

## What Right to Strike?

*John Hyde*

Justice Brooking's judgement against senior members of the Australian Federation of Air Pilots (AFAP) was interpreted by some as a blow to 'the right to strike'. There is, however, no such right in law, although there is freedom to stop working. Workers who combine to cease working, but who do not expect to resume their old jobs, are not in any normal sense of the term 'on strike'---they have quit. To be on strike we must not only have ceased working but expect to resume our old jobs, at some time. The confusion between the freedom of workers, in the absence of a freely-entered contractual obligation to the contrary, to withdraw their labour, and a presumed right of workers to return to their old jobs when it suits them is common.

A right to resume work would necessarily be a right to exclude other workers from the specific jobs. It would make impossible the rights of other people to accept the vacated jobs, and employers' rights to engage new staff.

Any form of industrial action involves the collusion of employees to raise the price of their labour. Were employers to combine to raise their incomes by raising the price of the goods and services they produce, they would find their collusion proscribed by the anti-monopoly provisions of the Trade Practices Act. Never the less, collusion among employees when dealing with their own employer is not unlawful under that Act. Following Justice Brooking's judgement, however, it does seem that conspiring to injure an employer is not different under the common law from conspiring to injure anyone else, but the freedom to resign *en masse* would seem to be unaffected by the ruling.

There is, of course, no such thing as a 'right' which does not have a matching obligation to respect the right in question. And the ordinary courts have, yet again, lent their authority to the common-sense view that while unionists have all of the rights and privileges enjoyed by other citizens, they have no special rights imposing special obligations upon other people.

The Dollar Sweets case had already illustrated that striking workers are not exonerated from their obligation to

respect the rights of other people to work. The freedom to stop work is thus analogous to anyone's freedom to swing his fist---a freedom that is constrained both by the presence of other people's noses and by the obligation not to frighten people.

An employee does not own his job, as he owns, say, his car, and he may not defend the job against others by force, threat of force or even by unwarranted abuse. By the same token, the industrial tribunals ought not defend it for him. When fallible and corruptible officials, who have the force of law, order reinstatement of ex-employees they are in reality denying jobs to other people. When the ex-employees in question have laid down their tools voluntarily, their claim to their former employment is not only unfair but bordering on the ridiculous. A so-called scab is not a thief. He is, on the contrary, a person going about his lawful, productive business.

The pilots, even before they gave notice to Ansett and Australian, did not hold their jobs as of right. They held them only as one side of a mutually-beneficial exchange. When the exchange ceased to be mutually beneficial there was no reasonable obligation on Ansett and Australian to keep the jobs open for them.

When workers stop working the common-sense and only just view of the situation is that they have quit. When they refuse to work as directed so that the activity ceases to be beneficial to the employer---say, by restricting their flying times to the hours of 9AM to 5PM---workers should expect that other workers will replace them.

The employees in question would merely have decided to test the market by withdrawing their labour. They should be perfectly entitled to do this. And, moreover, they should be entitled to expect that the government will not distort the market by subsidising their ex-employers or using the armed services to provide an alternative service as it has in the pilots dispute.

In the absence of government interference the employees would be finding out whether they were, in fact, over-worked or under-remunerated in relation to other possible employments. If they were, then they would be able to find better jobs elsewhere and their former employer would have to come cap-in-hand to re-engage them on better terms. If, on the other hand, they were working too little---as appears to have the case of AFAP members---or were paid too much, then the employer would find new employees to serve him better. Whether the employer would be forced to pass these gains on to customers, would depend upon whether or not he faced competition.

The power of unionised employees to gain more than market clearing rates of pay and conditions rests on their ability to stop work in unison and on their ability to stop others from taking the jobs they have just vacated. To achieve the first,

unions attempt to monopolise coverage of the employees within an occupation. To achieve the second, they impose what sanctions they can upon the new employees who occupy 'their' jobs and upon the employers who engage the services of newcomers.

Such sanctions clearly subtract from other people's rights, and ought on that ground to be unlawful. That, in Australia, they may be illegal, was shown in the Dollar Sweets case. Freedom to stop working oneself does not imply any right to stop other people from working. And there is, therefore, no 'right' to strike.

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