SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

A critical analysis of the issues
of Reinstatement, specific performance and victimisation in the
field of labour law

by
Glenn Turner

Carnegie Conference Paper No.283
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1. INTRODUCTION

In attempting an analysis of the issues of Reinstatement, Specific Performance and Victimisation, this paper shall adopt three broad approaches to these issues.

The first approach concerns the purely legal analysis of the relevant substantive law, including an historical perspective, the law as it exists today, and a suggestion of the direction in which this aspect of labour law is heading in the light of recent developments. The issue of reinstatement at Common Law will be discussed and compared with the position under the 'unfair labour practice' provisions of the Labour Relations Act.

The second approach is concerned with the nature of the employment contract itself and its economic, social and psychological consequences upon the community. The desirability of the use of contract as a means of regulating the employment relationship will be discussed, and, alternatives explored. In this context, the notion of the 'right to work' will be analysed in terms of current labour relations and the Industrial Court decisions.

Finally, as an appendix to this paper, an analysis of a series of case-studies concerning worker-management approaches to these issues will be undertaken. This analysis is supported by the views of persons actively engaged in areas concerning Industrial Relations. This practical analysis will be used to support the final conclusions reached in this paper.
11. THE LEGAL ISSUE - COMMON LAW

The substantive law regarding Reinstatement after victimisation dismissals requires re-evaluation in the light of recent developments in this area. The case of National Union of Textile Workers v. Stag Packings (Pty) Ltd¹ (hereinafter referred to as the Stag Packings appeal²), heralded a departure from the controversial approach adopted in the case of Kubheka v Imextra (Pty) Ltd. This case in turn represented a departure from the case of Rooiberg Minerals Develop. Co. v Du Toit.⁴ In this case it was held by a full-bench of the Transvaal Provincial Division that dismissal in contravention of a victimisation section is invalid, and hence the contract is not at an end. In casu it was held that S.66 of the Industrial Conciliation Act⁵ in fact, prohibits victimisation and does not merely place a penalty on its performance, hence the dismissal was a nullity.

Then arrived the Kubheka decision, in which Black workers sought an order declaring their dismissal null and void and a declaratory order reinstating them in their former employment. It was held (per Botha J) that because an employee is not entitled to reinstatement at common law, the remedies contained in the victimisation section⁶ were innovative. On this basis, the Court applied the so-called 'Madrassa'⁷ line', holding that the statute created new rights and obligations and thus the statutory remedy excluded all other forms of relief.

The learned judge held further that the nullity of a dismissal (the ratio decidendi of the Rooiberg case (supra) ), could only be used as a 'shield' against ejectment, for example, and not as a 'sword' for reinstatement.⁸

The Court held further that an application for a declaratory order (in the instant case there were two such applications), should be dealt with on the same basis as a claim for specific performance.⁹ This judgement attracted considerable academic criticism¹⁰ and certain intermittent support¹¹, however, it would appear as if the basic shortcoming of the Kubheka decision originated in a misconception of the dicta contained in the case of Schierhout v Minister of Justice¹². In Schierhout, Innes C.J. differentiated between employees entrenched by statute against arbitrary dismissal, and ordinary employees, and ruled out the possibility of specific performance in cases involving the latter.¹³
The learned Chief-Justice then proceeded to list some 'practical considerations' against specific performance involving ordinary employees, such as:

- the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality ...

The first misconception contained in Kubheka was the elevation of such 'practical considerations' to legal principles, which thus enabled the Court to find an absolute rule against specific performance at common law and thereby apply the Madrassa line (supra).

The second misconception would appear to have been the Court's equation of a rule for specific performance with a declaration for 'reinstatement' pursuant to a wrongful dismissal. Since S.24(2) of the Black Labour Relations Regulation Act (In casu) prohibits victimisation and does not merely place a penalty on its performance (Roosiberg, supra), it follows that the 'Ea quae lege fieri prohibetur' rule, as clearly laid down in Schierhout's case, should apply. So what is done contrary to the prohibition of the law is null and void; hence a declaratory order giving effect to this rule is not a rule for reinstatement per se as the contract in fact never terminated (cf Beck's criticism supra).

It is important to note that the above two 'misconceptions' apparent in the Kubheka decision are by no means the only criticisms levelled against this highly controversial judgement. They are, however, particularly relevant to an appreciation of the changes brought about in the Stag Packings appeal (discussed at length infra) and were selected for that particular purpose. 16

The case of Mabaso v Nel's Melkery (Pty) Ltd. 17 indicates that Kubheka did not enjoy judicial sanction. In this case, Goldstone AJ was faced with an urgent application for an interdict restraining the respondent from dismissing the applicants for trade union activities. The learned judge distinguished the facts from those in Kubheka and then proceeded to deal an oblique blow to the ratio of Kubheka by stating that there were two different directions in which the 'high horse of public policy' may carry a judge (using the equine analogy first used by Burrough J in 1824). 18 The one direction is not to compel an employer to retain the services of his employee against his wishes, 19 (at last a recognition that the Schierhout dicta to this effect is nought more than policy consideration).
The other direction is to give effect to the meaning of the victimisation section of the relevant legislation aimed at preventing victimisation, and to effect this by granting a proper remedy. The leanred judge then granted an interdict to the applicants thus in effect rejecting the major import of Kubheka by giving effect to the industrial legislation rather than the common law considerations outlined in Schierhout.

However, two years later, a single judge of the same Division faced with similar but largely distinguishable facts, decided to follow the Kubheka approach, despite certain crucial differences in legislation facing the Court. In the case of National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another, the Court was approached by applicants bringing an urgent application claiming an order that their dismissals (allegedly in contravention of S.66 of the Industrial Concilliation Act and S.25 of the Wage Act - both victimisation sections) were unlawful and therefore, null and void; and secondly, a rule nisi calling on the respondent to show why the applicants should not be reinstated.

It would appear as if the central thrust of the judge's argument is to draw the distinction between common law servants and statutory servants, and despite the fact that the employee's contracts are governed by statute, he concludes:

... that does not make them statutory servants.

With respect, this analysis is simply not true. The industrial legislation with which this Court is concerned makes many serious in-roads into the common law contract which is said to exist. For instance, dismissal is not left to the employer's discretion in terms of the Industrial Concilliation Act and the Wage Act, and virtually all the conditions of employment are governed or at least regulated by the relevant legislation. Indeed this distinction between statutory servants and ordinary employees is traced back to Schierhout;

It is this entrenchment against arbitrary dismissal which differentiates the position of civil servants (statutory servants) from that of an ordinary employee.

It is clear that if this test is applied, the employees in the Stag Packings case are indeed statutory servants. However, this distinction between the two classes of employees becomes superfluous in the light of the Appellate Division decision in Stewart Wrightson (Pty) Ltd. v Thorpe.
In this case, Jansen JA stated:

As in other contracts (a fundamental breach of the service contract) did not per se end the contract, but served only to vest the respondent with an election either to stand by the contract or terminate it.29

Thus if it is accepted that unlawful dismissal (in contravention of s.66 and s.25) constitutes a 'fundamental breach' of the contract, then it is clear that the contract is not at an end and that specific performance may be demanded by even an ordinary employee. It is against this background that the Stag Packings Appeal was heard by a Full Bench of the T.P.D.

In this appeal, Van Dijkhorst J confirms the view that if the Stewart Wrightson test is applied, then the distinction drawn between ordinary employees and civil servants in Schierhout's case is, 'one without a difference.' He confirms the view taken in Haynes v King Williamstown Municipality32 that the Court has a discretion whether to grant specific performance or not, and elaborates as to the nature and scope of this discretion. The learned judge then proceeds to state categorically that the dicta in Schierhout regarding the 'foisting' of an employee upon an unwilling employer, and the so-called absence of mutuality, are no more than, 'practical considerations and not legal principles.'33 The judge thus applies the principles laid down by the Appellate Division in the Stewart Wrightson case (supra), although curiously without reference to this seminal decision.

This then leaves the Court with an unfettered discretion when deciding whether to grant an order for specific performance. In deciding this matter, the Court must consider each case in the light of its own circumstances. On the one hand, are the considerations mentioned in Schierhout's case which:

are very weighty indeed and in the normal case they might well be conclusive.34

However, on the other hand, the fact that the appellants had been dismissed solely by reason of their trade union membership, was considered sufficient to outweigh the counter-considerations. This was because, given the object of the Labour Relations Act as:

the furthering of good labour relations in trade and industry.35
the prevention of victimisation and the remedy of reinstatement were necessary to give effect to this object. The Court, therefore, granted an appeal and effected the reinstatement of the dismissed workers.

Whilst Stag Packings appeal is undoubtedly a significant progression in this field of labour law, the progression must be seen in the correct perspective. The fact that the Courts are prepared to grant civil relief in the form of reinstatement, for victimisation contrary to industrial legislation, is indeed significant in that the anomalies of Kubheka are finally laid to rest. The new emphasis placed on policy considerations giving effect to the object of industrial legislation in South Africa is also a welcome approach, particularly in view of the increasing statutory protection against victimisation found in the Industrial Court arrangements.

However, the following dicta from Van Dijkhorst J would seem to raise an important caveat:

A very important consideration was the allegation that the appellants had been dismissed solely by reason of their trade union membership.36

This would seem to imply that if the employer could prove further grounds for dismissal, then despite a proven, allegation of victimisation, the Court may exercise its discretion in favour of the Schierhout considerations. As will become apparent from the case-studies (infra), employers invariably adduce some or other common-law ground for dismissal and should this be proven, the Court might well be hesitant to 'foist' an employee upon an unwilling employer. A further problem in this regard is that of retrenchment. If an employer adduces this as the ground for dismissal, it would seem highly unlikely that a Court would order reinstatement in the absence of strong evidence that such retrenchment was not economically necessary. It is submitted that a solution to this situation would be the strict application by management of the 'last in - first out' principle. If unions could include such provisions in Recognition Agreements, it would make victimisation by this means more difficult for management. (Case-studies show that management is almost always against the acceptance of such principle in Recognition Agreements). Perhaps it should be left to Parliament to effect this much needed protection by incorporating the principle in industrial legislation. However, the Industrial Court has to a large extent obviated the need for such considerations as shown below.
However, despite the many practical problems associated with victimisation allegations, it would appear that the recognition of policy considerations based on statutory protection against victimisation, is a major step forward. In this sense the Stag Packings appeal has opened up a very important avenue of protection against victimisation via the common law.
In this section, selected decisions of the Industrial Court in respect of unfair labour practices will be treated of, with special emphasis on the reinstatement of dismissed employees.

The present definition of an 'unfair labour practice' as amended by Act 95 of 1980 reads:

'Unfair labour practice' means -

(a) any labour practice or any change in any labour practice, other than a strike or a lockout, which has or may have the effect that -

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a).'

To say that this definition is very wide would be to do injustice to the perceptive powers of the reader. As Etienne Mureinik has written,

'Plainly, this definition is open texture in the extreme and its content depends very largely upon the manner of its interpretation.'

The significance of the definition is, however, to allow the court the discretion to determine what 'fairness' in a particular case will be.

'Fairness is the righteousness of the particular case; it can therefore only become exclusively relevant in specific situations.'

Thus it is only by examining the specific facts of each particular case that a Court will be able to determine whether an alleged unfair labour practice is in fact unfair. This is an important factor to bear in mind when examining the decisions in this respect.
Section 46(a) of the Act provides that a dispute may be referred to the Industrial Court for determination. However, the section does not prescribe the nature of the determination the court has to make. In the case of S.A. Diamond Workers' Union v S.A. Diamond Cutters' Association the Court was faced with the decision of whether it could, as a determination under S.46(9), order reinstatement of employees dismissed as a result of an unfair labour practice and who had not accepted termination of their employment contract. The Court canvassed the situation under the Common Law referring to such cases as Rooiberg Minerals Development Co. v du Toit, Schierhout v Minister of Justice and Kubheka v Imextra (Pty) Ltd. (see Chapter 1 supra) and Somers v Director Indian Education. and concluded that the court was not limited in the granting of relief, pursuant upon the determination of an unfair labour practice, to remedies which are recognised in law. The court (per Parsons P.) noted that the concept of reinstatement is not foreign to industrial legislation (vide S.43(4) of the Act regarding status quo orders) and concluded that a determination providing for reinstatement could be made in terms of S.46(9). It is interesting to note that this decision was made without reference to the then undecided case of the Stag Packings appeal (supra). It is thus clear that in terms of both the Common Law and the provisions of the Labour Relations Act, reinstatement is indeed a remedy recognised in law. In the first instance, the considerations outlined in the Stag Packings appeal will apply, whilst under the Labour Relations Act, the industrial court makes the determination in terms of what it perceives to be necessary to remedy the unfair labour practice. The practical consequences of this on employer - worker relations will be outlined in the Appendix to this paper.

Reinstatement by the Industrial Court is not limited to determinations under S.46(a), but may also be ordered in terms of S.43 of the Labour Relations Act - the so-called status quo order. The provisions of S.43 come into operation when a dispute arises over a change or proposed change in the status of an employee, over a change or proposed change in terms and conditions of employment, or when there is a dispute over an alleged unfair labour practice. The status quo order is designed to restore the position prior to the change, 'until the statutory conciliation procedures have been exhausted. The effect of a status quo order has been described by Anderman as having two functions:
They draw the line between actions which may be taken unilaterally by either side and those that must be deferred until either jointly agree or until procedure has been exhausted.\textsuperscript{46}

S.43(6) provides that a status quo order cannot be a final order. It remains operative for at most 90 days, unless extended by the court for further periods not exceeding thirty days. It remains operative until, inter alia, the industrial court makes a determination concerning, for example, a dispute involving an unfair labour practice.

Thus in cases of alleged unfair dismissal, the industrial court may grant a status quo order reinstating the dismissed employees until such time as it makes a determination on the matter in terms of S.46(9). Of great practical significance is S.43(7) which provides that where the industrial court orders the reinstatement of an employee whose employment has been suspended or terminated, payment by the employer of his remuneration in respect of his normal hours of work will be deemed to be sufficient compliance with the order of reinstatement. The employer may thus compensate rather than reinstate. However, this method of circumventing physical reinstatement is merely temporary, and if the court makes a determination ordering reinstatement, then the employer's right under S.43(7) is removed. (Interestingly, in terms of the decisions in Stewart Wrightson v Thorpe\textsuperscript{47} and Muzondo v University of Zimbabwe\textsuperscript{48} the so-called 'contractual right to work' could be arguably an express term of the contract.\textsuperscript{49} These considerations are unfortunately beyond the scope of this paper).

In respect of S.43, the case of M.A.W.U. v Stobar Reinforcing (Pty) Ltd\textsuperscript{50} provides a useful guideline to the application of the status quo by the industrial court. In casu, management unilaterally retrenched six workers, informing them of the decision on the same day that their services were terminated. This fact, together with other ancillary incidents, resulted in an alleged 'go-slow' strike. In consequence of this 'strike' management informed the entire workforce that they had 'dismissed themselves' and summarily terminated their contracts of employment. Accordingly the Union (M.A.W.U.) applied in terms of S.43(2) for an order in terms of S.43(4) of the Act, that all the workers be reinstated in their employment and that the reinstatement remain operative in terms of the period referred to in S.43(6).
The court (per van Schalkwyk) held that, 'orders granted in terms of S.43(4) of the Act can be said to be analagous to interlocutory interdicts.' Therefore the principles laid down in Setlogelo v Setlogelo regarding such interdicts, applied to S.43 orders. This provided that the onus was cast upon the employer to prove a prima facie clear right to summary dismissal. In casu, the court found that;

(a) an alleged embarkation on a 'go slow' strike was not the only reasonable inference to be drawn from the decline in production figures (submitted as evidence by employers);

(b) that the termination of the applicant's contracts of employment was not justified.

The court therefore granted reinstatement of the employees with retrospective effect.

A significant decision in terms of S.43(4) is the recent (as yet unreported) decision of Margaret Shezi; and Others v Consolidated Frame Cotton Corp. In this matter, the employee's contracts of employment with respondent were terminated by reason of retrenchment. The employees contended that this constituted a unilateral act by the employer which made their dismissals unfair and accordingly applied for reinstatement in terms of S.43(4). The employer contended that reinstatement was not possible since the workers' jobs no longer existed.

The court held however that physical reinstatement was not required as the employer could compensate the 'reinstated' workers in terms of S.43(7), and could recover money so paid from the workers in the event of the dismissals being confirmed in subsequent proceedings in terms of the Act. The court accordingly applied the Setlogelo test regarding the requisites for the right to claim an interdict, and found that the workers were entitled to the order under S.43(4).

The court further went on to enumerate general principles to be followed in retrenching workers, such as; considering alternatives (eg transfers or working short-time) and consultation with employee representatives regarding criteria for selection of workers to be retrenched. This is a very important consideration in that the selection of persons to be dismissed is not arbitrary, but can be objectively tested against such things as attendance records, efficiency at the job, experience or length of service (the 'last-in-first-out' principle referred to above). In
this sense, the victimisation of employees by retrenchment on economic grounds has been significantly checked. The Frame Cotton case may in future be used as authority for challenging such 'victimisation retrenchment', (if such retrenchment was effected without reference to the general principles enumerated therein) as an unfair labour practice.\(^{53}\) Since failure to furnish an unconditional undertaking not to victimise (within a reasonable time of a demand to do so), is an unfair labour practice, on the basis if the Fodens decision (supra), it is clear that if workers demand and receive such an undertaking from their employer, the employer is obliged to follow the general principles regarding retrenchment. Failure to do so may be regarded as a breach of his undertaking not to victimise and therefore is an unfair labour practice per se.

A common method of covert victimisation of employees (which emerged from the discussions with various employers outlined in the Appendix infra), is that of non-renewal of migrant labour contracts which are allowed to expire. In the case of Mawu v A. Mauchle (Pty) Ltd\(^{54}\) the employer allowed certain of its migrant workers' contracts to expire without renewing them. The workers then contended that this was an unfair labour practice amounting to a concealed victimisation and applied for a reinstatement order under S.46(9).

The court dismissed arguments in limine that the non-renewal of migrants' contracts could not be an unfair labour practice and accordingly allowed the matter to proceed to evidence. (In fact however the matter did not proceed to evidence and was settled out of Court, resulting in the workers' reinstatement).

From the aforesaid, it can be concluded that the provisions of the Labour Relations Act as applied by the industrial court, have resulted in significant adjustments to the employment relationship, especially in terms of reinstatement of dismissed or retrenched workers. These adjustments are best contextualised and understood with reference to the changing nature of employment relation, and with particular reference to the resultant social, economic and psychological effects, which will be treated of in the following Chapter.
IV THE NATURE OF THE LABOUR CONTRACT

The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship. It is an attempt to infuse law into a relation of command and subordination.

Sir O. Kahn-Freund.

The most important, albeit limited, area in which the law could improve its performance as a means of ensuring a 'right to work' is in regard to dismissals from employment. Jobs no longer exist simply at the whim of the employer.

Prof. Bob Hepple.

The above quotations would seem to encapsulate the two broad approaches to the conflict between labour and capital, inherent in the modern employment relationship. The first statement is typical of the Marxist critique expounded by those writers particularly concerned with the labour contract - from E.B. Pashukanis on the one hand, developing his categories of legal subject and object, to Karl Renner on the other, who recognised that the employment contract was one without contractual content, its content being command.

The second statement by Prof. Heppie concerns the liberal approach to the conflicts inherent in the labour contract mechanism of employment relations. This is in turn part of the notion of distributional justice, which would include the enlargement of access to jobs through a legal 'right to work.'

The object of this section of the paper is to compare the two approaches, so that the notions of specific performance and victimisation can be seen in a broader perspective of the labour contract itself.

The basic Marxist tenet is that the ownership of private property underlies the 'power of command', which is seen as the actual nature of the labour contract. It is then this absence of real property, rather than spontaneous need, which precipitates the act of exchange - labour for wage. Thus by treating labour as a commodity, the labour contract is seen as part of the general law of property whereas in actual fact it is inconsistent with it. As Renner states:
We see that the right of ownership thus assumes a new social function. Without any change in the norm, a de facto right is added to the personal absolute domination over a corporeal thing. It is the power of control - the power to issue commands and enforce them.  

Thus power over objects becomes power over people and their labour.

There are also fundamental psychological implications flowing from the labour contract. Firstly, the worker is alienated from the product of his labour by treating his labour itself as a commodity. But more importantly, the right of unilateral termination of the contract by the employer places the access to the means of the future well-being of the worker, directly in the hands of the employer - thus creating a form of psychological subordination. It is only when the employer exercises this right of dismissal for 'unlawful' purposes, that the 'victimisation' legislation purports to intervene in favour of the worker. However, according to the Marxist critique, the very nature of the labour contract is a 'victimisation' of the worker. This is because the real conditions of the wage relation are, 'absolute poverty, alienation of self and submission.' The formal legal conditions are 'rights and freedom.' It is submitted that this is where the crux of the matter lies. The Marxist critique of the labour contract is essentially concerned with the real conditions of the wage relation. The liberal analysis is concerned with the 'rights and freedom' associated with the formal legal conditions.

As an answer to widespread unemployment and poverty, modern liberal lawyers have tried to formulate a principle called the 'right to work', as part of a distributon justice idea. This principle is concerned with the enlargement of access to jobs through a legal right. Through a legal right against the State and employers, the worker is to be guaranteed a form of employment to counteract retrenchment and general unemployment. Were such a 'right to work' recognized by law, it would appear that 'victimisation' of employees due to union activities by dismissal and retrenchment or by failure to renew fixed-term contracts, would be largely ineffective, since such 'victimisation' would interfere with a legal right sanctioned by penalty.
However, as it conceded by Prof. Hepple, such a 'right to work' is impractical in a capitalist market economy where labour is merely another commodity. It is the supply and demand of such labour (coupled with other market structures such as inflation) which determines the levels of employment. Such 'structural unemployment' as may be responsible for worker poverty, is simply a phenomenon of the capitalist market economy, and legal intervention is not a solution to that problem.

It is submitted that whilst it may be 'impractical' to place legal restraints upon the labour market per se, there should be effective legal restraints placed upon dismissals from employment. As is shown in case-study 2, procedural justice in dismissal from work is one of the most effective ways to prevent 'victimisation' of workers. The 'last-in-first-out' principal applied to retrenchment procedure will help greatly to reduce such retrenchment victimisation. The recognition by the Courts of an 'expectation of renewal' of fixed term contracts which have naturally expired, as grounds for ordering reinstatement, is another such procedure. These procedures, coupled with the civil relief and Industrial Court protection, would significantly reduce the employer's ability to prevent workers from organising by victimisation.

A further right, characteristic of the classic liberal state, is the right to strike. From empirical evidence it would appear as if this right (not a legal right in South Africa), is indeed a strong weapon against victimisation. A high proportion of strikes recorded by the General Worker's Union this year, were as a result of victimisation of employees. Such victimisation includes harassment of workers, ejectment from worker hostels, transfer to other branches and many other 'methods'. Whilst it is beyond the scope of this paper to analyse strikes and their efficacy, the application of a legal right to strike would significantly increase worker resistance against victimisation. It would at least legalise what is presently the only immediate and effective recourse against such action.

In terms of the Marxist analysis, proper regulation of labour cannot be achieved, 'as long as labour - power remains actually chained to the res.' If this analysis is applied, then reformist legislation is only significant insofar as it organises workers to:
revolt and loosen these chains and to make society conscious of its mission to regulate labour. 64

From the liberal perspective, the 'rights and freedom' of the worker are to remain intact. This includes the right to a freedom of association by way of Union membership and activity. The introduction of procedural justice in the regulation of dismissal of workers, is an integral part of this approach to labour law. Thus as long as society continues to operate within the legal system of a capitalist market economy, the maintenance of the 'rights and freedom' of the worker will continue to remain important to the issue of victimisation.

'Contract' versus 'Relationship'

From the earlier comparison of the Common Law decisions with those of the Industrial Court, it is clear that the Industrial Court has gone much further in limiting the 'managerial prerogative' than has its Common Law equivalent. The reason for this, it is submitted, lies in the fact that the Common Law views the employment relation as one based on the 'contract of employment,' with all its attendant rules and remedies. 65 Any inequality in bargaining power resulting from the social status of the parties to the contract, is ignored. Since the parties are supposed to possess the 'freedom of contract' and since, once concluded, pacta sunt servanda, it is clear that any notion of 'fairness' based on the law itself, is excluded. (In an economic climate where unemployment is dramatically high, it is of little consolation to a worker to know that he may terminate his contract (on notice) if he finds a particular aspect of his employment undesireable). 66

It is against this background that legislative intervention via the 'unfair labour practice' provisions (and, of course, all other regulatory legislation) must be viewed. These provisions seek to compensate for the 'unfair' inequalities in the employment relation, resulting from the 'contract of employment,' and act as instruments for creating standards to be observed by employers and workers individually and for creating individual rights and obligations - quite apart from the Common Law rights and duties. 67. Thus the whole range of cases cited under the 'unfair labour practice' section, have begun to create new standards to be observed within the employment relation - standards which were simply not attainable by operating under the Common Law.
It is thus important that in this sense the law (as applied in the Industrial Court) does not see the employment relation as one based on contract, but rather as a 'relationship' between worker and employer requiring certain standards to be observed. It is for this reason that the Act uses the word 'relationship' rather than 'contract' in the definition of an 'unfair labour practice'.

This has led to the Industrial Court laying down (quite definitely in certain cases), what are considered 'unfair labour practices', eg the refusal to negotiate, interference with the freedom to organise, termination of a fixed-term contract despite lawful notice.

Is it then true to say that our law is moving towards a recognition of the so-called 'right to work'? It would seem as if this question must be answered in the negative, especially if one looks at current labour trends regarding unemployment, dismissals, etc. In the broad sense, the Industrial Court is using its powers under the Act, for example to make S.43 status quo orders, is rather recognising the worker's 'right to remain employed' once he or she has entered into the employment relation. Even then, this right is not a legal one in the sense that it arises out of the employment 'relationship' (as protected by the Act) and not out of the 'employment contract'. The 'right to remain employed' is however of fundamental importance to workers in South Africa. This is because the worker does not only lose his job and attendant income, but, and this will increasingly be the case, he may also lose his right to be in an urban area under the Influx Control legislation. Therefore the stakes involved are substantially raised and the conflict between labour and capital intensified. The need for the protection of the worker's 'right to remain employed' in order to adjust the employment relationship, is thus manifest. In this sense, the function of the Industrial Court has been to attempt to curb the managerial prerogative and protect workers within the employment relationship. This has resulted in the diversion of labour conflict to a certain extent, but has also been an attempt to curb the use of unilateral action, such as strike action. However, as will be demonstrated in the Appendix (infra), the strike remains a powerful tool in the industrial conflict.

In conclusion therefore it would appear as if the recent changes in the law (via legislation in particular) have provided for an adjustment in the labour relationship. They have not and indeed cannot, provide for the elimination of industrial conflict which is 'inherent in an industrial society and therefore in the labour relationship.'
APPENDIX

As a result of a series of case-studies and interviews conducted throughout the spectrum of workers, union representatives, management and other parties directly concerned with industrial relations, certain attitudes and issues have emerged regarding Dismissals, Reinstatement and Victimisation. This chapter shall attempt to analyse these issues in terms of the approaches adopted in this paper, and thereby reach certain conclusions based on this analysis.

The most appropriate starting point is the issue of Dismissal as it provides the basis for discussion of the issues that are raised by its implementation ie Reinstatement, Victimisation and strike-action. Firstly, the attitude of employers towards Dismissal has apparently shown a marked change subsequent to the introduction of the concept of unfair dismissal 'via the Industrial Court'. On a general level, management appears to have adopted a cautionary attitude which is manifest in the revised labour manuals consulted, in which remarkably intricate dismissal procedure is laid down. It must however be pointed out that this new attitude is only apparent with regard to the larger companies consulted. This is probably because of the more developed awareness of labour management in the larger firms, who have kept abreast of developments regarding unfair dismissals. It is generally true that the smaller concerns are far less informed, and this fact results in a very high lack of certainty amongst employers regarding their rights to dismissal. The effect of this, it would seem, is to 'reduce them to a paralysis of inaction'.

Whilst this is true of employers on a general level, the fact remains that ignorance of the provisions of the law on the parts of both management and workers, is very high indeed. One of the Personnel Managers consulted made the interesting observation that the provisions of the law itself were so vague, that it was only with each Industrial Court decision that management was able, ex post facto, to know its rights and ability to dismiss.

Whatever the degree of awareness regarding the law on the part of employers, it is abundantly clear that the issue of dismissals has received close attention from management. This has become obvious either through revised labour manuals (which in some cases recommend dismissals only as a last resort after exhausting intricate dismissal procedure) or from the strategies of management regarding strike handling. In this context, it
is interesting to note that there appears a marked discrepancy in the training in industrial relations between management and, for example, union shop stewards. This fact is admitted (reluctantly) by some Personnel Managers consulted, and raises the startling anomaly that worker representatives are better versed in the law than are their employers. It is submitted that this anomaly is a strong factor in triggering strikes and walk-outs as a result of dismissal - the employer is simply unaware of the 'unfairness' of the dismissal whereas his work force is not. This aspect will however be canvassed in greater depth when dealing with strike statistics below.

What then of the union and worker attitudes to dismissals in the light of legal developments in this respect? The 'adjustment process' in the employment relationship brought about by the unfair labour practice decisions of the Industrial Court, has had the effect of greatly strengthening the bargaining power of unions (particularly those with majority membership), and of limiting the options open to employers. Unions appear to see the S.43 Status-Quo order as an immense reserve of strength, particularly when dealing with mass dismissal after strike action. This attitude is borne out by the recognition of the strike as the most important weapon in negotiating disputes. In the past, a major obstacle facing unions contemplating strike action had been the possibility of widespread summary dismissal on the basis of the strike action. However, on the basis of such cases as Mawu and Others v Stobar, it is clear that not only is the onus cast upon the employer to prove that they had prima facie rights to summary dismissal but also that in the absence of proof of such clear right, reinstatement of such dismissed workers will be made an order of Court in terms of S.43.

It is thus no coincidence that dismissal triggered strikes ie strikes pursuant to dismissals that were perceived by workers and/or unions to be unfair, were by far the most evident in the first half of 1983: some 43% of recorded strikes were discipline/dismissal triggered. The knowledge of the possibility of S.43 orders in the event of large-scale dismissal can surely have played no small part. This is of course not to say that economic factors played an insignificant role. It is clear that in the light of the recessive economy, job security is of fundamental importance. This importance is dramatically complicated when one introduces the possibility that residence rights may also be lost with the job, especially in view of the impending Influx Control regulations. (In this
respect, the availability of a spoliation order reinstating evicted workers in their hostel premises on the basis of Mgrew v Union Co-operative Bark and Sugar Co.\textsuperscript{82} is important).

Nevertheless, dismissals have remained a prominent strike trigger from unions, but especially in terms of spontaneous worker walk-outs. This was explained by a representative of a prominent Western Cape Union in terms of dismissals being a high level, overt manifestation of industrial conflict, likely to arouse intense solidarity from fellow workers if the reasons are perceived to be unfair. This in turn raises a further point – workers themselves are able to judge the 'fairness' or otherwise of a dismissal, and it is in terms of worker perception of an unfair dismissal that strikes and walk-outs are triggered. In this sense, one of the objectives of the Industrial Court in applying the unfair labour practice definition, namely the curbing of unilateral worker action (ie strikes), has in fact had the opposite effect by allowing workers to perceive a 'breach' in the employment 'relationship', thereby assuming legal justification for strike-action. It does not require a union to inform workers of the fairness or otherwise of a dismissal, whereas it certainly required a specialised knowledge of the law to determine legal justification or otherwise for a common-law dismissal. This then is one of the practical consequences of treating the employment relation as a 'relationship' as opposed to an 'employment contract', as explained above in Chapter 2.

It is the view of union representatives and labour relations experts, that workers in general are becoming more and more aware of the new protection and possibilities open to them in terms of the Industrial Court. 'This points to a stronger politicisation and sense of solidarity amongst the workforce.'\textsuperscript{83} This has manifest itself in an increasing number of worker-led strikes and walk-outs as a reaction to perceived unfair dismissals. (One particular union consulted in Cape Town had become involved in three such strikes out of the four which it was handling at the time in late 1983).

On the point of strike action, it is interesting to note that labour relations consultants in Johannesburg\textsuperscript{84} have noted significant increases in industrial action 'which falls short of the actual work stoppage.' This action would include go-slow, works to rule, overtime bans and general non-cooperation. This form of industrial action has the advantage of avoiding the dangers of a full strike and yet is an effective method of
reducing production dramatically. It is submitted however, that this form of industrial action runs the risk of itself being challenged as an unfair labour practice by employers, in terms of sections (a)(iv) or (b) of the definition. Indeed, it would appear from Management Sources that given the right set of facts, such action may well be challenged as an unfair labour practice, although at the time of writing, no such case has been heard by the Industrial Court.

Turning now to the S.43 status quo order (dealt with in detail in Chapter 2 supra), which may be used by the Industrial Court to order the reinstatement of workers dismissed as a result of an alleged unfair labour practice and the concern of employers regarding these orders, it has become apparent that most firms consulted have adopted a firm policy that such orders are to be dealt with in terms of S.43(7). This section provides that where the Industrial Court orders the reinstatement of an employee whose employment has been suspended or terminated, payment by the employer of his remuneration in respect of his normal hours of work will be deemed to be sufficient compliance with the order of reinstatement. In other words, the employer may compensate dismissed employees rather than reinstate them. This was explained by certain managers in terms of the 'loss of face' caused to the firm if a dismissed employee is physically reinstated. Others were of the opinion that the dismissed employee would be able to incite fellow workers if reinstated in his job. Here the fear of dismissal-triggered strike action was again very much in evidence from management perspective. This fear is indeed understandable if reference is made to the statistics of strike-triggers over the period from the last quarter of 1982 to the present. From the last quarter of 1982 until the end of the first quarter 1983, some 43.3% of strikes were dismissal/discipline triggered. During the second and third quarters of 1983, this figure had dropped to 15% (allowing for a massive 57.5% wage dispute trigger). From the last quarter 1983 to date, the dismissal/discipline trigger percentage had risen to 26.6%. Thus, the dismissal/discipline trigger, although fluctuating somewhat, remained a prominent trigger of strike action throughout this period.
CONCLUSION

'Law is a technique for the regulation of social power. This is true of labour law, as it is of other aspects of any legal system. Power - the capacity effectively to direct the behaviour of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to ensure that these are obeyed is a social power. It rests on many foundations, on wealth, on personal prestige, on tradition, sometimes on physical force, often on sheer inertia. It is sometimes supported and sometimes restrained, and sometimes even created by the law, but the law is not the principal source of social power.'

It would appear as if Kahn-Freund's oft quoted statement is indeed apposite when summarising the role of the law regarding the issues of reinstatement and victimisation. In South Africa with its capitalist market economy, the primary source of social power emerges from that system in all its forms and manifestations, be they overt or covert. That system is 'sometimes supported' and 'sometimes even created by the law.' However, that social power is also 'sometimes restrained' by the law. It is clear from the legal issues canvassed as well as from the empirical survey conducted, that the law - especially that legislation applied in the Industrial Court - is largely instrumental in the process of 'adjusting' the employment relationship to curb the managerial prerogative. That it has succeeded in so doing is manifest from the decisions canvassed above - to a greater or lesser extent. The question however is not only how the Labour Relations Act has operated to adjust the employment relationship, but also - why?

If the statistics regarding man/days lost per annum by strike action are analysed, especially regarding the period immediately prior to the Wiehahn Commission's Report, it can be appreciated that industrial conflict and the pursuant use of unilateral action by workers (mainly in the form of strike action), was on a dramatic increase. In 1978, barely 10 000 man/days were lost per annum. By 1980, this figure had risen to approximately 180 000 man/days and by 1982 to approximately 370 000 man/days. The consequent loss in production has not been statistically measured, but would presumably follow an equally dramatic curve.
It was with a view to curbing unilateral worker action and with it, worker militancy, that the 'unfair labour practice' legislation was introduced. Since strike-triggers were dominated by dismissal/discipline and wage related issues, it was simply, inter alia, a means of limiting the autonomy of employer action in dismissal and of worker action in the strike.

This view is endorsed by Anderman in his statement on the law of Unfair Dismissal, as applied in Britain where dismissal is also a significant strike trigger. Although it is still relatively early to judge the effect of such legislation on employers and workers, it is clear that neither dismissal/retrenchments nor strike action has significantly been reduced. It can be argued that the 'unfair labour practice' legislation has resulted in a better bargaining position for workers and thereby improved the day-to-day living standards and expectations for workers. This is undoubtedly so. It would be high handed in the extreme to dismiss the significant worker gains via industrial court decisions as being a mere diversion of the industrial conflict, a blunting of the recourse to unilateral action. In actual fact, the incidence of dismissal/discipline triggered strikes remains high. As shown in the Appendix to this paper, the availability of recourse to the industrial court has not blunted this powerful means of industrial autonomy. On the contrary, there are some who would argue that the recent legislation has opened up recourse to such action even further.

The real significance of the industrial court and the attendant legislation, it is submitted, lies in the fact that the law has been extended to encompass those areas of industrial conflict which hitherto had been left to the regulation of those parties involved in such conflict. The means of regulation had previously been heavily stacked in the favour of management. The 'adjustment process' via the recent legislative amendments have, to a significant extent, served to balance out the access to regulatory measures by bringing the conflict within the embrace of the law. The significant factor here is that the protection afforded the workers by the law is not founded on common-law contractual notions, which in themselves perpetuate the inequality of bargaining power, but is rather founded on the 'employment relationship'. It is within this relationship that standards of conduct are set, based on the notions of fairness, to be decided casuistically depending upon the circumstances before the court. Thus the 'internal inconsistencies', inherent in the common-law employment contract are excised, and a new basis for collective bargaining is formed.
The prognosis of the industrial court in applying the law on this basis must however be viewed with one important caveat. "Neither the legislative nor the courts should attempt to burden the law with tasks it cannot fulfil." Having broadened the scope of the law to this significant extent, it must be appreciated that the future of industrial relations in South Africa will be dependent upon factors far more potent than the law. It may be that economic factors will compel the various parties to the industrial conflict to adopt different attitudes and policies of 'adjustment and of restraint'. These considerations will apply as and when they are raised. However, what is clear is that the new legislation and the industrial court in particular, has provided for a fairer and more fundamentally just method of resolving industrial conflict.
FOOTNOTES:

1. 1982 (4) SA 151 (T)
2. Appeal from Nat. Union of Textile Workers v Stag Packings 1981 (4) SA 932 (W)
3. 1975 (4) SA 484 (W)
4. 1953 (2) 505 (T)
5. Act 36 of 1937
6. S.24(2) of the Black Labour Relations Reg. Act 48 of 1953
7. Madrassa Islania v Johannesburg Municipality 1917 AD 718
8. cf Kubheka p.490 G-H
9. Kubheka p. 491 C
10. Compare M.S.M. Brassey (1979) 96 SALJ 312
     A.C. Beck (1981) 98 SALJ 322
     E. Mweini K (1980) 1 ILJ 41
     P. Benjamin (1982) 4 ILJ 22
13. Schierhout at p. 109
14. cf Stag Packings appeal (supra) at p.157
15. Schierhout at p.107
16. Compare the other criticisms in footnote 10 (supra)
17. 1979 (4) 362 (W)
18. Richardson v Mellish Bing.229 at 252
19. Mabaso (supra) at p.362 B
20. 1981 (4) SA 932 (W)
21. Act 28 of 1956
22. Act 5 of 1957
23. cf footnotes 21 and 22.
24. Stag Packings case (supra) at p.937 C.
25. Act 28 of 1956 cf SS. 52,66,67,72,74, etc ...
27. Schierhout (supra) p.109
28. 1977 (2) SA 943 (A)
29. Stewart Wrightson at p.952 A
30. 1982 (4) SA 151 (T)
31. supra at p.155 6
32. 1951 (2) SA 371 (A)
33. Stag Appeal at p.157 C
34. Stag Appeal at p.158 E
FOOTNOTES (Continued)

35. **Stag (supra) at p.158 F**

36. **Stag (supra) at p. 158 F**

37. Subject to the caveat (supra)

38. Hoyninger - Heune 'Die Billigkeit in Arbeitsrecht' at 228, as quoted in *Uamawu v Fodens (S.A.) 1982(3) ILR 212 (IC)*

39. The Labour Relations Act (supra)

40. 1982(2) ILR87 (IC)

41. 1926 AD 99

42. 1975(4) SA 484(W)

43. 1979(4) 713(D)

44. Act 28 of 1956

45. 'Status Quo Relief - The Sacred Cow Tethered' by Paul Pretorious 1983(3) ILJ at 167

46. S.D. Anderman 'The Status Quo Issue and Industrial Disputes Procedures' 1975 4 ILJ (UK) 131

47. 1974(4) SA 67(D), 1977(2) SA 943(A)

48. 1981(4) SA 755(2)

49. See article by M.S.M. Brassey in 1982(4) ILJ 247 at 251

50. 1983(1) ILR 84(1C)

51. 1914 AD 221

52. Although P. Pretorious argues that the analogy is not sound, vide ILJ 1983(3) at 174 et seq

53. The failure to furnish an unconditional undertaking not to victimise workers, is in itself an unfair labour practice cf Fodens case (supra)

54. 1980(3) ILR 227(1C)

55. Sir O. Kahn-Freund, (1972) Labour and the Law, p.8

56. E.B. Pashukan's (1978) Law and Marxism, Ch. 5


58. Karl Renner (supra) at p.207

59. Kay and Mott (1982), Political Order and Law of Labour p.121

60. Such as Peter Townsend and Prof. Hepple

61. See Sections 11 and 111 (supra)

62. Renner (supra) p.116

63. Renner (supra) p.116

64. See section on 'The Nature of the Contract' supra

65. The consequences of such 'termination' in South Africa are for more profound in that resultant loss of employment may in most cases mean banishment to a homeland
67. - as expressly stated in the case of United African Motor and Allied Workers Union v Foden (S.A.) (Pty) Ltd 1982(3) ILR 212(IC)

68. The Labour Relations Act 28 of 1956 as amended by Act 51 of 1982

69. See The Fodens decision inter alia (supra)

70. The Fodens case (supra)

71. The Fodens case (supra)

72. The case of Mavu v Barlows 1983(4) ILR 283(IC)

73. See Chapter II (A) (supra)

74. See Appendix for practical illustrations

75. - this is of course not a legal right at all, but merely a phase encapsulating the role of the Industrial Court in adjusting the relationship between employer and worker, as evidenced in the decisions of the Industrial Court. For a discussion of the 'Contractual Right to Work' see the article by M.S.M. Brassey in the 1982 Industrial Law Journal Vol. 3 Part 4 at p.247

76. Especially regarding 'Aliens' working in S.A.

77. O. Kahn-Freund (supra) p.17

78. vide the Chapter on the Industrial Court (supra)

79. Prominent industrial relations consultant Andrew Levy

80. 1983 (1) ILR 84 (IC)

81. Andrew Levy and Associates - 'Pattern of Strike Action 1983'

82. NPD 24 - April 1981 - an unreported judgement

83. Andrew Levy and Associates - 'Strike Action 1983'

84. Andrew Levy and Associates

85. Andrew Levy and Associates - 'Pattern of Strike Action 1983'

86. Man/days are days of work per man involved in strike action. These figures per courtesy of Andrew Levy and Associates

87. cf the strike figures quoted in Appendix

88. Anderman (supra) pp.154-5 on the 'Status Quo Issue'

89. Kahn-Freund op cit p.276

90. Kahn-Freund op cit p.276
These papers constitute the preliminary findings of the Second Carnegie Inquiry into Poverty and Development in Southern Africa, and were prepared for presentation at a Conference at the University of Cape Town from 13-19 April, 1984.

The Second Carnegie Inquiry into Poverty and Development in Southern Africa was launched in April 1982, and is scheduled to run until June 1985.

Quoting (in context) from these preliminary papers with due acknowledgement is of course allowed, but for permission to reprint any material, or for further information about the Inquiry, please write to:

SALDRU
School of Economics
Robert Leslie Building
University of Cape Town
Rondebosch 7700