MRS. BARBARA JARVIS (*Respondent*) ..APPELLANT;

AND

ASSOCIATED MEDICAL SERVICES, INCORPORATED (*Applicant*) ..... RESPONDENT;

AND

THE ONTARIO LABOUR RELATIONS BOARD, A. M. BRUNSKILL (*Respondents*) ..... RESPONDENTS.

1963
*Nov. 5
1964
Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour—Certiorari—Discharge for union activity—Reinstatement of complainant ordered by Labour Relations Board—Finding that complainant exercised managerial functions—Whether "person" within protection of s. 65 of Labour Relations Act—Whether Board had jurisdiction to order reinstatement—The Labour Relations Act, R.S.O. 1960, c. 202, ss. 1(3)(b), 50, 65, 80.

On the hearing of a complaint of the appellant made as to a breach by the respondent of the provisions of s. 50 of the Ontario *Labour Relations Act*, the Labour Relations Board found that the complainant had been dismissed for union activity, that she was a member of the Office Employees International Union, Local 131, to the knowledge of the managing director of the respondent, that the union activity for which she was dismissed did not conflict with her duty to her employer, and that although her duties were managerial in nature and she was therefore a person deemed not be an employee as defined by s. 1(3)(*b*) of the Act, nevertheless, she was a person entitled to the rights given under s. 65 of the Act. The Board ordered that she be reinstated in her employment. A motion to quash the order having been dismissed, the employer appealed. The Court of Appeal in allowing the appeal held that because the complainant exercised managerial functions, she was not a "person" within the protection of s. 65 of the Act and that in her case the Board had no jurisdiction.

Held (Abbott, Judson and Spence JJ., dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Cartwright, Fauteux, Martland, Ritchie and Hall JJ.:

The appeal could succeed only if the Act could be construed as giving the Board power, in appropriate circumstances, to compel the continuation of the employment not only of all persons who were "employees" within the meaning of that term as defined in the Act but also of all persons exercising managerial functions. Such a construction would be at variance with the purposes which appeared from reading the Act as a whole, and would involve giving a forced meaning to the words which the Legislature had employed.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

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The Board having found that the appellant was not an "employee" within the meaning of the Act at any time material to the application, it followed that the rights accorded to "any employee" under s. 65(5) were denied to her, so that if this Court were to restore the order of the Board it would be restoring an order which could not be enforced by the appellant in the manner provided by s. 65(5) for the enforcement of such a determination. It was unreasonable to suppose the Legislature to have intended that the benefits conferred by s. 65(4) were to be enjoyed by a class of persons who were plainly excluded from the right to enforce those benefits in accordance with s. 65(5), and when s. 65 was read against the background of the Act as a whole, it was apparent that the provisions of subs. (4) did not clothe the Board with any authority or jurisdiction to reinstate a person such as the appellant, who the Board itself had found had been exercising "managerial functions" and who was thus not an "employee" within the meaning of s. 65(5) or any other section of the Act.

Section 80 of the Act did not prevent the quashing of the decision of the Board. The effect of this section, if it received the construction most favourable to the appellant, was to oust the jurisdiction of the superior Courts to interfere with any decision of the Board which was made in exercise of the powers conferred upon it by the Legislature; within the ambit of those powers it might err in fact or in law; but the section did not mean that if the Board purported to make an order which, on the true construction of the Act, it had no jurisdiction to make the person affected thereby was left without a remedy. The extent of the Board's jurisdiction was fixed by the statute which created it and could not be enlarged by a mistaken view entertained by the Board as to the meaning of that statute.

Per Abbott and Judson JJ., *dissenting*: There was error in the judgment of the Court of Appeal in its restriction of the rights conferred under the Act to those who were employees within the meaning of the Act. The term "person" as used in ss. 50 and 65 included one who exercised managerial functions. The appellant was a person within the meaning of s. 50(*a*) and was entitled to its protection. Likewise, the appellant was a person whom the Board could order to be reinstated in employment pursuant to the provisions of s. 65(4).

As to the matter of *certiorari*, the Board's right to entertain the application was unquestionable. It related to the subject-matter which was given to the Board for decision, and its decision was reasonably capable of reference to the power given to it. Section 80 prevented a decision of this kind from being quashed on *certiorari* because the reviewing tribunal may choose to call what it finds to be error a jurisdictional defect. If there was error (and there was a conflict of opinion here) it was in the exercise of the function exclusively assigned to the Board by the legislation, and within that area, even if mistakes were made, s. 80 prevented judicial review.

Per Spence J., *dissenting*: The appellant had a right to obtain a decision of the Board. The word "person" in s. 50 and s. 65(4) should not be limited to mean only "employees" as described in s. 1(3)(*b*). Those who were entitled to complain and obtain a hearing by the Board under s. 65(4) were of a broader class than those who could enforce the resultant determination by court order under s. 65(5). Other means of enforcement were available, such as commencement of action in the ordinary fashion.

However, as to the right of a Court to consider the application for *certiorari*, the Board was nowhere given exclusive jurisdiction to determine for itself the meaning to be attributed to s. 50 or to s. 65 and, of course, the Board could not by an erroneous interpretation of any section or sections of the Act confer upon itself a jurisdiction which it otherwise would not have. *Certiorari* still lay, despite s. 80, if the inferior tribunal gave itself jurisdiction by a wrong decision in law.

Also, the factum filed on behalf of the Board made no reference to the propriety of the respondents proceeding by way of *certiorari* and counsel for the Board in his argument made no submission in reference to *certiorari*. Moreover, the factum of the appellant did not refer at all to the provisions of s. 80 and although counsel for the appellant who submitted argument on the issue of the right to *certiorari* did cite the section he based his whole argument upon the proposition that *certiorari* only lay if there was error on the face of the record—not that *certiorari* proceedings, even if there were utter lack of jurisdiction in the inferior tribunal, were excluded. It would not, therefore, be appropriate for this Court to take such a position in this case.

[*In re Ontario Labour Relations Bd., Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*, [1953] 2 S.C.R. 18; *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Bd.*, [1953] 2 S.C.R. 140, applied; *Re Ontario Labour Relations Bd., Bradley et al. v. Canadian General Electric Co.*, [1957] O.R. 316; *Labour Relations Bd. et al. v. Traders' Service Ltd.*, [1958] S.C.R. 672; *Farrell et al. v. Workmen's Compensation Bd.*, [1962] S.C.R. 48; *Alcyon Shipping Co. v. O'Krane*, [1961] S.C.R. 299; *R. v. Ontario Labour Relations Bd., Ex. p. Taylor*, 41 D.L.R. (2d) 456; *The King v. Hickman, Ex. p. Fox and Clinton* (1945), 70 C.L.R. 598; *Tyrrell v. Consumers' Gas Co.*, [1964] 1 O.R. 68, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Parker J. and quashing a decision of the Ontario Labour Relations Board. Appeal dismissed, Abbott, Judson and Spence JJ. dissenting.

W. B. Williston, Q.C., and *John Sopinka*, for the appellant.

D. K. Laidlaw, for the respondent, Associated Medical Services, Incorporated.

H. L. Morphy, for the respondents, Ontario Labour Relations Board and A. M. Brunskill.

Taschereau C.J. and Martland and Hall JJ. concurred with the judgment delivered by

CARTWRIGHT J.:—The relevant facts and statutory provisions and the course of this litigation in the Courts below are set out in the reasons of my brothers Judson and Spence.

[1] *Sub nom. Associated Medical Services Incorporated v. Ontario Labour Relations Board et al.*, [1962] O.R. 1093, 35 D.L.R. (2d) 375.

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All parties argued the appeal on the assumption that the findings of fact made by the Board must be accepted.

The appellant was discharged on February 2, 1961, on the ground that she was engaging in union activities on company premises during working hours. The Board found that her dismissal was unjustified and ordered that she be reinstated forthwith in employment with the respondent. The Board made the following finding as to the appellant's status:

> There can be no question but that on and after February 28, 1960, Mrs. Jarvis exercised functions which viewed in their entirety were functions which the Board has uniformly characterized as managerial in nature. If the issue as to the status of Mrs. Jarvis had arisen in these proceedings for the first time, I would have no hesitation whatever in finding that in my opinion at the material times in so far as the present proceeding is concerned, Mrs. Jarvis was exercising managerial functions and that she was therefore a person deemed not to be an employee under the terms of sec. 1(3)(*b*) of the Act.

The question calling for determination is whether, under *The Labour Relations Act,* R.S.O. 1960, c. 202, hereinafter referred to as "the Act", the Board had jurisdiction to order the reinstatement of the appellant who at the time of her discharge had for almost a year ceased, for the purposes of the Act, to be an employee of the respondent.

It appears to me that the appeal can succeed only if we are able to construe the Act as giving the Board power, in appropriate circumstances, to compel the continuation of the employment not only of all persons who are "employees" within the meaning of that term as defined in the Act but also of all persons exercising managerial functions.

In my opinion such a construction would be at variance with the purposes which appear from reading the Act as a whole, and would involve giving a forced meaning to the words which the Legislature has employed.

I find myself so fully in accord with the unanimous reasons of the Court of Appeal[1], delivered by Aylesworth J.A., that I wish simply to adopt those reasons in their entirety. In particular, I find unanswerable the reasoning in the following passage where, after quoting the wording of ss. 50 and 65 of the Act, the learned Justice of Appeal continued:

> Upon the facts as found by the board, the complainant "for the purposes of this Act" was not an employee; hence if complainant comes within

[1] [1962] O.R. 1093, 35 D.L.R. (2d) 375.

the purview of sec. 50 she must be included in the term "person" as used therein. I do not think the term can be given so broad a meaning.

In clause (*a*) the pertinent prohibition is against refusal to employ or to continue to employ a "person" "because the person was or is a member of a trade union or was or is exercising any other rights under this Act." In clause (*b*) the prohibition is against imposing or seeking to impose certain conditions of employment against "an employee or a person seeking employment" and in clause (*c*) the prohibition is against compelling an "employee" to do or refrain from doing certain things. To employ or to continue to employ a person is for the purposes of the Act, to cause a person to become an employee or to continue a person as an employee. The section refers to two classes of individuals—a person who seeks employment i.e., who seeks to become an employee and a person who already is an employee. This meaning of the word is quite in keeping with the general object and purpose of the Act; on the other hand it is neither logical or necessary to construe "person" as it appears in this section as applying to anyone other than an individual seeking to become an employee or who already is an employee and we are told in plain terms by sec. 1(3)(*b*) of the Act that someone working in a managerial capacity is not, for the purposes of the Act to be considered an employee.

The same reasoning applies to the provisions of sec. 65; in clauses (1) and (4) thereof "person" is used in exactly the same connotation as in sec. 50; clause (1) envisions a complaint that a person has been refused employment, i.e. has been thwarted in an attempt to become an employee or has been discharged, i.e. denied continuation in the role of employee. Clause (4) contemplates that the board, where a complaint has not been settled "may inquire into the complaint" and if it is satisfied "that the person has been refused employment" (or) . . . "discharged . . . it shall determine the action . . . to be taken by the employer . . . with respect to the employment of such person which . . . may . . . include reinstatement in employment." Again the section is dealing with the same two classes of individuals—the person who is seeking to become an employee and the person who is an employee. In both instances it is "employment" which is spoken of and it is the refusal or termination of employment i.e. the withholding or termination for certain reasons of the role of "employee" which is the subject-matter of the board's inquiry. Since for the purposes of the Act, the complainant is not deemed to be an employee, it is difficult to appreciate how it can be held that under sec. 65 her duties in a managerial capacity are to be included in the term "employment". As in sec. 50, so in sec. 65 it is illogical and unrealistic that "employment" should be given any wider or other meaning than referring to work as an "employee" or that "person" should be construed as including anyone other than one seeking to become an employee; if any wider meaning is given either to person or to employment the language used is given a laboured and unnecessary meaning and one which does not further the general object and purposes of the legislation. Once the board determined, as it had the right to determine, that the complainant was a person deemed not to be an employee for the purposes of the Act it had *ipso facto*, demonstrated its lack of jurisdiction to proceed further with the complaint. The remedy, if any, of the complainant lies in another forum.

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My entire agreement with the reasons of Aylesworth J.A. includes, of course, the adoption of his statement:

> . . . it is trite to observe that the Board cannot by an erroneous interpretation of any section or sections of the Act confer upon itself a jurisdiction which it otherwise would not have.

However, in view of what is said by my brother Judson as to s. 80 of the Act, I wish to add a few words as to why, in my opinion, that section does not prevent the quashing of the decision of the Board in this case.

The effect of this section, if it receives the construction most favourable to the appellant, is to oust the jurisdiction of the superior Courts to interfere with any decision of the Board which is made in exercise of the powers conferred upon it by the Legislature; within the ambit of those powers it may err in fact or in law; but I cannot take the section to mean that if the Board purports to make an order which, on the true construction of the Act, it has no jurisdiction to make the person affected thereby is left without a remedy; indeed, in *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*[1], Rinfret C.J. explicitly rejected such a suggestion. The extent of the Board's jurisdiction is fixed by the statute which creates it and cannot be enlarged by a mistaken view entertained by the Board as to the meaning of that statute. The governing principle was succinctly stated by my brother Fauteux in *In re Ontario Labour Relations Board, Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*[2] at p. 41:

> The authorities are clear that jurisdiction cannot be obtained nor can it be declined as a result of a misinterpretation of the law, and that in both cases the controlling power of superior Courts obtains, notwithstanding the existence in the Act of a *no certiorari* clause.

This was the rule applied by the Court of Appeal in the case at bar. What is complained of by the respondent is not that the Board has been induced by errors of fact or law, or by both, to make an order in the exercise of its statutory jurisdiction, but rather that it has purported to make an order which the Act has not empowered it to make at all.

Since writing the above I have had the advantage of reading the reasons of my brother Ritchie and I agree with them.

[1] [1953] 2 S.C.R. 140 at 155. [2] [1953] 2 S.C.R. 18.

I would dismiss the appeal but would make no order as to costs.

Taschereau C.J. and Martland and Hall JJ. concurred with the judgment delivered by

RITCHIE J.:—The circumstances giving rise to this appeal have been fully set out by other members of the Court and it would be superfluous for me to reiterate them.

I agree with the reasons for judgment of my brother Cartwright and would dispose of this appeal in the manner proposed by him, but as there are other reasons which lead me to the same conclusion, I am prompted to make brief reference to them.

The appellant's argument rests upon the proposition that although, by reason of the provisions of s. 1 (3)(*b*), a "person" who "in the opinion of the Board exercises managerial functions" is not an "employee" within the meaning of that word as used in *The Labour Relations Act,* R.S.O. 1960, c. 202, such person is nevertheless to be included in the category of individuals with respect to whose employment by the employer the Board is authorized to make a determination under s. 65(4) of the said Act.

It was pointed out by counsel for the appellant that "the Court must have regard to the statute as a whole" and he contended that when this was done it became apparent that in the sections of the Act dealing with collective bargaining, the legal subjects and objects are employers, employees, employers' organizations and trade unions, whereas in the sections dealing with freedom to join and participate in the activities of trade unions and with unfair practices, the legal subjects and objects are employers, employees, trade unions, employers' organizations and "persons".

Dealing specifically with s. 65, the appellant's counsel submitted that "if the legislature intended the benefits of s. 65 of the Act to be restricted to employees it would have used the term 'employee' and not 'person'."

It is upon this foundation that the appellant seeks to obtain an order setting aside the judgment of the Court of Appeal and restoring the determination of the Ontario Labour Relations Board dated April 27, 1961. It occurs to me that this argument loses much of its force when s. 65 itself is read as a whole and consideration is given to

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the provisions for enforcement of the Board's determination which are contained in subs. 5 thereof. Section 65 (4) and (5) read as follows:

(4) Where the field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act, it shall determine the action, if any, to be taken by the employer and the trade union or either of them with respect to the employment of such person, which, in its discretion, may, notwithstanding the provisions of a collective agreement, include reinstatement in employment with or without compensation by the employer and the trade union or either of them for loss of earnings and other employment benefits and the employer and the trade union shall do or abstain from doing anything required of them by the determination.

(5) Where the employer or the trade union has failed to comply with any of the terms of the determination, any employer, trade union or employee affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

The only mention of this latter subsection in the tribunals below is to be found in the opinion of the chairman of the Ontario Labour Relations Board who had occasion to say:

It may be that the complainant, having regard to my finding as to her status, may encounter difficulty in enforcing any determination that the Board might make concerning her employment if she should seek enforcement under subsection 5 of section 65. However, we are not called upon at this stage to deal with that problem. It may not be amiss to point out here that, prior to the coming into force of the 1960 amendments to The Labour Relations Act, the relief afforded to a complainant under the counterpart of section 65 of the Act was not enforceable as a judgment or order of the Supreme Court.

The effect of the chairman's "finding as to her status" (with which the majority of the Board agreed) is that the appellant exercised managerial functions at all times material to this complaint and that she was therefore expressly excluded from the status of an "employee" as that word is used in *The Labour Relations Act*.

These proceedings were initiated by a personal letter signed by Barbara Jarvis and addressed to the Ontario Labour Relations Board which bore the following heading:

REQUEST FOR REINSTATEMENT UNDER SECTION 65 OF THE LABOUR RELATIONS ACT FOR UNFAIR DISCHARGE FOR ALLEGED UNION ACTIVITY . . .

As I have indicated, I agree with the view that the "reinstatement in employment" which the Board, in its discretion is entitled to include in "the determination" made by it under the authority of s. 65(4) is a "reinstatement in employment" as an "employee". An "employee" who has been "dismissed by his employer contrary to the provisions of the Act or to any collective agreement" is not deemed to have ceased to be an "employee" by reason only of his ceasing to work for his employer on account of such dismissal (see s. 1(2)) and such "employee" is therefore entitled to apply for reinstatement under s. 65(4) and to proceed to the enforcement of the Board's determination in accordance with s. 65(5), but the same considerations do not, in my opinion, apply to one who was not an "employee" within the meaning of the Act at the time of her dismissal.

The Board having found that the appellant was not such an "employee" at any time material to this application it follows, in my view, that the rights accorded to "any employee" under s. 65(5) are denied to her, so that if this Court were to comply with the request made by counsel for the appellant and were to restore the order of the Ontario Labour Relations Board dated April 27, 1961, it would be restoring an order which could not be enforced by the appellant in the manner provided by s. 65(5) for the enforcement of such a determination.

It appears to me to be unreasonable to suppose the Legislature to have intended that the benefits conferred by subs. (4) of s. 65 were to be enjoyed by a class of persons who are plainly excluded from the right to enforce those benefits in accordance with subs. (5) of the same section, and when s. 65 is read against the background of *The Labour Relations Act* as a whole, I am satisfied, for the reasons stated by Cartwright J. and by Aylesworth J.A., speaking on behalf of the Court of Appeal, that the provisions of s. 65(4) do not clothe the Labour Relations Board with any authority or jurisdiction to reinstate a person such as Mrs. Jarvis, who the Board itself has found to have been exercising "managerial functions" and who was thus not an "employee" within the meaning of s. 65(5) or any other section of the Act.

As I have indicated, I would dispose of this appeal as proposed by my brother Cartwright.

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FAUTEUX J.: For the reasons given by my brothers Cartwright and Ritchie, I would dismiss the appeal but make no order as to costs.

ABBOTT J. (*dissenting*): I have had an opportunity of reading the reasons of my brother Judson, with which I am in respectful agreement. I desire to add only a brief comment with respect to s. 80 of *The Labour Relations Act*, R.S.O. 1960, c. 202.

The primary purpose of *The Labour Relations Act* is to promote harmonious industrial relations within the province. A board such as the Labour Relations Board, experienced in the field of labour management relations, representing both organized employers, organized labour, and the public, and presided over by a legally trained chairman, ought to be at least as competent and as well suited to determine questions arising in the course of the administration of the Act as a Superior Court judge.

In enacting s. 80, the Legislature has recognized that fact and has indicated in the clearest possible language that the workings of the Board are not to be unnecessarily impeded by legal technicalities. The duty of the Courts is to apply that section, not to attempt to circumvent it.

I would dispose of the appeal as proposed by my brother Judson.

JUDSON J. (*dissenting*):—The judgment under appeal quashes a decision of the Ontario Labour Relations Board, which ordered the respondent, Associated Medical Services, Incorporated, to reinstate the appellant, Barbara Jarvis, in her employment. She had made a complaint to the Board that she had been discharged because she was a member of a labour union. The Board acted under s. 65 of *The Labour Relations Act*, R.S.O. 1960, c. 202, in ordering her reinstatement. The judgment of the Court of Appeal holds that because Mrs. Jarvis exercised managerial functions, she was not a "person" within the protection of s. 65 of the Act and that in her case the Board had no jurisdiction. With respect, I think that there was error in this conclusion.

Mrs. Jarvis was a member of the Office Employees International Union, Local 131. In December 1959, this union filed an application for certification as the bargaining agent of the employees of the respondent. At this time Mrs. Jarvis was employed as a clerk. In February 1960, she was

promoted to the position of railway claims supervisor. In October 1960, the Labour Relations Board certified the union. At this time Mrs. Jarvis, according to the subsequent opinion of the Board, was exercising managerial functions. She was discharged from her employment in February 1961 and applied promptly for reinstatement under s. 65 of the Act. The Board ordered her reinstatement in June 1961.

The Board found that she had been dismissed for union activity, that she was a member of the union, Local 131, to the knowledge of the managing director of the respondent, that the union activity for which she was dismissed did not conflict with her duty to her employer, and that although her duties were managerial in nature and she was therefore a person deemed not to be an employee as defined by s. 1(3)(*b*) of the Act, nevertheless, she was a person entitled to the rights given under s. 65 of the Act.

This is the decision that was quashed by the Court of Appeal on what was, in my respectful opinion, an unduly narrow and erroneous construction of the statute.

Section 1(3)(*b*) reads:

> 1. (3) For the purposes of this Act, no person shall be deemed to be an employee,
>
> (*b*) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The result of this section is that in the sections of the Act which deal with bargaining rights and collective bargaining (the legal subjects and objects being employers, employees, employers' organizations and trade unions), a person exercising managerial functions cannot be included within the bargaining unit. On the other hand, in the sections of the Act which deal with freedom to join and participate in the activities of trade unions and with unfair practices, the legal subjects and objects are employers, employees, trade unions, employers' organizations and persons. For example, s. 3 of the Act provides that every person is free to join a trade union of his own choice and to participate in its lawful activities. This right is not limited to employees as defined by the Act, that is, to the exclusion of a person exercising managerial functions. Thus, a person who is not an employee as defined by the Act because of these managerial functions, is still a person and is amenable to the obligations of the Act and entitled to its protection.

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The term "person" as used in ss. 50 and 65 includes one who exercises managerial functions. Section 50(*a*) reads:

> 50. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (*a*) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

Mrs. Jarvis is a person within the meaning of that section and is entitled to its protection. Likewise, Mrs. Jarvis is a person whom the Board can order to be reinstated in employment pursuant to the provisions of s. 65(4), which reads:

> 65. (4) Where the field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act, it shall determine the action, if any, to be taken by the employer and the trade union or either of them with respect to the employment of such person, which, in its discretion, may, notwithstanding the provisions of a collective agreement, include reinstatement in employment with or without compensation by the employer and the trade union or either of them for loss of earnings and other employment benefits, and the employer and the trade union shall do or abstain from doing anything required of them by the determination.

The error in the judgment of the Court of Appeal is in its restriction of the rights conferred under this Act to those who are employees within the meaning of the Act. There is sound reason for the exclusion of employees exercising managerial functions from the bargaining unit but there is no such reason for the exclusion of these persons from the protection of the Act if they are members of a trade union and are discriminated against for union activity. There are many cases where a person exercising minor managerial functions retains union membership either by choice or compulsion.

Therefore, solely as a matter of statutory construction, I would hold that there was error in the judgment of the Court of Appeal and affirm the judgment of Parker J., who heard the original motion to quash and whose reasons for judgment are summarized in the following extract:

> A perusal of the Act indicates that in the sections dealing with bargaining rights the term used is employees, but in the sections dealing with freedom to join and participate in the activities of trade unions the term

used is persons. Section 65 refers to persons and, in my opinion, gives the Board power to consider an application such as this. The findings of fact made by the Board in this case were properly within its jurisdiction.

So far I have dealt with the matter as one of construction. Now that it appears that this order of the Board is going to be quashed on the ground of excess of jurisdiction, I wish to say something about the privative clause in the Act. The Board was authorized to embark upon an inquiry whether this person was discharged contrary to the provisions of the Act. This was the issue to be decided and the Board's decision, to the extent that it is based on evidence, cannot be questioned on *certiorari*. It is now said that this decision cannot apply to Mrs. Jarvis because of the question of interpretation which I have discussed above. The Board put one interpretation on the word "person" to include Mrs. Jarvis and the Court of Appeal another. Which one is right does not matter. If the Board made a mistake, it is not deprived of jurisdiction. It makes a mistake, as many tribunals do, in the course of doing what it is told to do. This kind of mistake is not reviewable on *certiorari*.

In enacting s. 80 of *The Labour Relations Act* the Legislature has recognized that decisions made by the Board may involve what are looked upon by a Court as jurisdictional errors. The Legislature has said that it prefers to have these errors stand rather than have the decisions quashed on *certiorari*.

The quashing of this decision amounts to a disregard of the provisions of s. 80 of the Act, which reads:

> 80. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

It seems to me that the Court of Appeal in this case ignored its own decision in *Re Ontario Labour Relations Board, Bradley et al. v. Canadian General Electric Co. Ltd.*[1], and the decisions of this Court in *Labour Relations Board et al. v. Traders' Service Ltd.*[2]; *Farrell, et al. v. Workmen's Compensation Board*[3], and *Alcyon Shipping Co. Ltd. v. O'Krane*[4]. What is taken to be an error in law

[1] [1957] O.R. 316, 8 D.L.R. (2d) 65.
[2] [1958] S.C.R. 672.
[3] [1962] S.C.R. 48.
[4] [1961] S.C.R. 299.

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becomes a jurisdictional defect and so within the scope of judicial review. In all these cases at least one Court had found error in law and founded a jurisdictional defect on that finding. It does not matter what the error in law was. It was called jurisdiction. In *Bradley and Traders' Service,* it was the composition of the bargaining unit. In *Farrell,* it was whether there was an accident arising out of and in the course of employment. In *Alcyon,* it was whether the case was one where the right to bring an action was taken away by the statute. These cases have this common feature, that in the first instance the Court found error in law and founded a jurisdictional defect on that conclusion. But if the Legislature takes away the remedy of *certiorari,* it must be dealing with this so-called jurisdictional error, for the correction of jurisdictional error is the only purpose of *certiorari.*

The Board is being told by the decision under appeal that it should have split its inquiry into two parts and that having found that Mrs. Jarvis was employed in a managerial capacity, it should have stopped at that point. But the Board had also found that Mrs. Jarvis was a person who was dismissed for union activity. I do not think that a decision ordering reinstatement does involve an excess of jurisdiction. The right to entertain the application is unquestionable. It relates to the subject-matter which is given to the Board for decision, and its decision is reasonably capable of reference to the power given to it. Section 80 prevents a decision of this kind from being quashed on *certiorari* because the reviewing tribunal may choose to call what it finds to be error a jurisdictional defect. If there is error (and there is a conflict of opinion here) it is within the exercise of the function exclusively assigned to the Board by the legislation, and within that area, even if mistakes are made, s. 80 prevents judicial review.

In stating the matter in this way I am doing no more than repeating what has often been said before and most recently by McRuer C.J.H.C., in *Regina v. Ontario Labour Relations Board, Ex p. Taylor*[1]. I do, however, wish to refer to and to adopt the statement of Dixon J. in *The King v. Hickman, Ex p. Fox and Clinton*[2], as summarizing the attitude of the High Court of Australia to this problem.

[1] (1964), 41 D.L.R. (2d) 456. [2] (1945), 70 C.L.R. 598 at 614.

The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg. 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

I do not think that the decisions of this Court in *In re Labour Relations Board; Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*[1] and *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*[2] touch the present case. In the *Globe* case the union filed a number of membership cards. Counsel for the employer was not permitted by the Board to see these cards or to cross-examine on whether persons who were said to be members had, in fact, resigned. Nevertheless, the Board certified the union and based its decision on the cards. This Court held that there was a refusal of admissible evidence and that this refusal was of such a serious nature that the Board had not undertaken any task that the Act assigned to it. Its duty was to hold a hearing to determine whether the applicant represented the necessary percentage of employees and not merely to count cards. It never conducted such a hearing and its decision was a nullity. I have deliberately avoided the use of the word "jurisdiction" but what the Board did may actually be called a refusal of jurisdiction because it never attempted to do what it was told to do.

L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board held that decertification without notice was bad as being a violation of natural justice even though s. 41 of the Act did not then require it. There was no clear expression of any legislative intention that the Board could act without the necessity of hearing the person affected. This case belongs to a long line of cases which hold that a violation of natural justice is a ground for quashing an administrative decision. *Ridge v. Baldwin et al.*[3] is perhaps the most recent example.

[1] [1953] 2 S.C.R. 18 at 41. [2] [1953] 2 S.C.R. 140 at 155.
[3] [1963] 2 W.L.R. 935.

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I would allow the appeal with costs throughout against the respondent, Associated Medical Services, Incorporated. There should be no order for costs against the Ontario Labour Relations Board.

SPENCE J. (*dissenting*): This is an appeal from the judgment of the Court of Appeal for Ontario[1] which allowed an appeal from Parker J. and quashed a decision of the Ontario Labour Relations Board. That Board had considered the complaint of the appellant made as to a breach by the respondents of the provisions of s. 50 of *The Labour Relations Act, R.S.O.* 1960, c. 202, and exercising jurisdiction which it believed it had under the provisions of s. 65 of that statute, had directed her re-employment by the respondent.

Mrs. Jarvis was a member of the Office Employees International Union, Local 131. In December 1959, this union filed an application for certification as the bargaining agent of the employees of the respondent. At this time Mrs. Jarvis was employed as a clerk. In February 1960, she was promoted to the position of railway claims supervisor. In October 1960, the Labour Relations Board certified the union. At this time Mrs. Jarvis, according to the subsequent opinion of the Board, was exercising managerial functions. She was discharged from her employment in February 1961 and applied promptly for reinstatement under s. 65 of the Act. The Board ordered her reinstatement in June 1961.

The Board found that she had been dismissed for union activity, that she was a member of the union, Local 131, to the knowledge of the managing director of the respondent, that the union activity for which she was dismissed did not conflict with her duty to her employer, and that although her duties were managerial in nature and she was therefore a person deemed not to be an employee as defined by s. 1(3)(*b*) of the Act, nevertheless, she was a person entitled to the rights given under s. 65 of the Act.

The Court of Appeal for Ontario quashed the decision of the Labour Relations Board being of the view that the appellant because she exercised managerial functions, as found by the Board, did not have available to her the

[1] [1962] O.R. 1093, 35 D.L.R. (2d) 375.

provisions of ss. 50 and 65 of *The Labour Relations Act.* These sections are as follows:

50. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(*a*) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(*b*) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(*c*) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to exercise any other rights under this Act.

* * *

65. (1) The Board may authorize a field officer to inquire into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act.

(2) The field officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(3) The field officer shall report the results of his inquiry and endeavours to the Board.

(4) Where the field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act, it shall determine the action, if any, to be taken by the employer and the trade union or either of them with respect to the employment of such person, which, in its discretion, may, notwithstanding the provisions of a collective agreement, include reinstatement in employment with or without compensation by the employer and the trade union or either of them for loss of earnings and other employment benefits and the employer and the trade union shall do or abstain from doing anything required of them by the determination.

(5) Where the employer or the trade union has failed to comply with any of the terms of the determination, any employer, trade union or employee affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

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It is to be noted that in s. 50(*a*) the employer is prohibited from refusing to employ or continue to employ or discriminate against *any person*. And in s. 65(4) the Board is empowered to direct that the employer shall rehire the person. Section 1(3), para. (*b*) of *The Labour Relations Act* provides:

> (3) For the purposes of this Act, no person shall be deemed to be an employee,
>
> (*b*) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

It is the submission of the respondent, however, and such a view was adopted by the Court of Appeal for Ontario, that it was the intent of the Legislature to grant the protection of s. 50 only to those who were "employees" or perhaps also to those who sought to be employees and those who had been employees prior to discharge. Therefore, it was submitted, when, by virtue of the provisions of s. 1 particularly subs. (3), para. (*b*), the appellant, having assumed managerial functions, ceased to be such an "employee" she no longer had available to her the protection of s. 50.

This construction of the statute entails the limitation of the word "person" in s. 50, and also s. 65, to a compass much narrower than the ordinary meaning of the word.

The Shorter Oxford Dictionary defines "person", *inter alia*, as "an individual human being; a man, woman, or child" and certainly that is the ordinary use of this most common English word.

Craies on Statute Law, 6th ed., p. 162, puts the cardinal rule on interpretation of words in a statute in this fashion "The first rule is that general statutes will, *prima facie*, be presumed to use words in their popular sense", quoting Lord Esher M.R., in *Clerical, Medical and General Life Assurance Society v. Carter*[1] at p. 448. Such a view was approved in Ontario in *Composers, Authors and Publishers Association of Canada, Ltd. v. Associated Broadcasting Co. Ltd. et al.*[2] at p. 111.

The word "person" is used in a very large number of sections in *The Labour Relations Act*, many of which I shall

[1] (1889), 22 Q.B.D. 444.

[2] [1951] O.R. 101.

deal with hereafter. In *Re National Savings Bank Association*[1], Turner L.J. said at pp. 549-50:

> I do not consider that it would be at all consistent with the law or with the course of this court to put a different construction upon the same word in different parts of an Act of Parliament without finding some very clear reason for doing so . . .

It is true that the learned Justice on Appeal was there dealing with a technical word "contributory" while here the respondent seeks to put a restricted meaning on a very ordinary word "person" but I am of the opinion the same principle applies. It would appear therefore we must turn to *The Labour Relations Act* to determine whether the word "person", in these two sections, may bear a meaning restricted to those who may be of a sort described as "employees", former "employees" or prospective "employees" as that word is itself limited by s. 1(3)(*b*).

Section 3 provides:

> 3. Every person is free to join an employers' organization of his own choice and to participate in its lawful activities.

And counsel for the appellant submits that "person" in this section must mean "anyone". This section illustrates the principle that any word in a statute must be interpreted in accordance with the context: *Colquhoun v. Brooks*[2]. Although in s. 3 the word "person" could not be considered to be limited to "employees", former "employees" or prospective "employees", neither could it, in the light of s. 10 and s. 48 include an "employer" or any "person acting on behalf of an employer or employers' organization". Section 3 is therefore an illustration of the use of the word "person" in a sense limited to exclude some of those who might fall within the word "anyone".

Similarly, the word "person" in s. 4 must be interpreted in the light of s. 49 to exclude a trade union or a "person acting on behalf of a trade union".

In s. 6(2), the word "person" may well be taken to mean "anyone" who falls within the descriptive words which follow the use of that word.

In s. 9 again, exactly the same interpretation must be given to "person".

[1] (1866), L.R. 1 Ch. 547.
[2] (1889), 14 App. Cas. 493.

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In s. 16(*a*), it is provided that the Minister may call upon each party to recommend a "person" to be a member of the conciliation board. I find it significant that in the sections prior to this dealing with certification of a bargaining agent and negotiation of a collective agreement, the word "person" had been used only with a descriptive addendum while in s. 16 the general word appears because, I believe, it was the intent of the section to permit the union to recommend someone who was not a member or an "employee" and to permit the employer to recommend someone not one of its officials. Indeed, it is the course which must be adopted—see s. 17—in itself an example of where the words "no person" would only mean "no one".

The word "person" in s. 19 bears the same limitation as in s. 16.

In s. 21, the word "person" is used in the general sense, *i.e.*, anyone authorized to administer oats. And again, in s. 28(*d*) and (*e*), and s. 34(9)(*d*) and (*e*) the word "person" could only mean "anyone".

In s. 38, the word "person" again must mean "anyone" and the limiting description following it "who was a member of the employees' organization . . ." illustrates that the word is used generally and indeed with the exact opposite meaning to that attributed to it by the respondent in considering ss. 50 and 65.

Section 47 would seem to use the word "person" to contrast with "trade union" so as to include within the meaning of the word both an employer and an "employee" but it is difficult to understand how the word could be used with a more general application than that.

Sections 48 and 49 both employ the word "person" followed by a limiting phrase and it would appear that the word so used in that section is of general meaning subject only to the limiting phrase which follows.

This partial survey of the various sections of the statute has demonstrated that the word "person" is used sometimes in the widest general sense, sometimes in a sense limited by a phrase which follows and sometimes limited by the provisions of other sections of the statute.

When we turn to s. 50, we see that the word "person" appears in the first line and I believe all would agree that there the word means "anyone" subject to the limiting

phrase which follows, *i.e.* "acting on behalf of an employer or employees' organization". It is the respondent's submission that the word "person" in s. 50(*a*) is limited to "employee" not because of any limiting phrase which follows nor because of the limiting effect of any provisions but because of the policy of the statute in dealing with two classes, *i.e.* employers and "employees", the members of those two classes being separated by the provisions of s. 1(3)(*b*). I am unable to agree that such a policy must be taken from the statute. I agree with counsel for the appellant that when dealing with collective bargaining and particularly the composition of the bargaining unit the legislator has been accurate in his use of the word "employee" while elsewhere he has used the word "person" either generally or limited in one of the two fashions I have described.

In s. 50(a) it would seem that no limitation of the general meaning of the word need be implied. It may be contrasted with such provisions as s. 37 which make the collective bargaining agreement bind only those named with exactness. Section 50, on the other hand, may well be designed to protect a broader group than "employees". In the present case, we are concerned with one who has ceased to be an "employee" because of the provisions of s. 1(3)(*b*). We might as easily be concerned with one excluded from that class by the provisions of s. 1(3)(*a*). Many large corporations employ professional engineers in considerable numbers. These men may well be, almost invariably are members of a professional association. Were such an organization capable of being a "trade union" as defined in s. 1(1)(j) then an engineer might well be discharged by an employer who disliked the activities of such an organization. There seems to be no reason why such engineer should not have the protection of s. 50.

It must be remembered that many servants of large corporations in the ordinary course of promotions attain positions which result in their exclusion from the class of "employees" under the provisions of s. 1(3)(*b*). It is quite proper that these servants, foremen, supervisors and the like should be excluded from the advantage of membership in the bargaining unit. It is much more difficult to understand why they should not be protected from unfair labour practices.

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Counsel for the respondent points out that the appellant acting in her capacity as railway claims supervisor might have "hired or fired" others and have involved the respondent in a proceeding under s. 50 by such action. Counsel argues that the appellant cannot be entitled to the protection of s. 50 when by her action she might involve her employer in a complaint under that very section. Again I am unable to understand how such a position is fatal to the appellant. There appears to be no sound reason why one should be deprived of the protection against unfair labour practices simply because, acting for her employer, she might on other occasions engage in those same unfair labour practices.

I have had the privilege of reading the reasons of my brother Ritchie and I therefore find it necessary to deal with the view expressed as to the effect of s. 65(5) of *The Labour Relations Act*. The subsection provides for the enforcement of the determination made by the Labour Relations Board under the powers conferred upon it in s. 65(4) of the statute, and it permits "any *employer, trade union* or *employee* affected by the determination" to cause the Board to file in the office of the Registrar of the Supreme Court a copy of the determination and provides that such determination shall be entered as a judgment or order of the Court and is enforceable as such. It is my brother Ritchie's view that when those who are given by this subsection the right to have the Board's determination enforced as a court order are limited to the three classes whose names I have italicized above, it is proper to interpret the word "person" in subs. (4) of s. 65 in the same limited fashion. An analysis of the legislative history of the section would appear appropriate. In the Revised Statutes of Ontario, 1950, c. 194, s. 57(1) provided:

> 57. (1) The Minister may appoint a conciliation officer to inquire into any complaint that any *person* has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act. (The italics are my own.)

Section 58(3) provided:

> 58. (3) The commissioner shall give the parties full opportunity to present evidence and to make submissions and if he finds that the complaint is supported by the evidence he shall recommend to the Minister the course that ought to be taken with respect to the complaint, which may include reinstatement with or without compensation for loss of earnings and other benefits.

And subs. (5) provided:

> (5) The Minister shall issue whatever order he deems necessary to carry the recommendations of the commissioner into effect and the order shall be final and shall be complied with in accordance with its terms.

The statute contained no provisions whatsoever for the enforcement of the order of the Minister as a court order. In 1960, *The Labour Relations Act* was very largely amended by the Statutes of Ontario 1960, c. 54, and by s. 30 of that statute ss. 57 and 58 as they existed in the Revised Statutes of Ontario 1950 as amended, were repealed and new sections substituted therefor. Section 57(4) and (5) are the exact verbatim counterpart of the present s. 64(4) and (5).

Section 1(3)(*b*) existed in exactly the same form and as the same numbered section in the Revised Statutes of Ontario 1950, c. 194.

It would appear therefore that in the predecessor section to s. 65(4) of the present statute, *i.e.*, s. 58(3) of R.S.O. 1950, c. 194, the Legislature used the word "parties" but in the section empowering the Minister to inquire into a complaint, *i.e.*, s. 57(1) of the 1950 statute, the Legislature used the same word "person" used in the present s. 65(4). When the Legislature then, in 1960, re-enacted in much more detailed terms those provisions, it chose in the then section 57(4) (now s. 65(4)) to repeat the use of the same word "person" but when it added in subs. (5) the power to obtain enforcement of the determination by court order it limited those who could take advantage of that right to those within the classes mentioned, *i.e.*, "employer, trade union or employee".

It is my view that if the Legislature, when enacting in much greater detail the provisions which had appeared as s. 57 and s. 58 in the 1950 statute, had intended to limit the right to make a complaint and obtain a hearing to employers, trade unions and employees, it would have used those words in subs. (4) as it did when it provided for the enforcement by registration as a court order in subs. (5), and its failure to use the three words chosen rather than the one general word indicates that those who were entitled to complain and obtain a hearing were a broader class than those who could enforce the resultant determination by court order. I do not think that this Court need speculate

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as to the reason for such limitation of those who could so enforce. There may well have been a decision of policy involved and such a view was expressed by counsel for the Ontario Labour Relations Board in argument in this Court as to the Board's view of the importance of retaining the broader interpretation of the word "person". Of course, other means of enforcement are available, such as commencement of action in the ordinary fashion. Those permitted to apply for registration as a court order are limited and in my view s. 64(5) does not provide a complete code of enforcement as was the view of Gale J. in *Tyrrell v. Consumers' Gas Company*[1], in reference to the provisions of s. 34(9) of the statute.

I am not ready to agree that the order which the Board might make under subs. (4) and which could "include reinstatement in employment with or without compensation by the employer" is limited to permitting an order for reinstatement as an "employee" in the sense limited by s. 1(3)(*b*) of the statute. That section limits the word "employee" but neither "employed" or "employment" are defined in the statute or limited in any way and I have already cited authority for the proposition that they should be given their ordinary grammatical meaning. In my view, therefore, it would be quite possible for the Board to make an order for the reinstatement of a servant of an employer in his or her work, whether that servant be "employee" in the limited sense or not. For these reasons, I cannot find that the provisions of s. 65(5) aid in the limiting interpretation of the word "person" appearing in s. 64(4) as urged by the respondent Associated Medical Services Inc.

I am therefore of the opinion that the word "person" in s. 50 and s. 65(4) should not be limited to mean only "employees" as described in s. 1(3)(*b*).

Since writing the above, I have had the privilege of reading the reasons of my brother Judson. As will be seen, I am in substantial agreement with his view of the applicant's right to obtain a decision of the Board. I must, however, express a different opinion as to the right of a court to consider the application for *certiorari* preferring to adopt

[1] [1964] 1 O.R. 68 at 73.

that of Aylesworth J.A. in the Court of Appeal when he said:

> The board, however, is nowhere given exclusive jurisdiction to determine for itself the meaning to be attributed to sec. 50 or to sec. 65 and, of course, it is trite to observe that the board cannot by an erroneous interpretation of any section or sections of the Act, confer upon itself a jurisdiction which it otherwise would not have.

My brother Judson cited, *inter alia*, the following decisions of the Court of Appeal for Ontario and of this Court: *Re Ontario Labour Relations Board, Bradley et al. v. Canadian General Electric Co. Ltd.*[1]; *Labour Relations Board et al. v. Traders' Service Ltd.*[2]; *Farrell et al. v. Workmen's Compensation Board*[3], and *Alcyon Shipping Co. Ltd. v. O'Krane*[4].

I have carefully considered each of those cases and am of the opinion that in each of them the Court refused the *certiorari* because it found there had been no exercise of function in excess of jurisdiction, or refusal to accept jurisdiction, by the lower Court rather than on any view that the Court was, even by a privative provision, as stringent as s. 80 of *The Labour Relations Act*, R.S.O. 1960, c. 202, prohibited from inquiry whether there had been any such excess of jurisdiction or refusal to accept the same even if such excess consisted only of an interpretation of the provisions granting such jurisdiction to cover a broader field than, in the opinion of the Court, it should cover.

In *Re Ontario Labour Relations Board, Bradley et al. v. Canadian General Electric Co. Ltd., supra*, Roach J.A. dealt with an application for *certiorari* in reference to a matter where exactly the same privative clause appeared in the statute as the then s. 69 of R.S.O. 1950, c. 194. The learned justice in appeal, at p. 325 O.R., quoted *Colonial Bank of Australasia v. Willan*[5] at p. 443, and the first two lines of the quotation are most significant:

> There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends.

After canvassing the whole question in considerable detail, Roach J.A. determined that, when the Board made findings that certain servants of the respondent exercised "manage-

[1] [1957] O.R. 316, 8 D.L.R. (2d) 65.
[2] [1958] S.C.R. 672.
[3] [1962] S.C.R. 48.
[4] [1961] S.C.R. 299.
[5] (1874), L.R. 5 P.C. 417.

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rial functions" or were "employed in a confidential capacity in matters relating to labour relations" and certain others were not of such class, the Board was acting exactly within the jurisdiction specifically and exclusively conferred upon it by the statute and not upon any collateral matter. Roach J.A., therefore, concluded at p. 336:

> In my opinion, the Board in the instant case acted within the limits of jurisdiction and its decision is not reviewable by the Court and the order of Mr. Justice Wells should be varied so to declare.

It should be noted that the action, superficially much similar to the present one, is in truth essentially different. In that case as in this the Board had determined that certain servants carried on managerial functions. In that case, however, it was sought to contest such a decision in the Court. In this case, such a decision was accepted but the applicant applied to the Court for *certiorari* on the basis of such a decision, then by interpretation of s. 50 and s. 65 of the present statue the Board has no jurisdiction to make the order subject to complaint in such proceeding.

The question in that case was as to the constitution of a bargaining unit. The statute provides that the bargaining unit shall be of "employees" (ss. 6 and 7 of R.S.O. 1950, c. 194) and no question of any alleged excess of jurisdiction by incorrect interpretation of any word of the statute arose. In my opinion, it is implicit in the reasons of Roach J.A. that if such excess of jurisdiction had been found he would have been of the opinion that *certiorari* lay despite the privative clause.

In *Re Labour Relations Board et al. v. Traders' Service Ltd., supra,* the Court held that the Board made a finding of fact within the exact power granted by the statute which provided that such finding was to be final and conclusive. At p. 678, Judson J. said:

> The matter therefore was solely within the Board's jurisdiction and is not open to judicial review.

Again, in *Alcyon Shipping Co. Ltd. v. O'Krane, supra,* this Court determined that the Board made a finding that the defendant company was not an employer in an industry within the scope of Part I of the *Workmen's Compensation Act* of British Columbia. That finding the Court determined

was one which the Board had power to make by the express provisions of the statute. Therefore, Judson J. said at p. 302:

> I would dismiss the appeal but on the grounds given by the learned trial judge and the minority opinion in the Court of Appeal, namely, that these two matters were conclusively determined by the Board and that the Board had exclusive jurisdiction in these matters whether before or after the institution of an action.

In *Farrell v. Workmen's Compensation Board, supra,* this Court held that the Board in determining that a workman's death occurred through natural causes had exercised a jurisdiction granted expressly to the Board in Part I of the statute. Therefore, Judson J. said at pp. 50-51:

> I agree with the majority reasons of the Court of Appeal that the Board's return, consisting of the application and its decision, was a proper one, that there was no error in law on the face of the record, and that there was error in compelling the Board to supplement its return in the absence of any question going to jurisdiction.
>
> The issue here is a very simple one—whether there was an accident arising out of and in the course of employment. This issue is unquestionably within the jurisdiction of the Board under Part I of the Act and even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review, including *certiorari*. Section 76(1) of the Act, R.S.C. 1948, c. 370, provides:
>
> 76. (1) The Board shall have exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court; and without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear, and determine:
>
> (*a*) The question whether an injury has arisen out of or in the course of an employment within the scope of this Part.

With some diffidence in view of the fact that the judgment of the Court in the last three decisions quoted above were written by my brother Judson, I express the view that it is implicit in each of them that had the Court found there had been excess of jurisdiction by the Board in question then even strict terms of such a provision as the present s. 80 of *The Labour Relations Act* would not have barred the Court's quashing the decision on a *certiorari* application. I am of the opinion that the problem of jurisdiction is a real problem. There is a valid distinction between the attempt of a superior Court to inquire into the manner in which the inferior tribunal has discharged its duty within its admitted

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jurisdiction, where the superior Court is barred despite its view that the inferior tribunal has committed errors in findings of fact or even of law, and the review by a superior Court to determine whether the inferior tribunal has acted beyond the jurisdiction granted to it by the statute and therefore without jurisdiction. In my view, this distinction is not touched by the judgment of Dixon J. in *The King v. Hickman*[1], as an action by the inferior tribunal whereby it had interpreted the powers granted to it in broader terms than the Court thought proper would not be "reasonably capable of reference to the power given to the body" (p. 615).

In *Regina v. Ontario Labour Relations Board, Ex. p. Taylor*[2], McRuer C.J. refused a *certiorari* application. That decision was later affirmed on appeal and leave to appeal to this Court was refused by this Court on February 3, 1964. McRuer C.J.H.C. said, at p. 179 of the Ontario Reports:

> My conclusion is that the sections of the *Labour Relations Act* in question are constitutional and I do not think it was beyond the powers of the Legislature to clothe the Labour Relations Board with jurisdiction to make decisions of law incidental to its administrative duties. Obviously the Board must decide many incidental questions of law in the performance of its administrative functions but in saying this I do not wish it to be taken that I think that the Board has power to make decisions in law with respect to collateral matters, which may not be reviewed on *certiorari*. In other words, it cannot give itself jurisdiction by wrong decisions in law.

expressing in the words last quoted my view that *certiorari* still lies if the inferior tribunal gave itself jurisdiction by a wrong decision in law.

I have read with interest the views of the learned author of the article appearing in The University of Queensland Law Journal, vol. 1, no. 2, p. 39, that any check of the purported exercise of jurisdiction by such inferior tribunals should be left to the legislative authority which created it. Until the relevant legislative enactment expressly prohibits the superior Court's investigation of whether the inferior tribunal has exceeded its jurisdiction and so acted beyond any power granted it by the Legislature, I conceive it the duty of the superior Court to the litigant to exercise such function. Any legislative correction, no matter how efficient its operation in the future, will not restore to the particular

[1] (1945), 70 C.L.R. 598.
[2] [1964] 1 O.R. 173, 41 D.L.R. (2d) 456.

litigant his right taken from him by the unauthorized and illegal action of the inferior tribunal.

There is a further matter which should be noted. Both the appellant Jarvis and the Ontario Labour Relations Board filed factums in this Court in which each sought to uphold the decision of the Board which granted relief to the appellant Jarvis. The factum filed on behalf of the Board made no reference to the propriety of the respondents proceeding by way of *certiorari* and counsel for the Board opened his oral submission by the unequivocal statement that he supported counsel for the appellant in his argument as to the interpretation of the statute but made *no* submission in reference to *certiorari*. If the Board in question does not wish to lay claims to such a drastic immunity from judicial review as is implicit in the reasons of my brother Judson, should this Court confer it unasked?

Moreover, the factum of the appellant does not refer at all to the provisions of s. 80 of *The Labour Relations Act* and although the counsel for the appellant who submitted argument on the issue of the right to *certiorari* did cite the section he based his whole argument upon the proposition that *certiorari* only lay if there was error on the face of the record—not that *certiorari* proceedings, even if there were utter lack of jurisdiction in the inferior tribunal, were excluded. Again, I do not think it would be appropriate therefore for this Court to take such a position in this case.

In the result, for the reasons outlined in the earlier part of this judgment, I would allow the appeal with costs against the respondent Associated Medical Services. There should be no costs for or against the respondent Labour Relations Board.

Appeal dismissed, ABBOTT, JUDSON *and* SPENCE JJ. *dissenting.*

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