

## Statutory Collective Bargaining: A Duty of Fair Representation? (1993) 14 ILJ 1167 \*

An issue that has received little attention in our law is the nature of a union's duty vis-à-vis its membership in the course of collective bargaining and the consequences of breach of such duty. This is, in the first instance, a practical question of law and industrial relations which may determine the enforceability of disputed collective agreements. Over and above this it is a question of democracy. Trade unions are widely regarded as a means whereby individually powerless employees can gain a degree of control over their working lives and moreover, in today's political climate, over socio-economic policy and labour legislation. But such control can only be meaningful if the union itself is subject to democratic control by its members.

### *The union and its members' mandate*

The acid test is whether the law confers binding status on an agreement entered into by a union (a) without any mandate (express or implied) by its membership or (b) in defiance of its members' mandate. (This article confines itself to the implications of these issues in negotiations at an industrial council. It also does not look at a union's duties vis-à-vis individual members in matters such as disciplinary hearings.)

At the outset it is necessary to distinguish between statutory bargaining and informal or plant level bargaining. This point was made forcefully in *SA Association of Municipal Employees v Pretoria City Council* 1948 (1) SA 11 (T) at 17:

'The so-called industrial agreement is not really an agreement or contract, but a form of permitted domestic legislation by which the will of a statutory body is by a majority vote imposed on all the members of the designated group of employers and employees, irrespective of any concurrence by the individuals affected, and notwithstanding any positive disapproval by any such individual.'

(Cf Alan Rycroft & Barney Jordaan *A Guide to South African Labour Law* (2 ed Cape Town 1992) at 47-8.)

At first sight this would seem to dispose of any question regarding the validity of an industrial council agreement arrived at in conformity with the requirements of the LRA and the constitution of the council itself. This impression is heightened by the learned judge's remarks immediately

preceding the passage quoted above:

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'The representatives of the City Council on the industrial council are in no sense agents with power at common law to bind the City Council by their votes on the industrial council. They are persons with purely statutory functions, and it is only by virtue of the discharge of such functions in [the] manner prescribed by the statute that their votes can affect the City Council.'

(But cf the proposition that an industrial council agreement which is not promulgated may be contractually binding on the parties to the council: Edwin Cameron, Halton Cheadle & Clive Thompson *The New Labour Relations Act* (Cape Town 1989) at 42-3.)

On closer consideration, however, this cannot be taken to mean that union (or employer) representatives have carte blanche to do as they see fit subject only to the formal requirements of the LRA. A number of factors limit the discretion of union representatives. The constitutions of the various industrial councils are the primary point of reference; everything that is done by the councils must obviously be in accordance with

their provisions. Beyond this, every union constitution contains aims, objectives and rules which define an outer parameter to what may lawfully be done on the union's behalf. Since a registered union is a body corporate with functions determined solely by its constitution, ultra vires acts by union representatives will prima facie be null and void.

The analogy of company law lends some support to this view. Here the legislature found it necessary to enact s 36 of the Companies Act 61 of 1973 to provide, by way of exception, that 'no act of a company shall be void by reason only of the fact that the company was without capacity or power so to act'. No corresponding provision has been enacted in respect of unions.

The very generality of this limitation, however, renders it somewhat academic. Most union constitutions require the organization to 'protect and promote the interests of its members'. In the light of this, almost any bargaining concession could arguably be justified as being necessary to reach an agreement for the greater good of the members. It would be invidious if not impossible for a court to decide whether one strategy as opposed to another is in the members' interests; court intervention of such a nature would strike at the roots of collective bargaining itself.

But acts by union representatives will also be subject to constitutional limitation in other, more specific ways. Firstly, there will normally be rules identifying the persons authorized to act on the union's behalf, the extent of their authority and the manner of their appointment.

It is true that s 75 of the LRA provides that no 'irregularity in the election or appointment of any representative on an industrial council' shall invalidate 'any agreement . . . which, *but for that . . . irregularity . . .* would be binding in terms of s 48'. The italicized

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words indicate that but for the provisions of s 75 the consequence of such defect would indeed have been nullity. It will be noted, however, that the section is concerned with formal defects only and not with the conduct of representatives who have been or are deemed to be duly appointed. To the extent that the legislature refrained from legitimizing unauthorized acts by representatives, it is submitted, agreements should be open to challenge if such representatives acted in breach of their authority.

Secondly, it is possible that special formalities (for example, ratification by the executive) may be required before particular acts may be performed. In general, those dealing with a union will be deemed to have knowledge of the requirements of its constitution and will be entitled to assume that such requirements have been complied with (the *Turquand* rule). But this rule, too, is not absolute; the presumption will not apply if the act in question would normally be beyond the powers of the representative in question (B Bamford *Bamford on the Law of Partnership and Voluntary Association in South Africa* (3 ed Cape Town 1982) at 199) - or, it is submitted, if other circumstances exist which should have alerted the outside party to the likelihood of an irregularity.

A further, more general limitation may be implicit in the principle that, to enjoy exclusive registration, a union should be 'sufficiently representative' (s 4(3)(b) LRA) of the 'area' or 'interests' for which it seeks registration. What is meant by 'representative' is open to interpretation (Cameron, Cheadle & Thompson at 8 n 8) but the ordinary dictionary meaning implies that some kind of majoritarianism should be at least one of the criteria.

The basic function of a 'representative' union is to represent its constituency. Even if this does not arise from common-law agency, it does imply a legal relationship which remains to be clarified by the courts (or the legislature) but which will presumably be subject to some

form of control by the employees whom the union is deemed to represent. To the extent that a majority of employees in a given bargaining unit may appoint a union as their exclusive bargaining agent, it would seem that they should also be entitled to determine what the union may do on their behalf - a proposition underscored by the common-law rule that, in general, 'there is an implied power in the majority of members of an association to make administrative and executive decisions' (Bamford at 180).

(It may also be that the duty to bargain in good faith can be extended to restrain a union party from agreeing to demands which it knows to be unacceptable to a majority of its constituents.)

The opposite interpretation - that union and employer parties are legally independent and free to act without reference to their

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constituencies - would not only contradict any concept of representation; it would open the road to industrial chaos in glaring conflict with the objects of the LRA. As was observed in *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A):

'The whole idea underlying the trade union system, which system is recognised by the Industrial Conciliation Act, is that the trade union concerned should act as the spokesman of its members whenever a dispute arises between employers and employees.'

A duty of fair representation?

An obvious problem is that the constituencies represented by unions on industrial councils are not limited to union members and that, therefore, no statutory machinery exists whereby a union negotiating team can be mandated by its constituency as a whole. (Cf Cameron, Cheadle & Thompson at 37-8; Clive Thompson 'A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp' (1990) 11 ILJ 808 at 812.) But this in itself should not entitle union representatives to adopt a cavalier or dismissive attitude towards majority union decisions unless it is shown that such demands are not shared by the majority of the bargaining unit as a whole. Rather, it creates an anomalous situation where a union's contractual duty towards its members may be in conflict with, and overridden by, its statutory duty to its notional constituency. How it is to be resolved our courts have yet to decide.

The doctrine of 'fair representation' developed by the US courts offers one possible solution. First enunciated in *Steele v Louisville and Nashville Railroad* (323 US 192, 15 LRRM 708 (1944)), its content was defined as follows in the later case of *Vaca v Sipes* (386 US 171, 64 LRRM 2369 (1967)):

'[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.' (Quoted in Patrick Hardin (editor in chief) *The Developing Labour Law* (3 ed Washington 1992) vol II at 1412. In terms of the National Labour Relations Act, only a single union with majority membership may represent employees in a defined bargaining unit.)

The rule was originally formulated to protect individual workers against discrimination by unions with sole bargaining rights. It consequently did not require the court to pronounce on the merits of union strategies but, in the first place, only to examine whether any members of the statutory bargaining unit had been *unfairly* discriminated against. In this sense the rule has only passing relevance to the issue under discussion. Subsequently, however, it was extended to the process of collective bargaining more generally.

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In *Ford Motor Co v Huffman* (345 US 330, 31 LRRM 2548 (1953)) the following was said:

'The complete satisfaction of all who are represented [by a union] is hardly to be expected. A wide range of reasonableness must be allowed in a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' (Quoted in Hardin at 1464.)

The reference to 'discretion' makes it clear that a situation was envisaged where no a priori mandate has been entrusted to the union. Rather, the court was concerned with the more typical position where the contract signed by the union would subsequently be presented to the membership for ratification. In the recent case of *Air Line Pilots v O'Neill* 136 LRRM 2721 (1991) the extent of a union's discretion under such circumstances was emphasized. While it was confirmed that 'judicial scrutiny of union conduct in collective bargaining is . . . inescapable' (Hardin at 1465), it was also held that the court should only intervene if the final product of the bargaining process is 'so far outside a "wide range of reasonableness" . . . that it is wholly 'irrational' or 'arbitrary'' (Hardin at 1465-6).

Should the majority of a union's constituents express a clear demand, it is submitted, the position will be different. It would constitute a breach of the duty of 'complete good faith and honesty of purpose' for a union to ignore such a demand.

It was recognized in *Ford Motor Co v Huffman* that 'any authority to negotiate derives its principal strength from a *delegation to the negotiators* of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented' (quoted in Hardin at 1464; emphasis added). In other words, notwithstanding statutory regulation of the collective bargaining process, no independent statutory authority or autonomy to act as they see fit is conferred on union and employer representatives. Their authority derives from their respective constituencies. No other explanation is compatible with the concept of collective bargaining or with any prospect of industrial stability.

The ruling in *SA Association of Municipal Employees v Pretoria City Council*, it is submitted, should be interpreted in a similar light. While the end product of the bargaining process may be 'a form of permitted domestic legislation', this tells us nothing about the relationship between the bargaining parties and their constituencies in the course of formulating the agreement. More significant is the finding that 'the representatives of the City Council on the industrial council are in no sense agents with power at common law to bind the City Council by their votes on the

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industrial council'. It is manifestly true that the functions of parties on industrial councils are determined by statute and not by common-law agency. On the other hand, the mere fact that such representatives cannot bind their constituency does not mean that the constituents cannot bind their representatives. The language of the LRA suggests that 'industrial council agreement' contemplates more than merely a majority decision by a quorate meeting of the council; it is an 'agreement' in the sense that it is assumed to reflect the views and/or interests of the constituencies represented on the council (cf ss 18, 21(1)(a), 23 and 24 read with the definition of 'agreement' in s 1).

In practice, matters are likely to be more complicated. As has already been noted, structures through which a heterogeneous constituency of unionized and non-unionized employees can formulate a mandate in general do not exist. To this extent a measure of discretion must form part of the negotiators' brief. For industrial council purposes, it is

submitted, a range of factors should be looked at to determine the extent of such discretion including past practice and the conduct of those who challenge the negotiators' actions. Beyond this, the doctrine of fair representation may serve to establish general criteria against which existing practices can be tested.

It should be noted that the US labour courts have not been very consistent in defining what the duty entails. (The examples that follow are discussed in *Hardin* at 1470-1.) *Inter alia*, refusal to allow one union in a multi-union negotiating group to attend a contract ratification meeting has been held to be a violation of the duty. Likewise, it has been held that the duty of 'honest disclosure' includes the duty to advise members of the progress and nature of negotiations. On the other hand, a diametrically opposite finding was reached in an earlier case; and failure by a union to inform its members adequately prior to a ratification vote has been condoned on the grounds that the union had not acted in bad faith.

None of this, however, challenges the proposition that if and when the evidence points at an identifiable demand by the majority of a union's constituents (for example, by means of a ballot), the union will not be entitled to sign an industrial council agreement in defiance of such demand without some form of consultation and authorization or subsequent ratification, expressly or by conduct.

The remedies available to aggrieved members under these circumstances remain to be clarified by the courts. The ideal solution, from the trade union point of view, would be for the membership to resolve the problem by means of constitutional procedures. Legally this is enshrined in the principle, derived from the rule in *Foss v Harbottle*, that an ordinary member of an

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association may not bring an action against the association if the act complained of could be ratified by simple majority vote. But, where the executive itself is purporting to perform an unconstitutional act, '[t]here is no other remedy for the applicants [ie the members seeking legal relief], since the persons who are perpetrating this act are the only persons who could bring an action . . . in the name of the trade union' (*Sorenson & others v Executive Committee, Tramway and Omnibus Workers' Union* 1974 (2) SA 545 (C) at 552).

## Conclusion

In conclusion, it is submitted that mere allegations of irregularity in the conduct of a union representative would be insufficient to support an interdict by disaffected members or to invalidate signature of an industrial council agreement by such representative. By the same token it would not suspend the operation of the *Turquand* rule, place the industrial council under a duty to inquire or prevent other parties from proceeding with signature on the presumption that the requirements of the union's constitution have been complied with. It would be otherwise, however, if *prima facie* evidence of unauthorized conduct (eg certified minutes of a meeting by which the representatives are bound and which they are purporting to defy) is placed before the council. Subject always to the council's own constitution and the two-thirds rule contained in s 27(7) of the LRA, it is submitted that the council would then be under a duty to suspend proceedings pending clarification and/or rectification of the matter complained of. If the union representative and the council nevertheless propose to proceed with signature, the aggrieved members should be able to obtain an interdict against them.

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— My thanks are due to Clive Thompson