HCJ 1074/93

1. Attorney-General

2. Bezeq, the Israel Telecommunication Corporation Ltd

v.

1. National Labour Court, Jerusalem

2. General Federation of Labour in Israel

3. Bezeq Employees' Joint Representation

4. All Bezeq Employees

The Supreme Court sitting as the High Court of Justice

[10 April 1995]

Before Justices D. Levin, M. Cheshin, Ts. E. Tal

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The second petitioner, the Bezeq Corporation, had a monopoly in the field of providing telephone services in Israel. When the Government decided to allow competition in this field, the General Federation of Labour feared that the restriction of the monopoly would affect the jobs and rights of Bezeq's employees, and it therefore gave notice of a strike. The petitioners applied to the Regional Labour Court for an injunction against the strike. The injunction was given, but the National Labour Court overturned it on appeal. The petitioners then petitioned the High Court of Justice to set aside the judgment of the National Labour Court.

Held: Strikes can be divided into three categories: (1) economic strikes, which oppose an action that clearly and immediately harms employees, and are considered legitimate; (2) political strikes, which oppose a general policy of the Government, and are not considered legitimate; (3) quasi-political strikes, which oppose an act that is not directly connected with terms of employment, but do affect them directly. Quasi-political strikes only justify a short protest.

In this case, it was not proved that the restriction of Bezeq's monopoly would clearly and immediately harm Bezeq's employees. Therefore at most it could be a quasi-

political strike, which justifies a short protest strike. Therefore the Regional Labour Court had been correct in issuing an injunction against the extended strike.

Petition granted.

Basic Laws cited:

Basic Law: Human Dignity and Liberty, 5752-1992, ss. 1, 2, 4.

Statutes cited:

Collective Agreements Law, 5717-1957.

Contempt of Court Ordinance, 1937.

Labour Court Law, 5729-1969, s. 30(a).

Procedure (Attendance of Attorney-General) Ordinance [New Version], 5728-1968, s. 1.

Resolution of Labour Disputes Law, 5717-1917, ss. 2, 5A, 5B, 37A, chapter 4.

Telecommunications Law, 5742-1982, ss. 50, 51, 60.

Israeli Supreme Court cases cited:

[1] HCJ 3679/94 *National Association of Managers and Authorized Signatories of First International Bank of Israel Ltd v. Tel-Aviv Labour Court* [1995] IsrSC 49(1) 573.

[2] HCJ 51/69 *Rudenitsky v. Great Rabbinical Court* [1970] IsrSC 24(1) 704.

[3] HCJ 550/89 *Attorney-General v. Parole Board* [1989] IsrSC 43(2) 739.

[4] HCJ 910/86 *Ressler v. Minister of Defence* [1988] IsrSC 42(2) 441; IsrSJ 10 1.

[5] HCJ 2148/94 *Gilbert v. Chairman of Commission of Enquiry for examining the Massacre in Hebron* [1994] IsrSC 48(3) 573.

[6] CA 506/88 *Shefer (a minor) v. State of Israel* [1994] IsrSC 48(1) 87; [1992-4] IsrLR 170.

[7] HCJ 73/85 *'Kach' Party v. Knesset Speaker* [1985] IsrSC 39(3) 141.

[8] CA 593/81 *Ashdod Automobile Enterprises Ltd v. Chizik (dec'd)* [1987] IsrSC 41(3) 169.

[9] CA 25/71 *Feinstein v. High School Teachers' Association* [1971] IsrSC 25(1) 129.

[10] HCJ 525/84 *Hativ v. National Labour Court* [1986] IsrSC 40(1) 673.

[11] HCJ 1520/91 *Wilensky v. National Labour Court* [1992] IsrSC 46(5) 502.

[12] HCJ 675/84 *General Federation of Labour in Israel v. Tel-Aviv Labour Court* [1985] IsrSC 39(3) 13.

[13] HCJ 289/79 *Israel Ports Authority v. National Labour Court* [1980] IsrSC 34(2) 141.

[14] ALCA 7112/93 *Tzudler v. Yosef* [1994] IsrSC 48(5) 550.

[15] HCJ 262/62 *Peretz v. Kfar Shmaryahu Local Council* [1962] IsrSC 16 2101; IsrSJ 4 191.

[16] HCJ 840/79 *Israel Contractors and Builders Centre v. Government of Israel* [1980] IsrSC 34(3) 729.

[17] HCJ 453/94 *Israel Women's Network v. Government of Israel* [1948] IsrSC 48(5) 501; [1992-4] IsrLR 425.

Labour Court cases cited:

[18] NLC 37/4-3 *Katza Workers' Committee v. Katza Co. Ltd* [1977] IsrLC 8 421.

[19] NLC 52/4-3 (unreported).

[20] NLC 36/4-5 *Ginstler v. State of Israel* [1976] IsrLC 8 3.

[21] NLC 46/4-7 *Tel-Aviv-Jaffa Municipality Lifeguard Committee v. Tel-Aviv-Jaffa Municipality* [1986] IsrLC 17 264.

[22] NLC 52/4-37 *United Mizrahi Bank Ltd v. Bank Mizrahi Workers Union* [1992] IsrLC 25 53.

English cases cited:

[23] *Mercury Communication v. Scott-Garner* [1984] Ch. 37 (C.A.).

Dutch cases cited:

[24] *Re Keijzer v. Peters N.V.* 3 I.L.L.R. 306 (1977).

[25] *N. V. Dutch Railways v. Transport Unions FNV, FSV and CNV* 6 I.L.L.R. 3 (1986).

Finnish cases cited:

[26] *Metal Industry Employers' Federation v. Metal Workers Union* 9 I.L.L.R. 522 (1988).

For the first petitioner — M. Rubinstein, director of the Civil Department at the State Attorney's Office.

For the second petitioner — S. Bechor.

For the second respondent — A. Mei-Tal, R. Kariv.

For respondents 3-4 — A. Feingold.

JUDGMENT

Justice D. Levin

1. We have before us a petition of the first and second petitioners against the judgment of the National Labour Court in NLC 53/4-4,[*] in which the National Labour Court allowed the appeal of respondents 2-4 and held that an injunction should not be given against the respondents in a strike that they held, since according to its ruling, the strike was legitimate.

The facts relevant to the case

The main facts are not in dispute, but clear details of them, as set out by his honour the President of the National Labour Court in his judgment, are necessary in order to consider the dispute and its solution properly and precisely.

2. The second petitioner (hereafter — Bezeq) operates under a licence granted to it under the Telecommunications Law, 5742-1982, and it is a 'public service' within the meaning thereof in chapter four of the Resolution of Labour Disputes Law, 5717-1957. Sections 50 and 51 of the Telecommunications Law granted Bezeq exclusivity in various fields of operation, and the following is the wording of those sections:

> '50. A general licence to carry out telecommunications operations or to provide national telecommunications services on a national telephone network or to provide international telecommunications services on an international telephone system shall only be given to one company; for this purpose, "national telephone network" — a national cable infrastructure, wireless installations and telecommunications installations by means of which telephone services and additional telecommunications services are provided to the public.
>
> 51. (a) A special licence shall not be given with regard to the equipment that the Ministry of Telecommunications dealt with before the passing of this law in the *Knesset* (hereinafter — the

[*] *General Federation v. Bezeq, the Israel Telecommuncation Corporation Ltd* IsrLC 25 367.

> equipment of the Ministry) or with regard to identical equipment that may replace it.
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> (b) A special licence shall not be given with regard to equipment similar to the equipment of the Ministry that will replace it or that is designated to replaced it, until the Minister has consulted with the company and decided, after considering *inter alia* the interest of the company in carrying out the action or in providing the service to which the licence refers, that the public interest requires the licence to be given to whoever asked for it.'

3. The Government decided to limit this exclusivity by opening up various sectors in the field of telecommunication services to competition. First this was done by a decision of the Minister of Telecommunications at that time, and shortly before the dispute before us this intention was expressed in the draft State Economy Arrangements (Legislations Changes for Achieving Budget Targets) Law, 5753-1992, which states in section 26:

> 'In section 50 of the Telecommunication Law, 5742-1982, the words "or to provide international telecommunications services on an international telephone system" shall be deleted, and at the end shall be added "but a mobile radio-telephone network shall not be regarded as part of the national telephone network".'

4. Respondents 2-4, under the leadership of the second respondent (hereafter — the General Federation), opposed these changes on the grounds that revoking the exclusivity will affect the terms of employment of Bezeq employees and lead to the dismissal of many of them. Their request was to enshrine in an agreement, before revoking the exclusivity, the question of the rights of employees, both those who would continue to work for Bezeq and those who would be forced to leave it as a result of that change.

The General Federation based its main arguments on that fact that when the Telecommunications Law was passed, the commencement of the law was made conditional, *inter alia*, on the signing of a collective agreement with regard to the rights of Bezeq's employees, and the transfer of employees from the civil service to the employment of Bezeq (s. 60 of the Telecommunications Law).

5. On 14 May 1992, the Federation of Clerks delivered to the Chief Director of Labour Relations and to Bezeq a 'Notice of a Strike', stating that

the notice was given under sections 5A and 5B of the Resolution of Labour Disputes Law.

6. On 12 July 1992, Bezeq employees began sanctions in accordance with the decision of Bezeq's Workers Council, and several days later, on 20 July 1992, the Central Committee of the General Federation approved, for the second time, 'a labour dispute at the Bezeq Corporation, because of the granting of licences to private enterprises and the transfer of work to contractors, a reduction in the definition of the general licence and a privatization of the "Bezeq" corporation.'

7. On 16 July 1992, Bezeq applied to the Tel-Aviv-Jaffa Regional Labour Court in an application for a temporary and permanent injunction to stop the sanctions. On 17 July 1992, an order was given as requested, and this was extended several times.

8. It should be mentioned, just as the National Labour Court emphasized at the beginning of its judgment in a condemnation of their behaviour, that despite the temporary injunction given against them, Bezeq's employees carried out sanctions that compelled Bezeq to ask the court twice for orders under the Contempt of Court Ordinance (LC 53/48-2; LC 53/48-3), and an order was even made in this respect. Again, after judgment was given in the main proceeding, which was the subject of the appeal to the National Labour Court, Bezeq was compelled to commence contempt of court proceedings.

This behaviour of Bezeq's employees deserves strong condemnation, and we will refer to it and mention it below.

9. A further fact that is relevant in this case is the determination that before the hearing of the appeal before the National Labour Court, the sanctions taken by the employees stopped.

10. As stated, the General Federation appealed the decision of the Tel-Aviv-Jaffa Regional Labour Court to the National Labour Court in Jerusalem, which allowed the appeal and set aside the judgment of the Regional Labour Court and the injunction given by it, in so far as it related to the General Federation being forbidden from declaring the strike.

The judgment of the Regional Labour Court

11. After it considered the matter on its merits and in depth, the Regional Labour Court found that the strike of the Bezeq employees was not legitimate, since the reason for it could not be the subject of a collective agreement. In addition, the Regional Labour Court held that the strike was

'not protected', with all that this implies, as set out in chapter four of the Resolution of Labour Disputes Law.

In its judgment, the Labour Court considered the 'balance of convenience', and on this basis it held that the general public, and also the Bezeq company itself, should be spared substantial harm. The Labour Court therefore ordered the Bezeq Employees' Representation to maintain full industrial quiet and refrain from a strike or sanctions, and it also ordered the General Federation to order the Bezeq Employees' Representation and its employees to work fully and without interruption.

The appeal to the National Labour Court

12. The General Federation appealed the judgment of the Regional Labour Court. In essence, the General Federation argued that the strike was declared lawfully and held lawfully, and that it should not be regarded as a 'political strike' or an 'unprotected strike'. In its opinion, the strike does not contradict the 'industrial quiet' clauses in the binding agreements.

The National Labour Court considered in depth the many and complex questions that were raised before us, and held, unanimously, but for different reasons, that the appeal should be allowed, and that the judgment of the Regional Labour Court, including the injunction in it, in so far as it related to the prohibition against a strike being declared by the General Federation, should be overturned (paragraph 25 of the judgment of his Honour President M. Goldberg).

The judgment of the National Labour Court

13. The National Labour Court referred to the definition of strikes in case-law, and held that it ought to be changed, even if this involved a deviation of the National Labour Court from its own rulings. This is what was said:

> 'In these days, when the legislator intervenes more than ever in employment terms that are determined or that may be determined in agreements or collective agreements… and has become an active partner in determining the terms of employment of all employees, particularly in the public sector… it is highly questionable whether the definition of the term "strike", as reflected in case-law, can be allowed to stand as it is.'*

* *Ibid*., at p. 377.

The court went on and held, for the purpose of the term 'unprotected strike or work stoppage', as defined in section 37A of the Resolution of Labour Disputes Law, that:

> '… it is proper that a strike in the civil service directed against a change, that may significantly affect the terms of employment of the employees in a certain enterprise, and which is intended to ensure the rights of the employees as a result thereof, as long as it is not against the law, should not fall into the category of an "unprotected strike" in the civil service, even if it is not the employer who initiated the change.'*

Therefore the National Labour Court reached the conclusion, in the majority opinion written by the learned President, that the question as to whether we are dealing with a 'political strike' should be answered in the negative.

The National Labour Court held, at the end of the hearing, that not every strike that is not against the Government as sovereign, rather than as employer, is a 'political strike', and in consequence thereof it decided that the strike carried out by the Bezeq employees was not an 'unprotected strike' within the meaning thereof in the Resolution of Labour Disputes Law.

14. In order to complete the picture, alongside the reasoned judgment of the majority of the panel of the National Labour Court we should mention the minority judgment of the learned Vice-President, Justice S. Adler, who, although he agreed with the outcome, did so for reasons that are entirely different from those of the majority. The learned Vice-President was of the opinion that the strike in this case was a 'mixed strike', partly political and partly economic, and it was mainly political in nature, since:

> '… its tangible and immediate purpose is to change the policy of the Government and the *Knesset*…'†

The agreement of the learned Vice-President to cancel the order made against the General Federation was based merely on the fact that the order had achieved its purpose, and the employees had returned to work. When the appeal of the General Federation was allowed in the National Court, the petitioners submitted this petition, which is now before us.

The main arguments of the petitioners

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* *Ibid.*, at pp. 378-379.

† *Ibid.*, at p. 386.

15. The petitioners recognize the fact that labour law is within the expertise and sole jurisdiction of the Labour Court. They are also aware of the ruling, which was made by this court and which had been upheld more than once, that the High Court of Justice does not sit as a court of appeals on the judgments of the National Labour Court, and it will intervene in the judgments of the National Labour Court only when it transpires that there is a substantial mistake of law, and justice requires us to intervene in order to correct it (HCJ 3679/94 *National Association of Managers and Authorized Signatories of First International Bank of Israel Ltd v. Tel-Aviv Labour Court* [1], at p. 584, and the many citations set out in the judgment).

Notwithstanding, they are of the opinion that the case before us does indeed fall into the category of rare and special cases where our intervention is justified.

16. According to the petitioners, in the ruling made by the National Labour Court in its judgment there is a fear that a mistake of law may become entrenched and undesirable norms may be adopted in a most important subject, which is one of the foundations of collective labour law and labour relations in the economy. The petitioners argue that a strike directed at the government to achieve political aims, when the employer is usually a third party who cannot agree to the demands, has been called a 'political strike' in Israeli case-law, and it is considered a forbidden strike. In the opinion of the petitioners, the strike which is the subject of the case before us is indeed of this kind, and it follows that it does not fall within the sphere of labour law, since its purpose is to achieve objectives that are not legitimate ones in the field of labour law. In addition, the petitioners argue that the provisions of section 37A of the Resolution of Labour Disputes Law distinguish between an unprotected strike relating to salary and social benefits, and a strike which is not of this kind, but this is only with regard to the formal terms stipulated in the law and not in order to expand the concept of the strike and to grant legitimacy to a 'legal strike'. According to them, the strike still needs to be within the field of labour law and within the framework of a labour dispute, it must be directed against the employer and it must relate to terms of employment or labour relations which are not salary or social benefits — for these two subjects are only some of the matters that may be the basis for a labour dispute, as defined in section 2 of the Resolution of Labour Disputes Law. In this respect, the petitioners argue that a change of the general licence of the Bezeq Corporation and the legislation proceedings for amending the Telecommunications Law are not a part of

'work conditions' and they are not a part of 'labour relations', since they cannot be the subject of a collective agreement within the meaning of this term in the Collective Agreements Law, 5717-1957. Finally, the petitioners point out that the conclusion of the National Labour Court, in so far as it relates to the widening of the freedom to strike, has no parallel in foreign law.

The main arguments of the respondents

17. The respondents argue that the judgment of the National Labour Court, which is the subject of this petition, was made lawfully and it is right and just on the merits. Therefore, there is no reason for this court to set it aside.

18. The respondents argue before us that it should not be assumed that organized opposition of employees to a harmful action of the Government should not be regarded as a strike, but rather as a forbidden act, merely because the initiative for the harmful act does not proceed from the direct and formal employer. They argue that in the prevailing legal situation in public services, the formal employer has almost no power in matters relating to the determination of employment terms and employees' salaries, and therefore the formal distinction with regard to the identity of the direct employer cannot be implemented in the present circumstances.

The respondents further argue that just as every citizen and every group of citizens may demonstrate against the implementation of any Government policy, as part of their basic rights in our democratic regime, so too employees have the freedom to associate in order to protect their place of work and their livelihood. They argue that the only practical expression of this freedom to associate is the freedom to strike, i.e., not to work.

Therefore, in view of the aforesaid, the respondents ask the court to cancel the show cause order, to dismiss the petition and not to intervene in the judgment of the National Labour Court.

Preliminary arguments

19. This is the factual and legal background to this petition, on the basis of which a show cause order was issued, and our deliberation will be based on this. But first I must remove from our path two preliminary arguments raised before us by counsel for the General Federation, according to which we are asked to dismiss this petition *in limine*.

20. First, the General Federation argues before us that section 30(a) of the Labour Court Law, 5729-1969, does not grant the first petitioner

(hereafter — the Attorney-General) the authority to challenge the decision of the National Labour Court before this court. It further argues that the petition under discussion raises an academic question that is dead and buried, since the dispute that is the subject of the strike under consideration has already been resolved.

The two arguments should be rejected.

21. With regard to the argument of the General Federation that section 30(a) of the Labour Court Law does not give the Attorney-General the authority to challenge the decision of the National Labour Court before this court, the answer is as follows. Indeed the text of the aforesaid section 30(a) grants the authority to intervene in proceedings before the Labour Court, and it is with this that we are concerned, but what is stated does not imply what the Attorney-General does not have authority to apply to this court.

First, when the Attorney-General became a party in the National Labour Court, he acquired standing both before the court with procedural jurisdiction and also before the court with review jurisdiction. No impropriety should be attached to the fact that this standing should continue to exist also before us as the highest court of review, in order to examine the arguments of the Attorney-General that were rejected in a lower court, which in this case is the National Labour Court.

Second, it seems to me that it is fitting that the Attorney-General, as the person who represents the public interest, should petition the High Court of Justice in cases where he thinks that one of the branches of government has erred in a matter which he thinks is of supreme public importance. This approach is based on two lines of reasoning: first, the Attorney-General has the authority to become a party to a petition filed by someone else, by attending, as in the present case, in the High Court of Justice, by virtue of section 1 of the Procedure (Attendance of the Attorney-General) Ordinance [New Version] (for recognition by this court of a proceeding of attendance that was similar in its circumstances, see: HCJ 51/69 *Rudenitsky v. Great Rabbinical Court* [2], at p. 711; HCJ 550/89 *Attorney-General v. Parole Board* [3]).

Third, opening the doors of this court even to a 'public petitioner' who can show a general public interest that justifies proper consideration applies *a priori* to the Attorney-General within the framework of his authority (see Dr Z. Segal, *The Right of Standing in the High Court of Justice*, Papyrus, second

edition, 1994, at pp. 71, 268-270; and also diverse case-law: HCJ 910/86 *Ressler v. Minister of Defence* [4]; HCJ 2148/94 *Gilbert v. Chairman of the Commission of Enquiry for examining the Massacre in Hebron* [5]).

22. With regard to the argument about the academic nature of the question under discussion, the remarks of the Vice-President of the Supreme Court, Justice Elon, in CA 506/88 *Shefer (a minor) v. State of Israel* [6], at p. 98 {179}, are apt:

> 'Usually we do not become involved in deciding an issue that is purely academic. But there is no rule that does not have exceptions… This is because usually… the *decision* must be given without delay, as required by the nature of the case and the facts, and the reasons relate to the heart of the matter and the reasoning for it, so that we will know and have established the law on each of the issues before us when it arises and comes before us once more.'

Or, as Justice Barak chose to express it in HCJ 73/85 *'Kach' Party v. Knesset Speaker* [7], at p. 146:

> 'It is true that this court does not consider questions that are not practical, and it does not give an opinion that is merely academic on questions of theoretical application, but this rule does not apply when the nature of the event, to which the petition refers, is such that the judicial determination of it may come after the event has taken place, but there is a reasonable likelihood that similar events will happen in the future…'

So we see, and the experience of life teaches us, that legal issues of a special and flexible nature from the past that appeared academic at the time became important and urgent practical questions at a later date. For this reason, both because of the direct relevance of the questions that are at the heart of the structure of the constitution and labour law in Israel, and also because of the doubt as to whether this dispute and ones like are merely events of the past, I think it appropriate to consider in detail the question before us.

The freedom to strike

23. In order to decide whether the sanctions taken by the employees in this case should be considered a 'strike', within the definition of this term for the purposes of labour law, we must first consider the status of this 'institution'.

24. It would appear that there is no longer any basis to question the lofty and protected status of the freedom to strike. More than once we has emphasized that:

> '… the "right" to strike has acquired for itself a firm foothold in Israeli legislation and case-law' (CA 593/81 *Ashdod Automobile Enterprises Ltd v. Chizik (dec'd)* [8], at p. 190).

In the eloquent language of Justice H. Cohn in CA 25/71 *Feinstein v. High School Teachers' Association* [9], at p. 131:

> 'It may be said that there is nothing further from the mind of the Israeli legislator than the desire to eliminate the institution of the strike: if an English judge, in a recent decision, described the strike as a 'holy cow', then here it should be regarded at least as a kind of revered tradition, such that it can no longer be questioned.'

Moreover, in an age where we are guided, both in legislation and in case-law, by the Basic Law: Human Dignity and Liberty — and its constitutional values — it would appear that the 'strike', which we have always considered to be included among the basic freedoms not written in the statute book and which was described as something that 'in essence belongs not to the sphere of "rights" but to the sphere of "freedoms" which are subject to binding restrictions...' (See NLC 37/4-3 *Katza Workers' Committee v. Katza Co. Ltd* [18]; NLC 52/4-17 (unreported) [19]; NLC 53/4-4[*]), will in the future find refuge in the value of 'human dignity' that is enshrined in this basic law (sections 1, 2 and 4 of the Basic Law: Human Dignity and Liberty, and for more detailed analysis, see the book of (Vice-President) Prof. A. Barak, *Legal Interpretation*, vol. 3, "Constitutional Interpretation", Nevo, 1994), and also his article 'Human Dignity as a Constitutional Right', 41 *Hapraklit*, 1993-1994, 271, at p. 279).

It is clear, then, that the focus of our consideration is a freedom that has the status of a constitutional right and is well-established in the different branches of Israeli law — a status that grows stronger all the time. Nonetheless, and precisely for this reason, when we are required to determine which acts of protest adopted by workers in their struggle will find refuge under the protection of the 'strike', the courts and labour courts must look to the definition of 'the strike', with its changing facets and nuances.

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[*] IsrLC 25 367.

Definition of the 'strike' — the status of a strike against the sovereign authority

25. In their petition, the representatives of Bezeq and the Attorney-General reiterated their initial and fundamental argument that they argued before the National Court, that an indispensable condition for a concerted action of employees to be recognized as a 'strike' for the purpose of labour law is that it is declared within the framework of a struggle to achieve employees' demands from *an employer* — with regard to their terms of employment. Counsel for the petitioners argues that this condition is not fulfilled in our case, where the demands of the Bezeq employees are not directed at their employer — the Bezeq Corporation — at all, but at the Government. In their opinion, since this is the case, the actions taken do not fall within the definition of a 'strike', and certainly these actions should not be granted legitimacy.

Indeed, as his honour, the learned President of the National Labour Court, Justice Goldberg, pointed out in his judgment:

> '… not infrequently have the Labour Courts, and the civil courts, expressed themselves in such a way that it may be understood that only a strike against an employer, in matters that are a subject for collective bargaining and a collective agreement, is a "strike" within the meaning thereof in labour law.'*
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> See the development of this definition: NLC 36/4-5 *Ginstler v. State of Israel* [20], at p. 15; NLC 46/4-7 *Tel-Aviv-Jaffa Municipality Lifeguard Committee v. Tel-Aviv-Jaffa Municipality* [21], at p. 269; HCJ 525/84 *Hativ v. National Labour Court* [10], at p. 702; NLC 52/4-37 *United Mizrahi Bank Ltd v. Mizrahi Bank Workers Union* [22], at pp. 62-63.

26. One might ask why we need all this repeated study and examination of the nature of a 'strike', when we have established the traditional nature of the definition of the 'strike', which is directed against the employer only, whereas in the case before us it is directed against the sovereign authority? To this questioner we will reply that there are sound reasons for this investigation and examination, for we are not divorced from the people and we are charged with seeing the current reality of our times, which changes

* *Ibid.*, at p. 376.

and varies continually, both in general and also in the field of labour relations. So it would appear that it was not an accident that the legislator chose not to define the term 'strike', except in chapter 4 of the Resolution of Labour Disputes Law. It is clear that by doing this the legislator expressed the opinion that:

> '… the concept *strike* is not one that has a single meaning, which applies at all times, for every purpose and in every situation of a development of labour relations and labour law' (NLC 36/4-5 [20], at p. 27).

And in the words of Justice Goldberg (President of the National Labour Court) in one of his articles:

> '… it may be good that this matter has been left to the discretion of the courts, for the reason that the needs and situations in the area of labour relations and labour law are dynamic and changing, and a statutory definition, which by its very nature is inflexible, does not change with the passage of time, and may well become a burden when the courts are required to apply the law…' (M. Goldberg, 'The Strike in Statute, Collective Agreements and Case-law', *Hapraklit*, *Special edition celebrating 25 years of the Bar Association*, 1987, at pp. 51-52, cited in NLC 53/4-4, 25, *supra*[*]).

27. We cannot ignore the changes that have been taking place for some time in the field of labour relations in the Israeli economy. It is clear that the Government is both an active and influential factor in the field of labour relations and in the negotiations about labour agreements. This interventionism has many, different causes, and it will suffice if we mention that, in addition to being one of the largest employers in the economy, the State intervenes in the field of labour relations as an active and highly influential factor in 'package deals', in wages, taxes and pricing policy.

In this respect, the following remarks, which reflect a familiar reality, are correct:

> '… the fact that the Government has become an active partner in negotiations regarding work conditions, justifies the expansion of the employees' protest base, so that it may extend also to

[*] IsrLC 25 367.

> attack the policy of the additional partner to the negotiations and not merely the employer, as was the case in the past, which reflected the reality that prevailed then' (Prof. R. Ben-Israel, 'The Political Strike', *Iyyunei Mishpat*, 1986-1987, 609, at p. 624).

It is therefore proper to consider this development when we seek to formulate an up-to-date approach to the important issue in the case before us.

The political strike — classification and status

28. At the heart of the petition before us lies the argument of the Attorney-General that the strike was directed against a specific provision in the Telecommunication Law, 5742-1982, which granted the Bezeq Corporation a monopoly in certain fields. The policy adopted by the State in putting forward the aforesaid draft law to correct the situation in a very limited manner was intended to bring about a measure of change in an undesirable monopolistic situation, and provide for the possibility of free competition in the field of international telephone services and mobile telephone services.

Opposition to this policy, when it is in the process of being legislated in the Knesset, is, in the State's view, a manifestly political strike, which is regarded by Israeli case-law as a strike that undermines our democratic process, and as such should be regarded as a strike that is not legitimate. This approach, to the extent that it relies on a proper factual basis, finds support in our case-law, and I need only refer to the remarks of President Shamgar in *Hativ v. National Labour Court* [10] and his decisive approach:

> 'The political strike — which attempts to force an act or an omission on government authorities that they would not have tolerated had it not been for the strike — raises many constitutional and social problems: in a democratic regime, this opens the gates for strikers to impose their will on democratically elected institutions, and to direct processes by means of the coercive power of organizations outside the government and even of minority groups who in practice have such coercive power. There may be countries where a national electric power cut, including for electricity being supplied to hospitals and nurseries, can compel the legislator to enact any legislation required of him. But there is no doubt that, together with the collapse of morality, this also harms most seriously the functioning of democracy as such' (*ibid.*, at pp. 703-704).

This approach of the President has won widespread approval, and it is supported by the opinions of scholars in Israel and abroad (see Professor F. Raday's article: 'Political Strikes and Fundamental Change in the Economic Structure of the Workplace', 2 *Hamishpat*, 1995, at pp. 159-177).

29. This issue is a delicate one and a very significant one in labour relations and labour law, as they have developed and crystallized in democratic countries. The distinction between a purely political strike, which is considered not legitimate, and an economic strike, which is recognized as a proper strike, is recognized and accepted by the different legal systems, but over time the two extreme forms of strike have been joined by an additional method of protest directed mainly at the sovereign power, which is a quasi-political strike that relies on a factual basis that is made up of a mixture of facts and goals.

Comparative law — conceptual distinctions

30. The law of the international democratic community, which has a long tradition in the field of labour relations, tends to distinguish between the 'economic strike', directed at the sovereign to achieve objectives in collective bargaining relating to work conditions, and the 'purely political strike', directed against the sovereign for the purpose of achieving political goals. This conceptual distinction is vague and rudimentary, for when considering questions relating to 'political strikes', the law in the aforesaid countries has generally shown that it is prepared occasionally to recognize a strike against the sovereign as an 'economic strike'. Therefore, where employees have started a strike against the sovereign — whether government or legislator — and their goals are directed against the direct intervention of the sovereign in their employment conditions and immediate rights, such as: freezing their wages (in Holland — *Re Keijzer v. Peters* (1977) [24]) or reducing their salary (in Holland — *N.V. Dutch Railways v. Transport Unions FNV, FSV and CNV* (1986) [25], at p. 8), their strike was recognized as an economic strike, even though, as stated, it was directed at the sovereign. On the other hand, where the strike was directed against the sovereign and targeted a policy that sought to make a fundamental economic, structural change, such as tax reforms (Finland — *Metal Industry Employers' Federation v. Metal Workers Union* (1988) [26]) or privatization processes (in England — *Mercury Communication v. Scott-Garner* (1984) [23]), the claim that the strike was economic and not political was rejected.

31. The implied conclusion, by way of analogy but in the proper context, is that a dichotomous distinction between a 'pure political strike', on the one hand, and an 'economic strike', on the other, is no longer applied in the law of the international community mentioned above, and it certainly cannot provide fitting solutions to the diverse labour disputes in a developing economy like that of the State of Israel. We can see how important is the purpose of the strike and how important are the objectives that the strike attempts to achieve. Therefore the interpreter must ascertain the purpose and objectives of the strike, and after he establishes its purpose, he will decide his position with regard to the legitimacy of that strike, even if it is aimed directly at the sovereign.

In this respect, the remarks of Justice Adler in the minority opinion of the judgment which is the subject of this petition are important. Judge Adler accepted the ruling in *Mercury Communication v. Scott-Garner* [23], *supra*, holding that:

> '… an additional tool for defining the scope of the strike within the framework of labour law is "the predominant purpose of the dispute".'*

A strike and a quasi-political strike

32. It follows that, in the reality prevailing in Israel as established above, there are grounds to distinguish between three types of strikes, which differ in their substance, their significance and the binding legal outcome in each of them. The first is the one defined as an economic strike, which involves a strike usually directed at the employer who wants to harm the rights of the employees, or who refuses to improve their terms of employment. This strike may be directed also at the government, when it acts in its capacity as employer, or when it wishes to intervene, by using its executive power, in order to change existing arrangements in labour relations between employees and employers or to prevent such arrangements. Such a strike is accepted as a legitimate strike.

The second is a purely political strike that is directed at the government, not in its capacity as employer, but as the body responsible for determining general economic policy that is not acceptable to employees who think that such a policy will limit them and harm their ability to struggle to achieve their rights as employees. This is a strike that is considered illegitimate, in

* *Ibid.*, at p. 390.

that it attempts to undermine the authority of the government to determine economic policy with a wide perspective of the general public interest, and to force it to accept the employees' demands; this is a strike that tries to intervene in legitimate legislation proceedings within the authority of the legislature, not by methods of persuasion acceptable in our democratic system, but by forceful intervention which tries to impose on the legislator what is unacceptable to it. This strike is not legitimate, and there is a justification for preventing it.

The third is a quasi-political strike, which falls between the two extremes that have been mentioned. It is about this that I would like to make some remarks. In these cases, which fall within the range that I have described, the test of 'the predominant purpose' becomes doubly important, since we are dealing with those cases where the employees are striking over an issue that is not directly related to their terms of employment in the narrow sense, but it *affects* them directly. Thus, when the proposed test shows and attests that there is indeed a direct effect on employees' rights, even if they striking against the government, labour law will arise and give their strike the title of a 'quasi-political strike', which shall entitle the employees to the right to hold a *short protest strike only*, without such a case being classified as one of the two ends of the spectrum, since it is in a class of its own.

In this respect, it is appropriate to adopt the remarks of Prof. F. Raday, in her article, *supra*, at p. 163, that:

> 'The right to strike over matters unrelated to terms of employment in the narrow sense, is completely different from the right to hold an economic strike. It is not possible to regard this as an instrument of economic pressure in conducting collective bargaining, for this would confer legitimacy on strikes against the employer or the government with regard to matters that are not subjects for collective bargaining. It should be regarded as a right of the citizen to freedom of speech and protest. Therefore it is limited to a protest strike only —to a brief action, which is not designed to put economic pressure on the employer. This right of a protest strike on broad socio-economic matters that directly affect workers may be regarded as the creation of a concept of a right to a quasi-political strike, which allows a protest act only.'

The same idea is expressed by Prof. Ben-Israel, in her article, *supra*, at p. 621:

> '… The proposed standard is, in one respect, that we are dealing with government policy that has an effect on the working sector, but in this context the effect must be direct, whereas an indirect effect is insufficient. An additional restriction arises from the case-law of the Committee of the International Labour Organization (ILO), which is that we are dealing with a strike that is designed to express a protest only, and is not designed to breach the peace.'

From the general to the particular

33. Should the strike before us be classified as an economic strike, entitled to the protection of labour law, as the National Labour Court ruled? In my opinion, this is not the case, and I do not accept the conclusions of the National Labour Court. I will explain my position.

34. With respect to the classification of the strike — if the General Federation wishes to rely upon the economic strike and to argue that the present strike is such, and to rely upon the protections conferred on such a strike, then it has the task, as the representative of the striking workers, of persuading the court that the policy of opening different fields of telecommunications services up to competition, as this is expressed in the Government's draft legislation, will directly harm employees and their terms of employment, in the narrow sense. In my opinion, convincing and well-founded evidence that restricting Bezeq's monopoly may cause direct and immediate harm to Bezeq's employees has not been presented at all, either before the National Labour Court or even before us. Therefore, I am prepared to rely on the determination of Vice-President Adler, when he indicated that:

> 'The facts submitted… have not shown a clear, certain or immediate effect that the new law will have on the terms of employment, the wages or the continued employment of Bezeq's employees. It is possible that they will suffer, but it is also possible that they will benefit from the competition, if Bezeq competes successfully… The effect of the draft law on Bezeq's employees is neither certain nor tangible, *since there is no direct threat to the places of work of Bezeq's employees, there is no direct intention to change their terms of employment, and there is no threat to reduce the corporation's manpower.*

> The opposite is true — Bezeq's employees enjoy job security by virtue of statute and by virtue of collective agreements that apply to them.'

Therefore the inescapable conclusion is that the correct classification of this strike, according to its objectives and background, is, *at most*, a 'quasi-political' strike, which only justifies a protest demonstration that can be expressed, as stated, in a protest strike of short duration.

I emphasize the words 'at most', because were it not for the expectation that Bezeq's employees have of exclusivity and an everlasting and unchangeable monopoly — expectations deriving from the provisions of sections 50, 51 and 60 of the Telecommunications Law, it is in my opinion highly questionable whether a change in the law could be regarded in any way, even *prima facie*, as having a direct and material influence on the employees' terms of employment. From a review of the facts of the case and the provisions of the said law, I can determine that these feelings and expectations of the employees are unfounded. But I can understand that when the employees' hope — albeit a mistaken one — was disappointed, a genuine fear took root in their minds that a change in the law would harm their terms of employment in some way. For this reason, I would tend to place this strike in the category of the quasi-political strike, with the consequences elucidated above.

35. It seems to me that even section 37A of the Resolution of Labour Disputes Law will lead us to the same conclusion with regard to the nature of the strike before us, and its proper classification. The term 'strike or unprotected strike' is defined in section 37A of the Resolution of Labour Disputes Law, in the following terms:

> 'A "strike or work stoppage" — any one of the following:
>
> (1) A strike or work stoppage of employees in public service, at a time when they are subject to a collective agreement, except for a strike that is unrelated to wages or social benefits, and the national centre of the competent trade union has declared or authorized it;
>
> (2) …
>
> (3) …'

In our case, where Bezeq is a 'public service' within the meaning of this term in the Resolution of Labour Disputes Law, we must consider the

meaning of the words 'except for a strike that is unrelated to wages or social benefits'. With regard to the interpretation of this phrase, Prof. Ben-Israel expressed her opinion as follows:

> 'Two types of strike may be justified by the exception ['that is unrelated to wages or social benefits']:
>
> (a) Sympathy strikes…
>
> (b) Strikes of a certain political character…' (see Prof. R. Ben-Israel, *The Strike*, Sadan, 1987, 194) (square parentheses added).

Even if we adopt this interpretation, which I do not reject, we would still find ourselves bound by the spirit of section 37A, which seeks to ensure the uninterrupted supply of essential public services. For this reason, I believe that in providing an exception for 'the unprotected strike', the legislator is only prepared to recognize the quasi-political protest strike, and to protect it within its narrow limits. When the protest of Bezeq's employees took on the form of a general and prolonged strike, it significantly exceeded the quasi-political strike in its scope and objectives, and it became a political strike in the full sense of the term. For this reason, it is illegitimate and unprotected, contrary to the approach of the National Labour Court.

When will this court intervene in a judgment of the National Labour Court?

36. The respondents argued several times that we should not intervene in the ruling of the National Labour Court, for this is not an appropriate case for intervention. Only recently we reemphasized that:

> 'We do not sit as a court of appeals on the judgments of the Labour Court, and therefore this court will not consider petitions that are manifestly of an appellate nature, and it will usually consider intervening in the rulings of the National Labour Court when two conditions are fulfilled… i.e., the existence of a significant mistake of law and the existence of considerations of justice that require our intervention…' (see, for fuller treatment, HCJ 3679/94 [1], at p. 584, where the ruling in *Hativ v. National Labour Court* [10] was upheld).

Counsel for the petitioners is aware that labour law is the expertise of, and within the exclusive jurisdiction of, the Labour Court, and the intervention of this court in their decisions is limited, exceptional and requires cautious treatment. Nonetheless, their opinion is that in the present case, if the

innovative ruling in the judgment of the National Labour Court continues to exist, a material mistake of law with regard to norms that should be applied to the issue of the 'political strike' will become entrenched, and this is a very important issue that reaches the foundations of collective labour law and collective labour relations.

This position has merit. The question of the 'political strike' raises, as stated, questions that reach the foundations of collective labour law, and yet many aspects of it are vague and unclear. The rulings on this subject, both those given by the Labour Courts and those found in judgments issued by this court, are few, and they relate to the special circumstances of one case or another. Therefore there were reasons for the National Labour Court, but also for this court, to consider this question in depth, with all its fundamental aspects.

When there exists a real, substantial difference of opinion on this issue, which is innovative, multi-faceted and of general application, the binding law ought to be determined by us:

> 'For we should remember this: the ultimate responsibility for the development of case-law within the framework of the law is entrusted to the highest and final instance in the court system, namely the Supreme Court' (A. Barak, 'The High Court of Justice and the Labour Court — An explanation from the viewpoint of Jurisprudence', *The Bar-Niv Book — Selected Articles in Labour Law*, Ramot, A. Barak eds., 5747, 103, 116).

In the words of Justice Cheshin in HCJ 1520/91 *Wilensky v. National Labour Court* [11], at p. 519:

> 'This court, in which we sit, is the one that bears the burden and the responsibility, and if we do not speak succinctly and clearly, we will not be able to absolve ourselves by passing the responsibility onto others by relying on the intention of the legislator. We are the guarantors — and we are expected to determine the law.'

See, for fuller treatment and comparable cases: HCJ 3679/94 [1], *supra*; HCJ 675/84 *General Federation of Labour in Israel v. Tel-Aviv-Jaffa Regional Labour Court* [12], at p. 19; HCJ 289/79 *Israel Ports Authority v. National Labour Court* [13], at p. 159, etc..

Conclusion

As stated above, I have determined that the essence of the strike at issue is mainly a protest by Bezeq employees against a general, socio-economic policy, which is directed at on opening up the Israeli economy to competition and privatization. This policy is legitimate and even desirable. It does not constitute direct intervention in the freedom of negotiations or the employment conditions of the employees and it is truly concerned with the general public interest.

Where the sovereign decides that social and economic conditions justify changes in economic policy, whether by means of privatization of public services or by divesting certain bodies of their monopoly, we must recognize its right and authority to implement such a policy. The strike of the employees who dispute this policy because of an unfounded fear that their rights as employees will be affected may, at most, be classified as a short-term, quasi-political protest strike, but nothing more.

37. For these reasons, the petition has merit and we grant it. We are making the show cause order absolute, in the sense that we are reinstating the outcome which the Regional Labour Court reached in its judgment, but for the above reasons.

In the circumstances of the case, there will be no order for costs.

Justice M. Cheshin

1. I agree, but I thought I should raise two points.

First point: classification

2. The needs of society and the methods of governing the modern State — whether in relations between the State and the individual, or between individuals *inter se* — present us with social and economic conditions that refuse to fit into the legal models of the past. Models used in the past to decide legal disputes can no longer be applied in their old form, and legal classifications that were once all-embracing are collapsing and falling. This is not unprecedented. This phenomenon is encountered in every branch of law.

Only recently we were required to deal with the institution of the cooperative house, and we said that it was difficult to fit it into the traditional classifications of property law (see ALCA 7112/93 *Tzudler v. Yosef* [14], at p. 562):

> 'The cooperative house (which is called "condominium" in some jurisdictions) is an invention of modern law, and it originates in the physical and social conditions of modern society. From the viewpoint of traditional property law, the cooperative house is a kind of hybrid: the "apartments" in the cooperative house are owned separately… and alongside these the "common property" is jointly owned by all the owners. The provisions of joint ownership of the general law do not apply to the common property in the cooperative house… and the provisions of the chapter in the law on cooperative houses are unique to cooperative houses. The arrangement provided by law for the cooperative house restricts the right of the apartment owners to act both with regard to the common property and with regard to the apartments that they own, and in this we can see the normative uniqueness of the cooperative house and the arrangements that apply to it… Indeed, the cooperative house is an institution that is *sui generis*, which is in some ways like one thing and in other ways like another, and it adamantly refuses to fit into any of the traditional models of property law. Moreover, the cooperative house refuses to be classified only in property law, and it has elements that go beyond property law. These creative elements in the cooperative house — elements that go beyond property law — include, *inter alia*…'

An example which is closer to the matter at hand may be found in the traditional distinction between private law and public law. This distinction has, to a large degree, been blurred recently. With respect to certain legal issues, its value has greatly diminished, and its strength has almost been depleted. In the words of Justice H. Cohn in HCJ 262/62 *Peretz v. Kfar Shmaryahu Local Council* [15], at p. 2109:

> '… in the national and public economy of today, there is no longer any practical benefit in the accepted distinction between the commercial or civilian acts of any authority of the State or a local authority, and their executive or public acts.'

See also HCJ 840/79 *Israel Contractors and Builders Centre v. Government of Israel* [16].

3. This is also the case in the matter before us, namely, with regard to the traditional dichotomous classification of the strike as either an 'economic

strike', within the narrow field of employee-employer relations, or a 'political strike' (if this is indeed a 'strike'). For reasons that we shall not consider at length (which include the ever-increasing intervention of the State in the conditions of economic life, and the greater awareness of civil rights, and these are perhaps the main reasons), the courts, academics and practitioners in the field of social sciences have found that the traditional classification can no longer provide proper solutions for social and economic conditions, which life and the development of law in a modern State have shown us. This unsatisfactory nature of the traditional models naturally led to a need to try and find new models, whether by improving the existing models or by designing new models that fit the needs of our times. Apparently we are currently in a period of transition, from the model of the past to the model of the present. This leads to the various proposals for new (or reconstituted) models, and this leads to different opinions among academics and lawmakers. As long as we have the comforting protection of a universally accepted classification, the resolution of issues may appear simple and clear, and resolving disputes may appear to be routine (even if it is not so). But during a transition stage from one period to another, nerve-endings are exposed, the search for creative elements that transcend the law becomes urgent and vexing, and disagreements between opposing outlooks are revealed with increasing intensity.

4. My colleague suggests that we adopt the remarks written by Professor Raday with regard to the issue of 'quasi-political' strikes, and he goes on to mention in the same context the remarks of Professor Ben-Israel. The comments of these two authorities — each in her own way — appear beneficial and useful as models for examination and determination, but I believe that we should take care not to adopt one model only, a model that may provide us with a fitting solution for one set of facts, but may be ineffective with respect to another set of facts (we note that a 'quasi-political' strike is, by definition, supposed to give expression not (only) to the right to work and earn a livelihood, but (mainly) to civil rights). In our case, I have not the slightest doubt that the strike of the employees has gone beyond the framework of a strike that should be recognized as legitimate. A strike of the kind that we have seen in this case is capable of dealing a mortal blow to the infrastructure of a democratic society, obliterating fundamental values of social morality and destroying the norms of coexistence. We know where it begins, but who knows where it may end? In this respect, I can only refer to the remarks of President Shamgar in *Hativ v. National Labour Court* [10], at pp. 703-704, cited by my colleague in paragraph 28 of his judgment.

Second point: the right (or freedom) to strike and human dignity

5. My colleague states (in paragraph 24 of his judgment) that since the advent of the Basic Law: Human Dignity and Liberty, the right (or freedom) to strike 'will in the future find refuge in the value of "human dignity" that is enshrined in this Basic Law'. My colleague goes on to say that 'the focus of our consideration is a liberty that has the status of a constitutional right and is well-established in the different branches of Israeli law — a status that grows stronger all the time'. No one would dispute that the freedom to strike is one of the inalienable assets of the Israeli legal system. I would also agree that the freedom to strike and its status are on an elevated level, equal to that of statute. Notwithstanding, since we do not need to decide this now, I would not say that it is self-evident that the freedom to strike springs naturally from 'human dignity' in the Basic Law: Human Dignity and Liberty, and that its status today is that of a constitutional right. In HCJ 453/94 *Israel Women's Network v. Government of Israel* [17], our colleague, Justice Zamir, says the following at p. 536 {468}:

> 'In case-law since the enactment of the Basic Law: Human Dignity and Liberty, various *obiter dicta* can be found that recognize many aspects of the Basic Law. This is particularly true with regard to the right to dignity. The same is true of law books. Some see in human dignity the principle of equality, some see in it the freedom of speech, and some see in it other basic rights that are not mentioned in the Basic Law. Someone compiling these statements could receive the impression that human dignity is, supposedly, the whole law in a nutshell, and that it is possible to apply to it the saying of the rabbis: "Study it from every aspect, for everything is in it".
>
> I would like to restrain myself, in this context, from *obiter dicta* that find their way between the lines of judgments, on such a fundamental and basic matter, without thorough discussion of the matter itself as a binding part of the judgment. I believe that if it is not necessary, it is better not to commit oneself until the need arises. Let us cross that bridge when we come to it, in the sense of "do not raise or disturb it until it is required".'

In that case, the court considered the principle of equality, and Justice Zamir thought that it was possible to decide the dispute that arose between the litigants without also deciding that 'the principle of equality is a basic right enshrined in the Basic Law: Human Dignity and Liberty as part of the

value of human dignity, and it has, therefore, a super-legislative status' (*ibid*.). This was true with respect to the principle of equality, and it is also true, in my opinion, with respect to the freedom to strike in our case. Let the remarks of Justice Zamir be heard as if they sprung forth from my lips.

Justice Ts. E. Tal:

I agree with the judgment of the honourable Justice D. Levin. Like my colleague, Justice Cheshin, I too wish to emphasize the harm to the foundations of democracy that results from a strike that is not an economic strike against an employer, whereby a group of workers tries to bring the legislature to its knees by force. I would leave undecided the question whether the right to strike is currently enshrined in a basic law.

Petition granted.

10 Nissan 5755.

10 April 1995.