CASE NOTE

FRANZ HEIN v. JAQUES LIMITED[1]

Equal Opportunity — Discrimination on ground of private life — Whether discrimination on ground of political belief — Whether discrimination on ground of engaging in or refusing to engage in lawful political activity — Closed shop — Whether lawful agreement or arrangement relating to industrial relations — Equal Opportunity Act 1984 (Vic.) ss. 4(1), 17(1), 21(2), 21(4)(d), 35.

In February 1987 the Victorian Equal Opportunity Board handed down its decision in the case of *Franz Hein v. Jaques Ltd* in which Hein recovered damages under the Equal Opportunity Act 1984 (Vic.) against his former employer who dismissed him for failing to join a union whilst working in a 'closed shop'. The case centred on whether by reason of his 'private life' he had been 'unlawfully' discriminated against by such dismissal, and whether this discrimination was pursuant to a lawful agreement or arrangement relating to industrial relations which would put it outside the scope of the Act.

The case has significance in the context of the widespread *de facto* compulsory unionism in many Australian industries. 'Closed shops' are frequently maintained by employers acting upon inducements to not employ non-unionists, such as the threat of industrial action. This decision is limited to cases of that nature where the employer legally has a choice, albeit possibly constrained by political factors. However the decision has further significance as a likely catalyst to litigation on the lawfulness of closed shop agreements and arrangements, if unions and/or employers seek to enter sufficiently formal industrial agreements or arrangements to fall outside the scope of the Equal Opportunity Act.

The lengthy decision handed down on 19 February 1987 was by a majority comprising the President Jan Wade and Member Leanna Darvall. The dissent of Patricia Clancy is indicated below.

The facts

The complainant, Hein, had been a member of what is now the Amalgamated Metal Workers Union ('the A.M.W.U.') for 18 years from 1960, following his migration to Australia, until 1978. He had been a member of a German union before 1960, because he supported trade unionism when unions confined their activities to industrial matters relating to obtaining satisfactory working conditions for their members. He was, however, opposed to the political activity of trade unionism.

Hein resigned from the A.M.W.U. in 1978 because he believed it had provided insufficient support during a dispute with an earlier employer and because of his dissatisfaction with the Union's political activities. Whilst he had refused to participate in these activities and had demanded a refund of a levy paid to the Australian Labour Party ('the A.L.P.'), union work stoppages at these times rendered him also unable to work, which had the effect of him losing wages.

In May 1984 Hein was employed by the respondent, Jaques Limited ('the Company'), in its Clayton plant. As he was desperate to obtain the job and thought it would be a decisive factor, Hein said he was a member of the A.M.W.U. when in fact he wasn't. In December 1984 Hein had several approaches from a shop steward of the A.M.W.U. informing him that he must join the Union. Hein refused, and on the last occasion cited article 20(2) of the United Nations Declaration of Human Rights: 'No one may be compelled to belong to an association.' The shop steward sought the assistance of the Plant Manager who informed Hein that he would be dismissed if he did not join the Union. Hein refused without stating his reason, packed up and left the premises.

[1] Victorian Equal Opportunity Board, 19 February 1987: President Jan Wade, Members Leanna Darvall and Patricia Clancy. Decision yet to be reported at time of writing. Page references are to the transcript.

The A.M.W.U. is affiliated with the Victorian Branch of the A.L.P. The Union has an entitlement to send delegates to the A.L.P. State Conference based on the size of its membership. For 1986/7 the A.M.W.U. is entitled to 21 delegates, the largest of any union. The affiliation fee payable is at a rate of $1.48 for each member — in 1985/6 the A.M.W.U. paid approximately $52,000. In addition the A.M.W.U. makes additional contributions at election times and has policies on political matters such as opposition to uranium mining.

The Company considered the Clayton plant to be a closed shop for some time, arising from 'long standing practice' and as a matter of 'industrial reality'. The Company's management considered Hein to be a good tradesman and difficult to replace, and would have been prepared to continue to employ him if the A.M.W.U. was unaware of his position.

The provisions of the Equal Opportunity Act 1984 (Vic.)

The complainant, Hein, alleged that the Company had acted in breach of s. 21(2) of the Act:

> It is unlawful for an employer to discriminate against an employee on the ground of status or by reason of the private life of the employee —
> . . . (b) by dismissing the employee or subjecting the employee to any other detriment.

'Private life' is defined in s. 4(1) and was the reason alleged for dismissal in this case:-

> 'Private Life' in relation to a person means —
> (a) the holding or not holding of any lawful religious or political belief or view by the person; or
> (b) engaging in or refusing or failing to engage in any lawful religious or political activities by the person.

The criteria for discrimination is established by s. 17(1):

> A person discriminates against another person in any circumstances relevant for the purposes of a provision of this Act if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favorably than the first-mentioned person treats or would treat a person of different status or with a different private life.

Sub-section 21(4) excludes various forms of discrimination from the operation of s. 21. Amongst the exclusions is:

> (d) discrimination by an employer or a prospective employer which is authorised or required by or under any law of the Commonwealth or the State of Victoria or is pursuant to any lawful agreement or arrangement relating to industrial relations;

The issues to be resolved in applying the provisions

The parties agreed that Hein was dismissed, and that this dismissal was because of his refusal to join the A.M.W.U. The Board determined that this satisfied the s.17(1) requirement of discrimination for the purposes of a provision of the Act. By dismissing Hein, the Company had treated him less favorably than it treated other employees who were members, or prepared to become members, of the A.M.W.U.

The Board therefore identified that there were two matters in dispute. The first was whether this dismissal was by reason of his 'private life'. This led the Board to a very thorough examination of the meaning of the various limbs of 'private life'. If his dismissal was for this reason, the second issue was whether the discrimination was exempted from s. 21 by s. 21(4)(d) of the Act.

Whether dismissal was by reason of employee's private life

The Company submitted that the only substantial reason for Hein's dismissal was that there would be industrial action if he remained an employee. This, they argued, was not by reason of his private life, but by reason of likely industrial action. The Company had no inherent objection to non-union employees but for this problem.

Section 35 of the Act provides:

> Where a person (hereinafter called 'the first person') counsels, requests, demands or procures another person (hereinafter called 'the other person') to act in contravention of this Act —
> (a) if the other person so acts, both those persons shall be jointly and severally liable under this Act in respect of the contravention;

(b) if the other person refuses to act and the first person so acts and his action causes the other person to suffer any detriment as a result of such refusal, such action shall constitute unlawful discrimination under this Act.

The Board held that the motivation of the first person must be the status or private life of the person subject to the discrimination. The establishment of this element is examined below. Therefore Hein's dismissal was by reason of his refusal to join the Union, even if the Company had acted only under duress. However, the Board held that, as a matter of fact, Hein's refusal to join the Union was *a* substantial reason for his dismissal as the Manager acted immediately upon Hein's refusal, without knowing of any Union response other than the promise to call a meeting. It is sufficient that the doing of an act by reason of private life is one of many substantial reasons: s. 4(7).

The Board then examined the three parts of 'private life'.

First, on the question of political beliefs or views, the Board held that as the Company was not aware of Hein's beliefs or views, he had not been dismissed on this basis. Whilst Hein had made his views clear to the shop steward, Hein had been dismissed by the Manager who had no knowledge of them, nor had any reason to suspect that he held such views. The majority said *obiter dicta* that Hein's objection to the policies of the A.M.W.U. and the A.L.P., and his belief in freedom of association, both of which lead to his refusal to join the Union, did amount to requisite beliefs or views. Had those views been made known to the Manager he would have established discrimination on this basis. The minority Board Member concurred with the majority's decision on this first basis and was of the view that had Hein stated his reason to the Manager, 'the position may well have been different.'[2]

However, it may be that the Board overlooked the significance of s. 35 in this context. The Company claimed that their reason for dismissal was the Union's threat of industrial action. The Union's agent knew of Hein's political beliefs and they were at least *a* substantial reason for the Union's reaction. If the majority's interpretation of the facts, ss 4(7) and 35, and requisite political beliefs are consistent and correct, then Hein *was* dismissed because of his political views.

Secondly, on the question of *engaging* in lawful political activity, the Board held that the failure of Hein to convey to the Manager that his refusal was a form of political protest meant that this basis could not be satisfied. This was based on their view that a single instance of activity may be sufficient if made clear that it *was* a protest. There are, however, numerous other reasons for failing to join a union.

Thirdly, on the issue of *refusal* to engage in lawful political activity, the majority of the Board considered that the 'direct consequences' of membership of the A.M.W.U. were such that refusal by Hein to join the Union satisfied this basis. The employer cannot avoid the operation of the Act by failing to consider whether the activities concerned are political. Further, the complainants's reasons for refusing to engage in such activities are not relevant.

In the case of *Jolly v. Director-General of Corrections*[3] the Board considered that the meaning of political is a matter of 'judgment in the light of the circumstances surrounding each case assessed against the social objectives of the equal opportunity legislation'.[4] The majority considered that the direct consequences of membership, of increasing the A.L.P. affiliation fee and State Conference representation entitlement, and the requirement to take part in political activities made joining the Union amount to engaging in political activities. It was not possible to join the Union and not engage in these political activities.

It was on this point that the minority judgment differed from the majority and held that Hein's case was not established. The minority Member relied on the observation that many unions, including those affiliated with the A.L.P., contain amongst their ranks members of political parties other than the A.L.P. Therefore to say that membership of the Union results in the member himself or herself engaging in such activities could lead to absurd results given the rules of various political parties prohibiting multiple membership. She also noted that other associations, such as sporting clubs, sometimes engaging in political lobbying. 'Does it follow then that joining such a club is "engaging in political activities?"'[5]

[2] Transcript 56.
[3] [1985] E.O.C. 92-124.
[4] Transcript 36.
[5] *Ibid.* 56-7.

Even if one does not accept the reasoning of the minority Member (such as by answering 'yes' to her rhetorical question), the majority conclusion is open to considerable debate. In particular the majority held that the failure of the employer to consider the nature of the activities which the complainant *refuses* to engage in, does not avoid liability. However, where the basis is *engaging* in activities which may be political, the employer must be informed that the relevant activity *is* political. This suggests that whether or not the activity in which the person refused to engage is 'political' is an objective question of fact which the employer is capable of knowing. It could be argued that the 'man in the street' wouldn't consider joining a union to be engaging in political activity. It is therefore difficult to say that an employer should know.

Whether the discrimination is exempted as being 'pursuant to any lawful agreement or arrangement relating to industrial relations'

Section 21(4)(d) of the Act became an issue to be dealt with upon the majority finding that Hein had been discriminated against by reason of his private life. The Company submitted that the 'closed shop' at the Clayton plant was the result of an agreement or arrangement within the meaning of Paragraph (d). Hein submitted that the evidence was insufficient to amount to the existence of an agreement or arrangement, but that if one was found, it would be in restraint of trade and therefore unlawful on the basis of *Buckley v. Tutty*.[6]

Despite the Company's belief in 'a longstanding practice' and 'an unwritten law', the Board found that there was no agreement or arrangement. They recognized that an arrangement may be less formal than a legal agreement, may be unenforceable at law[7] and might be implied or inferred from the circumstances or conduct of the parties.[8] However, the Board considered that it was unable to identify the terms, the parties or their obligations.

It may be that 'in some circumstances the action of one party only may result in an arrangement if it operates as an inducement to some other person to act in a particular way.'[9] However, the majority held that this would also require an identification of the other party. It is unclear from the judgment why the Board did not consider the A.M.W.U. to be such a party. The final point upon which the Board relied was that the Company's management would have been prepared to continue employing Hein had the A.M.W.U. been unaware, and they did not consider this to be in breach of an arrangement. However this point should not be conclusive, otherwise much of the breach of contract litigation which occurs would be unnecessary.

It appears then that the Board has been very narrow in its view of what is a requisite agreement or arrangement and thereby has avoided confronting the difficult issue of the lawfulness of such relationships. It may be that the Board decided to construe s. 21(4)(d) narrowly as it is an exception to the Act which, in effect, says that some forms of discrimination against individuals are lawful because the employer has agreed in principle to the discrimination with some third party.

Finally, the Board considered the Parliamentary Debates on the Equal Opportunity Bill 1984 and found nothing to doubt their construction in this case. However, a more comprehensive search for parliamentary intention reveals the aim of the shadow Attorney-General, who moved an amendment to s. 21(4)(d), to bring it to its current form, to concur with the Attorney-General's desire 'to ensure that the Bill did not cut across normal industrial practices in normal industrial law.'[10]

In the absence of evidence that the Company resisted the closed shop situation, it could be said that it was a normal industrial practice and indeed an arrangement. However, this returns to the now crucial question: Is this situation lawful?

Damages

Hein was awarded damages, amounting to $9,644.32, to compensate for loss of wages for a period of 18 months from the date of his dismissal. In determining this duration, the Board took into account

6 (1971) 125 C.L.R. 353.
7 *Newton v. F.C.T.* (1958) 98 C.L.R. 1, cited at transcript 44.
8 *F.C.T. v. Lutovi Investments Pty Ltd* (1978) 22 A.L.R. 519, cited at transcript 44.
9 *Re British Basic Slag Ltd's Agreement* [1963] 2 All E.R. 807 cited at transcript 45.
10 Victoria, *Parliamentary Debates*, Legislative Council, 3 May 1984, 2692. See also Mr J. Ramsay, Legislative Assembly, 3 April 1984, 3689.

Hein's frequency of changing jobs since coming to Australia, which had resulted in an average of less than 18 months per job.

Consequences of the decision

The majority's very comprehensive judgment gives an indication of the Board's likely attitude to future cases. It is likely that a political view which opposes compulsory unionism, on account of freedom of association, can be the basis of discrimination on the ground of political belief or view under s. 21(2)(b) *if* this is made known to the employer. Objectors to compulsory unionism are likely to adopt this course, with the result that the need to establish that joining the union amounts to engaging in political activity will be less important. To avoid the operation of s. 21(2)(b) employers and/or unions will need to enter quite explicit agreements or arrangements in which the parties, their terms and obligations, and the ambit are made very clear. This will give rise to the crucial issue yet to be resolved: are such closed shop agreements or arrangements lawful? The doctrine of restraint of trade must be considered. Such legality inevitably will be a question of political debate and therefore possible future legislative determination.

However the remaining important issue left unanswered by the Board is where its decision fits in with other aspects of industrial law. Differently put, it is not clear whether the Board's attitude to future cases will be important if future litigants seek removal of their case to the federal jurisdiction.

Arising from the *Termination, Change and Redundancy* case,[11] the Australian Conciliation and Arbitration Commission has inserted in the Metal Industry Award and other awards a requirement that '[t]ermination of employment by an employer shall not be harsh, unjust or unreasonable.' Termination on the ground of 'political opinion' is deemed to amount to harsh, unjust or unreasonable termination. The Commission refused to include a savings provision to allow the state anti-discrimination legislation to continue to operate in respect of cases of termination of employment. It appears then that this federal provision would 'cover the field' and that the High Court probably would grant prohibition and *certiorari* to displace the Board's jurisdiction if called upon to do so.

It remains to be seen if the Commission would adopt a similar view of political beliefs and opinion. It may be that they would not because of the conscientious objector provisions of s. 144A of the Conciliation and Arbitration Act 1904 (Cth). These also have been suggested as 'covering the field,' however this is more arguable, as a statutory protection procedure need not block out general anti-discrimination principles.

It appears from the judgment in *Hein v. Jaques Ltd* that the Equal Opportunity Board did not consider this issue of relationship with federal industrial provisions. A testing of this relationship may see the Board's decision to be of very limited consequence.

To the extent that this decision stands as authority, the pressure of the closed shop has now shifted further to the employer, given the certain continuation of union policy for closed shops and new pressure for formal agreements. However, it is interesting to note that Hein would have had an action against the A.M.W.U. by virtue of s. 35. The individual has certainly emerged from this decision with an enhancement of his/her rights.

ANTHONY SEYFORT*

[11] (1984) 26 A.I.L.R. 256; (1985) 27 A.I.L.R. 1.

* B. Com. (Hons); Student of Law, University of Melbourne.