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Methods of Trade Union Action: Part II Picketing, Go Slow, Stay-In-Strike Gherao, Overtime Ban and Lock-Out*

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Picketing

THOUGH a strike is intended to bring pressure on the employer to act in a certain way, an employer is not obliged to cease the conduct of his business for the duration of a strike[1] and he may, for the purpose of carrying on his business, employ new hands for its duration. It is obvious, however, that the effectiveness of a strike would be largely negatived if the employer carries on his business as usual, so that it has become necessary for trade unions to evolve techniques to prevent employers from carrying on their business and thereby to heighten the pressure on the strike-bound employer. One such technique is picketing, which invariably accompanies a strike, and is designed to prevent, or at least dissuade, customers and workmen from entering the employer's premises. Picketing has been described as 'the marching to and fro before the premises of an establishment involved in a dispute, generally accompanied by the carrying and display of a sign, plackard or banner bearing statements in connection with the dispute.'[2] While picketing is intended to identify non-strikers, and customers who continue to give their business to the strike-bound employer, it is also intended to draw public attention to the existence of a dispute and to deter customers and other workers from dealing with the employer picketed. In short, the purpose of picketing

> 'may be to persuade non-strikers to join in the withdrawal of labour or to dissuade substitute labour or strike breakers from proceeding to or entering the strike-bound premises, or simply to establish check-points to

* Continued from Vol. 2, No. 1.

1 *All Ceylon Commercial and Industrial Workers' Union v. The Ceylon Glass Company Ltd.*, Industrial Dispute 284, Ceylon Government Gazette, 12,681 of 29th September 1961 at paragraph 25: 'The management of a company whose employees are on strike is not obliged to cease the conduct of its business. It has the right to employ others to take the place of the strikers.'

2 Ludwig Teller, *Labour Disputes and Collective Bargaining*, N. York, 1940, Volume I, Section 109.

ensure that no strikers return to work prematurely; or, again, the purpose of picketing may be to deflect supplies or custom from the employer in dispute. Picketing, in other words, aims at cutting something off from the employer in dispute, be it labour, supplies or custom.'[3]

The law relating to picketing, which is uncertain in most respects, reflects a reluctance on the part of the State to intervene through the law to regulate picketing. In England some statutory provision has been made from time to time to regulate picketing. The Conspiracy and Protection of Property Act (1875) by Section 7 imposed penalties on every person who, with a view to compelling any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority

(1) uses violence to or intimidates such other person or his wife or children, or injures his property, or

(2) persistently follows such other person about from place to place, or

(3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof, or

(4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or

(5) follows such other person with two or more other persons in a disorderly manner in or through any street or road.

As interpreted in *Lyons v. Wilkins*,[4] it amounted to a criminal 'watching and besetting' if persons picketing did not confine themselves to peacefully obtaining or communicating information but tried in addition to persuade any person, even peacefully, to abstain from working for or dealing with the employer. This situation was remedied by Section 3 of the Trade Disputes Act (1906) which protects pickets who induce employees to stop work in breach of their contracts of employment, if done in contemplation or furtherance of a trade dispute. Section 2 of the same Act provides that:

'It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union.....in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they do so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.'

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3 Cyril Grunfeld, *Modern Trade Union Law*, London, 1966, p. 443.

4 (1896) 1. Chancery p. 811; (1899) 1. Chancery p. 255. For judicial interpretations of this Section see the cases discussed by Cyril Grunfeld, *Op. Cit.*, pp. 447–52.

This Section deals with picketing of workers as well as picketing supplies or custom.[5] It affords protection where picketing takes place in a public place, but gives no protection against invasions into private property without authority. Further, the protection is dependent on the conduct being in contemplation or furtherance of a trade dispute. Even in regard to picketing in public places, it must not constitute a nuisance or obstruction. From a practical point of view persons engaged in picketing cannot legally prevent, except by peaceful persuasion, workers or customers from entering the strike-bound establishment.[6] Cyril Grunfeld concludes[7] that the effect of the special protection of the Act 'is virtually confined to neutralising trespass to the highway and inducing breach of contract of employment where there is a trade dispute.'[8]

Picketing becomes unnecessary unless there is another union or there are non-union members within the strike-bound establishment, or the employer seeks to carry on his business notwithstanding the strike. In Ceylon, in view of the multiplicity of trade unions and the existence of more than one union in an establishment, it is common to find that when one union is on strike, members of rival unions within the establishment continue to work. Therefore labour in Ceylon invariably resort to picketing to reinforce the effectiveness of a strike. However, no statutory provisions exist specifically protecting or outlawing picketing. As far back as 1943 Major Orde Browne said:[9]

> 'The legal position of Trade Unionism in Ceylon is satisfactorily established by Ordinance No. 14 of 1935. There is, however, one omission in this, in that no provision is made for the regulation of peaceful picketing. Some such measure is most desirable in a country such as Ceylon where crowds are apt to be easily excited; the clear statement of the purpose and justifiability of peaceful picketing should definitely distinguish between legitimate Trade Union activities and the resort to mob violence of which they are at present liable to be accused. It would also go far to clarify the position for the police and facilitate their difficult task of maintaining order at times of industrial tension.'

Section 26 of the Trade Unions Ordinance (1935)[10] affords immunity from civil action to trade unions, their officials and members in respect of any act done in contemplation or in furtherance of a trade dispute where such act has

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5 For interpretations of this Section see Cyril Grunfeld, *Op. Cit.*, pp. 443–47, 452–54.

6 On the question of Police powers in regard to picketing see Cyril Grunfeld, *Op. Cit.*, pp. 444–7.

7 *Op. Cit.*, p. 455.

8 For picketing in cases where there is no trade dispute see Cyril Grunfeld, *Op. Cit.*, pp. 454–5. Section 3 of the Trade Disputes and Trade Unions Act (1927) negatived to a large extent even the limited protection given by the 1906 Act. But the 1927 Act was repealed in 1946.

9 *Report on Labour Conditions in Ceylon* (Sessional Paper 19 of 1943).

10 Chapter 138, Legislative Enactments of Ceylon (1956).

induced another to break his contract of employment, or where it is an interference with the trade, business or employment of some other person. Section 27 affords protection against tortious liability. Peaceful picketing is protected against liability of the type and in the circumstances referred to in these two sections, but no protection is given against criminal liability under the Penal Code[11] if the manner in which the picketing is conducted amounts to criminal trespass,[12] criminal intimidation,[13] public nuisance[14] or wrongful restraint.[15]

Picketing raises a practical problem, commonly known as 'crossing the picket line', which usually occurs where the employer continues to carry on his business notwithstanding a strike and employees of another employer refuse to cross the picket line set up by the employees of the strike-bound employer. Legally, the employees of a strike-bound establishment have no right to prevent ingress to or egress from the establishment. However, from the point of view of industrial relations the issue is whether employees of one firm refusing to cross the picket line of another are liable to disciplinary action. The answer depends on the reason for the refusal to cross the picket line. If it is due to a reasonable apprehension on their part as to their personal safety, no question of disciplinary action arises since employees cannot be expected to take unreasonable risks in the discharge of their duties. But if the refusal is with a view to boycott the strike-bound employer's business, it is misconduct entitling the employer to take disciplinary action.[16]

In the United States of America the picket line is sacrosanct and no employee is expected to cross it. Neil Chamberlain[17] points out that

> 'In conjuction with a strike the picket line demonstrates conclusively the existence of a labour 'movement'–a bond among unions–by the respect which it is accorded, by the refusal of members of other unions to cross it whether engaged in their personal or their employer's business. The

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11 1883, Chapter 19, Legislative Enactments of Ceylon (1956).

12 *Ibid.*, Section 427.

13 *Ibid.*, Section 483.

14 *Ibid.*, Section 261.

15 *Ibid.*, Section 330.

16 *All Ceylon Oil Companies' Workers' Union v. Standard Vacuum Oil Company*, Industrial Dispute 237, Ceylon Government Gazette 12,034 of 8th January 1960, *Petroleum Service Station Workers' Union v. Perera*, Industrial Dispute 228, Ceylon Government Gazette 12,002 of 11th December 1959. Boycott as a method of trade union action will be discussed in the next part of this study.

17 *Collective Bargaining* (McGaw–Hill Book Company, U.S.A., 1951), p. 224. Jack Barbash, *The Practice of Unionism* (Harper & Brothers, N. York, 1956) p. 230 says: 'In general, crossing a picket line of another union is perhaps the most heinous offence against trade union morality.... the man who crosses another union's picket line is only second to the scab as an object of scorn and as a transgressor of union morality.'

> picket line has acquired an almost religious significance to many union members, so that its violation takes on aspects of sacrilege and taints the offender. In the presence of such dogma it becomes possible for even a small group of employees to isolate the company from the economy, inflicting a cost of disagreement upon the company out of all proportion to their significance in its operations.'

The United States National Labour Relations Board in December 1964[18] ruled that union branches are entitled to fine members who cross the picket line during an official strike. The matter went up in appeal and the Board's ruling was confirmed, the appellate court stating

> 'A union member may express agreement or disagreement with union rules or policies, but he cannot simultaneously be a member and also have whatever advantages there might be in non-membership, and he should not be immunised against discipline if, as a member he acts against a lawful union activity determined by the majority to be in his, as well as their, interest.'

Go Slow

Another technique often resorted to by trade unions, as a substitute for strike, is go slow. This technique does not properly fall within the meaning of a strike since it does not amount to a withdrawal of labour or a partial refusal to work but rather to a refusal to work at the normal pace. It has generally been characterised as an unfair labour practice and may sometimes involve criminal liability, as in England in the case of Post Office workers if, as a result of the go slow, an employee wilfully detains or delays any postal packet.[19] Some countries have regarded go slow as a strike.[20]

Most countries view a go slow as misconduct entitling the employer to take disciplinary action, for example, Italy, France, Australia, Canada, Ireland and New Zealand.[21] Since labour courts in Ceylon have generally followed Indian courts on the question of go slow, an examination of the Indian decisions is useful.

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18 The source of what is stated in the text is the Overseas Employers' Federation Newsletter of 13th January 1966.

19 Post Office Act, 1953, Section 58 (1).

20 For New Zealand see Article 189 of the Industrial Conciliation and Arbitration Act (1954), and for Trinidad and Tobago the Industrial Stabilisation Act (1965).

21 See the authorities cited by Alfred Avins, *Employers' Misconduct* (Law Book Company, Allahabad, India, 1968) at p. 455.

Go slow As Misconduct. In India it has been consistently held that go slow is misconduct warranting dismissal.[22] As stated by the Supreme Court of India in *Bharat Sugar Mills Ltd. v. Jai Singh*[23]

> "Go-slow', which is a picturesque description of deliberate delaying of production by workmen pretending to be engaged in the factory is one of the most pernicious practices that discontented or disgruntled workmen some time resort to. It would not be far wrong to call this dishonest. For, while thus delaying production and thereby reducing the output, the workmen claim to have remained employed and thus to be entitled to full wages. Apart from this also 'go–slow' is likely to be much more harmful than total cessation of work by strike. For, while during a strike much of the machinery can be fully turned off, during the 'go–slow' the machinery is kept going on a reduced speed which is often extremely damaging to machinery parts. For all these reasons, 'go–slow' has always been considered a serious type of misconduct.'

In Ceylon, too, it has been held that go slow is misconduct. In *Tea, Rubber, Coconut and General Produce Workers' Union v. A. F. Jones & Company Ltd.*[24] the Industrial Court, having stated that they cannot accept the argument that an act which is not expressly prohibited must be deemed not to be an unfair labour practice, held:[25]

> 'A decision on the question whether the method of 'go–slow' by workmen in any industry is or is not an unfair labour practice is of great importance to all engaged in production, whether it is in work connected with industries or the export trade or the plantation industry, which is of vital import to the economy of this country. It is manifest that in order to sustain our economy we must be able to maintain the marginal productivity of labour. Most of our industries, including the plantation industry, are dependent upon manual labour and not on mechanised labour. It is therefore of the utmost importance that any attempt on the part of manual workers to diminish the output of their productivity is bound to have far reaching consequences in diminishing the prosperity and economy of the country.'

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22 *Ziakh v. Firestone Tyre & Rubber Company Ltd.*, 1954 (1) Labour Law Journal, p. 281, *Israil v. Saxby & Farmer (India) Ltd.*, 1956 (1) Labour Law Journal, p. 72 at p. 75 et. seq., *Madhavrao v. Gujarat Rubber Works Ltd.*, 1956 (1) Labour Law Journal, p. 731 at p. 735, *Bai Santok Beni v. Fine Knitting Company Ltd.*, 1957 (1) Labour Law Journal, p. 409 at pp. 411–12, *Ganesh Flour Mills Company Ltd. v. Chandrika Prasad* 1957 (1) Labour Law Journal, p. 656 at p. 660.

23 1961 (2) Labour Law Journal, p. 644 at p. 647. So also *Indian Iron & Steel Company v. Their Workmen* 1958 (1) Labour Law Journal, p. 260 at p. 270, where the Supreme Court of India observed that 'it is now recognised that deliberate 'slow–down' tactics and an incitement to other workmen to adopt such tactics both amount to misconduct.'

24 Industrial Dispute 170 Ceylon Government Gazette 12,133 of 20th May 1960.

25 *Ibid.*, at paragraph 8.

The Court examined the relevant authorities in India which have come to the conclusion that go slow is misconduct on principle rather than by reference to the standing orders which employers are required by law to frame. The Court characterised[26] go slow as 'a dishonest form of activity, sometimes difficult to prove and highly indefensible. They are not sanctioned by many labour leaders and they should not be tolerated by responsible union leadership.'

The question of go slow was incidentally referred to by the Supreme Court of Ceylon in *Hayleys Ltd., v. de Silva.*[27] The Company had terminated the services of 23 workmen for misconduct for having participated in a concerted slowing down of work. The question for decision was whether the action of the workmen amounted to misconduct justifying dismissal. The Industrial Court came to the conclusion that the action resorted to by the Union was not a 'go slow' and therefore the dismissals were unjustified. In quashing the award on the ground that the Court had failed to consider the crucial questi n before it, namely, whether or not the action of the workmen amounted to misconduct, the Supreme Court observed :[28]

> 'I may pause here for a moment to consider what the position would have been had the Industrial Court found that the action resorted to by the Union was a 'go slow'. The Court would probably have then felt constrained to hold, as a finding which necessarily followed, that the dismissals of the twenty-three workmen were justified.'

This statement, though *obiter*, indicates that the Supreme Court was of the view that go slow is misconduct justifying dismissal.

Even piece-rated employees may be guilty of go slow.[29] In *Ziakh v. Firestone Tyre & Rubber Company Ltd.*[30] a piece – rated employee was dismissed for go slow. It was urged on behalf of the employee that in the case

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26 *Ibid.*, at paragraph 9. The Court also stated : "If punishment was not allowed for such misconduct, it would result in a serious drop in production and in the induction of a spirit of calculated indiscipline which would undermine industry." A similar conclusion that go slow is misconduct was reached by the Industrial Court in *Ceylon Plantation Workers' Union v. The Superintendent, Fordyce Group*, Industrial Dispute 270 Ceylon Government Gazette 12,266 of 6th January 1961 at paragraph 20 : '.... the method of go slow is an insidious labour practice highly reprehensible as it disrupts the economy of the industry and .... persons guilty of such misconduct are liable to be dealt with by suitable disciplinary action by the employer.' See also *All Ceylon Commercial and Industrial Workers' Union v. Asbestos Cement Industries Ltd.*, Industrial Dispute 166 Ceylon Government Gazette 12,073 of 4th March 1960 at paragraph 18.

27 Volume 64 New Law Reports, p. 130.

28 *Ibid.*, at p. 137.

29 *Ziakh v. Firestone Tyre & Rubber Company Ltd.* 1954 (1) Labour Law Journal, p. 281, *Beni v. Fine Knitting Company Ltd.* 1957 (1) Labour Law Journal, p. 409.

30 *Op. Cit.*

of a time-rated workman he is paid irrespective of what he produces so that he is obliged to work at average speed and with normal skill, whereas no such obligation is imposed on a piece-rated employee. This argument was rejected and the Court stated :[31]

> '..... both in the case of a piece-rated worker and in the case of a time rated worker, during the time the employee has to work the employer is entitled to expect from him average speed and normal skill. In the case of the petitioner, if he is paid according to the work done by him, it is rather as an incentive to do more work than to do less work. An employer expects a certain minimum, but as an incentive to an employee he says : 'We will pay you according to the work you do because the more you work and the more you produce the more you will be paid,' and that obviously would act as an impetus or an incentive to the employee to put forward his best. It is perfectly true that a piece-rated worker may on occasions put into his work every ounce of energy that he possesses. He may reach heights which it is not possible to reach everyday, he may surpass himself on certain occasions, and nobody suggests that if a piece rated worker does not maintain the same standard throughout he could be guilty of slowing down. But without reaching those heights it is expected even of a piece-rated worker that time that he is serving his employer he must at least use his normal skill and average speed.'

It was further argued on behalf of the workman that inasmuch as there was no minimum target which the workman was required to achieve in production there can be no go slow; in other words, there must be a norm for production for an employee to be guilty of go slow. In rejecting this argument the Court stated:[32]

> '..... we refuse to accept the position that because no minimum is prescribed it is open to the employee to produce what he likes and to work as he likes and to disregard the interest of the employer. Even though a minimum may not be prescribed, the conditions of service must require that during the time that the employee is in the service of his employer he must at least give to the employer what he is entitled to viz. the minimum of his ability and of his skill and of his time. If he deliberately refuses to give that minimum, he is as much guilty of misconduct as he would have been if he did not come up to the minimum if such a minimum had been prescribed under the contract of service.'

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31 *Op. Cit.*, at pp. 282–3.

32 *Ibid.*, at pp. 283–4.

Employer's Right to Select a Few for Punishment. An employer is not obliged to punish all or none of the employees participating in a go slow ; he is entitled to select a few from among those who have been guilty of go slow and to punish them, and even inflict varying degrees of punishment.[33] In determining the punishment an employer is justified in taking into account the previous conduct of the employees concerned.[34] In *Mazundar v. Brooke Bond (India) Ltd.*,[35] the Court held that

> 'Where more than one workeman is guilty of the same misconduct, the selection of some of them without more (sic) for purpose of inflicting punishment would not amount to unfair labour practice. The management, in our opinion, has a discretion in the matter of selection and if in the exercise of its discretion in a bona fide manner it comes to the conclusion that the conduct of some of them who have committed the same misconduct is much more objectionable than the conduct of the others, there would be nothing wrong for the management in either not taking action against those others by excusing them or in inflicting a lesser punishment. It is only if the selection is made with motives of victimisation, that would be improper.'

The principles applicable to go slow may be summarised thus :

(1) Go slow is misconduct punishable with dismissal.

(2) An employer is entitled to select a few from among those who are going slow for punishment. He is not obliged to punish all or none.

(3) Having selected the persons for punishment, the employer can impose different degrees of punishment on those selected.

(4) An employer exercising his right under (2) or (3) above must act bona fide.

Stay – in – Strike

A stay–in–strike includes 'sit–down', 'tools–down' and 'pen–down' strikes. The common feature among all of them is that the employees enter the premises and thereafter go on strike but do not leave the premises though they stop work. Ludwig Teller[36] defines a sit–down strike as

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33 *Tea, Rubber, Coconut and General Produce Workers' Union v. A. F. Jones & Company Ltd., Op. Cit.*

34 *Ibid.*

35 1954 (1) Labour Law Journal, p. 163 at p. 166, followed in *Ganesh Flour Mills Company Ltd. v. Prasad* 1957 (1) Labour Law Journal, p. 656 at p. 661. In *Israil v. Saxby & Farmer (India) Ltd., Op. Cit.*, the management selected a few for punishment.

36 *Labour Disputes And Collective Bargaining, Op. Cit.*, Volume I, Section 106, adopted in *Howrah Foundry Works Ltd. v. Their Workmen* 1955 (2) Labour Law Journal, p. 97 and *Sadul Textile Mills Ltd. v. Their Workmen* 1958 (2) Labour Law Journal, p. 628.

'occurring whenever a group of employees or others interested in obtaining a certain objective in a particular business forcibly take over the possession of the property of such business, establish themselves within the plant, stop its production and refuse access to the owners or to the others desiring to work. Issue is taken with the above definition, however, insofar as it explains the sit–down strike in terms of *taking over* of possession on the part of the employees. The genuine sit–down strike involves rather the *remaining in possession* by employees. The sit–down strike should more accurately be defined as a strike in the traditional sense, to which is added the element of trespass by the strikers upon the property of the employer. All the cases have uniformly outlawed the sit–down strike.'

As far as the United States is concerned, the sit – down strike has been uniformly outlawed and whatever legislation there is has also condemned it.[37] The same view was taken by the Supreme Court of the United States in *National Labour Relations Board v. Fansteel Metallurgical Corporation.*[38]

Prior to 1960 Indian courts took the view that stay–in–strikes were unjustified. Thus in *Lakshmi Devi Sugar Mills Ltd. v. Ram Sarup*[39] the Supreme Court of India appears to have regarded a tools–down strike as illegal, while in *Sadul Textile Mills Ltd. v. Their Workmen*[40] the court thought that 'even without violence a stay–in or sit–down strike is an invasion of the rights of the employer in the property of the mill and there can be no justification for such a strike ..... There is at the very least an element of trespass upon the property of the employer .... and such a strike must .... be always unjustified, whatever may be the justification for an ordinary strike in similar circumstances.' However, in the leading case of *Punjab National Bank v. Their Workmen*[41] the Supreme Court of India was faced with the question whether participants of a pen–down strike who entered the bank, occupied their seats and refused to work could be refused reinstatement. It must be noted that the answer to this question does not necessarily help to determine whether such a strike is justified since in India mere participation in an illegal or unjustified strike does not by itself debar reinstatement. In the course of its judgement the Supreme Court came to the following conclusions :

(*a*) A pen–down strike comes within the definition of a strike in the Industrial Disputes Act (1947),[42] so that it is not per se illegal.[43]

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37 See Ludwig Teller *Op. Cit.* Volume I, Section 106.

38 Volume 306 United States p. 59.

39 1957 (1) Labour Law Journal, p. 17.

40 *Op. Cit.*, at p. 632.

41 1959 (2) Labour Law Journal, p. 666.

42 *Ibid.*, p. 684.

43 *Ibid.*, p. 688.

(*b*) A pen-down strike does not by itself amount to criminal trespass.[44] The Court distinguished American authority on the ground that in the latter the employees had refused to leave the premises occupied by them when called upon to do so and they excluded the management and the law enforcement authorities from the premises until finally evicted after violence.

The principal question whether a stay-in-strike is misconduct was left unanswered by the Supreme Court, so that subsequent decisions have been divided on this issue.[45] All that the case suggests in this connection is that mere participation in a stay-in-strike without more does not warrant dismissal and that such conduct is not per se illegal. The *Punjab National Bank Case* was distinguished by the Madras High Court in *Chelpark Company Ltd. v. Commissioner of Police*[46] where the employees engaged in a stay-in-strike remained on the premises after working hours, and refused to accept injunctions served on them. The police refused to intervene on the ground that it was purely a labour problem and that no cognizable offence had been committed. The Court held that the strikers were guilty of criminal trespass and unlawful assembly since they had no right to occupy the employer's property either before or after working hours. The Court distinguished the *Punjab National Bank Case* on the footing that there the facts did not constitute criminal trespass, the strike itself was peaceful, the strikers did not occupy the premises after working hours and they did not prevent others from doing their work nor did they insult or intimidate the employer. In the present case the facts were different – the strikers continued to occupy the premises after working hours and were guilty of obstruction, intimidation and annoying and insulting conduct. On these facts, the strikers were clearly guilty of misconduct.[47] In *Mysore Machinery Manufacturers Ltd.* v. *State of Mysore*[48] the facts were similar and the *Punjab National Bank Case* was distinguished[49] on similar grounds. In this case there was the added factor that the employees continued to occupy the premises notwithstanding that notices of suspension had been served on them. The Court pointed out that even in the *Punjab National Bank Case* the Supreme Court recognised that the position would have been different had the bank issued notices of suspension on the employees. The Court concluded[50] that 'where the relationship of master and servant has ceased, any assertive action attended with threats of injury and violence on the part of the labour with a

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44 *Ibid.*, pp. 684–5.

45 See the authorities cited by Alfred Avins *Employees' Misconduct, Op. Cit.*, pp. 474–5.

46 1967 (2) Labour Law Journal, p. 863.

47 Mere entry into the premises and remaining during working hours was held to be lawful – *Ibid.*, pp. 840–43.

48 1967 (2) Labour Law Journal, p. 853.

49 *Ibid.*, p. 859.

50 *Ibid.*, p. 860.

view to preventing the willing workers from entering into the factory premises and the supervisory staff of the management from looking after their property and further, their unauthorised occupation of the premises to the exclusion of the management, cannot but be regarded as disclosing an intention to commit offences.'

The law relating to stay-in-strikes in India is somewhat uncertain.[51] The following principles, however, are suggested on the basis of the existing authorities :

(1) A stay-in-strike comes within the statutory definition of a strike and, as such, is not per se illegal or unjustified.

(2) Nor does it per se amount to criminal trespass.

(3) A necessary consequence of (1) and (2) above, from the point of view of industrial law, is that mere participation in a stay-in-strike is not misconduct and does not warrant any punishment.

(4) If, however, a stay-in-strike is accompanied by violence, intimidation, threats or insulting behaviour, or if the strikers remain on the premises after working hours or after they have been suspended from service, their conduct would be illegal, amount to criminal trespass and they would be guilty of misconduct justifying dismissal.

In Ceylon the Stay-in-Strikes Act No. 12 of 1955 made a stay-in-strike a criminal offence. It provided for the punishment of imprisonment or fine of any person who, while taking part in a strike, remains on the premises in which the industry is carried on. The Act differed from criminal trespass since there was no burden, under the Act, on the prosecution to prove intent to insult, intimidate or annoy or to commit an offence, and entitled the Police to eject the strikers. This legislation was repealed by the Stay-In-Strikes (Repeal) Act No. 23 of 1958. There is therefore no legislation in Ceylon specifically making a stay-in-strike an offence. However, the Industrial Court in *Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya v. The Management*, '*The Orient*'[52] appears to have regarded a stay-in-strike as illegal on the basis of Indian and American authorities. Such a broad generalization, it is submitted, is erroneous, certainly as far as the Indian authorities are concerned. But, on the facts of the case the conclusion was perhaps justified since the employees continued to remain on the premises even after working hours.[53]

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51 See Alfred Avins, *Op. Cit.*, pp. 475–6 for a criticism of the *Punjab National Bank Case*.

52 Industrial Dispute 300 Ceylon Government Gazette No. 12,885 of 26th January 1962 at paragraph 9.

53 *Ibid.*, see paragraph 6.

The Court concluded :[54]

> 'An employee has certain rights and certain obligations. An employer has the right to carry on his business. An employee has no right to occupy the premises of his employer and prevent his employer from carrying out his business. Any employee who takes part in a stay–in–strike takes part in an illegal strike, the only punishment for which would be dismissal from service.'[55]

The question of a stay–in–strike came up for decision by the Supreme Court of Ceylon in *Hayleys Ltd. v. Crossette–Thambiah*.[56] The Industrial Court had held that a stay–in–strike in Ceylon was not illegal in view of the Stay–In–Strikes (Repeal) Act of 1958 and hence the dismissal of seventeen employees was unjustified. The Supreme Court quashed the award on the ground that the Industrial Court had misdirected itself in stating that the law of Ceylon has declared that a stay–in–strike is not illegal. It does not follow from the Act of 1958 that a stay–in–strike is not illegal.[57] The Supreme Court stated[58] that in India a sit–down strike is illegal[59] and concluded :

> 'In spite of the settled view on this question in other countries, a practice appears to have developed in Ceylon to resort to this method of redress in settling disputes. If labourers stage a 'sit–down strike' in the premises of the employer and prevent the latter from operating his machinery, in most cases, the provisions of the Penal Code relating to criminal trespass are quite sufficient to bring such strikers within the ambit of the Penal Code since, in such cases, it will not only be trespass, but there will also be intention to annoy or intimidate.'

The above statement raises the question whether and to what extent a stay–in–strike would attract the provisions of the Penal Code.[60] Criminal trespass under the Penal Code[61] is committed by anyone who

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54 *Ibid.*, paragraph 9.

55 Though the majority of Industrial Court awards in Ceylon recognise that mere participation in an illegal strike warrants dismissal, it is uncertain to what extent this view would be accepted today since the Indian authorities, which many of these awards follow, can no longer be regarded as good law. On this question see Part I of this study.

56 Volume 63 New Law Reports, p. 248.

57 *Ibid.*, at p. 255.

58 It is submitted that this conclusion was erroneous since the *Punjab National Bank Case*, *Op. Cit.* had held otherwise and the Supreme Court's decision was given subsequent to this.

59 '....no where has the Legislature stated that a stay–in–strike is not illegal. Merely because a special provision dealing with stay–in–strikes has been repealed, it does not follow that the Legislature has stated that a stay–in–strike is not illegal in this country. Therefore, the Industrial Court gravely misdirected itself on what they termed as the main question for determination in holding that it is of the opinion "that the law as it now stands, has declared that a stay–in strike is not illegal." : *Ibid.*, at p. 255.

60 *Op. Cit.*

61 *Ibid.*, Section 427.

(*a*) enters into or upon property in the occupation of another or

(*b*) having lawfully entered into or upon such property unlawfully remains there

with the intent to

(1) commit an offence or

(2) intimidate or

(3) insult or

(4) annoy

any person in occupation of such property. Where the conduct of employees engaging in a stay–in–strike amounts to criminal trespass, it is more likely to fall under (*b*) above. The offence of criminal trespass is committed against a person in occupation and not necessarily against a person in possession or the owner, and occupation is a matter of fact.[62] Further, it must be shown that the primary or dominant intention of the employees was to commit an offence, intimidate, insult or annoy the occupant.[63] An estate labourer, after his services have been terminated, remaining on the estate unlawfully, contumaciously and in defiance of the Superintendent has been held guilty of criminal trespass since an intention to annoy must be inferred.[64] It must be noted, however, that Section 427 of the Penal Code does not make every trespass a criminal offence, the class of trespass which it contemplates being one calculated to cause a breach of the peace, and the section was not intended to provide a cheap and expeditious method of enforcing a civil right.[65]

It is clear that it is not every stay–in–strike that will amount to criminal trespass. For instance, where employees stage a sit–down or tools–down strike within working hours, without violence or intimidation and without obstructing those who wish to work, it is unlikely that such conduct would amount to criminal trespass. Such a situation would in all probability come within the definition of a strike.[66] Since the definition of a strike in the

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62 *R. v. Selvanayagam* Volume 51 New Law Reports, p. 470 (Privy Council). The requirement of occupation has raised a number of difficult questions of Law – see *Speldewinde v. Ward*, Volume 6, New Law Reports, p. 317, *Nallan Chetty v. Mustafa*, Volume 19 New Law Reports, p. 262, *Fernando v. Holloway*, Volume 60 New Law Reports, p. 90.

63 *R. v. Selvanayagam, Op. Cit., Marimuttu v. Wright*, Volume 48 New Law Reports, p. 253, *Abraham v. Hume*, Volume 52 New Law Reports, p. 449, *Angamuttu v. The Superintendent of Tangakele Estate*, Volume 58 New Law Reports, p. 190.

64 *Selliah v. de Krester*, Volume 70 New Law Reports, p. 263. But in *Namanathan v. McIntyre*, Volume 69 New Law Reports, p. 401 an intention to annoy was held to be absent and therefore the employee was not guilty of criminal trespass.

65 *R. v. Selvanayagam, Op. Cit., Nandohamy v. Walloopillai*, Volume 61 New Law Reports, p. 429.

66 Trade Unions Ordinance (1935): 'The cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed to continue to work or to accept employment.'

Industrial Dispute Act[67] of India is the same as in Ceylon, there appears to be no reason why the decision in the *Punjab National Bank Case*[68] should not apply in Ceylon in similar circumstances. On the other hand, strikers would be guilty of criminal trespass where thc employees remain on the premises after being ordered out or suspended from service, or where they indulge in violence, intimidation and similar conduct, or obstruct or prevent the employer from carrying on his business, or remain on the premises after working hours. Such conduct would, in addition, amount to misconduct justifying disciplinary action and perhaps even dismissal.

Gherao[69]

A new technique adopted by trade unions in India as a method of industrial warfare is Gherao. It is unknown in Ceylon. It has been described as[70]

> '. . . . . encirclement by the workmen of the employers or their managerial staff followed by various hostile manifestations . . . . Generally it assumes the form of keeping the management or the managerial staff . . . . . in wrongful confinement, thus depriving them of their personal and other liberties. Occasionally it assumes the form of physical surrounding of such establishments thus shutting off access of management thereto . . . . Once commenced, gheraos tend to degenerate into further criminal activities, for example, wrongful restraint, trespass, mischief, annoyance, intimidation and worse. The object of gheraos is to coerce the management and make them concede to the demand of labour.'

Sometimes gherao has taken the form of even preventing the persons restrained within the premises from access to food. It is clear that gherao does not come within the definition of a strike since it goes far beyond a concerted withdrawal of labour. As a method of trade union action it is invariably illegal as amounting, depending on the facts of each case, to wrongful restraint, criminal trespass, intimidation, unlawful assembly, wrongful confinement and similar offences under the Penal Code.

Overtime Ban

In order to exert pressure on an employer in an industrial dispute, trade unions and workmen sometimes adopt the technique of refusing to perform overtime work. The justifiability for such conduct depends, at least in part, on whether an employer is entitled to require his employees to perform overtime

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67 Section 2 (q).

68 *Op. Cit.*,

69 The origin of this term is Sanskrit and Persian – G. K. Roy, *Gheraos, Strikes and Lockouts* (University Book Agency, Allahabad, 1969), p. 1.

70 *Ibid.*, p. 1.

work.[71] As a general rule, in the absence of anything to the contrary in a contract of employment or other agreement, it is an implied term of employment that an employee can be required to work reasonable overtime.[72] This is particularly so today since overtime work is a normal feature in most industrial undertakings and has become customary in most trades. In Ceylon the Wages Boards decisions under the Wages Boards Ordinance (1941)[73] and the Shop And Office Employees (Payment of Remuneration) Act 1954[74] prescribe enhanced rates of payment for overtime work in respect of persons covered by them. There is nothing stipulated therein which suggests that an employee's consent is a necessary prerequisite for overtime work. Though these laws, as in other countries, define a normal working day, it does not follow that an employee cannot be called upon to work overtime.[75] As stated by the Madras High Court in *Sridharan Motor Service v. Industrial Tribunal*[76] :

> 'The liability to be called upon to work overtime is an incident of various kinds of employment and an order is not illegal merely because it requires an employee to work overtime. When that happens, the employee is entitled to extra payment at certain enhanced rates. But, he cannot refuse to work.'

Where the work is of an urgent nature, the obligation to work reasonable overtime would be greater.

Refusal to work reasonable overtime without justifiable cause is misconduct.[77] What constitutes a reasonable excuse must necessarily depend on the circumstances of each case. For instance, the fact that an employee has some urgent private matter on the particular day he is required to work overtime would usually be regarded as a reasonable excuse. Since an employer is entitled to demand only reasonable overtime from his employees, it would always be open to a court to determine what is reasonable in a particular case and, in doing so, the court would be influenced by the custom or practice in

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71 On this latter question see Alfred Avins, *Employees' Misconduct*, *Op. Cit.*. pp. 251–7 where the position in various parts of the Commonwealth is set out.

72 *Bose v. Chaibassa Cement Works* 1953 (1) Labour Law Journal, p. 781 at p. 784. This principle was recognised as long ago as 1829 in England in *R. v. St. John*, Volume 109 English Reports, p. 333 at p. 335.

73 Chapter 136, Legislative Enactments of Ceylon (1956).

74 Chapter 129, Legislative Enactments of Ceylon (1956).

75 *Sridharan Motor Service v. Industrial Tribunal* 1959 (1) Labour Law Journal, p. 380 at p. 388. See pp. 388–9 for illustrations given by the Court of the absurd consequences which would otherwise follow.

76 *Ibid.*, p. 389.

77 *Firestone Tyre and Rubber Company v. Workmen* 1951 (2) Labour Law Journal, p. 125, *Bengal Cardboard Industries and Printers Ltd, v. Employees*, 1954 Labour Appeal Cases, p. 234,

the particular trade. Reasonable notice should be given to an employee that he would be required to work overtime, and what is reasonable notice would depend on the facts of each case.

In *Ceylon Mercantile Union v. The Associated Newspapers of Ceylon Ltd.*[78] it was held that overtime is not purely voluntary and that a concerted and deliberate refusal to work overtime is not legitimate trade union action. In this case the employees had refused to work overtime as a protest against the dismissal of a fellow employee. The union sought to justify this refusal on two grounds, firstly, that overtime work is purely voluntary and has not been contracted for, and secondly that even if it is part of the contract of employment refusal to work overtime is legitimate trade union action and amounts to a partial strike. The first ground was rejected, the Court stating[79]:

> 'When overtime has been done continuously and for several years without a break and not spasmodically it is difficult to avoid the conclusion that it became a part of the contract of service..... In our view the working of reasonable overtime is an implied term of the contract of employment and is obligatory.'

Referring to the second argument, the Court took the view that a concerted refusal to work overtime is not a strike and that it was improper conduct.[80] The latter conclusion that it is improper conduct appears to have been reached on the authority of *Bengal Cardboard & Industrial Printers Ltd. v. Bengal Cardboard Industries Ltd*[81] and also in view of the fact that 'the branch union took concerted action to embarrass the Company and to compel it to withdraw the dismissal notice.....'

Lock – out

Lock–out is the antithesis of strike. It is the weapon available to an employer whereby he may seek to compel his employees to come to terms with him by refusing them work or temporarily closing down the place of business.[82] Shortly stated, lock–out is the witholding of work by an employer from his employees with a view to obtaining some concession from them. In India[83] lock–out is defined as

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78 Industrial Dispute 252 Ceylon Government Gazette 12,508 of 7th July 1961.

79 *Ibid.*, at paragraph 11.

80 *Ibid.*, at paragraph 12.

81 *Op. Cit.*

82 See *Kairbetta Estate v. Rajamanickam* 1960 (2) Labour Law Journal, p. 275 at. p. 278 (Supreme Court of India). 'A lock–out is generally adopted as a security measure and may in certain cases be used as a weapon corresponding to what the employees have in the shape of a strike...': *Lakshmi Devi Sugar Mills v. Ram Sarup* 1957 (1) Labour Law Journal, p. 17 at p. 21 (Supreme Court of India).

83 Section 2(1) Industrial Disputes Act. (1947).

> 'the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him.'

In Ceylon under the Industrial Disputes Act[84] lock-out has the same meaning as in the Trade Unions Ordinance (1935),[85] which defines it as

> 'the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.'

This definition is substantially the same as the Indian one, except that the definition in Ceylon sets out the purposes for which a lock-out may be effected.[86] However, the same result has been achieved in India in consequence of judicial interpretation so that today a lock-out in India has the same meaning as in Ceylon and may be effected for the same purposes.

Indian courts have refused to interpret the definition of a lock-out as it stands in the Industrial Disputes Act to mean that closure of the place of business for any reason would amount to a lock-out.[87] It is only where the closure, suspension or refusal by the employer to continue to employ his workmen is used as a weapon corresponding to a strike that it will amount to a lock-out :

> 'The lock-out is the corresponding weapon in the armoury of the employer. If an employer shuts down his place of business as a means of reprisal or as an instrument of coercion or, as a mode of exerting pressure on the employees or, generally speaking, when his act is what may be called an act of belligerency there would be a lock-out. If, on the other hand, he shuts down his work because he cannot for instance get the raw materials or the fuel or the power necessary to carry on his undertaking or because he is unable to sell the goods he has made or because his credit is exhausted or because he is losing money, that would not be a lock-out.'[88]

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84 *Op. Cit.*, section 47.

85 *Op. Cit.*, section 2.

86 In India Section 2(e) of the now repealed Trade Disputes Act (1929) set out the purposes for which a lock-out may be effected in practically the same terms as the definition in Ceylon.

87 *Sri Ramachandra Mills v. State of Madras* 1957 (1) Labour Law Journal, p. 90.

88 *Ibid.*, pp. 92–3. See also *Jaya Bharat Tile Works v. State of Madras* 1954 (1) Labour Law Journal, p. 286 for the distinction between closure and lock-out.

In other words, one must look to the reason for the closure, suspension or refusal of work in order to determine whether the employer's action falls within the meaning of a lock–out. Hence the words 'refusal by an employer to continue to employ . . .' in the definition does not bring a case of dismissal or discharge of employees b an employer within the meaning of a lock–out.[89] So also it has been held that 'refusal to employ' means a refusal or an intention not to pay the employees rather than a refusal to find work, so that it is not a lock–out where the employer pays the workmen but does not give them work.[90] Similarly, as pointed out by the Supreme Court of India in *Express Newspapers Ltd. v. Their Workers*,[91] every closure does not amount to a lock–out :

> 'The theoretical distinction between a closure and a lock–out is well settled. In the case of a closure, the employer does not merely close down the place of business, but he closes the business itself; and so, the closure indicates the final and irrevocable termination of the business itself. Lock–out, on the other hand, indicates the closure of the place of business and not the closure of business itself.'

The Court pointed out that though this was the theoretical distinction, in practice difficulties arise in distinguishing between a bona fide closure and a lock–out in the guise of a closure. Thus a closure is a lock–out if effected as a retaliatory measure though not with a view to resisting economic demands made by the employees.[92] A temporary stoppage of work due to shortage of raw materials is not a lock–out.[93] Nor is it a lock–out where the employer closes down a section of his business for trade reasons,[94] or where he suspends his workmen for misconduct.[95] The words 'any number of persons' in the

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89 *Feroz Din v. State of West Bengal* 1960 (1) Labour Law Journal, p. 244 at pp. 247–9.

90 *Turner v. Sawdon & Company* (1901) 2 King's Bench p. 653, *Mohammed Samsuddin v. Sasamusa Sugar Works Ltd.* 1956 (1) Labour Law Journal, p. 575 at p. 577. This principle would not apply where there is a duty cast on an employer to provide work in addition to the duty to pay wages. One such case would be where a court orders re–instatement of an employee, in which event reinstatement must be factual and not notional – *Ovid v. Jayasinghe* 1966 Industrial Court Reporter p. 72. See also V. B. Patel, *The Industrial Disputes Act* (Tripathi, Bombay, 1963), p. 169.

91 1962(2) Labour Law Journal, p. 227.

92 *Lord Krishna Sugar Mills Ltd. v. State of Uttar Pradesh* 1964 (2) Labour Law Journal, p. 76 at p. 78. This is subject to the qualification that if the closure is of a permanent nature, for whatever reason, it would not be a lock–out since a lock–out pre–supposes an intention to carry on the business at a later date.

93 *Praboo Pandey v. J. K. Jute Mills Company Ltd.* 1956 (1) Labour Law Journal, p. 588.

94 *Industrial & General Engineering Company v. Their Workmen*, 1964 (2) Labour Law Journal, p. 438.

95 *State of Bihar v. Deobar Jha*, All India Reporter 1958 (Patna), p. 51 at p. 58, *Ram Naresh Kumar v. State of West Bengal*, 1958 (1) Labour Law Journal, p. 567.

definition of a lock-out imply that refusal of work to one workman only is not a lock-out because, although the word 'any' by itself includes an individual, the phrase read together with 'number' means two or more.[96]

In the first part of this study we have seen that in strict English legal theory a strike terminates the contract of employment, whereas in many other countries such as India a strike has been regarded as only suspending the contract of employment. Since lock-out is the antithesis of a strike, it has the same effect on the contract of employment as a strike. Thus in India a lock-out has been held to only suspend the contract of employment.[97]

In Ceylon just as much as the Industrial Disputes Act imposes certain restrictions on a strike,[98] so also does it impose similar restrictions on a lock-out. In terms of the Industrial Disputes Act the following restrictions have been placed on a lock-out:

(1) Twenty-one days' notice of a lock-out in an essential industry must be given[99] and failure to do so is an offence.[100]

(2) An employer bound by a collective agreement or by a settlement under the Act or by an award of an Arbitrator or Industrial Court commencing a lock-out with a view to procuring the alteration of any of the terms and conditions of that agreement, settlement or award is guilty of an offence.[101]

(3) An employer commencing, continuing, participating in or doing any act in furtherance of a lock-out in any industry after an industrial dispute in that industry has been referred for settlement to an Industrial Court or Arbitrator, but before an award in respect of such dispute has been made, is guilty of an offence.[102]

It does not follow from the fact that a lock-out is legal that it is also justified[103] but a lock-out that is illegal cannot be justified under any circumstances, as is also the case of a strike. A lock-out declared where workmen stayed away from work, assembled near the office of the establishment and continued there so as to prevent the rest of the employees from

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96 *Singareni Collieries Company Ltd. v. Their Mining Sirdars*, 1967 (2) Labour Law Journal, p. 465 at pp. 469 et. seq

97 *Feroz Din v. State of West Bengal*, *Op. Cit.*, at p. 248, *Mohammed Samsuddin v. Sasamusa Sugar Works Ltd.*, *Op. Cit.*, at p. 578. As far as English Law is concerned, just as much as strikers must give notice of a strike, an employer must give notice of a lock-out, the minimum period of notice being 4 weeks in terms of Section 1 of the Contracts of Employment Act (1963).

98 See Part I of this study.

99 Section 32 (1)

100 Section 40 (1) (c)

101 Section 40 (1) (ff)

102 Section 40 (1) (1)

103 We have seen, in Part I of this study, that the same applies to strikes.