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several shifts. However, the precise nature and timing of these earlier shifts is still open to question because of the data problems involved in splicing together three series of unequal, uneven, and in some cases unknown, reliability. We restricted our analysis to post-1970 because we do not have much faith in the vacancy data which pre-dates Statistics Canada's Job Vacancy Survey. Second, we do not agree with Professor Reid that the broken pipeline theory implies that the paradox is only a temporary phenomenon. The failure of a substantial portion of a whole cohort to obtain satisfactory employment and the reluctance of employers to take on inexperienced employees in industry for several years is likely to have lasting effects. It is now apparent that individuals' first experiences in the labour market exert a major shaping influence upon their subsequent employment motivation, job search, and work behaviour. The effects of several years of discouraged unemployment, under-employment, and job-hopping will be felt long after the economy recovers.

DROIT DU TRAVAIL

LABOUR ARBITRATION AND THE REFUSAL TO PERFORM HAZARDOUS WORK

Ray SENTES

The modern basis of Canada's collective bargaining system is the Order In Council No. 1003 passed by the federal government in February, 1944. The Order provided for a high degree of state intervention. As H. D. Woods has noted in particular:

« Looked at from the point of view of the right to strike, it becomes apparent that this instrument, as well as the lockout, was severely curtailed. In the broad classification of dispute areas, strikes formerly took place over issues involving jurisdiction between unions, recognition of unions by employers, negotiating new agreements or renegotiating old ones, and the interpretation or application of agreements in force. Strikes had now been rendered unlawful over jurisdictional issues, recognition issues, and application or interpretation issues. »¹

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¹ H. D. WOODS, *Labour Policy in Canada*, second edition, P. 93.

Except where contract negotiation was concerned, compulsory arbitration or some form of binding settlement replaced the right to strike. Union leaders of the day supported the legislation.² Following the war, most provinces passed legislation modelled on P. C. 1003. Thus, arbitration became an integral part of Canadian industrial relations.

Naturally, arbitrators adjudicating disputes have upheld the 'work now, grieve later' rule. For example:

«Some men apparently think that, when a violation of a contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view..... an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision.»

(Re USW and Lake Ontario Steel Company Ltd. (1968) 19 L.A.C. 103 (Weiler) at p.p. 107-08 quoting from Ford Motor Co. 3L.A. 779)

One exception to the above doctrine is where an employee refuses to perform a task which is hazardous to his health. In such cases the refusal to carry out an order does not necessarily provide grounds for disciplinary action by the employer. This right of refusal, is far from being absolute.

«If an employee disobeys orders out of fear for the safety of himself or others, then he runs the risk that such a fear may be determined not to have been justified in the circumstances. In such case, he would quite properly be disciplined for insubordination.»

(Re. Int'l Chemical Workers, Local 721 and Brockville Chemicals Ltd., (1965) 16 L.A.C. 261 (Weatherill) at p. 265)

What guidelines, then, are available to an employee wishing to exercise his right of refusal? An examination of reported arbitration cases reveals that certain criteria must be met if disciplinary action is to be avoided.³

The first criteria relates to an employee's state of mind. He must 'honestly believe' that by carrying out management's order he would

² *Labour Gazette*, volume 44, part 2, 1944, pp. 362-372.

³ The two main sources for this study are *Labour Arbitration Cases* (January, 1954 to October, 1976) and *Western Labour Arbitration Cases* (January, 1967 to October, 1976). Approximately fifty cases were reported. Relevant cases are also reported in sources such as: C. C. H., *Labour Arbitration News*, *Sentences Arbitrates de Griefs*, U.S. arbitration reports as well as court case reports. A systematic study would include such additional sources as well as unreported cases. Nevertheless, *Labour Arbitration Cases* appears to be the preferred source amongst Canadian arbitrators. This limited study should reflect the dominant tendency in the area concerned.

be exposing himself to serious harm. Certain information may be available to assist the arbitrator with his evaluation but, in essence, a personality assessment is made. This practice may result in an extra burden being placed upon the employee in question. For example, an arbitrator's preference for 'respectable' life styles or the 'correct' social values may affect his judgement. In one case, where an employee refused to perform work on medical grounds J. D. O'Shea, Q. C. observed:

«There was some indication that the company's objection to the grievor's long hair might have contributed to the company's refusal to accept the grievor's word concerning the alleged health hazard...»

He then revealed his own beliefs:

«While long hair was initially adopted by the original hippies as a sign of social dissent, in recent years the wearing of long hair by males has often been adopted as part of the uniform of the immature. While this *evidence of immaturity* may tend to raise suspicion it is not in itself sufficient to give rise to disciplinary action...» (My emphasis)

(Re United Automobile Workers, Local 636, and F.M.C. of Canada, Ltd., Link-Belt Speeder Division (1971) 23 L.A.C. 234 (O'Shea) at p. 239)

By contrast, another arbitrator outlines a socially approved personality:

«The grievor had worked four and one-half years without any previous disciplinary incidents. He gave his evidence in a straight-forward and candid manner.... He was not an unduly timorous lad and was obviously used to hard, dirty, rugged work»

(Re Steel Co. of Canada Ltd., and United Steelworkers, Local 1005 (1973) 4. L.A.C. (2nd) 315 (Johnsont) at p.p. 321-22)

Should an employee fail his initial credibility test he is open to employer discipline. If he passes further criteria must be satisfied.

An employee's 'honest belief' must be communicated, with some particularity, to management at the time when his refusal to work occurs. For example:

«The Grievor did not indicate the nature of the unsafe conditions at the time of his refusal and the Company was within its rights to suspend him. The nature of the unsafe conditions should have been made clear in order for the company to remedy the situation.»

(Re: B. C. Forrest Products Ltd. and Pulp and Paper Workers of Canada, Local 2 (1967) W. L. A. C. 67/201 (Herbert) at p.p. 67/20/202)

It is not apparent, from the cases studied, how detailed an employee's explanation must be. The formalistic approach of most arbitration boards suggests, however, he should be as explicit and precise as possible.

Honest belief, properly communicated must also be based on objective data. Thus, the arbitrator determines which objective data are relevant in the case. Next, the data must be of a nature, such that, when viewed by other reasonable persons it would produce a similar response. The 'reasonableness' of an employee's response may involve assessing the history of a particular task as well as the actions of his workmates at the time of the incident. In a case where an employee refused to remove overhead debris from an open hearth checker chamber, the arbitrator took into consideration the fact that:

«.... the practice of poking checkers from below was a regular though not frequent, one for at least 20 years... and it had never produced another incident similar to the one herein tested.»

In addition he noted:

«Another way of testing the reasonableness of apprehended danger is to ask how the other crew members reacted to the same circumstances.»

(Johnston 1973, at p. 318)

Hence, an employee's refusal may be judged unreasonable if the task has an accident free history or if fellow employees do not express similar concern. To some extent, consideration of the first factor may be justified. Given the existing management-employee power relationship and the low level of hazard awareness, there is little justification for the second.

Finally, the employee must prove that «the danger was sufficiently serious to justify the particular action he took.»

(Johnston, 1973, p. 318)

All jobs contain some degree of risk. At what stage does the risk involved justify the refusal to perform a specific task? More importantly, how does the arbitrator arrive at an acceptable level of risk. Perhaps existing fatality or injury frequencies by industry are used to arrive at acceptable or normal risk levels. If so, the arbitrator may simply be giving approval to patterns which never have been acceptable to the employees in question. The cases studied were all silent on this crucial problem.

Some arbitrators have also insisted that an employee must remain at the job site after his refusal, and that he must accept other work assigned to him.⁴ If the task is found to be hazardous, the employee may still suffer a loss of pay. Arbitrators generally hold that:

«While breach of such an obligation may have, among its ultimate results, the effect of depriving employees of work, we would not say that

⁴ Re: Domtar Chemicals Ltd. and International Chemical Workers Union, Local 682 (1975) 8 L.A.C. 346 (Weatherill) at p. 348.

the remedy for such a breach was intended to be payment of damages to such employees for loss of earnings.»

(Re Domtar Chemicals Ltd. and International Chemical Workers Union, Local 682 (1975) 8 L.A.C. (2nd) 346 (Weatherill) at p. 349)

In summary, an employee refusing to perform a hazardous task must satisfy *at least* the following conditions.

- (1) He must honestly believe the task in question is hazardous.
- (2) He must communicate his belief, with some particularity, to management at the time of his refusal.
- (3) Honest belief must be supported by objective data.
- (4) The task in question must be unusually hazardous.

At all times the onus of proof rests on the employee. It is difficult not to conclude that, from an employee's viewpoint, arbitrators have developed criteria which are unnecessarily restrictive. Recent legislative developments⁵ may offer some relief. At present, employees attempting to exercise their right to self-preservation face formidable obstacles.⁶

⁵ In 1973 Saskatchewan amended its Labour Standards Act, thereby granting employees a statutory right to refuse to perform unusually dangerous work. Ontario, responding perhaps to the Royal Commission on the Health and Safety of Workers in Mines as well as several well publicized Asbestos related incidents passed Bill 139 in December of 1976. The Employees' Health and Safety Act, 1976 states in Section 2. «Where an employee in a work place has reasonable cause to believe that a machine, device, or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or a place in or about a work place is unsafe for him to work in, or the machine, device, thing or place is in contravention of The Industrial Safety Act, 1971, The Construction Safety Act, 1973 or Part IX of the Mining Act, or any regulations thereunder, as the case may be, the employee may refuse to use or operate the machine, device, or thing, or work in the place.» Section 3 (2) seems however to modify that right, since an employee «may continue to refuse to use or operate the machine, device or thing, or work in the place unless a collective agreement binding the employee expressly provides otherwise.»

The Federal Government is also preparing a similar provision. Labor Minister John Munro recently said: «I believe it is essential that employees not be required to work at processes or places which they believe to be inherently unsafe or unhealthy.» (The Globe and Mail, March 29, 1977)

Alberta's Occupational Health and Safety Act in Section 27 (1) (a) states: «no worker shall carry out any work where there exists an imminent danger to the health or safety of that worker.» The general and ambiguous nature of such legislative protection means that the courts will determine the rules under which an employee's right may be exercised. Employees would be unwise to expect much relief from that direction. Additionally, an employee's right may be further restricted by existing legislative provisions against work stoppages. Common to all jurisdictions except Saskatchewan's. Section 49 (1) of the Alberta Labour Act for example, states: strike includes —

- (1) a cessation of work, or
- (2) a refusal to work, or
- (3) a refusal to continue to work,

by two or more employees acting in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer or an employer's organization to agree to terms or conditions of employment or to aid other employees to compel their employer or an employer's organization to accept terms or conditions of employment.

⁶ N.D.L.R. En milieu québécois, la règle du « Obey Now, Grieve Later » retient de moins en moins l'attention des arbitres de griefs à titre de solution de principe. Le lecteur pourra consulter à ce sujet trois décisions où une étude jurisprudentielle exhaustive est faite: Syndicat national des employés de l'Université de Montréal, (1974) *S.A.G.* 1625; Syndicat canadien de la fonction publique et Commission scolaire de l'Île Perrot, *R.S.E., S. A.* 0292, vol. 020 à 0300, p. 339. Cité de Charlesbourg et Fraternité des policiers-pompiers de la Cité de Charlesbourg, (1975) *S.A.G.* 661. Selon cette nouvelle approche, un salarié pourrait refuser d'obéir à un ordre reçu dès lors qu'il estime que cet ordre est contraire aux dispositions de la convention collective.

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