LOUISE FREYER

UNJUSTIFIABLE DISMISSAL: PROCEDURAL FAIRNESS AND THE EMPLOYER

LLM RESEARCH PAPER
EMPLOYMENT LAW (LAWS 543)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1996

CONTENTS

ABSTRACT

This paper looks at the procedural fairness rule with regard to unjustifiable dismissal, in order to determine whether this rule, which has the funtion of supplying employment security to workers, is also fair to employers.

The paper reviews the history of "unjustifiable dismissal" in New Zealand Employment law, and then examines the content of procedural fairness, the relationship between procedural and substantive fairness and the reduction of remedies because of contributory fault. The conclusion is reached that the employer is constantly at a disadvantage. The subordination of procedural to substantive fairness, pedantic scrutiny of the courts, and the fact that the reduction of remedies because of contributory conduct does not adequately redress the imbalance, all combine to create a situation that is not fair to the employer. The consequence of this situation may well be that employers are discouraged from taking on additional staff.

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 14,000 words.

I INTRODUCTION

The trend in Employment Law in New Zealand has been to provide employees with increasing certainty in their employment.[1] One aspect of this trend is the treatment of unjustifiable dismissal which is by far the most frequent complaint in personal grievance actions.[2] Although an employer is required to justify the dismissal of an employee both substantively and procedurally, it is now firmly established that procedural unfairness alone justifies a finding of unjustiable dismissal.[3] It has been argued that the Employment Tribunal and the Employment Court do have "mechanisms" to deal with the situation where the facts may justify a dismissal but where the employer has acted unfairly. One "mechanism" is to ensure that an employer is not burdened by excessive technicality in ensuring that procedural fairness is observed, and the other is that an award may be reduced on the grounds of contributory conduct.[4]

This paper traces the history of the requirement of procedural fairness, examines the contents of this requirement as interpreted by case law, and analyses the way in which the Tribunal and the Court have dealt with contributory conduct. The purpose is to determine whether the "mechanisms" result in a fair deal for the employer or whether the subordination of substance to procedure is being used as a basis for awarding liberal compensation[5] to the employee even when there has been substantive justification for a dismissal.[6]

---

1 K Johnston "Personal Grievances: Remedies" (1995) Employment Law Bulletin 126.

2 C Howard *Interpretation of the Employment Contracts Act 1991* (NZ Business Roundtable/ NZ Employers Federation, December 1995) 18.

3 J Hughes *Personal Grievances* (Butterworths, 1996) at 4.5.

4 G Anderson, B Banks, J Hughes, K Johnston (eds) *Employment Law Guide* (2ed Butterworths, Wellington, 1995) 319.

5 Statistics released by the Employment Court and Tribunal for 1995 show that the majority of awards of compensation for "humilation" ranged between $2000 and $8000.

6 Above n 2, 19.

II PROTECTION AGAINST DISMISSAL: A CONTROVERSIAL ISSUE

A Two Opposing Viewpoints

Protection against unjustified dismissal is part of the wider concept of employment security,[7] and it remains a hotly debated issue in many countries. In the post-war period there has been the general idea that workers have a right to a reasonable degree of employment protection.[8] There are three main arguments in favour of employment protection. Firstly it is held that where employers can dismiss workers at will they will abuse this right or coerce workers into forgoing legal entitlements. Secondly workers have an investment, not only financial but also of intangible benefits in their jobs and should not be unjustifiably deprived of these. Thirdly it is argued that a particular job has more value to an employee than a particular employee has to the employer. This view is mainly opposed by the Chicago School of neo-classical economists who argue that an efficient labour market depends on employment at will. It is argued that an employer must be free to hire and fire to meet the productive requirements of the firm and to maximise its operating efficiency. It is also argued that an employer would not dismiss without good reason because of its investment of training and experience in the worker.

B The Employment Protection Debate in New Zealand

At the time when the Employment Contracts Act 1991 ("ECA") was passed it was decided to leave the personal grievance provisions largely unchanged. This decision was made in spite of strong arguments from within the Government and other quarters for its abolition.[9] The NZ Business Roundtable and NZ Employers' Federation proposed that unless parties had contracted to the contrary, all contracts of employment

---

7 Above n 4, 197.

8 Principle incorporated in ILO Convention 158 on the Termination of Employment at the Initiative of the Employer; see above n 4, 198.

9 Above n 4, 199.

may be terminated on 14 days notice.[10] They argued that any increase in job security for some comes at the expense of reduced job security for others. By making firing unnecessarily difficult and costly, the costs of employing workers in the first place are increased, and this results in the reduction of overall employment. Employers will be unwilling to take on "unknown quantities", such as long-term unemployed workers, if it is difficult to terminate relationships that do not work out. While individual workers may gain as a result of the courts' pro-worker decisions, workers as a group and the unemployed will be the losers.[11]

The debate continues in New Zealand, for dismissal remains a contentious issue. Although the requirement of procedural fairness with regard to dismissal is firmly established in case law, there is still a considerable amount of dissatisfaction that continues to be expressed. On the one hand there is the view that the courts do not go far enough in the favour of employees - that the level of compensation does not recognise the real economic consequences of dismissal.[12] On the other hand it is argued that it is unfair that employees retain the right to leave employment "without explanation or consideration of even the most minor of the employer's interests, provided only that they give the agreed notice",[13] whereas an employer who terminates a working relationship has his attitude, behaviour and procedures minutely examined and criticised. There is also dissatisfaction with the assumption (on which job protection is based) that a particular job has greater value to an employee than a particular employee has to an employer, as if an employer who loses

---

10 NZ Business Roundtable, NZ Employers Federation *A Study of the Labour/ Employment Court* (December 1992) 46.

11 NZ Business Roundtable *Submission to the Labour Select Committee on the Employment Contracts Bill* (February 1991) 12; see also R Kerr "Back to Basics on the Labour Market" Paper at H R Nicholls Society (Melbourne, 22 August 1995) 10; see also CW Baird *The Employment Contracts Act & Unjustifiable Dismissal* (NZ Business Roundtable/ NZ Employers Federation, Wellington, August 1996).

12 J Hughes "Personal Grievances" in *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 107; see also G Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) N Z of Industrial Relations 269.

13 A Jones "Employers Pay the Price of Absurd Dismissal Demands" (1996) The National Business Review 12.

an employee can simply go and get another. This attitude, it is argued, ignores the fact that workers are not necessarily interchangeable to employers, and that losing a particular employee can be disabling to an employer.[14] In a recent publication[15] it is contended that the present unjustifiable dismissal doctrine not only discourages employers from taking on new employees because of the difficulties of firing without the costs and perils of litigation, but also adversely affects the productivity of already hired workers who know that their employers will not easily fire them because of the costs involved.

It is interesting to note that as New Zealand prepares for the coming election, the various political parties have set out the main points of their industrial relations policies. ACT New Zealand supports the ECA and would like to strengthen it by simplifying the personal grievance procedures. This party believes that the existing provisions "make it too hard for employers to dismiss workers". United New Zealand also supports the ECA and would wish to review the grievance and dismissal provisions of the Act to make them simpler and more streamlined, removing some of the "existing impediments to dismissing employees".[16]

III THE HISTORY OF UNJUSTIFIED DISMISSAL

Prior to 1970 employees who thought that they had been unjustifiably dismissed had the option of either seeking support from their union or to resort to a common law action. At common law an employer had to either give a reasonable period of notice or the period of notice provided for in the contract of employment, or make a payment in lieu of notice. It was not, however, necessary for an employer to give a

---

14 Above n 13, 12.

15 CW Baird, above n 11, 13-14.

16 "How Work Will Get Done", *The Sunday Star-Times*, New Zealand, 22 September 1996, D4.

reason for the dismissal.[17] The rule in *Addis v Grammophone Co*[18] limited damages to the financial loss caused by not giving the correct notice.[19] In practice the common law offered almost no protection to the average worker because of the short periods of notice provided for in most awards and the low level of possible damages. It is therefore not surprising that prior to 1970 dismissals were a major cause of strikes in New Zealand.[20]

In 1970 the Industrial Conciliation and Arbitration Amendment Act was passed which provided for a voluntary procedure to settle disputes over "wrongful dismissals". The wording confined the procedure to dismissals that were unlawful at common law. There was, at this stage, no intention on the part of the legislature to remove an employer's right to hire and fire, but rather a concern over the increasing number of strikes attributed to dismissals.[21] Because the common law terminolgy of "wrongful dismissal" was adopted, the Act made little change to the status quo. Three years later the Industrial Relations Act 1973 ("IRA") was passed which provided that a procedure for the resolution of personal grievances had to be contained in all awards and agreements, and the term "unjustifiable dismissal" replaced that of "wrongful dismissal". A personal grievance was defined as "a grievance that a worker may have against his employer because of a claim that he has been unjustifiably dismissed, or that other action by the employer...affects his employment to his disadvantage".[22]

The origins of New Zealand's personal grievance provisions can be traced back to developments which took place during the 1960s, when

---

17 G Anderson "The origins and development of the personal grievance jurisdiction in New Zealand" (1988) New Zealand Journal of Industrial Relations 259.

18 [1909] AC 488.

19 Above n 4, 202.

20 J Hughes *Labour Law in New Zealand* (The Law Book Co Ltd, Sydney, 1990) 1813.

21 Above n 17, 257-261.

22 B Boon "Procedural Fairness and the Unjustified Dismissal Decision" (1992) 17 NZ Journal of Industrial Relations 302.

a need was felt for greater protection against unjustified termination of employment, echoing an international trend towards greater protection for workers.[23] In 1966 Mr R Green published a paper, *Procedures to settle disputes over alleged wrongful dismissal*[24], in which he discussed the unenthusiastic response of employers and unions to the efforts of the then Minister of Labour to have a standard procedure to deal with alleged wrongful dismissals adopted. Employers were loath to lose their "right" to hire and fire at will and unionists feared, among other things, that compensation rather than reinstatement would become the norm. It was therefore only much later, with the passage of s 117 of the IRA, that an effective personal grievance procedure was enacted.

The procedure introduced by the IRA did not provide a remedy for all workers, as a great many workers were excluded. Only those workers who were union members and whose work was covered by an award or other agreement, were covered.[25] In addition, the personal grievance procedure did not provide for direct access to the Court for an individual worker, as it was the worker's union's right to take a personal grievance action on his or her behalf. Workers only had direct access to the Court where their union failed to act or act promptly. This was due to the overall policy of industrial relations legislation which, although it may have conferred benefits on individual workers, generally left enforcement to the worker's union or other agency.[26]

The Labour Relations Act 1987 ("LRA") extended the coverage of the personal grievance procedure to all union members,irrespective of whether they were bound by an award or agreement. The term "personal grievance" was extended to include discrimination, sexual harassment and duress. The latter three terms were defined in detail, but

---

23 Above n 17, 260.

24 Industrial Relations Centre, Victoria University.

25 Above n 17, 262.

26 Above n 17, 263.

unjustifiable dismissal was not.[27]

In 1991 the ECA extended the right to bring a personal grievance action to all employers. Union membership ceased to be a requirement and every contract of employment (individual or collective) contained an effective procedure for the settling of any personal grievance. Each individual employee can now bring a grievance action.

Since 1973 there have been relatively few amendments to the substantive law regarding personal grievances. Amendments have mainly affected matters such as remedies or new categories of grievance such as discrimination, sexual harassment or duress.[28]

IV THE INTERPRETATION OF "UNJUSTIFIABLE"

Unlike the United Kingdom where such matters were defined in detail, there have been no legislative guidelines as to what conduct justifies a dismissal and whether it is legitimate to consider procedural aspects of the dismissals as well as the substantive in reaching a decision.[29] It was therefore left to the courts to develop a body of law.

In 1980 Chief Judge Horn of the Arbitration court, in *Taranaki Amalgamated Society of Shop Assistants and Related Trades IUW v CC Ward Ltd* [30] expressed his reluctance to "set down rigid rules by way of precedent" and suggested that as "(t)he legislature has not seen fit to define unjustified dismissal...the court draws the inference that each case must be considered individually taking into account all surrounding circumstances". Chief Judge Horn's inference that because the legislature failed to define "unjustifiable dismissal",

---

27 Sections 210-213. See also H Fulton *Employment Law: Personal Grievances* Seminar by Auckland District Law Society (Auckland, 18 July 1996) 1.

28 Above n 4, 204.

29 See H Fulton, above n 27, 1.

30 [1980] ACJ 124.

the Court should not set down any guidelines, was criticised.[31] It was felt that it was the task of the court to establish guiding principles precisely because the statutory wording was ambiguous.[32] Likewise, in *Auckland Local Authorities etc Officers IUW v Waitemata City Council*[33] the Court said that it was "refraining (to a degree) from laying down too early too rigidly defined principles".

The Court of Appeal did however confirm in *Wellington Road Transport etc IUW (re Hepi) v Fletcher Construction Co Ltd*[34] that in a personal grievance claim the onus is on the employer to show that the dismissal is justified.

It would not be unreasonable to point out that in the absence of clear definition in the Act and the reluctance on the part of the Court to set out guiding principles, an employer could at that stage hardly be expected to know what procedure would be considered adequate when dismissing an employee!

Guidance as to the meaning of "unjustifiable" was at last laid down in the Court of Appeal decision in *Auckland City Council v Hennessy*[35] in which a car-park attendant, contrary to work rules, left his booth and assaulted patrons who were riding their motor cycles at excess speed. Shortly afterwards, while he was on leave, he was sent a letter of dismissal. He was not given the opportunity to state his side of the story.[36] Somers J held:

> ..(i)n the context of s 117 we find the word unjustified should have its ordinary accepted meaning. Its integral feature is the word unjust - that is to say not in accordance with justice or fairness. A course of action is

---

31 J Hughes "Emerging Procedural Requirements under section 117 of the Industrial Relations Act 1981" (1981) Otago Law Review 163.

32 DL Mathieson "The Lawyer, Industrial Conflict and the Right to Fire" (1981) New Zealand Law Journal 218.

33 [1980] ACJ 35.

34 [1982] ACJ 663.

35 [1982] ACJ 699; see also G Anderson "Procedural Fairness and Unjustified Dismissal" (1883) NZ Journal of Industrial Relations 1-10.

36 Above n 3, at 4.1.; see also above n 21, 303.

> unjustifiable when that which is done cannot be shown to be in accordance with justice or fairness.

Since this decision a body of case law has developed on this subject. The Court in New Zealand now sees the standard of fairness as being its own opinion based on a range of factors. It did not adopt the United Kingdom's test of whether the employer acted as a reasonable employer[37], and consequently the reasonableness of the employer is not the overriding test. Instead, the Court has placed a strong emphasis on a combination of natural justice and "good industrial relations practice".[38]

V WHAT IS PROCEDURAL FAIRNESS?

A failure to observe any of the requirements of procedural fairness will usually lead to a finding of unjustifiable dismissal. The overriding function of this rule is to promote employment security.[39] The minimum requirements of procedural fairness were set out in *NZ Food Processing Union v Unilever NZ Ltd* [40]:

> a) notice to the employee of the specific allegation of misconduct to which the employer must answer and of the likely consequences if the allegation is established;
>
> b) an opportunity, which must be real as opposed to a nominal one, for the employee to attempt to refute the allegation or to explain or mitigate his or her conduct; and
>
> c) an unbiased consideration of the employee's explanation in the sense that consideration must be free from predetermination and influenced by irrelevant consideration.[41]

These requirements are the principles of natural justice and may require adaptation to the specific circumstances of each individual case. Procedural fairness consists not only of compliance with the

---

37 See VII D.

38 Above n 17, 267.

39 I K Adzoxornu "Procedural Justification of Dismissals" (1991) NZLJ 291.

40 [1990] 1 NZILR 35; see also n 4, 321.

41 Above n 39, 290.

principles of natural justice but also compliance with any procedure that may be expressly set out in the employment contract or, in the absence of the latter, a particular procedure which an employee might legitimately expect the employer to follow.[42]

Four elements[43] can actually be identified in the concept of procedural fairness, and these consist of the three requirements of natural justice mentioned in *N Z Food Processing etc IUOW v Unilever NZ Ltd* above plus the requirement of warnings:

a) *Warnings.* The employer must warn the employer of the misconduct (unless it is serious misconduct warranting summary dismissal) and implicit therein must be a request for an improvement in conduct and performance. The employee must also be advised, at the warning stage, that his/her job in on the line.

b) *Investigation.* The employer must carry out a full investigation of all relevant facts before actually terminating the employee's employment, and the result of such an investigation should be communicated to the worker.

c) *Reasons for the dismissal* must be given to the employee before the dismissal is effected.

d) *Opportunity to be heard.* The worker must be provided with a real opportunity to be heard and to offer an explanation to the alleged misconduct, before dismissal is affected.[44]

A Warnings

Warnings are not part of the hearing itself but are included in procedural fairness. Warnings should be given to alert the employee to the possibility of dismissal. The only exception is where summary dismissal is justified. In 1981 in *Otago Meatworkers Union v NZ*

---

42 Above n 3, at 4.8.

43 JRP Horn, P Bartlett, WC Hodge, P Muir, C Toogood, R Wilson *Brookers Employment Contracts* (Brooker's, Wellington, 1991) at EC 27.15.

44 See also above, n 43, at EC27.15.

Protein Extraction and Manufacturing Co Ltd[45] Castle J said:

> The practice of dismissal warning procedures being established as between employer and union has become extensive and has great merit in that it removes a troublesome area of uncertainty in industrial relations..

However, the requirements that have to be met with regard to warnings have also become extensive. Examples of some of the many rules developed by the courts are the following: warnings must not only be given, but they must be adequate[46]; a prior warning cannot be relied on if it has "expired"[47]; an adequate period has to be allowed for the employee to improve in response to a warning about unsatisfactory work[48]; different warnings must be given to the same employee for different types of misconduct.[49]

B Necessity for Full and Proper Investigation

There should generally be an enquiry process leading to the decision to dismiss or to take other adverse action against the employee. The leading case in this area is the Court of Appeal decision in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*[50]. In this case the issue was discussed as to whether an employer has to prove as a fact the existence of serious misconduct in order to justify a dismissal, or whether the employer merely has to show that it is justified in accepting that serious conduct occurred after a complete and fairly conducted inquiry into the matter. Bisson J held:

> Put briefly, an employer in the conduct and management of its business is not called upon to sit in judgment of an employee and require proof beyond reasonable doubt of alleged misconduct. When an incident occurs which raises the question of misconduct by an employee, the employer is required to act fairly in considering the interests of the employer's business and of the

---

45 [1981] ACJ 319.

46 eg *O'Connor v Wellington CC* [1990] 2 NZILR 128.

47 eg *NZ Woollen Mills IUOW v Christchurch Carpet Yarns Ltd* [1989] 2 NZILR 14; see also above n 3. at 4.24.

48 eg *Trotter v Telecom Corporation of New Zealand Ltd* [1993] ERNZ 659; see also n 3, at 4.22.

49 eg *Robertson v Honda NZ Ltd* [1991] 3ERNZ 451. See also above n 3, at 4.24.

50 [1990] 3 NZLR 549.

> employee's employment in that business. In some situations the facts are so clear that instant dismissal is justified. In other situations an explanation by the employee may not be fully satisfactory but sufficient to require further consideration and possibly some investigation... [51]

C Reasons for the Dismissal

The reasons for the dismissal must be communicated to the employee before the dismissal is effected.[52] This means that allegations must be put to the employee. This requirement is especially suited to cases where the dismissal is based on incompetency. In *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson*[53] an employee was not previously informed that her performance was inadequate, and the Court held that it was unfair of the employer to present her with a list of complaints at the same time as dismissal.[54]

D Opportunity to be heard

In general an employer, in giving an employee an opportunity to be heard will

1) tell the worker in clear terms that dismissal is a possibility
2) tell the worker that he is entitled to seek assistance from a union or other representative
3) tell the worker that any explanation will be taken into account.[55]

An employee is entitled to a real as opposed to a nominal hearing which should be conducted by the decisionmmaker. An employee must have an opportunity to refute, explain or mitigate the alledged conduct.

---

51 Above n 39, 290.

52 Above n 43, at EC 27.18.

53 [1994] 1 ERNZ 920; see also VIII D 2.

54 Above n 4, 325.

55 Above n 43, at EC27.19.

E Other Factors

Apart from the requirement of procedural fairness, the Court may also take other factors into consideration as a matter of "fairness" in some situations. Examples of these are: past record[56]; disparity of treatment[57] and alternatives to dismissals.[58]

VI ARE THE PROCEDURAL REQUIREMENTS TOO DEMANDING?

A Is the Procedural Fairness Rule Statutorily Imposed?

It has been argued that because the procedural fairness rule in respect of employers who enjoy the statutory right not to be "unjustifiably" dismissed, has been held to have been derived from the particular construction of the word "unjustifiably", the rule is statutorily imposed, rather than being an implied term (which could be displaced by an express term in the contract).[59] This interpretation was confirmed in *Moffat Appliances Ltd v NZ Clerical Workers Union*[60] showing that the Court will not allow employers and their employees to contract out[61] of the requirement to adhere to the high standards of procedural fairness. In this case a wages clerk was dismissed without reason about three weeks after signing a contract of employment. The contract stipulated that during the first month of employment the employee or the company could give one hour's notice of termination and that neither party were required to give reasons for the termination.

---

56 eg *Wellington Local Bodies Officers Union v Wellington Regional Hydatids Control Authority* [1977] ICJ 141.

57 eg *Northern Clerical Union v Fruitpac UEB Carton* [1989] 2 NZILR 664.

58 eg *Northern Distribution Union v Lightning Transport Ltd* [1991] 2 ERNZ 779.

59 Above n 39, 289.

60 [1991] 2 ERNZ 437.

61 Above n 43, at EC27.15. The words "unless the parties have contracted out of this" indicate that the authors do not consider this impossible.

This view was challenged by the NZ Business Roundtable and the NZ Employers Federation[62] who argue that the ECA contains no provisions limiting matters which may be contained in an employment contract. They contend that although s 147 of the Act does provide that its provisions shall have effect notwithstanding any provisions in any contract or agreement, the personal grievance provisions merely require there to be some procedure for dealing with claims of unjustifiable dismissal. The circumstances of the case, including any relevant contractual provisions will determine whether a dismissal is substantively or procedurally justified. Unless a contractual provision is challenged under the harsh and oppressive contracts provisions of section 57, parties ought to be able to agree that reasons for dismissal need not be given and that contracts may be terminated by either party on notice.

The view above is not correct. Section 26(a) of the ECA states that all employment contracts must include an effective personal grievance settlement process; s 27(a) explicitly includes unjustifiable dismissal as a personal grievance; and s 147 proscribes contracting out of the provisions of the ECA.[63] Section 32(a) is also especially relevant, as it requires the procedure to be "not inconsistent with the requirements of this Part of the Act".

B Increased Litigation

Ralph Gardiner, a former chief of the Employment Tribunal, mentions that 75% of the workload of the Tribunal (mediations and adjudications) is made up of personal grievances. He says: "Thus, we are saturated with personal grievances, 95% of which are alleged unjustifiable dismissal cases".[64] One wonders whether the Employment

---

62 Above n 10, 16.

63 CW Baird, above n 11, 5.

64 R Gardiner "Personal Grievance Mediation in the Employment Tribunal" (1993) NZ Journal of Industrial Relations 343; see also n 10, 7. He states that under the LRA more than half the Labour Court's time was taken up with considering personal grievances, the great majority of which involved allegations of unjustifiable dismissal.

Tribunal would not perhaps be less "saturated" if employees who have been dismissed with substantive justification were not lured by the hope of compensation which may come their way if the Tribunal were to rule that there was some or other defect with regard to the procedure of their dismissal.[65]

It has been noted that the amount of litigation and involvement of lawyers in the resolution of this type of industrial dispute has increased, and the common complaint is that lawyers are the only group who are benefitting.[66]

Kenneth Johnston[67] suggests that it would be a good idea to reinforce the theme of s 41 of the ECA[68] in such a way as to provide that the maximum compensation recoverable for unjustifiable dismissal is the greater of three months' remuneration or the balance of the remuneration for the period of a fixed term contract (i e no compensation for humiliation, loss of dignity, injury to feelings or loss of any benefit). This could have the following benefits: Employers would be encouraged to take on additional staff if they could be certain that the maximum compensation, if the contract of employment had to be terminated, would be three months' wages or the balance of the remuneration for the period of a fixed term contract. It would reduce the amount of litigation in this area considerably, for many employers would rather pay three months' wages to an employee rather than face the uncertainty and costs of litigation.

C Pedantic Scrutiny

It must be conceded that a worker who faces the loss of a job, and

---

65 David Hurley, a member of the Employment Tribunal at Wellington, mentioned, at a breakfast meeting of the Arbitrators' Institute of New Zealand, at Palmerston North, on 4 July 1995, that many employees come to the Tribunal with "unrealistic" expectations of compensation which are far in excess of the actual average awards made by the Tribunal.

66 Above n 1, 126.

67 Above n 1, 127.

68 See above part VIII B.

possibly his reputation, is entitled to the benefit of the rules of natural justice, i e a fair procedure. However, there should also be some consideration for the employer who has a business to run and has to do this efficiently and profitably. It is not fair to expect standards of procedure that are so high that an employer is not able to dismiss an employee justifiably, even where there is substantive justification.

In NZ Food Processing Union v Unilever NZ Ltd[69] Chief Judge Goddard said :

> Failure to observe any one of these requirements will generally render the disciplinary action unjustified. This is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

This statement has been quoted with approval in a number of subsequent cases.[70] In several cases the courts stated that no superhuman effort is required from employers to satisfy the procedural fairness requirement. In *Wellington Road Transport IUW (re Hepi) v Fletcher Construction Co Ltd*[71] Judge Williamson said:

> ...the Court is not required to see whether it can discern some element of unfairness in the procedure, but rather whether the procedure was so unfair that the dismissal should be set aside regardless of its substantive merits.

However, in spite of the various dicta stating that the employer's conduct is not to be judged too critically, case law shows that the Court does at times subject the employer's conduct to "pedantic scrutiny". The view has been expressed that the Employment Tribunal and Court often take it upon themselves to decide whether they would

---

69 Above n 40.

70 eg *Finsec v AMP* [1992] 1 ERNZ 280; *Sparkes v Parkway College Board of Trustees* [1991] 2 ERNZ 851.

71 Above n 34; see also n 20, 1938.

have dismissed and what procedure they would have followed to do so. Hugh Fulton suggests that because procedure is a lawyers' topic over which they become unreasonably pedantic, 75% of the cases are decided on procedural fault or "what I would have done if I was them".[72]

In *N Z Food Processing Union v Unilever Ltd*[73] (the very case in which Chief Judge Goddard spoke out against "pedantic scrutiny") the dismissal of a Samoan employee, who had deliberately irritated fellow workers, refusing to desist when directed to do so, was held to be unjustifiable because the employee was not told prior to the meeting that dismissal was likely. The meeting, which was held with the employer was attended by the union representative and an interpreter, and the worker was afforded the opportunity to be heard. He was not able to offer any explanation for his behaviour. It could surely be argued that the omission of informing the worker that dismissal was possible is a minor defect seeing that it ought to be obvious to an employee that obnoxious behaviour puts his job on the line and that a meeting with the union representative and an interpreter could hardly be held for another reason! One could also ask whether giving this worker more time to prepare an excuse for his behaviour would have made a difference to the employer's decision.

In *Taurima t/a Looking Good Fashion Jewelry v Moore*[74] an employee was dismissed as shop manager because of her poor performance. About a month before the dismissal the employee was warned of possible dismissal. She was also given a letter to read on that occasion but did not receive a copy. The warning was held to be inadequate by Judge Palmer on the grounds that she was not given a copy. It would obviously make sense for an employer who has prepared a letter of warning to hand the employee a copy to keep. It does not follow, however, that because she only read the letter and did not get to keep a copy, she was not adequately warned. It is surely not unreasonable for an employer to believe that, having issued a warning

---

72 H Fulton, above n 27, 9.

73 Above n 40.

74 Unreported, 19 March 1993, Christchurch, CEC 13/93.

of possible dismissal, in the event of performance not improving, he or she was entitled to dismiss.

In *TA Johannink Ltd v Northern Distribution Union*[75] a store manageress was given oral and written warnings over a period of 16 months. In addition the employer provided "extraordinary support". The eventual dismissal was held to be procedurally unfair simply because the employer had not decided to dismiss earlier.

In *Burgess v Multiwall Packaging Ltd*[76] a factory worker was dismissed because of increasing absenteeism. The written warning to the effect that future absence without good reason and advice to the employer "could" result in dismissal was held to be an inadequate warning and should have read "would"!

In *Teutscher v Hazeldine Private Hospital (1976) Ltd*[77] the Tribunal held that the employee, a state registered nurse, had been unjustifiably dismissed from her position as nurse at a private hospital of 12 beds catering for continuing care patients who were wholly or substantially dependent. It was not denied that the employee had been responsible for several flagrant acts of misconduct which were in breach of her contract of employment and contrary to the hospital's rules. The allegations against her (certainly serious enough to warrant summary dismissal) were that she had

1) machine-washed linen contaminated by faeces; and
2) left a semi-naked patient covered in faeces, unattended; and
3) fed a patient while the patient was on the toilet

The employee received both written and oral warnings that her conduct was not satisfactory. The Tribunal held that the termination of Ms Teutscher's employment was substantially justified, but that the employer had not established that it had met the requirements of procedural fairness because Ms Teutscher was not given a final warning before dismissal. It was held that the previous warnings

---

75 [1990] 1 NZILR 874; see also n 10, 8.

76 [1990] 1 NZILR 970; see also n 10, 9.

77 Unreported, 24 May 1994, Wellington, WT 105A/94.

pertained to misconduct of a different kind to that of feeding a patient while the patient was on the toilet. This decision has, with reason, been criticised as "the height of absurdity".[78]

In *Outumarama Private Hospital v Mary Ann Bell and Petra Uta Kraase*[79] the Employment Court heard an appeal from a decision of the Tribunal upon an unjustified dismissal. Two nurses who were employed by a private hospital were dismissed after being caught sleeping on duty (after a tip-off was received that they regularly did so). Although there was a house rule under which sleeping on the job meant instant dismissal, Chief Judge Goddard held that the dismissal was unfair and too harsh. He held that the fact that they were seen asleep (having made themselves comfortable on sofas with cushions and rugs) could not prove that they had deliberately fallen asleep and not simply dozed off for a few minutes, and that there was no proof that there was any neglect of patients. He held the dismissal to "fall a long way short of that serious level of misconduct which is enough to disqualify an employee from fitness to continue in her employment" and commented that "the respondents have paid a very high rent for a few minutes' use of the appellant's pillows and blankets". It does seem strange that the Employment Court should dictate the standard of nursing care which the employer may expect from its employees, and not even mention the danger of neglect which a particular house rule was designed to prevent.

In *NZ Nurses Union v United Life Care*[80] the majority view of the Court was that the employer had acted unfairly in dismissing the employees because it did not actually have sufficient evidence at the time of the dismissal. There was strong dissent, however, by one member of the Court who felt that the majority view imposed on employers a duty to meet the exacting standards of the Court rather than to act as a reasonable lay person, and that an employer could hardly be expected to conduct a concentrated four day hearing before

---

78 K Johnston "Procedural 'Fairness'" (1994) Employment Law Bulletin 102.

79 Unreported, 5 December 1995, Wellington, WEC 73/95.

80 [1989] 3 NZILR 552.

making its decision![81]

In *N Z Woollen Mills Union v Feltex Carpets*[82] the dismissal of a worker for chronic absenteeism was held to be unfair because he had been absent from a meeting which was held with the union representative in accordance with the procedure set out in his contract. The worker was told to attend the meeting, which was held with the union representative, but he refused, which meant that the meeting, during which the employer decided to dismiss the employee, was held in his absence. The worker was awarded $2500 compensation for "humilation".[83] One may surely ask why an employer should be penalised when the employee has deliberately prevented him from following the required "fair" procedure.

In *Air New Zealand v Sutherland*[84] the Court reiterated the opinion expressed by Judge Goddard in *NZ Food Processing Union v Unilever*[85] and stated that the employer's investigation should not be subject to "minute or pedantic scrutiny" and that the court should rather have regard for fairness from the perspective of both parties. The enquiry had to be one which ascertained whether the overall principles of fairness had been complied with and not to try to identify procedural defects. In this case the Employment Court upheld an appeal against a finding by the Tribunal that a cabin crew member had been unjustifiably dismissed because of a breach of procedural fairness on the grounds that the employee had not been advised of the possibility of dismissal at an earlier stage of the process. Judge Colgan was satisfied that a thorough enquiry had been conducted in a fair way. This case shows clearly that the Tribunal had not avoided minute enquiries into every aspect of the procedure where there has been substantial compliance with the overall requirements of

---

81 Above n 10, 11.

82 [1988] 1 NZILR 848.

83 Above n 10, 9.

84 [1993] 2 ERNZ 10.

85 Above n 40.

fairness. The Employment Court attempted to balance the need for fairness with what is reasonable conduct in a work situation and attempted to avoid minute enquiries into every aspect of the procedure. However, the Tribunal did not avoid "pedantic scrutiny" when the case was first heard, and it is such cases that have led to the comments such as "New Zealand courts....are handing down an appalling series of decisions on.....dismissal cases".[86]

In *BP Oil NZ Ltd v Northern Distribution Workers Union*[87] Judge Hardie Boys held:

> ...the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances. Thus it is necessarily a question of fact and degree.

In *Eagle Airways Ltd v Lang*[88] Judge Palmer said that the question that should be asked by a Tribunal is "whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances." Judge Palmer expressed his concern that in some cases the Tribunal may have misapplied this test and instead substituted its own view for that of the employer.

In *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand*[89] the Court held that "the decision [to dismiss] must be looked at from two points of view, that is, fairness to the employer and fairness to the employee...."

However, there can hardly be "fairness to the employer" when the procedural requirements are contained in an ever-increasing and complicated body of law which is not easily accessible to and digestible by the average employer, whose conduct is often subject to the pedantic scrutiny of the courts.

---

86 R Kerr, above n 11,10.

87 [1992] 3 ERNZ 483.

88 Unreported, 20 February 1995, Auckland, AEC 5/95.

89 Above n 50.

D Redundancy and Fixed Term Contracts

Redundancy and fixed term contracts are contentious topics that deserve to be treated in depth and at length. It is not possible to do so within the short space of this paper, and they are therefore only briefly discussed to illustrate the added burden which is placed on the employer.

In *Brighouse Ltd v Bilderbeck*[90] the Court of Appeal held that redundancy is a dismissal which may give rise to a personal grievance. If the dismissal was not effected in a procedurally fair manner, it will be held to be unjustifiable even if the redundancy is genuine. Recently in *Phipps v New Zealand Fishing Industry Board*[91] it was held that unless the employer demonstrated that the procedure to show that the decision as to the genuine redundancy situation was fair and reasonable, the employer could not argue that the dismissal was substantially justified.

Although the ECA promotes freedom of contract and s 9 provides that "the type of contract and the contents of the contract [are] in each case a matter for negotiation", the Employment Court has imposed restrictions and holds fixed term contracts to be subject to restraints. In *Actors Equity v Auckland Theatre Trust*[92] the majority decision was that the failure to renew a fixed term contract was not a dismissal. In a dissenting opinion, Cooke P argued that the failure to renew a fixed term contract could form the basis of a personal grievance. In *N Z Food Processing Union v ICI (NZ) Ltd*[93], however, the court held that the dismissal of a worker whose fixed term contract, with a clause permitting an extention of the term, was not renewed and no reasons were given, to be unjustified. The court disagreed with the views expressed in the *Actors Equity* case, namely

---

90 [1992] 2 ERNZ 161; see also H Fulton n 27, 17; see also n 2, 11.

91 [1996] 1 ERNZ 195; see below part VII A.

92 [1989] 2 NZLR 154; see also H Fulton n 27, 7.

93 [1989] 3 NZILR 24; see also H Fulton n 27, 7.

that there is no room for the personal grievance procedure where, upon the expiry of a fixed term contract, it is not renewed or continued. In *Smith v Radio i Ltd*[94] the Employment Court confirmed that the personal grievance provisions apply to a fixed term contract unless the contract was genuinely related to the operation or requirements of the business of the employer, or the employer can discharge the burden of proving that there was a genuine reason for the fixed term of employment and the employer has considered whether the genuine need, at the time of the creation of the contract, for its termination on a particular date still existed when the expiry of the contract was imminent, or there was no express or implied promise of renewal that has not been kept.

With regard to both redundancy and the termination of fixed term contracts, case law shows that the courts, in order to protect the worker, have increasingly treated both these situations as dismissals, with the attendant burden of the procedural fairness requirement on the employer.

The NZ Business Roundtable and the NZ Employers Federation[95] suggest the following additions to s 27 (which defines "personal grievance") that would limit the relevance of procedural fairness in dismissals based on grounds of genuine redundancy and the termination of fixed term contracts. With regard to redundancy:

> (7) Where, in any proceedings for settling a personal grievance pursuant to a procedure under s 32 of this Act, an employer proves that an employee was dismissed on the grounds of redundancy the dismissal shall not be held to be unjustifiable-
>
> (a) by reason only of the failure of that employer to observe, follow or adhere to any procedural requirements in making or carrying out the decision to dismiss

With regard to fixed term contracts:

> (3) An employee shall not be held to have been unjustifiably dismissed by reason only of the fact that an employment contract which was expressed to be a fixed term has expired according to its tenor.

---

94 [1995] 1 ERNZ 281; see aslo H Fulton n 27, 7-8; see also n 2, 13.

95 Above n 10, 45-46.

VII THE RELATIONSHIP BETWEEN PROCEDURAL AND SUBSTANTIVE FAIRNESS

A No Substance Without Procedure ?

In *Madden v NZ Railways Corporation*[96] Chief Judge Goddard pointed out the close relationship between the two elements of justification: substantive reasons and procedural fairness:[97]

> ...an employer who has failed to give its employee an adequate oportunity of being heard prior to a dismissal for misconduct cannot be said to have had any valid reason to reach a conclusion adverse to the employee and therefore is treated as if it had not reached it. It thus becomes unhelpful to distinguish in such situtation between substantive and procedural justification.

In *Nelson Air Ltd v NZALPA* [98] the Court of Appeal stated:

> In considering such a question it is often convenient to distinguish between procedural and substantive unfairness. But there is no sharp dichotomy. In the end the overall question is whether the employee has been treated fairly in all the circumstances.[99]

In a recent case, *Drummond v Coca Cola Bottlers NZ*[100], the Court emphasised that an employer will not be able to demonstrate substantive fairness of a dismissal if a proper procedure is not followed. In this case the employee was summarily dismissed for dishonesty when seen stuffing a promotional T shirt down his trousers, which he admitted taking. At a further meeting he said it was a joke. The Chief Judge said:

> It is now well settled that it is incorrect to look at dismissals separately from the point of view of substantive justification and procedural fairness, especially in that order, for it is likely to lead to a mindset that on certain assumptions the dismissal must be justified, leading to a reluctance to defeat the making of those assumptions by criticism of what is sometimes described as "mere procedure". The true enquiry is one that looks at the dismissal overall but it would be no exaggeration to say that the enquiry into procedure should come first. As everybody knows, procedure is power. Those who

---

96 [1991] 2 ERNZ 690.

97 Above n 4, 220.

98 [1994] 2 ERNZ 665.

99 Above n 43, at EC27.13.

100 [1995] 2 ERNZ 229.

> have the control of the procedure may well thereby unfairly obtain control of the outcome. That is why it is necessary for control of the procedure to be shared. It is no use asking whether the employer honestly believed in the existence of bad motives or bad faith on the part of the employer if a procedure was not followed that had at least a chance of getting at the truth on that score. Thus it is that an employer who has not conducted a fair enquiry into a serious allegation such as an allegation of dishonesty cannot be allowed to insist that it had an honest belief in the truth of the allegation.

The Chief Judge held that the employer had to establish an intent to steal. The enquiry by the Employment Tribunal and the Employment Court is into the dismissal overall, but the enquiry into procedure should come first.[101] The Chief Judge's comments on sharing the control of the outcome has been criticised as illustrating the pedantic detail of procedure in the nature of a trial that is required of an employer.[102]

This case was followed by *Tupu v Romanos Pizzas*[103] in which the Employment Court allowed an appeal and severely criticised the Employment Tribunal for holding that the worker had been guilty of serious misconduct, in effect sobotaging the employer's business, even though the dismissal was held to be unjustified because of procedural defects. The Court held that it was not for the Employment Tribunal to decide what the worker had done by way of misconduct until dealing with remedies. It should have first asked if the employer had held a fair enquiry and only if so to ask if the employer formed a view of the worker's guilt. Such a view must be reasonably held. The Court stressed that it is the employer and its handling of the dismissal that is on trial, not the employee![104]

More recently the same approach was seen in *Phipps v The New Zealand*

---

101 In this case the dismissal was held not to be unjustified, and it is the *ratio decidendi* that is criticised, not the actual decision itself.

102 H Fulton, above n 27, 11.

103 [1995] 2 ERNZ 266.

104 H Fulton, above n 27, 11.

Fishing Industry Board[105] where the dismissal was for redundancy due to reorganisation. The Tribunal found the dismissal unjustified on the grounds of procedural unfairness because of a lack of consultation and because there was no attempt to consider alternatives to redundancy. The Employment Court held that the Tribunal was wrong in taking a two-step approach and particularly looking at the substantive before the procedural justification. Unless the employer justified the redundancy by showing that it acted in a fair and reasonable manner when making the decision, the employer could not argue that the dismissal was justified substantively. A decision of substantive justification was therefore unnecessary, wrong, and the fact that the redundancy was genuine was irrelevant!

The *Drummond, Tupu* and *Phipps* decisions lead to the conclusion that is is not appropriate for an employer defending an unjustified dismissal claim to lead evidence of the employee's misconduct, incompetence or redundancy. The Employment Tribunal's task is to determine, on the facts that the employer had at the time it made its decision, whether the decision reached was one that a fair and reasonable employer would have made in all the circumstances.To enable the Tribunal to make this assessment, an employer must first show that a fair procedure was followed. If not, the dismissal is unjustifiable.

This reasoning may be theoretically sound, but the results are not always fair, seeing that there have been many cases where the breach of procedural fairness made no difference to the decision on the substantive merits as they appeared at the hearing.[106]

B A Comparison with Judicial Review Cases

The finding of an unjustified dismissal has been compared to what

---

105 [1996] 1 ERNZ 195.

106 Above n 10, 13.

happens in judicial review cases.[107] With judicial review it is the validity of the decision that is at issue, not the actual merits of the decision. If the decision is found to be invalid, it will be set aside and is therefore nullified or deprived of effect. There is therefore no valid decision. Bernard Banks asks whether, in the case of unjustified dismissal, it would not be logical to consider the dismissal as not being valid, and whether the remedies should stem from this. He suggests that the employer should make a fresh, hopefully valid, decision as to dismissal, and points out that if an employer, having dismissed an employee, were met with a claim of procedural unfairness, the employer might assess the strength of that claim and elect to reconsider it.

The reasoning in the view described above is in keeping with the explanation which the courts give for subordinating substantive justification to procedural fairness. The argument is that substantive justification cannot be argued by the employer if the procedure was not fair, because the employer was not in the position to make a reasonable and fair decision. According to this reasoning it should follow that the only way substantive justification can be determined, if at all, would be for the employer to "repeat" the dismissal using a procedure which is fair. The courts, however, contradict themselves by holding, on the one hand, that in a case where an employee had been dismissed by means of an "unfair" procedure, the employer is not able to determine substantive justification for the dismissal, and on the other hand finding it quite acceptable for the employer to prove substantive justification when pleading the reduction of remedies because of contributory conduct. The courts have also repeatedly stated that it is not its function to try the employee for some crime or employment misdemeanour, but to scrutinise the quality of the employer's decision to dismiss.[108]

---

107 B Banks "Procedural Fairness- A Case for Reconsideration" (4 June 1996) Employment Law Bulletin 59.

108 eg *Tupu v Romanos Pizzas*, above n 103.

C Should the Procedural Requirement be Removed?

The procedural fairness requirement was not universally accepted. When the Employment Contracts Bill was tabled by the National Government at the end of 1990, it included cl 17(3) which provided

> ..,the failure by an employer to observe, follow, or adhere to any procedural requirements (whether imposed by law or by contract or otherwise) in making a decision to dismiss an employee shall not of itself render that dismissal unjustifiable, if, but for that failure, the dismissal would otherwise have been substantively justifiable.

In his speech introducing the Bill the Minister of Labour stated that the Bill would enable only dismissals that are unjustified in substance to be ruled unjustifiable. The Law Commission recommended that a change of terminology from unjustifiable dismissal to "without good reason" would permit concentration on substantive rather than procedural aspects of dismissal.[109] The inclusion of the clause was favoured by the N Z Employers' Federation.[110]

Because of vigorous opposition the clause was struck out from the Bill, voicing the fear that employees would deny natural justice to employees. The clause was also considered as "badly drafted"[111] and clearly "unworkable"[112] because of procedural and substantive justification being closely intertwined and not unrelated as implied.

Bronwyn Boon sought to determine what impact cl 17(3) of the Employment Contracts Bill would have on the unjustified dismissal decisions if it had been included in the final version of the ECA.[113] In order to suggest possible effects, she examined samples of dismissal appeal decisions under the LRA during the period 1987

---

109 NZLC R18 1991.

110 The NZ Business Roundtable favoured the removal of personal grievance procedures from the legislation; see also n 22, 304.

111 Above n 3, at 4.1.

112 A Geare *Employments Contracts Act 1991* (Research Centre for Industrial Realations and Labour Studies, University of Otago, 1991) 9.

113 Above n 22, 301-317.

to 1991. Of the cases she studied, most of the decisions were based on matters of unfair procedure, while a little under half involved lack of substantive justification.[114] The removal of procedural fairness considerations from the unjustified dismissal decision would therefore have a significant impact on the decision process and the result would be that the number of cases found to be unjustified would drop from three-quarters to under one-half. Boon argues, however, that such a conclusion assumes that the rationale for the decision will remain the same and that decisionmakers will still define inadequacies of the employer's behaviour in terms of procedural inadequacies and that these matters will be ignored to comply with the requirements of the legislation. She says that because of the difficulties of differentiating between matters of substantive justification and procedural fairness, issues contained under the principles of the opportunity to explain, inadequate investigation of the facts and inadequate warnings, would be incorporated into the proof of substantive justification. Because the legislation has, since 1973, left the task of establishing the mechanisms by which the personal grievance procedure operates to the courts, a body of case law which acknowledges and reflects these principles by which they operate has been developed. It is Boon's opinion that it does not make sense to prohibit the judiciary from using the essential principles upon which they base their practice. Clause 17(3) would have retained the judiciary in the central administrative role in the personal grievance procedure, but would at the same time have removed the major principle through which the court would have performed this task.[115] The argument here is that cl 17(3) would have resulted in the exclusion of a significant criterion for assessing the adequacy of employer behaviour. The assessment of substantive justification would have become more rigorous and former matters of procedural fairness would have become matters of substantive justification.

The argument above is based on the assumption that it is difficult

---

114 Above n 22, 314.

115 Above n 22, 315.

to separate substantive from procedural justification. In most cases, however, this is not the case.

D The Position in the UK

In contrast to Boon's view that the Court would have great difficulty separating procedural fairness from substantive justification, one could mention that the courts in the United Kingdom, where the "no difference" rule was used for several years under the Employment Protection (Consolidation) Act 1978 (UK), did not find this task impossible. This rule subordinated procedural to substantive issues in the finding of fairness, and meant that a failure to exercise procedural fairness was only relevant if following the correct procedure would have made a difference to the employer's final decision.[116] In 1987 this approach was overruled in *Polkey v A E Dayton Services Ltd*[117] which set out a test which is still not as onerous as the one applied by the New Zealand courts. In this case there had been a redundancy dismissal without consultation and the House of Lords held that the question the Tribunal should ask is whether the employer had been reasonable, or unreasonable, in deciding to dismiss, not whether the employee would nevertheless have dismissed even if there had been consultation or warning. The Tribunal should consider whether at the time when the employer took the decision to dismiss the employer could reasonably have concluded that consultation warning would be useless. Lord Mackay said:

> It is what the employer did that is to be judged, not what he might have done. On the other hand when judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss ..... If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the Code. Failure to observe the requirement of the Code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the Industrial Tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.

---

116 Above n 17, 268; see also n 43, at EC27.14.eg*British labour Pump Co Ltd v Byrne* [1979] ICR 347.

117 [1988] 1 AC 344; see also H Fulton, above n 27, 12.

The House of Lords approved earlier authority that the weight to be attached to procedural failure should depend on the circumstances known at the time of dismissal. It was conceded that there would be cases where the offence of misconduct is so grave and the facts so clear, that a reasonable employer could on the facts known at the time of dismissal take the view that any explanation the employee may offer would make no difference. Likewise, in a case where it is not reasonable for the employer to dismiss without giving an opportunity to explain, but facts which subsequently come to light or are proved before the Tribunal show that dismissal is in fact merited, compensation would be reduced to nil, ensuring that an employee who could have been fairly dismissed does not get compensation.[118]

In contrast to the approach followed in the United Kingdom, the approach developed by the courts in New Zealand places so much emphasis on procedural fairness that an employee whose dismissal would otherwise have been justified, is able to collect compensation simply because of minor procedural defects.

E Limiting the Relevance of Procedural Fairness

The NZ Business Roundtable and NZ Employers Federation recommend that the definition of personal grievance be amended by adding provisions, based on the English legislation, that would limit the relevance of procedural fairness.[119] They suggest that the following subsections should be added to s 27:

> (3) In determining, for the purposes of this Act, whether an employee has been unjustifiably dismissed, or whether an employer's action, judged under subparagraph (b) of subsection (1) of this section is unjustifiable, it shall be for the employer to show-
> (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal or other action, and
> (b) that it was a reason falling within subsection (4) of this section or some other substantial reason of a kind such as to justify either the dismissal of an employee holding the position which that employee

---

118 Cf VIII D 2.

119 Above n 10, 43.

held, or the action which has been challenged, as the case may be.

(4) In paragraph (b) of subsection (3) of this section the reference to a reason falling within this subsection is a reference to a reason which
(a) related to the capability or qualifications of the employee for performing the work of the kind which the employee has been employed by the employer to do, or
(b) related to the conduct or performance of the employee, or
(c) was provided for in the employee's employment contract, or
(d) was that the employee was redundant, or
(e) was that the employee could not continue to work in the position which the employee held without contravention (either on the employee's part or that the employee's employer) of a duty or restriction imposed by the law.

(5) Where the employer has fulfilled the requirements of subsection (3) of this section then the determination of the question whether the dismissal or other action was justifiable or unjustifiable, having regard to the reasons shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee or otherwise acting in the manner which has been challenged; and that question shall be determined in accordance with equity and the substantial merits of the case (which shall include reference to the terms of the employee's employment contract).

As mentioned before[120], "unjustifiable dismissal" is not defined by the ECA nor was it defined by the IRA or LRA. It has, however, been given a complicated content by the body of law developed by the courts. The definition suggested above would therefore make a dramatic change.

VIII CONTRIBUTORY CONDUCT AND THE REDUCTION OF REMEDIES

A Clause 17(3) of the Employment Contracts Bill

Because of the decision to omit cl 17(3) of the Employment Contracts Bill, which would have removed the procedural fairness requirement,[121] s 40(2) was inserted into the ECA. The failure to change the position with regard to procedural fairness led to a

---

120 Above part III.

121 See above part VII C.

corresponding emphasis upon remedies in such cases (the policy apparently being that any "employee fault" has to be dealt with by remedies, not by restricting the grievance procedure).[122] However, this new provision was not expected to make a difference to the practice of the Tribunal and the Court as the Court had already, under the 1987 Act (the LRA), taken the complainant's conduct into account in determining compensation and reimbursement.[123]

Although the requirement of procedural fairness in dismissals was retained, the opposition to it, and especially the comments of the Law Commission, indicate that some unease existed at the time concerning the emphasis on procedural fairness. Seeing that the reduction of remedies because of contributory fault is the only relief available to an employer[124] who has been held to have dismissed an employee in a manner which is procedurally unfair, although with substantive justification, the question is: is the imbalance adequately redressed? In order to answer this question, it is necessary to examine the statutory provisions regarding contributory conduct as well as the way in which the courts have interpreted these provisions.

B The Statutory Provisions

There are two provisions in the ECA that are relevant to contributory conduct and the reduction of remedies.

The first is s 40(2) which provides

> Where the Tribunal or Court determines that an employee has a personal grievance by reason of being unjustifiably dismissed, the Tribunal or Court shall, in deciding both the nature and the extent of the remedies to be provided in respect of the personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and shall, if those actions so require, reduce the

---

122 Above n 43, at EC40.07.

123 J Hughes, above n 12, 112.

124 Cf "mechanisms" mentioned in the Introduction.

remedies that would otherwise have been awarded accordingly.

This provision does not apply to any personal grievance, but only to an unjustifiable dismissal.[125]

The reduction, however, applies to any of the remedies enumerated in s 40(1)(a) - (c), namely reimbursement of wages, reinstatement, compensation for humiliation, loss of dignity or loss of any benefit.

The second provision is s 41(3) which is similar to section 40(2). It provides that where the Tribunal or Court has determined that an employee has a personal grievance and has lost remuneration as a result of the personal grievance

> where -
> (a) The Tribunal or the Court is obliged to make an order under subsection (1) of this section; and
> (b) The Tribunal or the Court is satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee in whose favour the order is to be made, -
>
> the Tribunal or the Court shall reduce, to such extent as it thinks just and equitable, the sum that would otherwise be ordered to be paid to the employee by way of reimbursement.

This provision applies only to the reimbursement of lost remuneration, but is not restricted to unjustifiable dismissals, as it applies to any personal grievance. Section 41(3) is equivalent to s 229(3) of the Labour Relations Act 1987.[126]

C The "three steps" set out in *Paykel Ltd v Ahlfeld.*[127]

Paykel Ltd v Ahlfeld[128] was an appeal against the level of remedies awarded for an unjustifiable dismissal. The employee had been

---

125 J Hughes, above n 12, 112.

126 Above n 43, at EC41.05.

127 [1993] 1 ERNZ 334.

128 Above n 127.

dismissed from his managerial position because of dissatisfaction with his performance. The employee was not sufficiently warned that his performance had placed his employment in jeopardy. The employer sought to have the remedies awarded reduced because of the employee's contributory conduct. The Court held that the Tribunal had erred in refusing to accept an argument of contributory conduct. Judge Travis first considered s 40(2). He pointed out that there are three steps that must be followed in making a decision as to whether remedies must be reduced:[129]

(i) There must be a finding of **unjustifiable dismissal**.

(ii) The Tribunal is required to consider "the extent to which the actions of the employee contributed towards the situation which gave rise to the dismissal". This is therefore a matter of causation as there must be a **causal link** between the conduct and the situation giving rise to the dismissal. Judge Travis stated categorically that "if there is no causal link between the employee's conduct and the situation which gave rise to the dismissal, there can be no reduction in the remedies. Thus, if the employer discovers, after the dismissal, that the employee had been guilty of serious misconduct, previously unknown, which would have justified a dismissal, that conduct cannot be taken into account under this subsection." It was also held that an employee's actions covered all conduct, both things done and undone. At this stage of the inquiry the blameworthiness of an employee's actions are not relevant. The Tribunal merely has to establish the causal link. Judge Travis held that in the present case the Tribunal was bound by the provisions of s 40(2) to determine whether the respondent's actions contributed to the situation which in turn gave rise to the dismissal.

(iii) The third step requires that the Tribunal **"shall" reduce the remedies** that would otherwise have been awarded "if the

---

129 S Woodward "The Relevance of Employee Actions to Personal Grievance Remedies" (1995) Employment Law Bulletin, 127.

> actions so require". At this stage the culpability or blameworthiness of the employee becomes relevant. Depending on the degree of culpability, the reduction may vary from no reduction to the award of no remedies at all. If the employer's warnings had been issued to the employee and an opportunity afforded him to improve his performance, and there was no response, the Tribunal would be justified in finding a substantial level of contribution. Judge Travis held that procedural fairness, although not relevant to the second step of finding a causal link, is relevant to this third step.

Judge Travis followed the approach of the English Court of Appeal in *Nelson v British Broadcasting Corporation (No 2)*[130] in which it was held that an award of compensation to a successful complainant could only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy.

Judge Travis then turned to s 41(3) of the ECA. This provision is limited to claims of remuneration lost as a result of, but not limited to, unjustifiable dismissal. The wording of s 41(3) does not refer to "actions" but to "fault". Subsection (1) requires a minimum reimbursement of the lesser of the actual remuneration lost or three months' lost remuneration. Subsection (3) allows this to be reduced in the circumstance set out in para (b) if the situation giving rise to the grievance arose "in part from fault on the part of the employee". Judge Travis held that under this provision the final two steps required under s 40(2) are effectively compressed into one. There must be a fault and that fault must have resulted in the situation giving rise to the grievance. The causal link must once again be demonstrated. This requires the Tribunal to find that the employee was guilty of blameworthy conduct and that this conduct was causative of the situation that gave rise to the personal grievance.

It is important to note that Judge Travis implied that there is no

---

130 [1980] ICR 110.

substantial difference between ss 40(2) and 41(3) of the ECA.[131]

D Causation, Blameworthiness and Proportionality

The application of either s 40(2) or 42(3) raises issues of causation, blameworthiness, and proportionality.[132]

1 Causation

In *Paykel Ltd v Ahlfeld*[133] Judge Travis, as mentioned above, emphatically stated that there can be no reduction in the remedies if the employer discovers, after the dismissal, that the employee had been guilty of serious misconduct that was previously unknown. The reason for this was given as the lack of a causal link between the employee's conduct and the situation which gave rise to the dismissal.

In *Macadam v Port Nelson Ltd (No 2)*[134] Judge Goddard, too, stressed that if there is no causal connection to the situation giving rise to the grievance, then misconduct, no matter how serious, is irrelevant.[135]

In *Carlton and United Breweries (NZ) Pty v Bourke*[136], however, a different approach was taken with regard to causation. This was an appeal against an award of compensation made by the Employment Tribunal. The contributory conduct consisted of a fraudulent charge which the employee made to the company for repairs to his privately

---

131 Employment Institutions Information Centre,"Employment Cases Summary", August 1994, 3.

132 Above n 129, 127.

133 Above n 127, 337.

134 [1993] 1 ERNZ 300.

135 See also *Finsec v AMP Soc. Ltd* [1992] 1 ERNZ 280, at 293.

136 [1994] 2 ERNZ 1.

owned car. This incident was not discovered until after the dismissal, which had been precipitated by the employer's concern over the employee's unsatisfactory performance and non-performance of managerial duties. The court had to decide what bearing the misconduct had on the level of compensation for unjustifiable dismissal. The problem was that the ECA itself only provides for a reduction for contributory conduct where there is a causative link between the conduct and the dismissal (ss 40(2) and 41(3)).[137] Judge Palmer stated:

> ... to adopt Mr Bumble's aphorism 'the law [would indeed be] an ass' if, in an employment setting, the Tribunal - and now this court upon appeal - was to ignore as irrelevant deliberate and serious misconduct by an employee... because such misconduct was not known to the employer at the time it dismissed the particular employee for unrelated misconduct....

Judge Palmer then pointed out that the Employment Court is a Court of Equity and is expressly empowered by s 104(3)[138] of the ECA to exercise its specialist adjudication jurisdiction "as in equity and good conscience it thinks fit". The Court wholly quashed the award of lost benefits made to the employee by the Tribunal, and substantially reduced the sum awarded as compensation for distress, humiliation and injury to feeling.

It has been argued that the *Carlton* decision may open the door for a critical analysis of an employee's performance over the entire period of his employment in an effort to discredit his character and reduce an award of compensation.[139] On the other hand it can be argued that the *Carlton* decision clearly illustrates that a strict interpretation of ss 40(2) and 41(3) of the ECA can lead to results that are unfair to the employer. It would be a gross injustice to an employer if an employee who was guilty of serious misconduct were to be awarded remedies that are not reduced, merely because the misconduct had been concealed prior to the dismissal. The fact that the general focus of the personal grievance procedure is on whether

---

137 Above n 4, 405.

138 The Employment Tribunal is similarly empowered by section 79(2).

139 Above n 4, 406.

a dismissal can be shown to be justified on the facts known to the employer at the time of the dismissal can therefore lead to unfair results.

In the UK the test with regard to causation is not as onerous. In *Polkey v A E Dayton Services Ltd*[140] the House of Lords stated that where it is not reasonable for the employer to dismiss without giving an opportunity to explain, but facts subsequently discovered or proved before the Tribunal show that dismissal was in fact merited, compensation would be reduced to nil to ensure that an employee who could have been fairly dismissed does not get compensation[141]. This approach, echoed by the *Carlton* decision (discussed above) is preferable to the strict approach in the *Paykel* decision, because the results are fairer.

The NZ Business Roundtable and NZ Employers Federation[142] recommend that s 40(2) of the ECA be deleted and replaced by the following:

> (2) Where the Tribunal or the Court determines that an employee has a personal grievance under either paragraph (a) or paragraph (b) of subsection (1) of section 27 of this Act, the Tribunal or the Court shall, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider-
> (a) The extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and
> (b) All material facts adduced by the employer or employee (whether available to the employer or the employee at the time the grievance arose or not)
> and shall, if those actions or facts so require, reduce the remedies that would otherwise have been awarded accordingly.

The NZ Business Roundtable and the NZ Employers Federation argue that this amendment would make it explicit that the Tribunal or Court should take into account, in determining the appropriate remedy, material facts that have become known since the dismissal.[143] One

---

140 Above n 117; see also above part VII C; see also H Fulton n 27, 12-13.

141 See above part VII D.

142 Above n 10, 18, 45.

143 Above n 10, 18.

must assume, however, that the Court would be able to distinguish between such "material facts" that have become known since the dismissal, and a mere effort to discredit the employee on the part of the employer.

2 Blameworthiness

In *Paykel Ltd v Ahlfeld*[144] it was held that it is the degree of culpability which will determine the variation of reduction from no reduction to the award of no remedies at all. Judge Travis held that procedural fairness may be relevant to culpability, and that in this case the Tribunal was justified in finding that, in the absence of warnings, the employee was entitled to assume he was carrying out his duties satisfactorily.

In *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson*[145] Judge Goddard discussed the requirement of blameworthiness for the reduction of remedies and commented, at 930:

> The applicant could not be found guilty of blameworthy conduct if she was working at her job in ignorance of any dissatisfaction with her discharge of her duties unless she was guilty of gross, and obvious defaults.

This strict approach may be fair in a case where an employee is unaware of any dissatisfaction which the employer may have. This cannot be said of all cases as there will be circumstances where employees must know, even without warning, that their services are not satisfactory.

In *Wholesale Plant Nursery Ltd v Johnston*[146] the Employment Court criticised the "inappropriately rigid approach" to s 40(2) in *Paykel Ltd v Ahlfeld*[147] - to determine that contributory conduct of the

---

144 Above n 127.

145 Above n 53.

146 Unreported, 5 April 1995, Christchurch, CEC 13/95.

147 Above n 127.

employee must be held not to require reduction of the remedies where the employer has not sufficiently informed the employee of his/her unsatisfactory performance. In this case an employee who was employed on a probationary basis was dismissed because of her sarcastic manner of dealing with customers and staff, and her unwilling nature. The Employment Tribunal had awarded $8,000 for humiliation, which the Employment Court held should be set at $5,000, with a further reduction of 50% because of the employee's contributory conduct, even though the employer had not warned the employee of any dissatisfaction with her work. This approach is to be commended, especially in a case such as this where it could hardly be argued that the employee would have been unaware of her sarcastic manner and unwilling nature!

In *Robertson v Port Nelson Ltd*[148] the Appeal Court held that the actions of an employee, whose dismissal was unjustifiable on procedural grounds, were held not to be blameworthy. He had been suffering from a mental condition and during this time he made nuisance phone calls to management. The court held that the mental condition (from which he later recovered) had deprived him of any liability in this respect. As a result there was no reduction of the remedies which amounted to full lost earnings plus $5,000 compensation.

A different approach was taken in *Wilson v Sleepyhead Manufacturing Co Ltd*[149]. In this case the unjustifiable dismissal concerned an epileptic worker who had suffered two seizures at work. The employer's motivation for dismissing the employee was that his work required him to work with a welding torch at a great height and that he could fall and be disabled if he had another seizure. The court held that although the employee was clearly not at fault in having a seizure, the "windfall " of $7,039 (being three months' ordinary remuneration by virtue of s 41(3)) would be somewhat punitive on the employer. The court therefore reduced this amount to $5,000 by

---

148 [1994] 1 ERNZ 976.

149 Unreported, 12 October 1992, Auckland, AT 211/92.

exercising "equity and good conscience".

The requirement of blameworthiness or fault sounds fair but is not necessarily so in practice, as shown in the *Robertson* and *Sleepyhead* decisions above. Although the reduction in the *Sleepyhead* case was not a considerable one, the decision shows that the Court recognised the fact that an absence of fault on the part of the employee should not necessarily be a bar to the reduction of remedies. The *Robertson* decision, on the other hand, cannot be said to be fair to the employer because the result was that the "fault", not found with the employee, was by implication transferred to the employer!

3 Proportionality

Proportionality involves determining the level of fault on the part of the employee in order to determine the reduction of remedies.

In *Davis Trading Co Ltd v Lewis*[150] Chief Judge Goddard drew from the Law Commission's draft Bill, "Apportionment of Civil Liability",[151] which deals with contributory conduct in contract and tort claims. He applied to an employment situation the principle that apportionment must be to such extent as is just and equitable having regard to

> (a) the nature, quality and causative effect of
> (i) the wronged person's failure (if any) to act with due regard for that person's own interest, and
> (ii) the acts and omissions of the wrongdoer...and
> (b) the rights and obligations of the wronged person and the wrongdoer..in relation to one another.

An employee therefore has a responsibility to act with regard to his or her own interests, and if he or she does not, then any remedies awarded will be reduced.

---

150 [1993] 2 ERNZ 272.

151 Paper no 19, March 1992.

In *Macadam v Port Nelson (no 2)*[152] Chief Judge Goddard said, by way of an example, that an award of one third of wages lost reflects a finding that the employee has been twice as culpable as the employer in causing the personal grievance, but he stressed:

> I would not wish to give the impression that the matter of apportionment called for by section 40 and 41 involves some highly technical question or some mechanical process or anything other than the application of common sense to a given factual question.

The notion of "common sense" and the broad principles to be applied by the Tribunal were set out in the English case *Stapeley v Gypsum Mines Ltd*[153]:

> The question must be determined by applying common sense to the facts of each particular case.....A court must deal broadly with the problem of apportionment, and in considering what is just and equitable, must have regard to the blameworthiness of each party, but the claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.

In *Paykel v Morton*[154] Judge Colgan commented that a reduction of 25% made pursuant to s 40(2) was a "significant" reduction, and in *Donaldson and Youngman (t/a the Law Courts Hotel) v Dickson*[155] Judge Goddard said that it should be very "rare" for the Tribunal to find that an employee's contribution has been in the order of 50% or even greater. He added that in most cases where an employee has contributed to the grievance to the order of 75%, the difference between 75% and 100% (which would mean no award at all) was imperceptible to the naked eye, even to a trained and experienced one.

These value judgements as to what is a "significant" reduction and which reductions should be "rare" are not of much help, and although

---

152 Above n 134.

153 [1953] 2 All ER 478; see also n 43, at EC40.07.

154 [1994] 1 ERNZ 875.

155 Above n 53.

one would expect similar culpability to receive a similar reduction, case law does not reflect a consistent approach.[156]

The following examples illustrate the fact that the Employment Tribunal and Court have not been consistent in their decisions:

(a) In *Finsec v AMP Society*[157] an employee was dismissed following an investigation by his employer which showed irregularity in the handling of funds which were the property of the employer or its clients. Because of the employee's contributory conduct by way of failure to properly account for the moneys held, the Employment Court refused to grant any remedy at all to the employee in view of the degree of fault.

(b) In *Northern Distribution Union v BP Oil Limited*[158] the Labour Court (exercising transitional jurisdiction under s 186 of the ECA) found that the employee had been guilty of failing to account for a cheque for $3,100 intended to benefit a staff social club which he place in his own bank account. The court held that although this failure amounted to a breach of obligation of trust, it was not an act of serious dishonesty. Although the Court found contributory conduct on the part of the employee, it ordered reinstatement and the payment of three months' lost wages. There was no reduction!

This decision was reversed by the Court of Appeal which described the Labour Court's view as "rather remarkable" and "entirely unjustified".[159] The dismissal was held to be procedurally fair and justifiable. The orders made in the Labour Court were consequently set aside.

---

156 Above n 129, 128.

157 [1992] 1 ERNZ 280.

158 [1991] 2 ERNZ 530

159 Above n 10, 15.

(c) In *Quest Rapuara (The Career Development and Transition Education Service) v Rahui*[160] the Employment Court reduced the remedies for an unjustifiable dismissal by 75% because of contributory conduct consisting of an assault on a fellow worker.

(d) In *Wilson v PC Direct Ltd*[161] the reimbursement ordered in the case of an unjustified dismissal was reduced by only 10% for contributory conduct. An employee was dismissed because his employer discovered that he had been aware that his co-worker and flatmate had been stealing property from the employer and had lied about his knowledge of this.

(e) *In Country Fare (Christchurch) Ltd v Dixey*[162] the Appeal Court held that the apportionment of 25% only for contributory fault, consisting of "uncompromisingly and deliberately refusing to perform work which he was reasonably and lawfully required to undertake by his supervisor" was "manifestly deficient" and apportioned it at 60% (i.e. two-thirds reduction of compensation).

(f) In *Albany Rest Home Ltd v Somerville*[163] the Appeal Court calculated contributory conduct at 33.3% (the Tribunal had apportioned it at 16.6%). The employee was the manager of a rest home and had been dismissed because of concerns over her overall performance and especially a potentially life-threatening incident when she left a resident unattended and unsupervised in a full bath.

E Is the Imbalance Redressed?

160 Unreported, 11 October 1994, Christchurch, CEC 41/94.

161 Unreported, 14 March 1994, Auckland, AT 64/94.

162 [1995] 2 ERNZ 372.

163 Unreported, 24 April 1995, Christchurch, CEC 15/95.

Case law has shown that there is no substantial difference between ss 40(2) and 41(3) of the ECA and that causation and blameworthiness are requirements for the reduction of remedies. However, the courts have not been consistent in their interpretation of these provisions, and have also, in a few cases, reduced remedies in circumstances where these two requirements were lacking, by relying on ss 79(2) or 104(3) of the ECA which allow the Court "to make such decisions or orders...as in equity and good conscience it thinks fit". This shows that the statutory requirements are too strict. With regard to proportionality there has also not been a consistent approach, and for this reason one can only surmise that the decisions vary according to how sympathetic the Court feels towards the employee. The Court has therefore failed to establish a coherent body of law in this area and Anderson et al admit: "The relevant principles on fault are perhaps still not fully formulated".[164] Case law with regard to contributory conduct also shows that there is not much relief for the employer who has failed to follow the required procedure when carrying out a substantively justified dismissal.

IX CONCLUSION

The term "unjustifiable dismissal" has not been defined by either the IRA, LRA or ECA, and it has therefore been the courts that have given meaning to the term in an ever-increasing volume of case law. Although an employer is required to justify a dismissal both substantively and procedurally, it is now firmly established that procedural fairness alone justifies a finding of unjustifiable dismissal. A failure to observe any one of the requirements of procedural fairness will usually lead to a finding of unjustifiable dismissal. Recent case law, especially, shows that the Court does not look at substantive justification and procedural fairness overall, but considers the procedure first and holds that if there is any defect in this procedure, the employer cannot argue that the dismissal was justified substantively.

---

164 Above n 4, 319.

The present unjustifiable dismissal doctrine is unfair to the employer. The procedural rules that have to be followed when dismissing an employee are set out in a complicated body of law and are hardly accessible to the employer, and although the Court has repeatedly stated that the employer's conduct is not to be subjected to pedantic scrutiny, case law shows that all too often this is exactly what happens.

Is it fair that only the employer and his handling of the dismissal should be on trial, and not the employee's conduct as well? Because substance is subordinated to procedure, an employer who slips up with procedure pays dearly for his oversight while his employee is "rewarded" for his misconduct by means of remedies. Case law shows that the treatment of contributory conduct does little to redress the imbalance.

The "mechanisms"[165] which the Court has to deal with the situation where a dismissal is procedurally unfair but substantively justified are therefore inadequate to produce results that are fair to the employer.

It is to be asked whether this strict approach does not ultimately affect the economy and unemployment in general. The intention of protecting employment may not have the desired benefit if its effect is to make employers wary of taking on new workers.

---

165 See Introduction.

BIBLIOGRAPHY

Texts

G Anderson, B Banks, J Hughes, K Johnston (eds) *Employment Law Guide* (2 ed Butterworths, Wellington, 1995).

P Brook *Freedom at Work. The Case for Reforming Labour Law in New Zealand* (Oxford University Press, Auckland, 1990).

J Deeks, P Boxall *Labour Relations in New Zealand* (Longman Paul Ltd, Auckland, 1989).

JRP Horn, P Bartlett, WC Hodge, P Muir, C Toogood, R Wilson *Brooker's Employment Contracts* (Brooker's, Wellington, 1991).

J Hughes *Labour Law in New Zealand* (The Law Book Co Ltd, Sydney, 1990).

J Hughes *Personal Grievances* (Butterworths, 1996).

Journal Articles

IK Adzoxornu "Procedural Justification of Dismissals" (1991) NZLJ 288.

G Anderson "Procedural Fairness and Unjustified Dismissal" (1983) NZ Journal of Industrial Relations 1.

G Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) NZ Journal of Industrial Relations 257.

B Banks "Procedural Fairness - A Case for Reconsideration" (1996) Employment Law Bulletin 58.

B Boon "Procedural Fairness and the Unjustified Dismissal Decision" (1992) NZ Journal of Industrial Relations 301.

R Gardiner "Personal Grievance Mediation in the Employment Tribunal" (1993) NZ Journal of Industrial Relations 343.

J Hughes "Personal Grievance: Dismissal for Theft" (1980) NZLJ 292.

J Hughes "Comments on Recent Developments in the Law. Emerging Procedural Requirements under Section 117 of the Industrial

Relations Act 1973" (1981) Otago Law Review 162.

K Johnston "Procedural 'Fairness'" (1994) Employment Law Bulletin 102.

K Johnston "Personal Grievances: Remedies" (1995) Employment Law Bulletin 126.

A Jones "Employers Pay the Price of Absurd Dismissal Demands" (1996) The National Business Review 12.

R Kerr "Bargaining under the Employment Contracts Act" (1995) Employment Law Bulletin 97.

D L Mathieson "The Lawyer, Industrial Conflict and the Right to Fire" (1981) NZLJ 216.

R Rossiter "Assessment of remedies by the Employment Court" (1996) NZLJ 167.

S Woodward "The Relevance of Employee Actions to Personal Grievance Remedies" (1995) Employment Law Bulletin 127.

Case Reports

Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd [1990] 3 NZLR 549.

Air New Zealand v Sutherland [1993] 2 ERNZ 10.

Auckland City Council v Hennessy [1982] ACJ 699.

Auckland Local Authorities etc Officers IUW v Waitemata City Council [1980] ACJ 35.

B P Oil NZ Limited v Northern Distributors Union [1992] 3 ERNZ 483.

Burgess v Multiwall Packaging Ltd [1990] 1 NZILR 970.

Carlton and United Breweries (NZ) Pty v Bourke [1993] 2 ERNZ 1.

Donaldson and Youngman (t/a Law Courts Hotel) v Dickson [1994] 1 ERNZ 920.

Drummond v Coca Cola Bottlers NZ [1995] 2 ERNZ 229.

Eagle Airways Ltd v Lang Unreported, 9 March 1995, Christchurch, CEC 6/95.

Finsec v Australian Mutual Provident Society [1992] 1 ERNZ 280.

Macadam v Port Nelson Ltd (No 2) [1993] 1 ERNZ 300.

Madden v NZ Railways Corporation [1991] 2 ERNZ 690.

Moffat Appliances Ltd v NZ Clerical Workers Union [1991] 2 ERNZ 437.

Nelson Air Ltd v NZALPA [1994] 2 ERNZ 665.

Northern Distributors Union v BP Oil New Zealand Ltd [1991] 2 ERNZ 531.

NZ Food Processing Union v Unilever NZ Ltd [1990] 1 NZILR 35.

NZ Nurses Union v United Life Care [1989] 3 NZILR 552.

NZ Woollen Mills Union v Feltex Carpets [1988] 1 NZILR 848.

Otago Meatworkers Union v NZ Protein Extraction and Manufacturing Co Ltd [1981] ACJ 319.

Outumarama Private Hospital Ltd v Mary Ann Bell and Petra Uta Kraase Unreported, 5 December 1995, Wellington, WEC 73/95.

Paykel v Ahlfeld [1993] 1 ERNZ 334.

Paykel v Morton [1994] 1 ERNZ 875.

Phipps v The New Zealand Fishing Industry Board [1966] 1 ERNZ 195.

Polkey v A E Dayton Services Ltd [1988] 1 AC 344.

Robertson v Port Nelson [1994] 1 ERNZ 976.

T A Johannink Ltd v Northern Distribution Union [1990] 1 NZILR 974.

Taranaki Amalgamated Society of Shop Assistants and Related Trades IUW v CC Ward Ltd [1980] ACJ 124.

Taurima t/a Looking Good Fashion Jewelry v Moore Unreported, 19 March 1993, Christchurch, CEC 13/93.

Teutscher v Hazeldine Private Hospital (1976) Ltd Unreported, 24 May 1994, Wellington, WT 105A/94.

Tupu v Romanos Pizzas [1995] 2 ERNZ 266.

Wellington Road Transport etc IUW (re Hepi) v Fletcher Construction Co Ltd [1982] ACJ 663.

Wholesale Plant Nursery Ltd v Johnston Unreported, 5 April 1995, Christchurch, CEC 13/95.

Wilson v PC Direct Ltd Unreported, 14 March 1994, Auckland, AT 64/94.

Wilson v Sleepyhead Manufacturing Co Ltd Unreported, 12 October 1992, Auckland, AT 211/92.

Statutes

Employments Contracts Act 1991

Industrial Conciliation and Arbitration Amendment Act 1970

Industrial Relations Act 1973

Labour Relations Act 1987

Miscellaneous

CW Baird *The Employment Contracts Act & Unjustifiable Dismissal* (NZ Business Roundtable/NZ Employers Federation, Wellington, August 1996).

Employment Institutions Information Centre *Employment Cases Summary* August 1994.

R Epstein *Judicial Meddling in Labour Markets: Give the Employment Contracts Act its Due* Commentary given at an employment conference (Wellington, 19 December 1995).

H Fulton *Employment Law: Personal Grievances* Seminar by Auckland District Law Society (Auckland, 18 July 1996).

A Geare *Employment Contracts Act 1991* (Research Centre for Industrial Relations and Labour Studies, University of Otago, Dunedin, 1991).

"How Work Will Get Done" *The Sunday Star-Times*, New Zealand, 22 September 1996, D4.

C Howard *Interpretation of the Employments Contracts Act 1991* (New Zealand Business Roundtable/ New Zealand Employers Federation, December 1995).

J Hughes "Personal Grievances" in *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993).

R Kerr *Back to Basics on the Labour Market* A Paper at the H R Nicholls Society (Melbourne, 22 August 1995).

R Kerr *Labour Market Reform: A Review* Paper at the AIC Conferences 3rd Annual Employment Relations Conference (Auckland, 22 September 1993).

NZ Business Roundtable/ NZ Employers Federation *A Study of the Labour/Employment Court* (December 1992).

NZ Business Roundtable *Submission to the Labour Select Committee on the Employment Contracts Bill* (February 1991).

NZ Business Roundtable *Supplementary Submission to the Labour Select Committee on the Options Paper* (March 1991).

r Freyer, Louise
Folder Unjustifiable
Fr dismissal