

DIRECTOR OF PUBLIC PROSECUTIONS

v.

GYANENDRA NAVEEN PRAKASH SINGH & OTHERS

[SUPREME COURT, 1977 (Kermode J.), 12th August]

Appellate Jurisdiction

Trade disputes—unlawfully breaking contract of service—whether contract of service breached—whether breach wilful—elements of offence—Trade Disputes Act 1973 ss.2, 3, 14, 16, 33—Penal Code (Cap. 11) s.10—Contracts of Employment Act 1963.

Before the magistrate, the accuseds charged with wilfully breaking their contracts of service were acquitted on the grounds that the employer had already repudiated the contract by unilaterally derecognising the Union and by refusing to allow Union representation at an interview of seven employees prior to their suspension. The magistrate also held that the accuseds believed that the employer had repudiated the contract or had been guilty of a fundamental breach of contract and therefore the accuseds' breach was not wilful.

On appeal by the Director of Public Prosecutions against the acquittal:

Held: 1. The magistrate, although he did not finally resolve the issue, did direct his mind to the conclusion that the terms of the collective agreement made between the employer and the Union were incorporated in the employees' contracts of service. This was not the true position; such terms were incorporated in so far as they were applicable to the employees' position. The collective agreement itself was not the contract of service.

2. There was no evidence to support any breach by the employer of the clause in the collective agreement relating to the derecognition of the Union or to the lack of Union representation at the interview of the seven employees.

3. As far as the contracts of service were concerned, there was ample evidence to indicate that the employers had not repudiated their contracts of employment.

4. If the act of breaking the contract was wilful and was done with the requisite mens rea, it mattered not that the respondents were ignorant or mistaken or what their motives were. Trade Disputes Act s.14(1) was a penal enactment which did not allow of a defence of mistake of law or of fact.

Cases referred to:

Sheffield Corporation v. Luxford [1929] 2 K.B. 280; [1929] All E.R. Rep. 581. *R. v. Walker* (1934) 24 Cr. App. R. 117.

Camden Exhibition and Display Ltd. v. Lynott [1966] 1 Q.B. 555; 1965 3 All E.R. 28.

Scott v. Cawsey (1907-8) 5 C.L.R. 155.

Benmax v. Austin Motors Co. Ltd [1955] A.C. 370; [1955] 1 All E.R. 326.

- Rishman v. Thierry* 14 R.P.C. 105.
- A *Mersey Steel v. Iron Co. v. Naylor Benzon & Co.* (1884) 9 App. Cas. 434.
Ross Smyth & Co. Ltd. v. Bailey Sons & Co. Ltd. [1940] 3 All E.R. 60.
Suisse Atlantique Societe d'Armement Maritime S. A. v. N. V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361; [1966] 2 All E.R. 61.
Proudman v. Dayman (1941) 67 C.L.R. 536.
- B Appeal by the Director of Public Prosecutions against the acquittal of all eight respondents by the Magistrates' Court of wilfully breaking their contracts of service.
Professor Veeramantri for the appellant.
K. C. Ramrakha for the respondents.
- KERMODE J.: [12th August]
- C This is an appeal by the Director of Public Prosecutions against the acquittal of all eight respondents by the Magistrates Court, Suva, on the 14th February 1977.
 The eight respondents were charged with the offence of Wilfully Breaking Contract of Service contrary to section 14(1)(a) of the Trade Disputes Act No. 7 of 1973. The particulars of the offences were as follows:
- D *Particulars of Offence*
 "GYANENDRA NAVEEN PRAKASH SINGH, SATYA PRAKASH NARAYAN, MICHAEL PREM MASIH, RAJENDRA SINGH, TUTUE DAVETA, MICHAEL URAKMATA RAFOI, SAHJAD ALI and ILIESA SAMULALA in combination with other members of the Air Pacific Employees Association between the 29th day of October 1976 and the 3rd day of November 1976 at Suva and Nausori being in the employment of Air Pacific Limited did wilfully break their contract of service knowing or having reason to believe that the probable consequence of their so doing would deprive the public to a great extent of an essential service, to wit, air transport services."
- E
- F There are two main grounds of appeal. Firstly that the verdict is unreasonable and cannot be supported on the evidence in the case and, secondly, that the learned magistrate in his judgment misdirected himself in a number of respects. The allegations of misdirection in the grounds of appeal refer to 31 instances of misdirection grouped under three headings, namely, **Collective Agreement** (Exhibit 6) (10 instances) **Breach of Contract** (16 instances) and **Wilful** (5 instances).
- G This appeal is a test case and I have been requested by counsel for the appellant Professor Veeramantri to fully consider all arguments raised before me. While I am of the view that, on the facts of the case, the appeal could be decided in a reasonably short judgment I recognised the importance of the case and accede to the appellant's request.
- H I propose to first refer to the facts which led up to the alleged offence and then to refer to the learned magistrate judgment. Finally I will set out the grounds of appeal and consider the arguments raised by counsel for the appellant and the respondents. In referring to the respondents individually I will adopt the learned magistrate's method of identifying them by referring to them at A1 to A8.

On the 29th October 1976, the Association (which I shall hereafter refer to as the Union in conformity with the description used by the trial magistrate) imposed a ban on union members handling Qantas reservations (hereinafter referred to as the Qantas Ban). Air Pacific Limited (which I will hereinafter refer to as the Company) had a contract with Qantas and was contractually bound to handle their reservations. The Qantas Ban was a directive from the Fiji Trades Union Congress (F.T.U.C.). The F.T.U.C. had directed that if a Qantas Union official was put in prison the Qantas Ban was to be implemented forthwith. Two Qantas Union officials were jailed on the 29th October 1976 because they had failed to sign bail recognizances. A1 was prominent in taking action to implement the ban and this was done without any prior warning or advice to the Company.

On the 29th October 1976 the Company and the Union had a routine meeting. At a late stage during this meeting the Company's Industrial Relations Manager raised the matter of the Qantas Ban and inquired whether a ban had been imposed and was informed by A1 that it had been.

The trial magistrate found as a fact that the ban was imposed by the Union without any prior notice to the Company. He was of the view, that the Union's action was a high handed and unreasonable one. There was in existence at the time a collective agreement between the Company and the Union which incorporated the principles of communication and consultation set out in the Industrial Relations Code of Practice (Exhibit 12). The Union's action was clearly in breach of those principles.

The Qantas Ban was not discussed at the meeting on 29th October 1976. According to the evidence of the Company's Industrial Relations Manager he requested A1 to lift the ban but A1 refused to commit himself and the meeting was abandoned. A break down in communication then occurred between the Company and the Union.

It is not necessary to fully consider this break down. Suffice it is to say that the trial magistrate held that the Union was responsible.

The Company's Personnel Manager on the 29th October 1976, wrote to the Permanent Secretary for Labour seeking to register a trade dispute in terms of the Trade Disputes Act. An answer to this letter, although dated 2nd November 1976, was not received by the Company until the 12th November 1976. The Permanent Secretary for Labour stated in his letter that the ban was not a trade dispute in terms of the Trade Disputes Act. While the Company's letter did not fully specify the matters required by section 3(2) of the Act to be specified in the report, there is no doubt in my mind that a trade dispute existed or was apprehended. The refusal by employees to handle Qantas reservations was certainly a dispute or difference between the Company and certain of its employees connected with employment within the definition of "trade dispute" in section 2 of the Act.

On the 30th October 1976, a Saturday, the Company sought a meeting with A1 and his executive but was unable to arrange a meeting. It is clear A1 did not desire a meeting.

On the same day the Company had a staff notice (Exhibit 8) placed on its notice boards relating to the Qantas Ban reminding employees that the Company had a contract with Qantas and warning employees that if they failed to carry out their

- A normal assigned duties they would be in breach of their contract of service and would leave themselves open to disciplinary action.

Nothing significant happened on Sunday the 31st October 1976.

- B On the 1st November 1976 the Company wrote again to the Permanent Secretary for Labour complaining about the Union's action. (Exhibit 10). The letter alleged the Union had acted in breach of clause 37 of the Collective Agreement. This clause provides that the Company and the Union would act in accordance with the provisions of the Industrial Relations Code dated June 1973.

In this letter the Company also alleged the Union by its action, in regard to the imposition of the ban, had effectively prevented the employees from satisfactorily fulfilling their contracts of service and consequently rendered the recognition clause in the Collective Agreement null and void. The Company stated that it sought withdrawal of recognition of the Union.

- C Also on the 1st November 1976, a meeting was held between the Company and the Union. The Union voiced its objection to the staff notice (exhibit 8) which they considered a threat to members, and demanded the notice be withdrawn and that the Company apologise. At the meeting the Union was given a copy of exhibit 10 and a letter addressed to the Union of the same date (exhibit 11) which warned the Union that if the ban was not lifted by 1,200 hours that day the Company would be forced to seek de-recognition of the Union. The Company refused to withdraw the staff notice or to apologise to the Union for having written it. The Qantas Ban was not lifted by the Union and the Union refused to discuss the ban until the notice was withdrawn.

- E On the 2nd November 1976 certain members of the Union in the reservation department of the Company continued the Qantas Ban. The Company interviewed several employees who were Union members and who were actually implementing the ban and quite properly suspended them.

The trial magistrate found as a fact that the seven members who were interviewed had requested a Union representative to be present at the interviews in alleged accordance with clause 30 of the Collective Agreement. Exhibit 6.

- F A1 had approached the Company that day with regard to the interviews and despite his representations the Company refused Union representation at the interviews. The Company contended that clause 30 did not permit Union representation at that stage.

As a result of the suspensions employees began leaving their work. The trial magistrate found as a fact that the walkout by employees was in protest at the suspensions of the seven employees. I should mention at this stage, as it is a relevant fact, that none of the eight respondents were suspended.

- G The magistrate found on the evidence that it was not possible to conclude beyond all reasonable doubt that all eight respondents were involved in the walkout on the 2nd November 1976. He was, however, satisfied beyond all reasonable doubt that on the following day each and every respondent took part in a stop work protest and did not return to work after the meeting.

- H Some 217 employees were not at work on the 3rd November 1976. The trial magistrate found that the absence of all these 217 employees was the result of industrial action.

The work stoppage resulted in disruption to the Company's activities.

The foregoing recital of facts does not purport to cover all the happenings between the 29th October 1976 and the 3rd November 1976. It does however cover the main facts. A

I now refer to the trial magistrate's judgment.

The trial magistrate found as a fact that the Company is an air transport business. Section 2 of the Trade Disputes Act defines "essential service" as "any service by whomsoever rendered and whether rendered to the Government or to any other person, which is specified in the schedule to the Act". The schedule refers to Air Transport. There can be no doubt that the Company which operates an air transport business is operating an essential service as defined by the Act. B

In considering the contracts of service of the respondents the trial magistrate referred to the Collective Agreement between the Company and the Union (Exhibit 6) dated 17th September 1976. He referred to the fact that there was a dispute as to whether there was any other contract of service and stated: "I do not think it is necessary for me to decide whether exhibit 6 is in itself a contract of employment or merely part of a further contract." C

Section 14 of the Act is concerned with the employees' contracts of service and it was essential that the trial magistrate should have determined what constituted the contract of service in respect of each of the respondents. While "contract of service" is not specifically defined in the Act the definition of "employee" in section 2 of the Act where the term "contract of service" is referred to indicates what is meant by the term. A contract of service is a contract entered into between an employer and employee for manual labour clerical work or otherwise entered into orally or in writing. D

The trial magistrate referred to section 33(7) of the Act which refers to a collective agreement and which reads: E

"The provisions of any such agreement shall be an implied condition of contract between every employee and employer to whom the agreement relates."

Then follows the following statement in judgment: F

"Thus it is clear that whether Exhibit 6 is the whole contract of service or only part of it, any breach of exhibit 6 would be a breach of a condition in the contract of service".

As I will be considering the issue as to what constituted the contract of service and the alleged breach of such contract in some detail later in this judgment I make no comment at this stage, on the trial magistrate's observations and findings as regards the contract of service. G

The magistrate then reviewed the events leading up to the walk out by 217 employees of the Company. I have already related the main facts and there is no need to refer to them again.

In the course of considering the events of the 2nd November 1976 the trial magistrate considered clause 30 of the collective agreement. It is to be noted that in setting out clause 30(a) the magistrate omitted any reference to the last two paragraphs of subsection (a). H

The paragraphs omitted were:

- A** "Nothing in this article shall prevent the Company from standing down an employee pending the outcome of such inquiry.

Should the enquiry find that the action of standing down was not justified, the employees shall be paid for rostered time lost during the period of stand down."

- B** It would appear that in omitting these paragraphs the magistrate considered they were not important. That they were of importance is clear from the evidence. The Company considered that an interview which led to suspension of an employee did not entitle that employee to have Union representation at that interview but that on the holding of an enquiry the employee could be so represented. The trial magistrate did not agree with the Company's interpretation which was also the interpretation urged by counsel for the prosecution.

- C** The exclusion of Union representatives from the interviews with the seven suspended members was stated by trial magistrate to be "vital to the decision in this case". He held that the interviewing of Union members without Union representation was not as a result of the Company's interpretation of clause 30 but in direct pursuance of its policy to exclude the Union. From this finding and the two letters exhibits 10 and 11 stemmed his findings that the Company had repudiated the contract, was also in breach of a fundamental term of the contract and the acquittal of the respondents. I will deal with these matters in more detail later in this judgment.

- E** The magistrate then considered the evidence against each respondent and as I have already stated he found as a fact and beyond reasonable doubt that each and every one of the respondents took part in a stop work protest on the 3rd November 1976 and did not return to work after the meeting.

The trial magistrate then considered the elements of the offences.

- F** He found as a fact that each of the respondents was employed by the Company on the 2nd and 3rd November 1976. He also found as a fact that each respondent was employed under a contract of service represented in the main by the collective agreement, exhibit 6.

He held also that the Company was an essential service.

- G** The Magistrate also considered the issue as to whether the respondents had reason to believe that the probable consequences of their actions on the 2nd and 3rd November 1976 would fulfill the requirements of section 14(1)(a) of the Act. He found as a fact that they were so aware that is each of them had reasonable cause to believe that their actions in ceasing work either alone or in combination with others would deprive the public or any section of the public wholly or to a great extent of an essential service or substantially to diminish the enjoyment of that service by the public or by any section of the public.

- H** There was ample evidence to indicate that serious disruption of transport of passengers, freight and mail did in fact follow the mass walk out of employees but such evidence is only of relevance as evidence of what was probable as a result of the respondents' alleged actions.

The reminder of the judgment deals with two major elements of the offence, namely, whether the respondents as a result of their walk out were in breach of their contracts of service and whether such breach was wilful. A

The trial magistrate was of the opinion that the de-recognition of the Union was a de facto if not a *de jure* state of affairs and that the de-recognition was a breach by the Company of clause 5 of the Collective Agreement and that the non-compliance by the Company with clause 30 thereof was also a breach of that agreement. B

These findings led the magistrate to consider what he held was a repudiation by the Company of the contract and whether there was a breach by the Company of a fundamental term of the contract. He held that the refusal by the Company to deal with the Union was a repudiation of the contract in toto but qualified this finding by stating that if the breach of clause 5 of the Collective Agreement was not wrongful it was certainly a breach of the contract as was the breach of clause 30. He held that the breaches were breaches of fundamental terms of the contract. C

After quoting the legal position that a party not in breach may either affirm the contract by treating it as still in force or on the other hand treating it as finally and conclusively discharged the trial magistrate found on the facts that the respondents had elected the latter course that is to say that their contracts were finally and conclusively discharged. He held they were entitled to consider their contracts had been discharged and that being so they could not be said to be in breach of their contracts of service as required by section 14(1) of the Act when they ceased work on 3rd November 1976. D

The learned magistrate then stated that if he was wrong in his view that there was no breach of contract by any of the respondents that did not affect the outcome of the case.

He considered the question to mens rea and whether there had been a wilful breach of the contract of service by the respondents. He held that the respondents believed and had reason to believe that the Company had repudiated the contract or been guilty of a fundamental breach of contract and the respondents' breach of contract was not wilful as required by section 14(1) of the Act. E

He acquitted all respondents.

The appellant has appealed on the two main grounds stated at the beginning of this judgment. F

It is unusual to have grounds of appeal which allege as many as 31 instances of misdirection by a trial magistrate in his judgment. The presentation of the argument by Professor Veeramantri for the appellant while fully and very ably covering the law and the facts was not related specifically to the 31 allegations of misdirection by the trial magistrate, in the order they appear in the grounds of appeal. This has presented me with some problems as to how best to consider the arguments raised and deal with them in this judgment. G

I propose first to consider the Trade Disputes Act in some detail and then consider the argument by counsel for the appellant in the compartment suggested by him in the course of which many of the allegations of misdirection will be considered but not necessarily in the order they are set out in the grounds of appeal. At the same time I will consider the arguments raised by counsel for the respondents. H

A The preamble to the Trade Disputes Act states it is an Act to make provision for the settlement of trade disputes and the regulation of industrial relations. Part IV of the Act deals with protection of essential services, life and property.

"Essential services" is defined in section 2 of the Act and refers to services specified in the schedule to the Act. Air Transport is one of the services listed.

B Before dealing with Part IV of the Act I would refer to Part II and in particular clause 3 of the Act although it is not relevant to this appeal.

Professor Veeramantri in referring to section 3(1) of the Act queried whether the word "may" used in the section had the force of "shall". That is, that the word "may" in the expression "any trade dispute may be reported" in a penal statute which directs the doing of a thing for the sake of the public good is the same as the word "shall".

C In my view "may" is a permissive or enabling expression as used in section 3(1). Section 16(1) on the other hand which also refers to the report in section 3 uses the mandatory term "shall". My view that "may" is a permissive or enabling expression is re-inforced by section 7 of the Act which enables the Permanent Secretary, whether the trade dispute has been reported to him or not, to enquire into the causes and circumstances of such trade dispute. The machinery is there to deal with disputes if they are not reported.

D Talbot J. in *Sheffield Corporation v. Luxford*, *Sheffield Corporation v. Morell* (1929) 2 K.B. 180 D.C. at pp. 183, 184 stated:

E " 'May' always means may. 'May' is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the powers it becomes his duty to exercise it. One of those cases is where he is applied to use the powers which the Act gives him in order to exercise the legal right of the applicant."

Section 3 of the Act is not one of the enactments which calls for the exercise of a power by a person in authority.

F "May" in section 3(1) is as I have stated used in permissive or enabling sense. Had it been used in a mandatory sense the legislature would have provided a sanction for failure to report a trade dispute. It is only under section 16 of the Act dealing with a trade dispute in an essential service that a report under section 3(1) is made mandatory.

The respondents were charged with an offence under section 14(1) (a) of the Act and it is necessary to consider this section in some detail.

G Section 14(1) of the Act is modelled on sections 4 and 5 of the Conspiracy and Protection of Property Act 1875 (Imp.). Section 3 of that Act legalised strikes subject to exceptions contained in sections 4 and 5. Section 4 has now been replaced by the Industrial Relations Act 1971, Ss. 133, 169 and schedule 9.

Both sections 4 and 5 refer to a person acting "wilfully and maliciously". Our section 14 omits the word "maliciously".

H The learned Author of *Citrines Trade Union Law* 3rd Edition at page 525 when discussing the English Act expressed the view that the word "maliciously" was redundant. He states: "Moreover, malice will be presumed from knowledge, for an

adult person is presumed to intend all the consequences which are likely to flow directly from his intentional conduct. In this section the condition of mind required to constitute the crime is expressly provided for in the words "knowing or having reasonable idea to believe" etc. This is, in effect, the quality of malice required, and the word "maliciously" is therefore redundant." A

To constitute the offence under section 14(1) of our Act a person must first "wilfully break his contract of service". The expression "wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence but so that the mind of the person who does the act goes with it. Per Avory J. in *R. v. Walter* (1934) 24 Cr. App. Rep. 117 at page 122. B

The words "breaks his contract of service" in section 14(1) relates to a breach of the contract of service and includes any such breach. It is however only such a breach which has the consequences referred to in (a) and (b) of section 14(1) which is caught by the section. In the instant case it is the wilful cessation of work by each of the respondents which is said to constitute the breach of contract of service. Such a breach by an individual may or may not have the probable consequences the section refers to depending on the position such individual holds but in combination with the others (in this case 216 other employees of the Company) the probable consequences could arise. C

"Contract of service" is not defined in the Act but as I have already mentioned the definition of "employee" in section 2 of the Act makes it clear what the term means. It is a contract entered into by an employee with his employer whether the contract is for manual labour, clerical work or otherwise and whether entered into orally or in writing. D

It is convenient at this stage to digress and consider what constituted the respondents' contracts of service. E

The learned trial magistrate expressed difficulty in determining what constituted the contract of service of each of the respondents.

There was ample evidence to establish that each of the respondents were employed by the Company at the relevant time and the trial magistrate found as a fact that they were so employed on the 2nd and 3rd November 1976. In considering the contracts of service the trial magistrate referred to the collective agreement between the Company and the Union (exhibit 6). He stated there was a dispute as to whether any other contract of service existed that is other than the collective agreement. F

There was put in evidence an application by A1 for employment with the Company (exhibit 20). This application contains a statement by the applicant that he agreed (*inter alia*) that if his application was accepted the terms and conditions would be in accordance with the appropriate industrial awards, or agreement (the collective agreement) and the Company's regulations as issued from time to time applicable to the applicant. The form of application also contains the approval of the appointment signed on behalf of the Company. G

In so far as A1 was concerned the completed form of application which contained the offer of employment and acceptance was his written contract of service. So far as the other respondents were concerned there was no documentary H

A evidence of contracts of service and it is immaterial whether they signed application forms or not. A contract of service in respect of each of the other seven respondents could be either in writing or an oral contract, and on the evidence were oral contracts.

The trial magistrate stated in his judgment "I do not think it is necessary for me to decide whether exhibit 6 is in itself a contract of employment or merely part of a further contract."

B He referred to the definition of "collective agreement" in section 2 of the Act and to section 33(7) which I have already quoted.

He then stated:

C "Thus it is clear that whether Exhibit 6 is the whole contract of service or only part of it, any breach of a clause of exhibit 6 would be a breach of a condition in the contract of service."

These extracts from the judgment indicate that the trial magistrate did not fully appreciate what constituted the contract of service. A perusal of the judgment indicates that the magistrate considered the collective agreement was the contract of service and this was evident when he came to consider the questions of repudiation and fundamental breach of contract.

D In the instant case so far as A1 was concerned his contract of service referred to in section 14 of the Act was a written one evidenced by the completed application form. That contract embodied the terms of the collective agreement not only specifically but also as conditions implied by virtue of section 33(7) of the Act. So far as the other respondents are concerned no written contracts were introduced in evidence. It is probable they did make written applications but on the evidence E their contracts were oral ones also embodying the conditions implied by virtue of section 33(7) of the Act.

F The collective agreement was not the contract of service and the definition of "employee" in the Act and indeed section 33(7) makes it clear that the contract of service is a separate contract, entered into between an employee and the Company whether in writing or orally. Exhibit 6 is an agreement entered into between the Company and the Union.

In my view the trial magistrate's statement that any breach of a cause in exhibit 6 would be a breach of a condition in the contract of service does not correctly express the legal position.

G The definition of "collective agreement" in section 2 of the Act indicates there can be three forms of agreement, one prescribing the terms and conditions of employment of employees of one or more descriptions, a procedure agreement, or a combination of both.

H Section 33(1) of the Act provides for collective agreements to be registered and subsection (7) provides that the provisions of any such agreement shall be an implied condition of employment between every employee and employer to whom the agreement applies.

Section 33(7) cannot in my view be applied literally. It is only, in my view, those terms of the collective agreement which are appropriate and have direct reference

to an employee's contract of service which should be considered as being implied operative terms when considering that contract of service. A

K. W. Wedderburn in *The Worker and The Law* 2nd Edition at page 193 in discussing the enforceability of collective agreements states:

"Two other problems add to the area of uncertainty. First not every collective term is appropriate for incorporation into the individual contract of employment. Some of them will only be a code agreement between collective parties other clauses could be incorporated only with some semantic juggling: e.g. 'No female shall be allowed to use nails longer than 1¾ inches'. 'Secretaries of Line Committees shall be allowed free rail travel' With minimum ingenuity this could be expressed as an implied term of the individual contract of employment of each secretary if the lawyers so desired The judges have on occasion suggested they will not extend the area over which terms are deemed appropriate for incorporation into the individual employment contract so as to affect the rights and duties of an employee." B C

The author of *Chitty on Contracts Specific Contracts* 23rd Edition at page 340 states:

"In most collective agreements there will be many terms not directly applicable to the individual employee e.g. matters between the unions and the employers, and these are not appropriate to be incorporated by implication into individual contracts." D

In exhibit 6 there are a number of provisions which are clearly agreements solely between the Company and the Union. For example clause 35 makes it obligatory for the Company to provide a notice board for the Union. Would a breach of this clause by the Company entitle an employee who was a Union member to allege there had been a breach of this contract of service? In my view it would not. E

Again with reference to clause 30 of the Collective Agreement which features prominently in this case would an alleged breach by the Company in relation to an employee entitle another employee to contend there had been a breach of his contract of service, a fundamental breach which put an end to his contract of service? The answer to this query is given later in this judgment as it is very much an issue in the instant case. F

As regards clause 5, of the Collective Agreement, the recognition clause, K. W. Wedderburn in *The Worker and the Law* 1st Edition at page 127 queried whether recognition of a trade union's "functions" could become an implied term of the relevant workers' contracts in the same manner as wage rates. He states in a note: G

"A similar claim by the National Union of Vehicle Builders failed early in 1965. It complained of dismissals and failure to consult union officials by an employer: but the Industrial Court refused to regard the collectively agreed clauses on union recognition as appropriately included within the terms of employment." H

In my view in section 33(7) of the Act the words "the provisions of such agreement" must be construed as relating to the terms and conditions of

- A employment which regulate the employment of an employee referred to in section 33(1) of the Act and be related to that employee's contract of service.

My view that all the terms of a collective agreement notwithstanding section 33(7) of the Act cannot be applied to an individual employee's contract of service is supported by the case of *Camden Exhibition and Display Ltd. v. Lynott* (1966) 1 Q. B. 555.

- B Under the Contracts of Employment Act 1963 (Imp.) an employer must give an employee written particulars of employment. Lord Denning M. R. at page 563 stated:

C "It seems to me that, since the Contracts of Employment Act, 1963 these working rules are incorporated into the terms of employment of all men in the industry. A notice was issued under that Act saying to every man "Your rate of wages, hours of work, holidays and holiday pay, are in accordance with the provisions of the constitution and working rule agreement issued by and under the authority of the National Joint Council." "

"In view of that notice these working rules are not only a collective agreement between the Union and the employers. They are incorporated into the contract of employment of each man *in so far as they are applicable to his position.*" (The underlining of the last few words is mine.)

- D I now return to consideration of the Act.

E Section 14(1) of the Act states the mens rea of the offence. There must be a wilful breach of the contract of service knowing or having reasonable cause to believe that the probable consequences of such breach are those stated in subparagraphs (a) and (b). The breach must be deliberate and intentional. Mere negligence and accident does not suffice. The necessary mens rea will be presumed from the actual or imputed knowledge of the person breaking his contract as to the probable consequences of his conduct.

It is not necessary for the prosecution to prove that harmful consequences were intended as a result of the breach of contract provided the conduct constituting the breach was itself intended.

- F The learned author of *Citrines Trade Union Law* 3rd Edition at page 526 states:

"It is sufficient to show that such consequences were probable and that, at the time of the breach the accused knew or had reasonable cause to believe that they would result from his conduct. The onus of proof on the prosecution will be discharged by showing that circumstances of which the accused knew, or must have known were such as would have led any reasonable man to believe that such consequences would probably ensue."

- G The learned author goes on to discuss the term "that the probable consequences" and says, "It should be noted that the actual consequences are not material, except in so far as they are evidence of what was probable. It is therefore not sufficient to prove that the actual consequences were to deprive the public of their supply (in the instant case an essential service) if such consequences were improbable in the circumstances."

- H Section 4 of The English Act did not make the lawful termination of the contract by proper notice a criminal offence even though this was done in combination with others and resulted in the deprivation of the public of a service.

On my interpretation of the Trade Disputes Act I consider that the Act so far as essential services is concerned intended that there should be no cessation of work whether in breach of contract or by notice if that resulted in the consequences section 14 seeks to avoid. An individual if not in a key position can lawfully terminate his employment by proper notice but if he acts in concert with others so that the concerted action has all the elements of a strike and the probable consequences referred to in section 14 could flow from such action section 16 of the Act must be complied with. Having complied with section 16 and the notice of strike is accepted by the Secretary of Labour 28 days thereafter the employees can cease work and no offence is committed.

To give full effect to the intention of the legislature to protect essential services life and property I would interpret "breaks his contract of service" in relation to employment as including a termination of the contract by an employee whether with or without normal notice. The Shorter Oxford English Dictionary defines "break" as "to do violence to, fail to keep sacred or intact". A person can break his contract by committing a breach of one of its terms or by terminating it. The breaking of a contract can be either justified or unjustified.

As regards the collective agreement section 33(8) of the Act specifically provides that the agreement shall remain in force until the date on which the parties have agreed it shall cease to have effect. It is not open for one of the parties to unilaterally terminate the agreement whether he has proper grounds for doing so or not. So it is in my view with Part IV of the Act. The usual contractual rights of parties where there is a dispute which leads to a strike are for the public well being delayed until the mandatory procedure designed to settle the strike are complied with and for 28 days after the Permanent Secretary has accepted the report.

In adopting the interpretation which I have of "breaks his contract of service" in section 14(1) I have not overlooked the principles of interpretation as regards a penal statute.

Isaacs J. In *Scott v. Cawsey* C.L.R. Vol. 5 1907-8 at page 155 quoted a passage from Sedgwick on *Statutory and Constitutional Law*.

"But the rule that Statutes of this class are to be considered strictly, if far from being a rigid and unrelenting one; or rather, it has in modern times been so modified and explained away, as to mean little more than penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the Enactment; the courts on the one hand refusing to extend the punishment to cases which are not clearly embraced in them and on the other, equally refusing by mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope."

If therefore employees were to combine to terminate their contracts albeit with normal proper notice as a result of industrial action with the probable consequences envisaged by section 14(1) of the Act that would in my view be a breaking of a contract of service within the meaning of the term in the section. Such a state of affairs is unlikely to arise in practice but it conceivably could in an essential service with highly trained specialists or where labour was in short supply and an employer had no option but to re-employ persons who had given notice to terminate their contracts and did terminate their contracts.

I proceed now to consider the grounds of appeal. They are as follows:

A "A. The verdict is unreasonable and cannot be supported on the evidence in the case.

B. The learned magistrate misdirected himself:

Collective Agreement—Exhibit 6

B (a) In proceeding on the basis that the Collective Agreement, Exhibit 6, constituted a contract between the Air Pacific Employees Association and their employer, Air Pacific.

(b) In treating the Collective Agreement as a definitive contract between the accused and the employer.

C (c) In proceeding on the basis that a breach of a clause in the Collective Agreement by the employer was a breach of a condition in the contracts of service with the accused.

(d) In concluding that the alleged breach of the Collective Agreement by the employer of clause 5 and clause 30 of the said Agreement—to the detriment of the persons other than the accused—enabled the accused to claim that their contracts of service were thereby terminated.

D (e) In failing to have regard to the mandatory wording of clause 4 of the Collective Agreement.

(f) In overlooking the provisions in the Collective Agreement which set out the procedure for the resolution of trade disputes.

E (g) In failing to consider the purported de-recognition of the Union by the employer as a "dispute" requiring resolution by the procedure laid down in the Collective Agreement and the Trade Disputes Act.

(h) In failing to give effect to the fact that clause 5 of the Collective Agreement was initially contravened by the Union.

F (i) In failing to give effect to the fact that the imposition of the ban by the Union in contravention of clause 5 of the Collective Agreement and the consequent repudiation by the employer of the same clause, severed the said clause from the remainder of the Collective Agreement which continued to be in operation.

(j) In inferring that the accused had repudiated their contracts of service because they believed the employer was in breach of clause 5 and clause 30 of the Collective Agreement.

G

Breach of Contract

(k) In holding that the accused did not break their contracts of service in terms of section 14(1) of the Trade Disputes Act 1973.

H (l) In failing to give effect to the fact that the accused could break their contracts of service despite a prior breach of contract by management and thereby concluding that the employers were in breach of their contracts of service with the accused.

- (m) In applying civil contractual concepts to legislation aimed at the uninterrupted maintenance of essential services to the public. A
- (n) In failing to interpret the statute viz the Trade Disputes Act in accordance with the principles of Interpretation of Statutes enacted in the public interest.
- (o) In determining the issues in the case on the basis of the concept of "fault" in contract without paying due regard to the phraseology of the section. B
- (p) In failing to consider the impact of the Trade Disputes Act on the common law principles pertaining to breach and termination of contract.
- (q) In resolving the issues in the case on the basis of the doctrine of fundamental breach, which doctrine did not warrant the importance given to it by the learned magistrate in construing section 14 of the Trade Disputes Act. C
- (r) In applying the doctrine of fundamental breach when it formed no part of the defence case.
- (s) In applying the doctrine of fundamental breach when the alleged breach by the employer did not justify termination by the accused of their contracts of service. D
- (t) In concluding that Air Pacific, the employer was in breach of the contracts of service with the accused.
- (u) In concluding that the accused contracts of service stood determined by the alleged breach by their employer.
- (v) In concluding that the accused could not break their contract of service because of the alleged prior breach by the employer. E
- (w) In concluding that the prosecutions assertion that the withdrawal of labour by the accused on the 2nd and 3rd of November was an unlawful breaking of their contracts as an acceptance by the prosecution that events prior to those dates could not be relevant to the determination of the accused's action. F
- (x) In failing to give effect to the admissions of the 1st and 4th accused that they did not terminate their employment but resolved to return to work.
- (y) In not taking into consideration the evidence to the effect that the accused continued to conduct themselves as employees under their contracts of service. G
- (z) In failing to conclude that the accused broke their contracts of service by their withdrawal of labour since they had elected to affirm the contracts notwithstanding the employers prior conduct.

Wilful

H

- (aa) In attributing mens rea to the word "wilful" and ignoring the mens rea created by the words "knew or had reasonable cause to believe".

- A (bb) By failing to draw the proper inference from his finding that the accused had acted with the knowledge that the probable consequences of their conduct would be to deprive the public of an essential service.
- (cc) In confusing the issue of mens rea by equating the accused's belief in the ethical correctness of their industrial action with the legal concept of the bona fide claim of right.
- B (dd) By concluding that the prosecution had failed to establish that the accused acted wilfully when none of the accused suggested directly or indirectly that they honestly believed that they had a right to terminate their employment or stop work.
- (ee) By failing to draw proper inference from the admissions of the accused and the evidence for the prosecution which can only lead to the inference that the accused acted wilfully."
- C

The appellant's alleged misdirections by the magistrate cover both facts and law and since I also find myself in the position of disagreeing with some of the magistrate's findings of fact I will first state the position of an appellate court which finds itself in a position where it does not agree with the trial magistrate's findings of fact.

- D An appellate court does not lightly disturb a finding of fact found by a court below.

In *Benmax v. Austin Motors Co. Ltd* [1955] A.C. 370 the House of Lords pointed out that it is necessary to distinguish between the findings of a specific fact and the finding of fact which is really an inference from facts specifically found.

- E Lord Reid at page 376 said:

"In cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge and ought not to shrink from the task though it ought, of course to give weight to his opinion."

- F In *Rishman v. Thierry* 14 R.P.C. 105 Lord Halsbury said:

"Upon an appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the Court from which the appeal proceeds....."

- G I will deal with the magistrate's judgment under the headings of the misdirections alleged by the appellant in the grounds of appeal.

Collective Agreement Exhibit 6

- H The appellant alleges 10 instances of misdirection relating to the collective agreement. The trial magistrate did not finally decide what constituted the contract of service of the respondents but his judgment indicates that exhibit 6 was very much in his mind at all times. The magistrate did have doubts as to whether exhibit 6 was in itself a contract of employment of merely part of a further contract but he did not resolve those doubts.

I have already pointed out that exhibit 6 was not the contract of service. The magistrate did not finally decide this issue although he found as a fact that each respondent was employed by the Company under a contract of service. It cannot strictly be said therefore that he misdirected himself in holding that exhibit 6 was a contract between the Company and the respondents. He left the issue unresolved. By implication it formed the bulk of the contract. This disposes of grounds (a) and (b) under this head.

As to ground (c) there was some basis for magistrate holding that a breach of a clause in exhibit 6 was a breach of a condition in the contracts of service with the respondents. This is because clause 33(7) of the Act incorporates the terms of exhibit 6 as conditions in the contract of employment, but as I have pointed out a breach of exhibit 6 may not necessarily be a breach of the contract of service. I will enlarge on this later when dealing with the issue of breach of contracts. As framed ground (c) under this head in general terms does not indicate any misdirection by the magistrate.

Ground (d) however is of some substance. Whether there were breaches of clauses 5 and 30 of exhibit 6 is an issue I have to deal with later in this judgment under the heading of "Breach of Contract" as is the issue whether a breach to the detriment of employees other than the respondents was a breach of their contracts of service.

As to ground (e) it is not clear what the appellant complains about. Certainly section 33(8) of the Act makes unilateral repudiation of exhibit 6 impossible but it does not follow that the contract of service could not be lawfully repudiated. It was not necessary in my view for the magistrate to consider clause 4 of exhibit 6.

Grounds (f) and (g) can be considered together. There was certainly a trade dispute but the dispute referred to was a dispute involving the Company, the Union and employees other than the respondents. In my view it had nothing to do with the respondents' contracts of service. It was not necessary in my view for the magistrate to consider the procedure provided for settlement of that dispute.

As regards ground (h) it was not relevant in my view that the Union may have acted in breach of clause 5 of exhibit 6. Such an alleged breach would not entitle the Company to repudiate the respondent's contract of service and the magistrate did not have to consider the Union's alleged breach.

As to ground (i) in view of clause 33(8) of the Act I do not consider that the alleged repudiation of clause 5 of exhibit 6 by the Company severed the clause from the remainder of exhibit 6 and there was no misdirection by the magistrate in not considering this matter.

Ground (j) is another ground of substance which I will deal with later in this judgment.

Breach of Contract

Under this head the appellant alleges there were 16 misdirections by the magistrate. Many of them overlap. They contain the main issues in this appeal. It is difficult under this heading to deal with the grounds of appeal seriatim as much of what I say as regards one ground applies equally to another ground. I will therefore deal with the issues as they arise.

A The magistrate found as a fact that there had been a de-recognition of the Union by the Company. He stated in his judgment:

"The de-recognition of the Union, as I am now satisfied existed, was not only a breach of clause 5 of exhibit 6 by the Company but was also unlawful in terms of Act 7 of 1973.

B The interviewing of employees and subsequent suspension thereof without compliance with section 30 of exhibit 6 is also a breach of that clause of the contract."

Later in his judgment the magistrate said:

C "To my mind the de-recognition of the union, or to put it another way, the refusal to deal with the other contracting party to exhibit 6 can amount to no other than a repudiation of exhibit 6.... That having been said I cannot but accept that to refuse to negotiate or deal with in any way, the opposite contracting party is a repudiation of the contract in toto. After all exhibit 6 is referred to as a collective agreement...."

D These extracts from the judgment clearly indicate that the magistrate was considering exhibit 6 which was an agreement between the Company and the Union and not the contracts of service of the respondents. This arose from his failure to determine what constituted the contract of service. He also found as a fact that the alleged breaches by the Company of clauses 5 and 30 were fundamental breaches of "the contract". Clearly he was here again referring to exhibit 6 as being the contract between the Company and the Union the terms of which were incorporated in the contract of service by implication. For this reasoning the magistrate went on to hold that the breaches were fundamental breaches of the contract of employment as regards the seven suspended employees and that the respondents had treated the contract (i.e. exhibit 6) as having been repudiated by the Company and they could treat the contract as discharged and did so treat it.

F The magistrate did not state as a fact that the alleged repudiation of exhibit 6 was a repudiation of the respondents' individual contracts of employment. It is apparent however that he proceeded on the assumption that exhibit 6 was also the contract of employment.

It is necessary to consider whether the facts established that there were breaches by the Company of any of the terms of exhibit 6. The alleged breaches relate to the non-recognition, clause 5 and clause 30 of exhibit 6.

P.W.3 the Permanent Secretary for Labour said in evidence.

G "I don't think Air Pacific told me they were withdrawing recognition of Air Pacific Employees Association before this walkout on 2/11/76."

H On 1st November 1976 the Company wrote to the Permanent Secretary for Labour seeking withdrawal of recognition of the Union and in a letter of the same date wrote to the Union complaining it had acted in breach of the recognition clause (clause 5) and threatening that if the Union did not lift its ban the Company would seek de-recognition of the Union. After these letters were written the Company had a meeting with the Union on 1st November 1976. A1 in his evidence testified that on 3rd November 1976 he told the members of his Union that the management of the Company wanted a meeting.

In view of the above facts it cannot be said the Company had in fact de-recognised the Union, although they had clearly indicated they had this in mind. A
The magistrate himself stated that with regard to the events between 29th October and 1st November 1976 the Company clearly believed that it was necessary to negotiate with the Union.

The magistrate goes on in his judgment to say:

"This leads me to conclude that the Company on 2nd November 1976 B
and probably on 1st November 1976 regarded de-recognition of the Union as a fait accompli."

In my view the above facts clearly show that the Company had not by 2nd November 1976 de-recognised the Union. Up to that date they were meeting with Union officials and wanted a meeting on the following day but had made it clear that they would seek de-recognition if the ban was not lifted by the Union. C

The magistrate was obviously influenced by the manner in which the Company conducted the interviews with the seven suspended employees. He stated:

"I have stated earlier that the interview of union members without union representation was in direct pursuance of a policy to exclude the union. The incident is also a clear manifestation to my mind that de-recognition of the union was, in the minds of the Company officials concerned a *de facto* if not D
a *de jure* state of affairs."

A number of Company officials gave evidence and stated their understanding of clause 30 of exhibit 6. They stated that employees were not entitled to Union representation at interviews leading to suspension.

This view expressed by several officials should have alerted the magistrate to the fact that there was a genuine belief as to the interpretation of clause 30 and the officials' actions were not evidence of a Company policy to exclude the Union. I cannot on my consideration of the facts find evidence to establish that there was in fact a de-recognition by the Company of the Union, or any policy to exclude the Union. What certain officials of the Company are alleged by the defence to have said in the heat of the moment and what the Company actually did is something quite different. Clause 30 of exhibit 6 reads as follows: E
F

"30. Disciplinary Procedure

(a) If an employee is to be interviewed in connection with an alleged irregularity which may lead to disciplinary action being taken against the employee he shall be informed by the Manager of his department or the Manager Personnel of the following: G

- (i) the purpose of the interview.
- (ii) the charge(s) of the alleged irregularity against him.
- (iii) that disciplinary action may result.
- (iv) of his right, if he wishes, to be accompanied and represented by an official of the Association.

Nothing in this article shall prevent the Company from standing down H
an employee pending the outcome of such enquiry.

- A Should the enquiry find that the action of standing down was not justified, the employee shall be paid for rostered time lost during the period of stand down.
- (b) Should it be proposed by the Company to take disciplinary action against the employee he shall be informed of the action to be taken in writing and unless the employee objects, a copy will be given to the Secretary of the Association.
- B (c) The employee who has been disciplined by the Company has the right to appeal against such disciplinary action. He shall inform the Manager Personnel in writing within five working days of the disciplinary action being imposed of his desire to appeal.
- (d) The Manager Personnel or his nominee in the presence of the employee or if so elected by the employee, a representative of the Association shall convene and hear the appeal within five working days.
- C (e) If the employee is not satisfied with the outcome of the appeal he may proceed with the matter according to the provision of Clause 31 (Grievance Procedure) of this Agreement."

D Clause 30(a) is very badly worded, and its meaning is not clear.

The magistrate in quoting clause 30 omitted two paragraphs from 30(a) which I have already quoted but quote again for easy reference:

"Nothing in this article shall prevent the Company from standing down an employee pending the outcome of such enquiry.

E Should the enquiry find that the actions of standing down was not justified, the employee shall be paid for rostered time lost during the period of stand down "

This was an important omission and I can only assume the magistrate omitted these paragraphs because he did not consider them of importance. Had he considered them he may have come to a different conclusion on the issue whether the Company was in breach of clause 30 of exhibit 6.

F The Company's interpretation and that urged by the prosecution was that clause 30 envisages two stages, an interview and an inquiry. Certainly the words "interview" and "enquiry" are both used in clause 30. Where "enquiry" is first used, however, it refers to "such inquiry" indicating that "inquiry" has been used previously in the clause.

G There is in clause 7(b) reference to a joint management and association inquiry. This clause also deals with a disciplinary matter that is dismissal of an employee. "Such enquiry" cannot refer to that inquiry which envisages a high level inquiry between management and the Union involving more than one official of the Union. "Such enquiry" can only refer to the procedure provided in clause 30 which involves the interview of an employee for disciplinary purposes.

H The clause is defective in that it does not sufficiently specify what procedure is to be followed at the interview. There is clearly a charge or accusation to be met by the employee and disciplinary action may follow and he may be represented by an

union official. The clause is silent as to whether the employee can call witnesses and as to many other matters which could have been provided to enable an employee to put his case or ensure a fair hearing. A

The interviewing of an employee under clause 30 is in my view in the nature of a disciplinary inquiry and the words "such inquiry" refers in its context to an interview in the nature of a disciplinary inquiry.

The trial magistrate was correct in his interpretation that at an interview of the nature envisaged by clause 30 an employee has the right to be represented by a union official. B

However the magistrate did not properly direct his mind to the facts in this case to determine whether the Company had conducted such an interview and this is because he did not consider the two paragraphs he omitted when quoting clause 30.

The facts indicate that seven employees were interviewed by Company management staff and were suspended. Clause 30 clearly envisages that an employee may be suspended or stood down which is the same thing and that can be done without following the procedure envisaged in clause 30. Clause 30 clearly indicates that there can be a suspension pending the outcome of the inquiry held pursuant to clause 30. C

It would be unusual if not unfair to suspend an employee without some enquiry as to whether an occasion had arisen to suspend him. This could entail a discussion with the employee in the nature of an interview. It is not however an interview of the nature envisaged by clause 30. D

P.W.5 Shiva Shankaran, the Company Industrial Relations Manager interviewed five employees directly dealing with Qantas matters. In evidence he told about the suspensions. Nowhere in his evidence or elsewhere in the record is there any evidence that the interviewing of employees was other than in regard to the ban and suspensions followed such interviews. On the evidence it is clear that none of the suspended employees were advised of any of the matters (i) to (iv) referred to in clause 30, and it is also clear that the Company envisaged a later inquiry at which the employees could be represented. E

The Company was generally correct in its view of what clause 30 meant. If the interview was confined to ascertaining what had occurred and led to a suspension this was not the interview envisaged by clause 30 which is in the nature of a disciplinary inquiry and at which inquiry any suspension could also be considered. Such disciplinary inquiry necessitated the Company complying with 30(a) (i) to (iv). In the instant case the Company did not have to accede to any request by the employees concerned to be represented by a union official. F

There was not in my view on the evidence any breach by the Company of clauses 5 and 30 of exhibit 6. If there was no breach by the Company then the respondents' actions in ceasing work was on the face of it a breach of their contracts of service. G

If, however, my interpretation of clause 30 is not correct and there was in fact a breach by the Company of exhibit 6 which was also a breach of the respondents' contracts of service a number of important issues remain to be considered. H

The learned author of *Cheshire and Fifoot's Law of Contract* 9th Edition at page

A 568 states:

"A BREACH of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in two types of case.

B Firstly, where the party in default has repudiated the contract before performance is due or before it has been fully performed.

Secondly, where the party in default has committed what in modern judicial parlance is called a fundamental breach. A breach is of this nature if, having regard to the contract as a whole, the promise that has been violated is of major as distinct from minor importance."

C The trial magistrate dealt at some length with the issues of repudiation and fundamental breach. He held as a fact that the Company had repudiated exhibit 6 and had also committed fundamental breaches of exhibit 6.

The magistrate stated:

D "To my mind the de-recognition of the Union or to put it another way his refusal to deal with the other contracting party to exhibit 6 can amount to no other than a repudiation of exhibit 6."

Later he says:

E "That having been said, I cannot but accept that to refuse to negotiate or deal with in any way, the opposite contracting party, is a repudiation of the contract in toto. After all exhibit 6 is referred to as a collective agreement"

Clearly the magistrate is here focusing his attention on exhibit 6 as being an agreement between the Company and the Union and not on the contracts of service. There is no evidence that the Company refused to deal with any of the respondents. He quoted an extract from *Mersey Steel and Iron Company v. Naylor Benzon & Company* (1884) 9 App. Cas. 434 at 438-9 which I repeat:

F "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other, you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract ... and whether the other party may accept it as a reason for non-compliance."

G Had the trial magistrate applied the law to the facts of the case and considered the contracts of service he would not have been led into error. Whatever the legal position between the Company and the Union was as regards the alleged breach of clauses 5 and 30 of exhibit 6 it was the magistrate's duty to consider the respondents' contracts of service. So far as the respondents' contracts of service were concerned there was ample evidence to indicate that the Company had not prior to the walk out

H by the respondents repudiated their contracts of employment.

Had he examined the conduct of the Company in relation to the respondents he could not have held that there was evidence of "an absolute refusal to perform the

contract" to repeat Lord Selbourne's words in the extract from the *Mersey Steel* case quoted above. At the worst the alleged breaches, if they applied in the respondents' contracts were breaches of one or two of the implied terms of their contracts. The Company did not want the respondents to cease work on the contrary they were anxious to keep their operations functioning and required their services—a clear recognition that the respondents' contracts of employment were subsisting. A

Cheshire and Fifoot at page 570 after quoting the extract from the *Mersey Steel* case states: B

"A refusal to proceed with the contract must not be regarded in isolation for it may be that the party bona fide, albeit erroneously, concluded that he was justified in staying his hand."

Then follows an extract from *Ross Smyth and Co. Ltd. v. Bailey Sons and Co. Ltd.* [1940] 3 All E.R. 60 at p. 72 which is pertinent to the instant case in relation to the Company's interpretation of clause 30. C

"A mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation. If for instance, his refusal to proceed is based upon a misconstruction of the agreement it does not represent an absolute refusal to fulfill his obligations, provided that he shows his readiness to perform the contract according to its true tenor. He has merely put its true tenor in issue." D

There was no evidence in my view on which the magistrate could have held that the Company had repudiated the respondents' contracts of service and there was in fact no repudiation.

This leads me to consider whether the alleged breaches of exhibit 6 were fundamental breaches of the contracts of service or whether they were breaches at all. E

I have already expressed my view that the terms of exhibit 6 which are implied by section 33(7) of the Act must be considered in relation to an employee's individual contract of service. The alleged breaches arose out of the Company's alleged conduct in relation to the seven suspended employees none of whom were the respondents. So far as the respondents were concerned there was no breach by the Company of their contracts. Non-recognition of the Union as regards the seven suspended employees does not mean that the Company did not recognise the Union for the purposes of the respondents contracts. Even if this was not so were the breaches fundamental breaches? The House of Lords in *Suisse Atlantique Soci'et'e d'Armement Maritime S. A. v. N. V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 pointed out that the expression "fundamental breach" merely indicated a breach of sufficient gravity to entitle the intended party to treat himself as discharged from liability. F G

Cheshire and Fifoot Law of Contracts at page 571—2 suggests there are two tests to determine whether a breach is fundamental. One is the importance that the parties would seem to have attached to the term which has been broken and the other is the seriousness of the consequences that have in fact resulted from the breach. H

- A On the facts in the instant case I would not consider the recognition clause 5 nor clause 30 of major importance when the contracts of service were entered into. Nor did breach of those terms go to the root of the respondents' contract of service. The contract could still be performed in the manner it was intended to be performed and there was no frustration of the contract consequent upon such breach.

- B The magistrate in his judgment was not consistent in his views on alleged breaches of exhibit 6. He held that the Union was in breach of exhibit 6 but such breach was not a breach as would entitle the Company to repudiate the whole collective agreement. Yet a similar breach by the Company is held by him to be a repudiation of the contract in to entitling the respondents to treat their contracts as repudiated. In relation to the respondents' contracts of service none of the respondents could contend that alleged breaches by the Company as regards the seven suspended employees contracts were breaches of their contracts. Even if the Company had repudiated exhibit 6 which they could not do legally the terms of exhibit 6 were still by law implied conditions in the respondents' contracts.

C Throughout his judgment the magistrate concentrated his attention on the collective agreement. When considering fundamental breach he stated "With fundamental. Since it acknowledges the status of all of the contracting parties it could not be otherwise."

- D The magistrate did not direct his mind to the question whether clause 5 of exhibit 6 as implied in a contract of service was a fundamental term or whether it could be applied at all. Clearly clause 5 did not affect the status of any of the respondents as regards their contracts. In the respondents' contracts of service a breach of clause 5 was of minor importance if it had application at all and it cannot be said the breach went to the whole root of the contract not merely to part of it so as to make performance of the contract impossible by the contracting parties.

E The trial magistrate correctly quoted the law as regards the effect of a fundamental breach of contract. He quoted from *Cheshire and Fifoot* 9th Edition at page 573 as follows:

- F "It must be observed that, even if one of the parties wrongfully repudiates all further liability or has been guilty of a fundamental breach, the contract will not automatically come to an end (the party not in breach) may either affirm the contract by treating it as still in force, or on the other hand he may treat it as finally and conclusively discharged."

G He found as a fact that the respondents adopted the latter course that is that their contracts were finally and conclusively discharged.

A perusal of the record indicates that the respondents did not treat their contracts as being at an end. None of the respondents stated their contracts of service had been terminated.

A1 in evidence in chief said:

- H "I never terminated my employment with Air Pacific or walked off the job."

A2 and A3 made unsworn statements and said nothing about their contracts of service.

A4 gave sworn evidence and stated:

"I had never abandoned my job at all and after we had been dismissed I was still trying to sort out union procedure."

He refers in his evidence to the fact that all eight respondents who formed the executive agreed to recommend a return to work.

A5 and A6 did not give evidence or make any statement.

A8 gave evidence on oath and claimed he had been dismissed. The magistrate considered A8's evidence and rejected it in its entirety.

A8 gave evidence on oath and claimed he had been dismissed. The Magistrate considered A8's evidence and rejected it in its entirety.

I cannot on my perusal of the evidence find any basis for the magistrate's statement that:

"They (the respondents) expressed their intention (i.e. to treat their contracts as finally and conclusively discharged) in lay terms when giving evidence but that is clearly what it amounted to."

In considering exhibit 6 the magistrate did not consider clause 31 which deals with grievance procedure. If the respondents had a grievance clause 31 provided the procedure they should have followed. Clause 31 contains a "no strike" clause which is an agreement between the Union and the Company.

Doubts have been expressed by some writers as to whether such a clause can properly be included in a contract of employment so as to take away a worker's right to strike. If clause 5 of exhibit 6 applied in a contract of service then clause 31 also applied. Grunfeld on "*Modern Trade Union Law*" page 324 says:

"Apart from these special cases of criminal prohibition of strike action, a strike will be unlawful, although due strike notice has been given, where the union or unions involved had previously negotiated away their freedom of immediate action."

Grunfeld points out also that extension of such clauses (i.e. no strike clauses) has been on a new scale over the past twenty years as part of the general trend in modern labour—management relations towards avoiding needless dislocation of production and services.

The Union and in particular A1 who went from department to department ordering workers out if they knew of such trend chose on this occasion to ignore clause 31.

Again at page 324 Grunfeld states:

"Where a no-strike clause has become incorporated in the individual contracts of employment of the employees concerned, whether by express incorporation or incorporation as a customary implied term, such employees will have lost the right to strike before exhausting the agreed arbitration procedure. Giving due strike notice will not help. Where the no-strike clause becomes part of the contracts of employment of the rank and file union members or other employees concerned, the right to strike may be said to have been, for the time being, voluntarily abandoned. A strike in breach of

- A a no-strike clause is sometimes called an "unconstitutional strike." It will therefore be seen that, whereas "unofficial strikes" are not in themselves unlawful, "unconstitutional strikes" invariably are, assuming the no-strike agreement to be incorporated in the individual contracts of employment.

- B Quite apart from section 14 of the Act each of the respondents in withdrawing their labour acted in breach of clause 31 if it applied. They and other workers were no doubt shocked when the Company dismissed them. In dismissing them the Company acted entirely within their legal rights although it is doubtful whether it was wise in the circumstances to take such extreme action. Clearly the Company was exasperated with the Union and in particular with A1 who at no time displayed any sense of responsibility as president of his Union.

- C What clause 31 does emphasise is that the intention of the parties to the agreement is that this procedure is to be followed before a strike is resorted to and that where there is an alleged breach by the Company that procedure should be followed. As with Part IV of the Trade Disputes Act the contractual rights of a party on breach are postponed until a certain procedure is followed.

- D If the respondents had a grievance relating to the terms of their contracts and clause 31 had application then they themselves were in breach of this clause when they took part in the walkout.

Wilful

The magistrate after considering the question of fundamental breach considered whether the respondents had acted wilfully. He stated:

- E "It would be upon the accused to satisfy me that their belief in the correctness of their action was both reasonable and in actual fact held by them. I am satisfied that, for the reasons I have given, this burden would be discharged had it in fact been necessary to do so."

In fact none of the respondents contended they were justified in acting as they did or were acting under ignorance or mistake whether of law or fact. Mr Ramrakha argued that they had acted under a mistake of fact and quoted section 10 of the Penal Code which reads:

- F "10. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

- G The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

It should be noted that in section 10 the mistake is one of fact and must be reasonable and that section 10 can be excluded by the express or implied provisions of the law relating to the subject.

As the question whether there had been a mistake of fact or law was argued by both counsel I will consider the issue.

- H The general defence of reasonable mistake of fact is a true defence and therefore the burden of proof is on the defence. The standard of proof is on the balance of probability.

In *Proudman v. Dayman* (1941) 67 C.L.R. 536 Dixon J. at page 541 stated:

"The burden of establishing honest and reasonable mistake is on the first place on the defendant and he must make it appear he had reasonable grounds for believing in a state of facts which if true would take his act outside the operation of the enactment and that on those grounds he did so believe."

In the instant case did any of the respondents believe that the Company had repudiated exhibit 6 or their contracts or that they believed they were entitled to act as they did? None of them said so. There was evidence that A2 and A3 had stated that they would not support the walk out because they considered it illegal. There is also mention in A1's evidence that A3 told him members had said they would not do anything illegal. Then there is the question whether the mistaken belief of the respondents was a mistake of fact or law. Their mistake if it existed was not whether the Company had repudiated their contracts but whether their belief on that score entitled them to break their contracts by withdrawal of their labour. That involved the construction of their contracts and of section 14(1) of the Act, both matters of law.

There is no affirmative defence of ignorance or mistake of law. A mistake of fact occurs when a person is mistaken as to what actually are facts. A mistake of law occurs when that person is mistaken as to the legal relevance of facts. In this instant case the respondents were mistaken if in fact they were mistaken as to their legal remedies based on a mistaken belief of a fact that the Company had repudiated their contracts—a mistake of law.

Howard in *Criminal Law* 3rd Edition in a note on page 379 refers to the fact that there has long been judicial controversy whether the word "wilfully" in the definition of a statutory offence admits a defence of mistake or ignorance of law. He quotes a number of Australian cases.

The wording of section 14(1) of the Act as I have endeavoured to show makes it clear that no such controversy can arise in the instant case. There must be a wilful breaking of the contract of service—a voluntary act with knowledge or having reasonable cause to believe that the probable consequences will be those referred to in the section. Once the actus reus and the mens rea have been established the offence has been established. A mistake of law is no defence. Defences open to the respondents would be that they had not broken their contracts e.g. they were not at work because they were ill or for some other valid reason or that the probable consequences of their acts would not be the results referred to in the Act. Some of the respondents did contend they were on Union business during the walkout and relied on clause 33(b) of exhibit 6, which with prior permission of management entitled them to attend to Union affairs during working hours. The magistrate considered this defence and quite rightly rejected it.

Section 14(1) is a penal enactment which does not allow of a defence of mistake of law or of fact. If the act of breaking the contract was wilful and was done with the requisite mens rea it matters not that the respondents were ignorant or mistaken or what their motives were. There is an absolute prohibition on their so acting in the interests of the public welfare until the procedure provided in section 16 is followed and until 28 days have elapsed since the notice of the strike has been accepted by the Permanent Secretary of Labour.

Mr Ramrakha raised a number of matters in his address.

A He complained that section 14 was one-sided legislation and was aimed only at the workers. Section 14(1) certainly is directed at employees and employees only but section 14(2) does cover any employer who causes a lock out to be declared in any of the circumstances referred to in subsection 1. There is no validity in Mr Ramrakha's criticism of section 14 of the Act.

B Mr Ramrakha also raised a procedural point and stated it was undesirable to seek enlargement of the period of time within which to appeal in the absence of the accused. There is nothing before me to indicate when the appellant sought extension of time under section 291 of the Criminal Procedure Code but the petition is dated 20th May 1977 which is more than three months' after the respondents were acquitted on 14th February 1977. Criminal Procedure Code section 291 does not require that notice of any application to extend time should be given to any other interested party nor does Order XXXVII III 4 of the Magistrate Courts Rules. A court heard the application and granted extension of time and that is the end of the matter. If the legislation had considered it desirable that an application to extend time be heard *inter partes* it would have so provided.

C Mr Ramrakha also contended that it was immaterial in view of section 33(7) of the Act whether exhibit 6 was a contract between the Company and the Union or between the Company and its employees. I have in this judgment indicated that exhibit 6 was not the contract of service and a breach of exhibit 6 was not necessarily a breach of the contract of service.

D Mr Ramrakha also contended that an appellate court cannot disturb a finding of fact by a trial magistrate. I have quoted authority to show that it is not so.

E He complained about the failure to properly investigate the offence and alleged that the prosecution had not established the offence and had not discharged the onus of proof. He stated that the magistrate's findings that the respondents had ceased work were findings that they were not at work and nothing more than that. As I understand Mr Ramrakha's argument he contended that the police investigation should have established why the respondents were not at work.

F The prosecution had to establish the contracts of employment and did establish the respondents after a stop work meeting did not return to work. *Prima facie* in the absence of any acceptable excuse for not working on the 3rd November 1976 which it was open to the respondents to offer the stoppage of work was a breach of contract.

G The trial magistrate found as a fact that all the respondents ceased work and did not return to work after the stop work meeting. There was ample evidence to support this finding. Such excuses as some of the respondents put forward to explain their actions were considered by the trial magistrate and properly rejected by him. Then Mr Ramrakha says that there was no evidence of intention to disrupt the services and the stoppage was intended only to be of short duration. He said it was the action of the Company which aggravated the situation.

H It is immaterial whether the stoppage was to be of short duration or not and whether the Company aggravated the situation. When the respondents wilfully stopped work that was a wilful breach of the contracts of service.

The trial magistrate fully considered whether the respondents knew or had reasonable cause to believe their stoppage of work in combination with others would have the probable consequences of disrupting the Company's activities and was satisfied they had such knowledge. There were at the stop work meeting and knew when they stopped worked that other employees were also going to stop work. They knew or must be deemed to have known what consequences could probably arise from a mass walk out of employees whatever duration of the stop work was in fact intended. A

To summarise the facts proved by the prosecution: B

It was established that all the respondents were employed by the Company at the relevant time and that the Company operated an essential service. They all ceased work and no acceptable excuse was given by any of them as to why they ceased work. Their contracts in the case of A1 was a written one and on the evidence oral as regards the other respondents. The stoppage of work by the respondents was a breach of each of their contracts of service and they had knowledge or reasonable cause to believe that their stoppage of work in combination with stoppage of work by other Company employees would have the probable consequences of depriving the public wholly, or to a great extent of an essential service—namely Air Transport. The offence under section 14(1) (a) of the Act was established by the prosecution beyond any reasonable doubt and the magistrate on the evidence should have convicted each of them. C D

The appeal is allowed and the order acquitting the respondents set aside. Each of the respondents is convicted of the offence of wilfully breaking contract of service contrary to section 14(1) (a) of the Trade Disputes Act, No. 7 of 1973.

SENTENCE E

The offence with which you have been convicted carries a penalty of a fine not exceeding \$500 or a term of imprisonment not exceeding one year or to both a fine and imprisonment. Section 14(1)(a) of the Trade Disputes Act is designed to protect essential services in the interests of the general public.

The eight of you hold responsible positions in your company and are also the executives of your union. There is no doubt in my mind that some, if not all of you, were perfectly aware that your actions in walking off your jobs was in breach of the law. Your actions were deliberate and in selfish disregard of the interests of the travelling public. It mattered not to any of you that the travelling public was inconvenienced or suffered loss or hardship as a result of your actions and apart from that, you showed no loyalty to your employer and were not concerned that your employer suffered financial loss. You also ignored the provisions of the Collective Agreement entered into by your employer and your union which was reached by collective bargaining. None of you obviously believed in the sanctity of a freely negotiated contract. F G

As far as I am aware you are the first to have been prosecuted under the provisions of this Act. There have been other prosecutions in the past few weeks. The Act has only been in force a little over four years. By contrast as regards to the corresponding provision in England there has not been a conviction in over 100 H

years. It is a sad reflection on union activity in Fiji that four years after our Act has been passed it has been necessary to prosecute and convict trade union officials.

A I bear in mind that there were 209 of your fellow workers who also acted as irresponsibly as you did. They have not been prosecuted. Although you are union officials I must treat you as ordinary employees. Had you been charged under subsection 14(2) of the Act your deliberate flouting of the law would have resulted in a very substantial fine if not a term of imprisonment without option of a fine.

B Prosecuting counsel has quite properly pointed out the lapse of time since you were first charged with this offence and has very fairly indicated that the Director of the Public Prosecutions is not pursuing you. The reason for this appeal was that it is a test case to determine a number of legal issues and not your punishment.

C *Appeal allowed. Each respondent convicted and discharged under Penal Code s. 38.*