industrial pressure cases but those have been cases where there were recognized tort forms of action, *viz.*, conspiracy or inducing breach of contract,[7] and there has been nothing distinctive in the injunctive part of the relief granted save in so far as the issue of any equity injunction involves the exercise of special discretionary criteria.

The lack of activity in Australia may be due simply to the obsession of both sides of industry with the compulsory arbitration process; there has indeed been little of the ordinary tort action for damages in respect of industrial pressures. One, however, needs to go to other factors for an explanation of the British position. Perhaps it is found in the fact that the injunction has usually been associated with the notion of protection of property rights, and British legal thought had some difficulty in regarding an employer's expectation that his labour force would keep on working for him as a right of property.

We now turn abruptly to the injunction as wielded by the arbitration courts. This originates from statute. The model was the injunction provided for by section 48 of the original *Commonwealth Conciliation and Arbitration Act*. That provided for an order in the nature of a *mandamus* or injunction to compel compliance with an award or to restrain the breach thereof respectively. This section (as later amended) gave jurisdiction to courts other than the Federal Arbitration Court, *viz.*, the High Court or a County, District or Local Court, but the practice of investing the ordinary (that is, non-industrial) courts with this jurisdiction has not been followed and in any event was largely due to constitutional considerations.[8]

Owing to Union dislike of the application of section 48 to enjoin strikes, notably in 1927, it was abolished in 1930 as a result of a change

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4 [1896] 1 Ch. 811 and [1899] 1 Ch. 255 respectively.

5 See [1899] 1 Ch. at pp. 267, 271.

6 It seems to be accepted that the equity injunction can be used as a prop to the enforcement of the criminal law in the area of minor statutory offences without any inquiry as to the existence of a property interest—see *A.G. v. Sharp* [1931] 1 Ch. 121 at p. 134; *A.G. v. Ashborne Recreation Ground* [1903] 1 Ch. 101 at pp. 107-8.

7 *E.g., Coffey v. Geraldton Lumpers' Union* (1928) 31 W.A.L.R. 33 (civil conspiracy); *Slattery v. Keirs* (1903) 20 W.N. (N.S.W.) 45 (civil conspiracy and inducement of breach of contract).

8 *I.e.*, the decision in *Waterside Workers' Federation v. Alexander* (1918) 25 C.L.R. 434, that judicial powers could be vested only in a body which answered to the description of a "Court" within the meaning of the Commonwealth Constitution. The Arbitration Court, reconstituted on the judicial tenure basis in 1926, was thought to be validly vested with the injunction power until the bombshell of the *Boilermakers' case—Attorney-General for Australia v. The Queen and The Boilermakers' Society* [1957] A.C. 288—obliged the power to be vested in a separate Court exercising *none but* judicial powers.

of government. Its place, however, has been taken by what is now section 109. The ancestor of this was the little noticed section 38 (e) which, in its original form, gave power to the Arbitration Court, *inter alia*, to "enjoin any organization or person from committing or continuing any contravention of this Act". In view of the fact that section 48 was originally applicable only to breach of award the function of this section seemed to be clear, but it became less clear when the former section was amended (in 1920) to cover breach of the Act.

After the repeal of section 48 in 1930, section 38 began very gradually to come into its own. An application for an injunction against a strike under such section was refused on the discretionary basis in 1943,[9] but the section [which was then section 29(c)] first came under searching scrutiny in 1951 with the case of an injunctive order granted against the Amalgamated Engineering Union for breach of a clause in the Metal Trades Award forbidding a ban on overtime.[10] It was held that a breach of an award was not a breach of the Act and that the injunction was wrongly granted in view of the fact that the relevant section limited the remedy to the case of a contravention of the Act. That decision seemed to determine the role of section 38 as the embodiment of the penal aspects of the Australian arbitration system, as, following the 1951 Metal Trades decision, the legislature explicitly extended the remedy to breach of award and also clarified the question of the power of the Court to punish as for contempt of court for breach of the order.

The provision now appears as section 109 which empowers the Industrial Court (which now wields the judicial powers associated with the Federal arbitration system) to "enjoin" any organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an award.[11]

Some of the States have followed the Federal example. Queensland has a provision which is on the model of the former Commonwealth section 48. It authorizes the industrial tribunal (the Industrial Court of Queensland) to make an order in the nature of a *mandamus* or an injunction.[12] It lies both in the case of a breach of the Act and a breach of an industrial award. The New South Wales and South Australian provisions are somewhat distinctive as they provide for a *writ* of injunction as the result of a conviction and as alternative to the infliction of a fine. In New South Wales the procedure lies only in the case of wilful breach of an award or of an industrial agreement and the order can be made only by an industrial magistrate.[13] In South Australia the remedy lies both for wilful breach of an award or industrial agreement[14] and

9 *Purcell Engineering Co.* (1940) *Pty. Ltd. v. Federated Moulders' (Metals) Union* (1943) 49 C.A.R. 297.

10 *R. v. Metal Trades Employers' Association, ex parte Amalgamated Engineering Union* (1951) 82 C.L.R. 208.

11 s. 109 also makes provision for a positive order, *viz.*, an order for compliance with an award proved to the satisfaction of the Court to have been broken or not observed.

12 *Industrial Conciliation and Arbitration Acts* 1932-1959 (Q.) s. 55 (1), (2).

13 *Industrial Arbitration Act* 1940-1959 (N.S.W.) s. 93 (3).

14 *Industrial Code* 1920-1958 (S.A.) ss. 105, 120 (2), (3), (4), and see s. 93 (2).

for breach of part II of the Act (comprising provisions relating to illegal strikes, lock-outs and picketing). A special magistrate[15] can act in the case of breach of award but where breach of the Act is concerned the writ is issued on the direction of the head industrial tribunal, *viz.*, the Industrial Court. Western Australia is also somewhat distinctive in that up to 1952 it had a provision similar to the Queensland section and to the repealed Commonwealth section 48, but in 1952 it introduced a wide provision which allows the Court to make almost any kind of order in a situation of industrial emergency.[16]

These injunctions have been little used against employees though nothing in the Act here suggests any restriction on such action. They have come to represent the main method of restraint on strikes. In those States which permit the injunction, strikes are, either absolutely or partially, illegalised so that the injunction can go against a strike in the appropriate situations on the basis of it being a breach of the Act. However, with the removal of the direct anti-strike provisions of the Federal statute in 1930, the strike is usually attacked in the Federal sphere on the basis of its being a breach of an award provision—normally a provision against the imposition of bans on work.

When one considers the question of the comparison of this statutory injunction with its equitable ancestor, it is necessary to bear in mind that the Queensland section reference is to an order "in the nature of" an injunction and that the Commonwealth, New South Wales and South Australian sections obviously contemplate something which from the point of view of procedural technique is not the same as that of the equity injunction.

The most obvious difference is that whereas the equity injunction in its most frequent application lies to vindicate private rights of property or to prevent the commission of tortious acts which are of a repetitive character, the industrial injunction lies to enforce group rights and duties and involves considerations of the public interest.[17] This difference is shown in sundry aspects. Thus, it is not necessary in the case of the industrial injunction to show that the individuals against whom the injunction is sought to be directed had either committed or threatened to commit the wrongful act.[18]

One of the centre points of interest is the question of discretionary character. There is no doubt that the industrial injunction, like the older remedy, is discretionary in character. It is another question, however, whether the same factors attend the exercise of the discretion. In the ordinary Courts one primary inquiry is whether there are other remedies

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15 South Australia does not appoint industrial magistrates as such, but special magistrates who constitute courts of summary jurisdiction in the hierarchy of the ordinary (*i.e.*, non-industrial) courts exercise a penal industrial jurisdiction.

16 *Industrial Arbitration Act*, 1912-52 (W.A.), s. 29.

17 See remarks of Foster J. in *Commonwealth v. Australian Communist Party* (1949) 64 C.A.R. 803 at p. 807.

18 See *State Electricity Commission v. Amalgamated Engineering Union* (1927) 25 C.A.R. 283 at p. 284.

as efficacious as the injunction. If the answer is in the affirmative the special remedy will be refused. There are, indeed, traces of this attitude from time to time in the judgments of the industrial tribunals. Thus, in *Whittaker Bros. v. Timber Workers' Union*,[19] the High Court, over a strong dissent by Higgins J., held that an order in the nature of a *mandamus* under the prior Commonwealth section 48 for the payment of wages should not be granted in view of the existence of the right to recover award wages by civil action. By the majority, though not by Higgins J., the remedy was regarded as one to be employed only in special circumstances.[20] It is not significant that the order sought here was one in the nature of a *mandamus* as it seems that in the industrial sphere this latter remedy has been regarded merely as a positive version of the injunction. The *Whittaker* situation was one where there was a well recognised civil remedy existing. In most of the situations where the industrial injunction has been granted, however, this aspect has been absent as it can fairly safely be said that neither the breach of anti-strike provisions in a State statute nor of a penal clause in an industrial award gives rise to a civil action for damages for breach of statutory duty, though the situation has been little tested.[21] The only alternative to an application for an injunction or a mandatory order is a direct prosecution for a penalty. In proceedings under the prior Federal section 48 for an injunction in strike situations there was little reference to the possibility of resort to other remedies.[22] In *Purcell Engineering Co.* (1940) *Pty. Ltd. v. Federated Moulders' (Metals) Union*,[23] O'Mara J. refused an application under the predecessor of the present section 109 and required that the device of proceeding for a penalty be first tried. Such an attitude has been, however, quite uncharacteristic of the judicial attitude to section 109 and the remedy is certainly granted today without inquiry as to the possible successful utilisation of other weapons.

Another great difference is that there is no shyness in using the injunction on the ground that it may involve forcing performance of a contract of service.[24] As previously mentioned the injunction is mainly used against strikes. Strikes may be made illegal either by statute or award and the injunction may be used in either case. In neither case is the injunction explicitly directed against a breach of the *contract of service*, but there is no doubt that compliance with the order in the case of a strike effectuates compliance with the contract of service. It is obvious, however, that such a result is specifically contemplated by the legislature.

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19 (1922) 31 C.L.R. 564.

20 *Ibid.*, at p. 569.

21 See *Wishart v. Doyle* [1926] St. R. Qd. 269, 275.

22 *Cf.* the numerous injunctions against strikes granted in the "twenties"; see 25 C.A.R. 257, 265. 269, 283, 360.

23 *Supra*, see footnote 9.

24 It is of course a well recognised principle that the equity injunction will not lie to restrain breach of a contract of service where the issuing of such an injunction would be tantamount to decreeing specific performance of the contract.

In other directions indeed the arbitration statutes have ignored the traditional policy of the ordinary Courts not to force specific performance of the contract of service.[25]

Another difference resides in the effect of non-compliance with an injunction. Non-compliance with the equity injunction meant resort to the historic processes of attachment or committal,[26] which involved the possibility of indefinite imprisonment. From the first, however, the arbitration statutes have specifically prescribed a maximum penalty or term of imprisonment as a sanction for breach. Under the previous section 48 it was held by the High Court that the technique for enforcing compliance was not the equitable process of attachment but the imposition of the penalty prescribed by the section.[27] Presumably this applies also to the State provisions.[28] Disobedience to an injunction is contempt—probably criminal contempt[29]—but it was held in the 1951 *Metal Trades Case*[30] that, in view of the presence of specific penalty provisions, the prior Commonwealth Arbitration Court[31] had not the ordinary unlimited power of fining possessed by a superior Court. While the Act has since been amended to give the Arbitration Court and now the Industrial Court the same power to punish for contempts as is possessed by the High Court,[32] yet in the case of disobedience to orders made under section 109 the Act prescribes the maximum pecuniary penalty that can be imposed on an organization and the maximum pecuniary penalty or term of imprisonment that may be imposed on an individual.[33]

All in all it cannot be said that there has been much adoption of those special principles governing the use of the equity injunction.

It is indeed difficult to see why there should be.

The social implications behind the use of these injunctions are of course bound up with the general question to what extent the existence of a compulsory arbitration system necessarily involves some departure from the assumption in the collective bargaining countries that there should be no restriction on the employment of extra-legal industrial pressures save in the case of the existence of some kind of national emergency. If it be accepted that some kind of penal weapon is necessary,

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25 *E.g.*, in the provisions allowing reinstatement of employees such as s. 5 (5) of the Federal Act. See *McKernan v. Fraser* (1931) 46 C.L.R. 343 at p. 374 (*per* Evatt J.).

26 It seems that historically committal was the correct procedure but the Rules of Court in the various States are not uniform.

27 *Graziers' Association v. Durkin* (1930) 44 C.L.R. 29.

28 This is suggested perhaps by *Mehieloff v. Maloney* (1943) 42 A.R. (N.S.W.) 389.

29 See *R. v. Metal Trades Employers' Association ex parte Amalgamated Engineering Union*, supra, at pp. 243, 253. It is remarkable, however, what varying answers the English decisions give on this point. See *Scott v. Scott* [1913] A.C. 417 at p. 456, *O'Shea v. O'Shea* (1890) 15 P.D. 59 at p. 62, *Re Freston* (1883) 11 Q.B.D. 545 at p. 556.

30 *Supra*, see footnote 10.

31 *I.e.*, the Commonwealth arbitral and enforcement tribunal existing before the 1956 amendment set up separate tribunals and conferred the enforcement powers on the Industrial Court.

32 *Conciliation and Arbitration Act* s. 111 (1).

33 *Ibid.*, s. 111 (4).

then the industrial injunction seems at least free from the main vices that beset the prior use in the United States of the equity injunction in labour disputes. It is granted only in the case of a breach of the Act or of an award. It, moreover, is not granted *ex parte*. It is, moreover, understandable that the discretion should be exercised on different principles from those which attended the use of the equity injunction. In the case of the latter there is a clear alternative in the form of a civil action for damages. But where the injunction against breach of the arbitration statute or of an industrial award is concerned, this is usually not so. The situation in the *Whittaker* case is exceptional.[34] Usually the only alternative to the industrial injunction is an ordinary prosecution for a penalty. In view of the fact that the breach of the industrial injunction entails only the penalty mentioned in the relative section, any process of "balancing up" on the question of relative efficacy, from the point of view of dry law, can lie only in a comparison between a pecuniary penalty on the one hand and a severer penalty plus perhaps a term of imprisonment on the other.[35] The fact that disobedience of the industrial injunction involves contempt of Court is hardly a factor in the legal sense. In fact there is no doubt that the injunction *is* more efficacious, but this efficacy seems to depend on psychological factors. In the case of the issue of the industrial injunction the union is as it were "put on the spot". It is told that what it is doing is a breach of the law and if it continues in its course it will be punished. The *locus poenitentiae* is pointed out to it and is brought home to its members.

The Commonwealth Industrial Court in making injunctive or mandatory orders is merely enforcing an obligation which is framed elsewhere. Strikes as such are not illegal under Commonwealth statute save in particular situations.[36] Nor does it seem that the strike is a breach of that kind of industrial award which merely prescribes minimum wages and maximum hours. In order to make it a breach of an award it seems that the existence of some anti-strike or anti-ban clause in the award is requisite. The insertion of such clauses in an award is indeed a phenomenon of increasing occurrence.[37] The responsibility for this, however, rests with the Arbitration Commission. The Industrial Court is merely enforcing an obligation created by the Commission. Whilst some of its decisions holding a union responsible for the acts of members may be criticised as applying a somewhat rigorous test, this pertains to a matter

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34 This is pointed out by Foster J. in the proceedings under the special legislation passed to deal with the Coal Strike of 1949—see *Australian Communist Party v. The Commonwealth* (1949) 64 C.A.R. 803 at p. 807.

35 In some cases, however, the disparity between the penalty on a direct prosecution and the penalty that may be imposed for disobedience to an injunction is not a very marked one. See the Queensland sections 51 (1) (breach of the section prohibiting strikes) and 55 (4) (breach of mandatory or injunctive order). In the case of the Federal Act there is a more marked disparity.

36 *Viz.*, under the present section 138 of the *Conciliation and Arbitration Act* or under such special provisions as section 30J of the *Crimes Act*.

37 The latest award to include an "anti-ban" clause is the Waterside Workers Award of 1960 (see clause 29 thereof).

of substantive law; it cannot be said that as a procedural vehicle the statutory industrial injunction smacks of obvious injustice. In fact, it improves on ordinary prosecution technique by providing a preliminary judicial warning of unlawful action. The only ingredient lacking from what is normally regarded as a "fair trial" is the right to a jury, but no-one seems to have as yet pressed the desirability of the introduction of this method of trial in the industrial arbitration area.