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Personal grievances.

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II INTRODUCTION

The decisions of the Court of Appeal in *W & H Newspapers Ltd v Oram*¹ and the Arbitration Court in *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*² may be seen as opposite ends of a spectrum of judicial responses to the personal grievance provisions over the last two decades. The provisions have formed an important part of New Zealand employment law since the Industrial Conciliation and Arbitration Amendment Act 1970,³ and despite three major upheavals of the industrial relations landscape since,⁴ the provisions themselves remain largely unchanged from their form as section 117 of the Industrial Relations Act 1973.⁵

Perhaps the most significant upheaval was the National Government's 1991 Employment Contracts Act (ECA), which made sweeping changes, replacing the previous collective-focussed approach with a more individual, arguably more pro-employer, and more contractually-centred one. Aiming "to promote an efficient labour market",⁶ in the words of one commentator it made New Zealand a unique "advanced country" in being "willing to challenge the hegemony of trade unions to such an extent".⁷ Amidst these changes, and despite some considering them at odds with the Act's overall ideology,⁸ the personal grievance provisions were retained, and their operation widened from applying only to collective agreements to covering any employment contract. In the light of a significantly weakened union movement, the operation of the procedures was thus a highly significant part of New Zealand's industrial relations law.

In 2000, the Labour/Alliance coalition Government provoked either hope or dread, depending on one's political perspective, of another such sea-change, with the passing of the Employment Relations Act (ERA). While the personal grievance provisions remained essentially unchanged, the Act had a significantly different philosophical focus that

¹ *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 (CA) Gault J for the Court.

² *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd* [1983] ACJ 653 Williamson J for the Court.

³ Industrial Conciliation and Arbitration Amendment Act 1970, s 4.

⁴ Their approach to employment matters being one of the most distinctive points of difference between New Zealand's political parties, the area is always a political issue.

⁵ Gordon Anderson *Personal Grievances – A Review of the Current Law and Proposals for Reform* (New Zealand Council of Trade Unions, 2003) 5.

⁶ Employment Contracts Act 1991, long title.

⁷ Charles W Baird *The Employment Contracts Act & Unjustifiable Dismissal – The economics of an unjust employment tax* (New Zealand Business Roundtable and New Zealand Employers Federation, 1996) 47.

⁸ Baird, above n 7, 3.

included not only "promoting collective bargaining",⁹ but also imposed an overarching obligation on employees and employers to act in good faith toward one another.¹⁰

Not only have the provisions remained largely unchanged throughout their history, they have also remained very broadly defined, partly because of the variety of situations presented by the area, but possibly also because political parties need to garner support from the centre of the political spectrum, and thus are reluctant to be seen to overly favour employers or employees. Thus the courts have had wide discretion over the development of the law, but one that has generally been exercised consistently with the tone of the employment relations statute in force.

It is arguable that the Court of Appeal, influenced by a decade of the operation of the ECA, have pushed the tests used in applying the provisions too far towards favouring employers, and have limited the ability of the Employment Court and Employment Relations Authority to perform their legislatively defined role in adjudicating according to "equity and good conscience".¹¹ This essay propose to examine this change of approach by looking at dismissals for serious misconduct and redundancies over the last two decades. *Oram*, which concerned a dismissal for serious misconduct, and its parallel *Coutts Cars Ltd v Baguley*,¹² which concerned a redundancy, represent what may be the high water mark for employer-focus in the courts' inquiries into dismissals, coming as they do at the end of a decade of the operation of the ECA— but the latter decision indicates refusal to depart from this approach in the face of another change of philosophy.

Thus further legislative change is required, and has been proposed in the form of the Employment Relations Law Reform Bill (ERLRB), which continues the tradition of minimal changes to the personal grievance provisions but which may return the tests to something similar to those in the *Fletchers* case, that is to say giving more attention to the interests of the employee, with a greater willingness to make an independent assessment of whether the dismissal was reasonable. However, while a step in the right direction, the proposed changes do not properly, or with sufficient clarity, deal with the problems of the current approach.

⁹ Employment Relations Act 2000, s 3 (1)(a)(iii).

¹⁰ Employment Relations Act 2000, ss 3 and 4.

¹¹ Employment Relations Act 2000, s 189(1).

¹² *Coutts Cars Ltd v Baguley* [2000] 2 NZLR 533 (CA).

III MUTUAL OBLIGATIONS OF TRUST AND CONFIDENCE

A The requirement of fairness

Despite the personal grievance provisions being enacted to relieve the harshness of the common law, the conceptual tools used to interpret them are common law-derived. Determining justification involves an examination of both procedural and substantive fairness, underlying which, although not legislatively recognised before the ERA, is the concept of mutual obligations of trust and confidence – obligations implied by the common law into all employment contracts. The courts' changing approach to what the personal grievance provisions require reflects a changing approach to what these obligations entail.

In his dissenting judgment in *Aoraki Corporation Ltd v McGavin*,¹³ Thomas J notes that references to implied terms of mutual trust and confidence began appearing in the 1970s in England. He quotes Browne-Wilkinson J of the English Employment Appeal Tribunal in *Woods v W M Car Services (Peterborough) Ltd*:¹⁴

In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ... We regard this implied term as one of great importance in good industrial relations.

In relation to the then in force ECA, he went on to suggest that this "obligation of fair dealing" is implicit in that Act's structure.¹⁵

B Inequality in employment relationships

Thomas J saw the obligations as the extension to employment law of administrative law principles, recognising the power inequality between employers and employees. He quotes Sir John Laws as saying:¹⁶

Employers and employees do not generally meet at a bargaining table, like two businessmen of equal power deciding what deal to strike. Nor is the contract like most that you make in a shop, a travel agency, or an insurance office. The prospective employee cannot, in very many cases, take it or leave it. The offer of a job may be his only chance of a decent livelihood.

¹³ *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, 628 (CA) Thomas J.

¹⁴ *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666.

¹⁵ *Aoraki Corporation Ltd v McGavin*, above n 13, 629 Thomas J.

¹⁶ John Laws "Public law and employment law: Abuse of power" (1997) *Public Law* 455, 455-456 cited in *Aoraki Corporation Ltd v McGavin*, above n 13, 629 Thomas J.

Thus Thomas J saw the employment relationship as requiring safeguards, both substantive and procedural, to prevent against "abuse or arbitrary exercise of the power in the hands of the employer"¹⁷.

Casey J makes a similar point in *Brighouse Ltd v Bilderbeck* in the context of redundancy:¹⁸

There will, however, be many cases where employees simply do not have the ability to procure satisfactory redundancy deals as part of their contracts. The personal grievance procedure affords a way of redressing the balance in those situations – usually in small organisations – where they have no real bargaining power.

The extent to which these obligations can impose non-contractually explicit duties is one of the more contentious issues of the area: while Justices Thomas and Casey see quite significant duties, others are much less willing to do so. Those who do not see bargaining power as unequal are unlikely to see a need to give employees extra protections.

According to business groups, the assumption that employees are generally at a disadvantage is fallacious: in a report commissioned by the Business Roundtable and the Employers' Federation arguing for the complete removal of the personal grievance provisions altogether, Charles Baird sees the assumption as a "hoary myth",¹⁹ and criticises the Employment Court for performing "interpretative gymnastics" in favouring employees and refusing to see employment law as "just like ordinary law".²⁰

In another analysis commissioned by the Business Roundtable and the Employers Federation, Dr Colin Howard argues that:²¹

[T]he contractual emphasis of the ECA contrasts sharply with the readiness with which the [Employment] Court departs from the terms of an employment contract to alter its effect in favour of the employee. The standard mechanism is the implied term which involves implying into a contract a term which is not there.

However, if one accepts, like Justices Casey and Thomas, that employment contracts often will not represent the outcome of a bargaining process conducted on an equal footing, the implication of reasonable minimum terms into all contracts, to ensure that employees are treated fairly, is no longer so shocking.

¹⁷ *Aoraki Corporation Ltd v McGavin*, above n 13, 630 Thomas J.

¹⁸ *Brighouse v Bilderbeck* [1995] 1 NZLR 158, 179 (CA) Casey J.

¹⁹ Baird, above n 7, v.

²⁰ Baird, above n 7, 3.

²¹ Colin Howard *Interpretation of the Employment Contracts Act 1991* (New Zealand Business Roundtable and New Zealand Employers Federation, 1996) 5.

The ERA now explicitly recognises this in the 'Key provisions' part of the Act:

3. The object of this Act is—
- (a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship—
 - (i) by recognising that employment relationships must be built on good faith behaviour; and
 - (ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships ...

Such an equalising motivation also underlay the enactment of good faith requirements in the United States three quarters of a century before,²² and underlies the idea of unionism. Given that the majority of New Zealand employees no longer benefit from the increased bargaining power of unions,²³ legislative recognition of a need for equalisation is desirable.

C The ILO

The recommendations and conventions of the International Labour Organisation (ILO) also recognise such inequality, and the need to balance it. While unratified and unincorporated into New Zealand law, they have been used by the courts, notably in *Fletchers*, and in Thomas J's dissent in *Aoraki*, in justifying the requirements of fairness. In *Petersen v Board of Trustees of Buller High School*, Goddard CJ noted that the personal grievance standards were partly a response to the ILO Termination of Employment Recommendation 1963, the thrust of which:²⁴

[W]as that employment should not be terminated in the absence of a valid reason connected with the capacity or conduct of the employee or the operational requirements of the undertaking or service. In addition, there was concern for process: an employee's employment should not be terminated before he was provided with an opportunity to defend himself against the allegations made and an employee unjustifiably dismissed should be entitled to appeal against that dismissal to an impartial body (Recommendation paras 2(1), 4, and 11(5), Convention 158, arts 4, 7, and 8). Article 9 contemplates that the impartial body hearing the employee's appeal should be able to render a decision on whether the termination was justified, with the burden of proving the existence of a valid reason for the termination resting on the employer.

Goddard CJ suggests that "our Courts have placed limitations on the scope of the inquiry upon such an appeal", and that especially after the *Oram* decision "It could be argued that [the inquiry] is a long way from the full appeal contemplated by Convention

²² Dannin, Ellen "Good Faith Bargaining, Direct Dealing, and Information Requests: The US Experience" (2001) 26(1) NZJIR 45, 47.

²³ Peter Agnew (ed) *Mazengarb's Employment Law* (loose leaf, LexisNexis, Wellington) Trade Unions para 2204 (last updated July 2004).

²⁴ *Petersen v Board of Trustees of Buller High School* [2002] 1 ERNZ 139, 165 (Emp Ct) Goddard CJ.

158". However, as the Employment Court is bound by the Court of Appeal's decisions, and not by international instruments like the Convention, the Court was obliged to accept such limitations.²⁵

D What the obligations entail

The obligations of trust and confidence are mutual, and thus not only require employers to act fairly towards employees but also vice-versa. Thus if an employee acts in manner that so seriously damages their relationship with their employer that it can be seen to be a repudiation of the employment contract, their dismissal will be lawful. It was put thus by Williamson J in *Fletchers*:²⁶

The lawfulness of a summary or instant dismissal (ie notice not given nor period of notice paid for) is similarly judged by reference to the general law of contract. Leading cases describe the concept in different terms such as "serious breach of the terms of contract", "grave misconduct", "repudiation of the fundamental terms of the contract", "sufficiently fundamental breach". Whatever the actual words used, the concept is that of repudiating or negating the contract.

Conversely, if an employer unfairly dismisses an employee, they will have breached their implied obligation. However, the common law tests are fairly harsh on employees, as can be seen in *Raddock v Air New Zealand*,²⁷ a case heard under the common law rules rather than the personal grievance provisions.²⁸ The Employment Court found that the implied terms of trust, confidence, and fair dealing were breached when Raddock was dismissed, purportedly for absenteeism, but in reality because of his criticism of management, and a desire to avoid having to make him redundant and give him the associated payout.²⁹

The majority of the Court of Appeal overturned this, finding that since the contract allowed dismissal at one weeks' notice for any or no reason, the dismissal was lawful. As argued in the dissenting judgment of Thomas J, to dismiss a person for reasons not only different from those alleged, but also in order to avoid another contractual obligation would surely be a breach of the implied obligations.³⁰ However, their effect was negated for the majority because they would limit the employer's contractual discretion to dismiss for

²⁵ *Petersen v Board of Trustees of Buller High School*, above n 24, 169.

²⁶ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 665.

²⁷ *Raddock v Air New Zealand* [1999] 2 NZLR 641 (CA).

²⁸ Section 113 of the ERA prevented such common law actions soon after this case.

²⁹ *Raddock v Air New Zealand Ltd* [1997] 1 ERNZ 399, 422 (Emp Ct) Colgan J.

³⁰ *Raddock v Air New Zealand Ltd*, above n 27, 670-1 Thomas J.

any reason or no reason, which extended to dismissing Raddock to escape his contractual redundancy payments.³¹

While the mutual obligations of trust and confidence link the common law and the personal grievance provisions, theoretically, whether a dismissal was lawful at common law was not determinative of its justifiability under the personal grievance provisions: In *Fletchers*, Williamson J said that the Court:³²

[M]ay make such reference to common law tests as it thinks proper, but the overall test is a much broader one since the Court is there dealing with a class of case for which the common law does not give a remedy, namely the lawful but possibly unjust dismissal.

In *Telecom South Ltd v Post Office Union (Inc)*, Richardson J put the meaning of the obligations in the context of the personal grievance provisions thus:³³

The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing. The statutory inquiry necessarily involves a balancing of competing considerations. Those mutual obligations must respect on the one hand the importance to workers of the right to work and their legitimate interest in job security, and on the other hand the importance to employers of the right to manage and to make their own commercial decisions as to how to run their businesses

Since *Fletchers*, reference has indeed been made to the common law tests, but the overall test is no longer 'much broader': the current test for justifiability is perhaps not so distant from the common law one. The approach in *Raddock*, and in recent cases decided under the personal grievance provisions, shows considerable reluctance (in accord with the arguments in the Business Roundtable studies above) to read non-explicit obligations into employment contracts, meaning that the protective effect of the obligations for employees is now minimal.

Along with codifying the mutual obligations of trust and confidence, the ERA introduced a new requirement that both parties to employment agreements act in good faith toward one another. It is the effect of this requirement (or rather the lack thereof) in widening protection for employees beyond the mutual obligations of trust and confidence that is controversial, and which has led to some of the changes proposed in the ERLRB, discussed below.

³¹ *Raddock v Air New Zealand Ltd*, above n 27, 641 Gault and Henry JJ.

³² *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 670.

³³ *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275, 285 (CA) Richardson J.

IV WHEN IS DISMISSAL JUSTIFIED?

A The legislation

The relevant provisions of the present Employment Relations Act 2000 are contained in Part 9 of the Act:

101. Object of this Part—
The object of this Part is—
- (a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; and
 - (b) to continue to give special attention to personal grievances, and to facilitate the raising of personal grievances with employers; and
 - (c) to recognise the importance of reinstatement as a remedy; and
 - (d) to ensure that the role of the Authority and the Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment.
103. Personal grievance—
- (1) For the purposes of this Act, "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because of a claim—
 - (a) that the employee has been unjustifiably dismissed; or
 - (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; ...

B Summary dismissal for serious misconduct

1 The progression (or regression) from *Fletchers* to *Oram*

The line of cases between *Fletchers* and *Oram* shows a gradual change in approach to the personal grievance provisions in relation to an employer's right to summarily dismiss an employee for serious misconduct. The key issues are the level of misconduct required, the degree to which an employer must be certain it did indeed occur, and the extent to which the courts can review the employer's view of whether dismissal was justified.

In the classic approach to justification for dismissal, the *Fletchers* case held that "[w]hat is a good and sufficient reason in a particular case must be determined after considering all the circumstances of that individual case", and that "[t]he ultimate test is the opinion of the Court, after making the inquiry and hearing the representations".³⁴

³⁴ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 671.

In deciding whether a dismissal was justified, *Fletchers* suggested that two questions must be asked:³⁵

The first is whether misconduct of the general type is capable of being justification for dismissal. In other words, is that type of misconduct usually reasonable and sufficient grounds for dismissal? The second consideration is whether the specific instance of that type of misconduct is, in all the particular circumstances surrounding the particular case, reasonable and sufficient grounds for the dismissal of that particular employee. Is it a valid reason in the particular circumstances

The Court, while reluctant to lay down an exhaustive set of principles, suggested that for the second step, the courts should consider:³⁶

[T]he conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated, and implied); the terms of any other relevant agreements; and the circumstances of the dismissal ... good industrial practice which includes some consideration of the social and moral attitudes of the community [and] ... ILO Recommendations and Conventions

It also suggested that in "finely-balanced" cases, in assessing what the employer should do, "it is proper to have some regard to the likely consequences of termination".³⁷ In that case, an employee taking materials from a building site without permission was found to have committed misconduct of a serious type, thus satisfying the first test, and having looked at the employee's admission, past record, the employer's awareness of its discretion, the employee's personal circumstances, and the employer's need to discourage such behaviour, the Court found the dismissal justifiable, although "ungenerous".³⁸

Discussed in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* was the extent to which an employer must be certain that the employee was guilty of the misconduct alleged. Stating the level that has applied ever since, Bisson J said that:³⁹

[A]t the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

Having found sufficient grounds for belief, the Court of Appeal expressed the test for justification in terms of mutual obligations of trust and confidence.⁴⁰

³⁵ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 678.

³⁶ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 666.

³⁷ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 687.

³⁸ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 688.

³⁹ *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*, [1990] 3 NZILR 584, 591 (CA) Bisson J for the Court.

⁴⁰ *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*, above n 39, 591.

Good working relations depend on loyalty and confidence, both ways as between employer and employee. Once the employee destroys that relationship to the extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable. Similarly, if an employer destroys that relationship by dismissing the employee without reasonable grounds for believing there has been misconduct by the employee, then the employee's dismissal is not justifiable and the employee has a remedy in the personal grievance provisions of the Act.

Earlier the Court had stated that the test is whether the decision to dismiss is a reasonable and fair one, having looked at the decision "from two points of view, that is, fairness to the employer and fairness to the employee".⁴¹

Still in line with the *Fletchers* approach is *Telecom South Ltd v Post Office Union (Inc)*, in which Richardson J put the test this way:⁴²

The statutory inquiry necessarily involves a balancing of competing considerations. [The mutual obligations of trust and confidence] must respect on the one hand the importance to workers of the right to work and their legitimate interest in job security, and on the other hand the importance to employers of the right to manage and to make their own commercial decisions as to how to run their businesses.

A dismissal is unjustifiable if it is not capable of being shown to be just in all the circumstances. Justifiability is directed at considerations of moral justice. Whether a dismissal is justifiable can only be determined by considering and balancing the interests of worker and employer. It is whether what was done and how it was done, including what recompense was provided, is just and reasonable to both parties in all the circumstances including, of course, the reason for the dismissal.

The approach taken in the above cases requires the court to make a moral finding about the fairness of the situation, and arguably it is nervousness about applying a moral rather than legal test that has led the Court of Appeal to move away from this approach.⁴³ In *Northern Distribution Union v BP Oil New Zealand Ltd*,⁴⁴ the test of justification was noticeably changed: "whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances".⁴⁵ The emergence of a *reasonable and fair employer* against which the conduct is to be measured represents the conversion of a test tied to 'moral justice' into the familiar legal concept of the reasonable person, but it also removes attention from the interests of the employee.

The Court of Appeal also took a different approach to the level of misconduct necessary to warrant dismissal, requiring only "conduct that deeply impairs or is

⁴¹ *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*, above n 39, 591.

⁴² *Telecom South Ltd v Post Office Union (Inc)*, above n 33, 285-286 (CA) Richardson J.

⁴³ Paul Roth, "Editorial: The Poverty of Fairness in Employment Law" (2001) 5 ELB 85, 85.

⁴⁴ *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) Hardie Boys J for the Court.

⁴⁵ *Northern Distribution Union v BP Oil New Zealand Ltd*, above n 45, 487.

destructive of that basic confidence or trust that is an essential of the employment relationship",⁴⁶ and holding that the Labour Court's finding that the misconduct was not serious enough to warrant dismissal "resulted from the Court substituting its judgment for that of the employer in a matter of which the employer was in reality the best and in law the only judge".⁴⁷ Thus the level of misconduct required is lower, and rather than assessing where the justice of the situation lies (the court substituting its judgment for the employer), the test of justification is whether the employer acted like a reasonable employer, an easier test to satisfy, and one which omits the consideration the employee's interests embodied in the second *Fletchers* step.

It is worth noting that, although decided under the Labour Relations Act 1987, the *BP* decision occurred after the enactment of the ECA, and may thus have been influenced by that Act's philosophy, as clearly occurred in the *Aoraki Corporation Ltd v McGavin*,⁴⁸ redundancy decision discussed below.

The effects of the *BP* decision can be seen in the Employment Court decision *Click Clack International Ltd v James*,⁴⁹ which held that the observations of the Chief Justice of the Employment Court in *Central Clerical Workers Union v Taranaki Maori Trust Board*⁵⁰ and *Northern Distribution Union v Newmans Coach Lines Ltd*⁵¹ went too far in requiring misconduct that:⁵²

"goes to the heart" of the particular employment relationship "so as to destroy it altogether"; and/or such misconduct as makes the continuance of a particular employment contract impossible.

Palmer J instead adopted the *BP* standard,⁵³ and, though citing the *Fletchers* approach, again ignored the second step.

⁴⁶ *Northern Distribution Union v BP Oil New Zealand Ltd*, above n 44, 487 cited in *Click Clack International Ltd v James*, [1994] 1 ERNZ 15, 31-32 (Emp Ct) Palmer J., 31-32.

⁴⁷ *Northern Distribution Union v BP Oil New Zealand Ltd*, above n 44, 488.

⁴⁸ *Aoraki Corporation Ltd v McGavin*, above n 13.

⁴⁹ *Click Clack International Ltd v James* [1994] 1 ERNZ 15, 31 (Emp Ct) Palmer J.

⁵⁰ *Central Clerical Workers Union v Taranaki Maori Trust Board* [1989] 3 NZILR 612, 636 (Emp Ct) Goddard CJ.

⁵¹ *Northern Distribution Union v Newmans Coach Lines Ltd* [1989] 2 NZILR 677 (Emp Ct) Goddard CJ.

⁵² *Click Clack International Ltd v James*, above n 49, 31.

⁵³ *Click Clack International Ltd v James*, above n 49, 31.

The current leading misconduct case is *W & H Newspapers Ltd v Oram*,⁵⁴ a decision that follows and approves, with slight modification, the *BP* and *Click Clack* approach. It is this decision that the Explanatory Note to the ERLRB suggests spurred the proposed changes to the personal grievance provisions.

Ric Oram was summarily dismissed from his position as a senior reporter for the *New Zealand Herald* after a photograph accompanying one of his articles was published with the caption 'Gang Chief', but depicting the wrong man. The Employment Tribunal and the Employment Court both found the dismissal unjustified, and that Herald processes contributed to the mistake. However, at the Court of Appeal, it was held that these decisions resulted from the Tribunal and the Court performing a "substitution of their own views for that of the employer in an area of the technical operation of a complex business".⁵⁵

Gault J went on to find that the Tribunal performed "a balancing of the factors ... rather than merely an assessment of whether a fair and reasonable employer could have weighed them in the same ways as the appellant".⁵⁶ Rather than this approach, which is more in line with that taken in the *Fletchers* case, the Court of Appeal used the *BP* test, but substituting whether an employer 'could' see the action as impairing basic trust and confidence for *BP*'s 'would', thus giving further discretion to employers:⁵⁷

The court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of "could" rather than "would"

The Court also held, like *BP* and *Click Clack*, that significant impairment of the employer's trust in the employee is sufficient to warrant dismissal, and again missed the second part of the *Fletchers* test:⁵⁸

If, in a particular case of summary dismissal, the employer shows that the conduct was such that a fair and reasonable employer could see it as deeply impairing of the basic confidence and trust essential to the employment relationship, it would hardly be necessary to consider, as a separate step, whether in all the circumstances the employee ought to have been dismissed

⁵⁴ *W & H Newspapers Ltd v Oram* above n 1.

⁵⁵ *W & H Newspapers Ltd v Oram*, above n 1, 39, para 41.

⁵⁶ *W & H Newspapers Ltd v Oram*, above n 1, 39, para 42.

⁵⁷ *W & H Newspapers Ltd v Oram*, above n 1, 37, para 31.

⁵⁸ *W & H Newspapers Ltd v Oram*, above n 1, 38, para 35.

Thus because a fair and reasonable publisher *could* form the view that "Oram's conduct meant he had lost the confidence of his superiors that he could be relied upon in the future",⁵⁹ the dismissal was justified, without the Court being prepared to fully examine whether this was fair. The degree of discretion left to the employer is at its widest yet, and what limited investigation the court is prepared to make is on a highly subjective basis.

Oram also suggests there is a 'band' of correct responses including ones, like that case itself, which "might have seemed harsh".⁶⁰ While this bears some similarity to the discretion remaining available to employers in the *Fletchers* case, and while undoubtedly some discretion must be available to employers, *Oram* takes this too far. The law as it currently stands is that if an employer, having conducted a reasonable investigation, believes on the balance of probabilities that their employee is guilty of conduct which a reasonable and fair employer *could* see as sufficiently damaging to the trust they have in their employee, then they will be substantively justified in dismissing them, even if this is a harsh response. If, on top of this, the substance of the employer's decision is subject only to a cursory investigation, for fear of the court "substituting their view for that of the employer", then the whole exercise becomes rather hollow, and the idea of *mutual* obligations of trust and confidence somewhat farcical.

As Roth puts it:⁶¹

What precisely is the point of requiring employers to have regard to the particular circumstances of each case if the specialist institutions have no power to find that an employer unfairly exercised its discretion? It would seem to be a colossal waste of time to require employers to consider all relevant circumstances, penalise them for breaching procedural fairness for failing to consider those circumstances, but withhold any remedy when an employer decides to dismiss anyway.

The tone in the passage quoted below from a recent Employment Court case would seem to show some nervousness that the Court of Appeal will, unless the employer's decision is unreasonable in the extreme, overturn decisions of the Employment Court, for performing a 'substitution of judgment':⁶²

I now re-emphasise I am satisfied for the reasons I have earlier explained that no fair and reasonable employer in the particular circumstances of this case, could reasonably conclude that Mrs Brocklesby wilfully disobeyed her employer (through Mr Thirlwall) on 5 April 1999, thereby committing serious misconduct in her employment setting ... *I am not, I now stress, inappropriately substituting my opinion for that of Mr Hamilton, but within the principled approach exercisable by me in my re-evaluation of the entire*

⁵⁹ *W & H Newspapers Ltd v Oram*, above n 1, 40, para 46.

⁶⁰ *W & H Newspapers Ltd v Oram*, above n 1, 40, para 44.

⁶¹ Roth, above n 43, 86.

⁶² *Air Nelson Ltd v Brocklesby* [2002] 1 ERNZ 184, 197-198, para 126 (Emp Ct) Palmer J. Emphasis mine.

situation as disclosed by the company's investigation, Air Nelson, I hold, as a fair and reasonable employer could not dismiss Mrs Brocklesby in this case, on 23 April 1999, for her alleged wilful disobedience/serious misconduct on Easter Monday.

C Personal Grievances for Redundancies

As with dismissals for misconduct, what is required of employers in redundancy situations, and the examination the courts are prepared to make of their decisions has been significantly limited in recent years by the Court of Appeal.

1 Avoidability

In *Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers Industrial Union of Workers v Greenwich*,⁶³ it was suggested that for a redundancy to be justified, it must be "unavoidable": that the business otherwise faced bankruptcy. Though the Court of Appeal cited this with approval in *City Taxis Society Ltd v Otago Clerical Workers Union*,⁶⁴ it later retreated from this position in *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc IUW*. As Cooke P put it:⁶⁵

[A]n employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

As a limitation on employees' rights to employment, this may be reasonable – the effect on employers of allowing redundancies except where 'unavoidable' would be serious, and discouraging of growth, not to mention politically costly for the government that allowed it to continue – if, as in Cooke P's formulation, this is accompanied by other fairness requirements, such as compensation and consultation about how to best implement cost savings.⁶⁶ However, these accompanying requirements were soon also to be removed by the Court of Appeal.

2 Consultation and Compensation under the ECA - Aoraki

In *Aoraki*, the Court of Appeal, while holding that "justifiability is directed at considerations of moral justice",⁶⁷ went on to considerably reduce what was required of

⁶³ *Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers Industrial Union of Workers v Greenwich* [1983] AJC 965. 981 Williamson J for the Court.

⁶⁴ *City Taxis Society Ltd v Otago Clerical Workers Union* [1989] 3 NZLR 463, 462 (CA) Casey J for the Court.

⁶⁵ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc IUW* [1991] 1 NZLR 151, 155 (CA) Cooke P.

⁶⁶ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc IUW*, above n 65, 155.

⁶⁷ *Aoraki Corporation Ltd v McGavin*, above n 13, 618 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

employers to make redundancies fair, by reference to the ECA, which it saw as “a significant change from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining”,⁶⁸ meaning that “employment issues are a matter of contract where the types of contract and the content are essentially for the parties freely to negotiate”.⁶⁹

Because it failed to follow the clear and direct” language and scheme of the ECA,⁷⁰ and because of perceived difficulties in discerning a single ratio from its judgments, the previous leading redundancy case, *Brighouse Ltd v Bilderbeck*,⁷¹ was overruled.⁷² Cooke P’s judgment in that case had held that a redundancy could be unjustifiable because of insufficient compensation being paid, or because of a failure to communicate, consult, or negotiate regarding alternatives to redundancy.⁷³ Casey J, while holding that “it cannot be said the stage has been reached where an obligation to pay redundancy can be implied as a matter of course in all employment contracts”, still thought that the law could be developed so as to “take into account the moral obligation of a fair-minded employer to pay compensation for redundancy in appropriate circumstances”.⁷⁴

Having looked at the object of the ECA, the majority in *Aoraki* held that it “cannot be mandatory for the employer to consult with all potentially affected employees ... [t]o impose an absolute requirement of that kind would be inconsistent with the employer’s prima facie right to organise to run its business operation as it sees fit”.⁷⁵ For similar reasons, all members of the Court found that where the redundancy is genuine, payments are not, as *Bilderbeck* suggested, compulsory.⁷⁶

⁶⁸ *Aoraki Corporation Ltd v McGavin*, above n 13, 611 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁶⁹ *Aoraki Corporation Ltd v McGavin*, above n 13, 610 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁷⁰ *Aoraki Corporation Ltd v McGavin*, above n 13, 620-621 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁷¹ *Bridghouse v Bilderbeck*, above n 18.

⁷² *Aoraki Corporation Ltd v McGavin*, above n 13, 616-617 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁷³ *Brighouse Ltd v Bilderbeck*, above n 18, 166-167 Cooke P.

⁷⁴ *Brighouse Ltd v Bilderbeck*, above n 18, 180 Casey J.

⁷⁵ *Aoraki Corporation Ltd v McGavin*, above n 13, 618 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁷⁶ *Aoraki Corporation Ltd v McGavin*, above n 13, 620 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

The contract rules and there is no basis conformable with the settled principles governing the implication of terms in other contracts to read in any implied obligation of that kind or to extend the mutual obligation of trust and fair dealing in that way. To do so would change the economic value of their overall agreement; and it would erode the statutory emphasis on the free negotiation of employment contracts.

In the context of an Act premised on equality of bargaining power, the approach taken to redundancy payments in *Aoraki* is understandable. While *Bilderbeck* was also decided under the ECA, it was by a split court (with Justices Richardson and Gault dissenting) perhaps influenced by the more liberal approach of Cooke P.⁷⁷ By the time of *Aoraki*, Richardson J, favouring a contract-focussed approach, was President of the Court.

While perhaps redundancy payments were inconsistent with the ECA philosophy, the decision on consultation is less easily explained – the ECA does not preclude it, and the mutual obligations of trust and confidence, which were held to require an employer to “implement the redundancy decisions in a fair and sensitive way”,⁷⁸ clearly apply. Consultation seems the epitome of what such obligations would entail.

If an employee is to be liable for dismissal for a negligent mistake which would undermine an employer’s trust in them (as the test stood under *BP* at the time of the *Aoraki* decision), it does not seem too much to expect of an employer that in the expression of their corresponding obligations they would at least discuss what is to occur with the employee, and possible alternatives to dismissal.

3 Really Redundant? - Thwaites

With *New Zealand Fasteners Stainless Steel Ltd v Thwaites*,⁷⁹ the Court of Appeal continued with the *Aoraki* approach, again overruling a previous Court of Appeal decision. *McKechnie Pacific (NZ) Ltd v Clemow*⁸⁰ had held that if another suitable position exists within the group of companies, the employee is not really redundant and so their dismissal

⁷⁷ Interestingly, the bench that decided *Bilderbeck* was identical, aside from the substitution of Gault J for Hardie Boys J, to that which decided *Telecom South*, arguably the most liberal of the recent Court of Appeal serious misconduct cases.

⁷⁸ *Aoraki Corporation Ltd v McGavin*, above n 13, 618 Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁷⁹ *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 (CA) Richardson P, Gault, Keith and Tipping JJ.

⁸⁰ *McKechnie Pacific (NZ) Ltd v Clemow* [1998] 3 ERNZ 245, 251 (CA) Blanchard J for the Court.

is unjustified. This was found, in *Thwaites*, not to accord with “the principles established in *Aoraki*”,⁸¹ despite having been decided after it, and so was overruled.

Again, while this is harsh to the employee – who, in a redundancy situation is not to blame for their lack of employment – this may be a fair balance between employers’ and employees’ interests, as an employee employed to do one job may not be the best person available for another, even if they are suitable for it. However, while this may, marginally, be a fair general approach, its application to the facts in *Thwaites* is much more concerning.

Thwaites was a finance manager, who, on the recommendation of external consultants, had a general finance manager appointed above him, but was assured that his own job was secure. Much of his original job having been taken by this new manager, Thwaites’ role changed over time to closely resemble the position of financial accountant that the consultants had also recommended. Thwaites was then, in an abrupt manner, told “we will have to let you go”.⁸² He later learned that a job, which he was neither offered, nor told of the existence of, and which the Employment Court found was “substantially similar and, in most respects, identical” to what he had been doing at the time he was made redundant, had been filled.⁸³

The Employment Court found that the dismissal was unjustified because the other position was suitable for Thwaites and should have been offered to him, following *McKechnie*. At the Court of Appeal, however, Gault J, delivering the judgment of the majority (Thomas J dissented as to the level of damages), held that the dismissal was “a business decision to be made as a matter of commercial judgment”,⁸⁴ and thus justified because:⁸⁵

⁸¹ *New Zealand Fasteners Stainless Ltd v Thwaites*, above n 79, 272 para 23 Richardson P, Gault, Keith and Tipping JJ.

⁸² *New Zealand Fasteners Stainless Ltd v Thwaites*, above n 79, 578 para 50 Richardson P, Gault, Keith and Tipping JJ.

⁸³ *New Zealand Fasteners Stainless Ltd v Thwaites* [1998] 3 ERNZ 894, 906 (Emp Ct) Travis J.

⁸⁴ *New Zealand Fasteners Stainless Ltd v Thwaites*, above n 79, 572 para 26 Richardson P, Gault, Keith and Tipping JJ.

⁸⁵ *New Zealand Fasteners Stainless Ltd v Thwaites*, above n 79, 572 para 25 Richardson P, Gault, Keith and Tipping JJ.

In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide ... it does not extend to any other position a Court might subsequently determine would be suitable to the employee.

Again it would appear that the Court of Appeal's reluctance to allow the decisions of employers to be subject to much scrutiny, coupled with its readiness to overturn Employment Court decisions, has meant that the interests of the employee – and their right to fair treatment – have been overshadowed. While in *Thwaites* the Employment Court's reliance on *McKechnie* was a factor, the Court of Appeal also apparently rejected its finding of fact that the position not offered to Thwaites was essentially the one he had left, despite the fact that his job had changed over time from what he was hired for. To find that obligations were no longer owed to Thwaites, Gault J had to find that his job had not changed, and that he was essentially no longer employed when actually made redundant. Surely this was a finding for the Employment Court to make based on the evidence presented to them, rather than the Court of Appeal as an appellate court.

4 *The ERA – Coutts Cars*

Most recently, in *Coutts Cars Ltd v Baguley*,⁸⁶ the approaches of *Thwaites* and *Aoraki* were cemented, despite those decisions having been made under the ECA.

Baguley was one of two car groomers made redundant out of a group of four. The dismissal followed a meeting at which he was asked to comment on his redundancy, but refused access to the criteria on which the decision was to be made, and was thus unable to effectively discuss the redundancy. A Full Court of the Employment Court found that Coutts being spurred into action initially by a commercial motive (the money saved by contracting grooming out) was “the end, as well as the beginning, of any spark of justification”.⁸⁷ The Court went on to outline the approach to be taken to claims of unjustifiable dismissal for redundancy in the light of the changes made to the law by the ERA. In an assessment of the new Act's philosophy similar to that undertaken in *Aoraki*, it found a regime “markedly different” from the ECA,⁸⁸ especially as a result of the requirement of good faith, and specifically those in section 3 quoted above, and section 4, the relevant parts of which state:

⁸⁶ *Coutts Cars Ltd v Baguley*, above n 12.

⁸⁷ *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409, 426, para 60 (EC, full court) Judgment of the Court

⁸⁸ *Baguley v Coutts Cars Ltd*, above n 87, 420, para 43.

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)—
- (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.
- ...
- (4) The duty of good faith in subsection (1) applies to the following matters:
- ...
- (d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:
 - (e) making employees redundant:

The Court held that the ERA “requires something of a return to the collectivist principles of previous legislation and some discarding of the model of free contractual bargaining. In its place are the doctrines of good faith and the principles underlying ILO Conventions 87 and 98”, that “it no longer matters that the contract may be silent on the employer’s obligation in the events that have arisen in this case”,⁸⁹ and that deciding whether a dismissal was justified should be a “common sense assessment of the situation”.⁹⁰ This assessment should bear in mind the requirements of the employer’s business, the employee’s right to relevant information, the ability of the employer to mitigate the blow of the redundancy, the nature of the relationship as one calling for good faith, and the Conventions of the ILO.⁹¹

The Court of Appeal considered that the facts found by the Employment Court “considerably overreach the evidence”,⁹² but, having considered setting their judgment aside because these errors, decided the appeal could be resolved on issues of law, “satisfactorily disregarding the excesses of inference and language that we consider the judgment to contain”.⁹³

Gault J, again writing the majority judgment, said of the good faith obligations that “[w]e do not see those obligations as differing significantly from those referred to in the judgments of this Court in *Aoraki Corporation Ltd v McGavin* ...” and later:

⁸⁹ *Baguley v Coutts Cars Ltd*, above n 87, 423, para 49.

⁹⁰ *Baguley v Coutts Cars Ltd*, above n 87, 424, para 56.

⁹¹ *Baguley v Coutts Cars Ltd*, above n 87, 424, para 56.

⁹² *Coutts Cars Ltd v Baguley*, above n 12, 543, para 30 Richardson P, Gault and Blanchard JJ.

⁹³ *Coutts Cars Ltd v Baguley*, above n 12, 544, para 31 Richardson P, Gault and Blanchard JJ.

[T]he relationship between employer and employee still rests on agreement (contract). It is in negotiating for and operating under that contract that the obligations of good faith apply. The obligation to deal with each other in good faith is not so much a standalone obligation as a qualifier of the manner in which those dealings are to be conducted ...

Thus, since "the law already required the observance of good faith", *Aoraki* and *Thwaites* continue to provide guiding principles, and while desirable, consultation remains voluntary.⁹⁴

Tipping J took particular issue with the Employment Court's suggestion that the contract's silence on the employer's obligations "no longer matters":⁹⁵

What the Court appears to mean is that it may impose a contractual obligation on one of the parties to the employment relationship when there is no express or implied term to that effect. The source of such a power is not identified, other perhaps than the statutory duty of good faith which is now a statutory term of all contractual relationships broadly equivalent to the earlier implied term requiring mutual trust and fair dealing. If the obligation is not an express term nor an implied term, nor a statutory term it is hard to see how it can be applied by the Court

McGrath agreed over the limited effect of the on the *Aoraki* principles, but considered the ERA to go beyond the common law or ECA implied contractual terms, requiring a higher standard of conduct from employers: "I consider that the legislature intended that the duty of good faith would require consultation with affected employees in a situation of threatened redundancy whenever that was reasonably practicable".⁹⁶

The approach of Gault J again carrying the day, it would appear that the erosion of the mutual obligations of trust and confidence discussed above has been carried over to the ERA, despite that erosion being partly predicated (especially in *Aoraki*) on the philosophical model of the ECA, which the ERA was clearly intended as a departure from.

V COMMENTATORS' DISCUSSIONS

Having noted the erosion of employees' right to fair treatment, Gordon Anderson, Associate Professor of Law at Victoria University, advocates changes to the personal grievance provisions to restore a more balanced approach. He suggests that the provisions require the Authority or Court to look at justification "from the position of an objective and neutral observer", decide whether the dismissal was justified in all the circumstances

⁹⁴ *Coutts Cars Ltd v Baguley*, above n 12, 545-6, paras 42-3 Richardson P, Gault and Blanchard JJ.

⁹⁵ *Coutts Cars Ltd v Baguley*, above n 12, 549, para 62 Tipping J.

⁹⁶ *Coutts Cars Ltd v Baguley*, above n 12, 554, para 83 McGrath J.

as a separate step, and consider in non-disciplinary cases “whether an alternative suitable position was available”.⁹⁷

The objective standard, combined with considering the justifiability as a separate step, would effectively re-instate the *Fletchers* rule, while the requirement of considering alternatives would reverse the *Thwaites* decision.

A completely different argument is made by Louise Freyer, who suggested in 1997 that “[t]he trend in employment in New Zealand has been to provide employees with increasing certainty in their employment”, that the Employment Court subjects the employer’s conduct to “pedantic scrutiny”, requiring of employers exactly what they would have done themselves. Thus she suggests it is “time for the Courts to pay more attention to fairness to the employer”,⁹⁸ and that procedural fairness be removed as a requirement. Given the pattern in the cases charted above, one can see how this is argued: when the Court of Appeal does find dismissals unjustified, it has recently been because of a lack of procedural fairness.

However, this is because of the court’s unwillingness to find dismissals unjustifiable for any other reason. For instance while the redundancies in *Coutts*, *Thwaites* and *Aoraki* were found to be substantively justifiable but procedurally unjustifiable, each case reflected a further decline of the inquiry into substantive justification without which the dismissals would have been substantively unjustifiable also. Thus procedural unjustifiability *is* prominent, but only because its substantive counterpart has all but vanished.

VI WHERE TO FROM HERE?

The personal grievance provisions give employees considerably less protection in 2004 than at any time since at least the *Fletchers* decision. As Roth puts it, “[t]he *Oram* case confirms that substantive fairness does indeed exist, but that it is stuffed and mounted above the mantle-piece alongside the redundancy and fixed-term contract trophies”.⁹⁹ Thus, since the changes made by the ERA have had no tangible effect on the interpretation of the provisions, further legislative action is needed.

⁹⁷ Anderson, above n 5, 26.

⁹⁸ Louise Freyer “Unjustifiable dismissal: Procedural fairness and the employer” (1997) 22 NZJIR 143, 155.

⁹⁹ Roth, above n 43, 86.

While employers must not be hamstrung, and must be allowed to dismiss workers for serious misconduct, when there is no longer work for them to do, or when the company can no longer afford to employ them, these dismissals must be properly reviewable by the Authority and the courts. As is clear from the cases, the assessment was, and should remain, a moral one – whether, giving weight to both parties' interests, the decision the employer made was a justifiable one.

As regards the scrutiny the employer's decision should be subject to in dismissals for misconduct, a test like that in *Fletchers* would seem appropriate – first determining whether the type of conduct could ever justify dismissal, then weighing up whether dismissal was the right response in all the circumstances. For the first part of the test, the current position by which conduct that a reasonable employer *could* think significantly undermines their trust in the employee will substantively justify dismissal is not fair. It concentrates too much on the needs of the employer, and too little on the effects of dismissal on the employee, who will not only have lost their job, but, having been dismissed for serious misconduct, may have difficulty finding other employment.

Preferable is the level from *Taranaki Maori Trust Board*: misconduct of “such gravity as to render the further continuance of the employment relationship an impossibility”.¹⁰⁰ Such a standard still allows dismissals for misconduct, but prevents frivolous ones – employment should not be discontinued for trivial reasons.

In performing the second part of the test, what should occur is a full investigation by the finder of fact, and a determination of whether the decision was a fair one. It is here that factors such as the employee's past conduct, the length of their employment, and whether the employer shared any responsibility for what occurred, should be weighed. There must be a willingness to assess what *should* have occurred, and while giving some leeway around this standard, a willingness to hold employers to it. Once a sufficient body of case law has built up, such decisions would eventually guide employers on what is and is not appropriate in dismissal situations. The courts should rightly have a role as independent institutions who can review decisions uninfluenced by irrelevant considerations.

¹⁰⁰ *Central Clerical Workers Union v Taranaki Maori Trust Board*, above n 50, 636.

In redundancy situations, compulsory compensation is an issue of some economic complexity and political controversy. Such payments, while possibly politically costly to implement, are another important protection for employees that has declined with union membership, and which should now be legislatively required: the present situation in which employees without contractual redundancy clauses can be made redundant for dubious reasons and with no compensation is unfair. While perhaps less justifiable where the employer is in serious financial trouble, where the employer's aim is to increase efficiency, requiring redundancy payments would force recognition of the serious cost to the employee of redundancy, and provide a disincentive to poorly thought through redundancies with marginal benefits to the employer.

Related is the issue of whether employers must be on the verge of bankruptcy before redundancies will be justifiable. While to require this would also prevent unnecessary redundancies, the cost to employers and to economic growth (potentially very politically painful for a government) arguably outweighs the benefits to employees. However, to justify redundancy, a genuine financial reason must be shown (the redundancy equivalent of the first part of the *Fletchers* test), and the decision to make the employee redundant must then be shown to have been fair (corresponding to the second part).

Requiring consultation about dismissals would further anger critics of the procedural 'hoops' employers must pass through, but it is probably the simplest and politically easiest change that could be made to the provisions. It is not asking a great deal of employers to properly discuss possible dismissals (for any reason) with employees. It does not require negotiation, nor acceptance of the employee's views, but it may facilitate the discovery of alternatives to dismissal, or, because the employee has been well informed, may reduce the number of unmeritorious personal grievance claims. For redundancies, in few situations will it be, as suggested in *Aoraki*, "impracticable" to consult – if large numbers of people are involved, then generally the company will be structured to deal with this number of people. A rare exception to this requirement may be emergency situations, where consultation really cannot take place without the whole enterprise collapsing.

Some of these changes would have been expected to occur with the introduction of the ERA,¹⁰¹ but *Coutts* shows the Court of Appeal's reluctance to recognise them. Thus further

¹⁰¹ Such as the good faith requirement meaning consultation is required in redundancy situations as seen by McGrath J in *Coutts*.

legislation emphasising the fact that changes are required, and specifying those changes, is desirable.

Along with specific changes, further emphasis on the role of the Employment Court, as finder of fact and developer of the law could reduce harshness. While not ousting the Court of Appeal's jurisdiction to review Employment Court cases, such a change could emphasise the fact that as a specialist institution, the court is best suited to develop its own procedures, and the Court of Appeal should be very reluctant to depart from its exposition of the law or its findings of fact.

Such changes would doubtless be described as a 'regression' to the interventionist approaches of the past, but this is only the case if the changes charted above are seen as progress. While employers have a right to have their interests protected, these interests have had too much influence on the courts' approach, and balance must be restored.

VII THE ERLRB CHANGES

Legislative change is now proposed in the ERLRB, which goes some way, but arguably not far enough, towards giving proper protection to employees.

Clause 37 proposes a new test of justification, "to resolve uncertainties arising from the decision of the Court of appeal in *W&H Newspapers Ltd v Oram*":¹⁰²

103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, was fair and reasonable to both parties in all the circumstances at the time the dismissal or action occurred.
- (2) For the purposes of **subsection (1)**, the employer must have considered and balanced the legitimate interests of the employee and the employer.

The proposed section 103A essentially represents a return to the pre-*BP* approach. Indeed a similarity has been noted between the wording used in the Bill and that used in the *Air New Zealand* case above.¹⁰³ Another way of looking at it is the re-introduction of the second part of the *Fletchers* test. It directs the courts and the Authority to make more

¹⁰² Employment Relations Law Reform Bill 2003, no 92-1 (Explanatory Note) 24.

¹⁰³ John Hughes, Paul Roth, Gordon Anderson *Personal Grievances* (loose leaf, LexisNexis, Wellington) chapter 3.43 (last updated June 2004).

than a superficial examination of the employer's decision, giving proper weight to the interests of the employee. As the Explanatory Note says:¹⁰⁴

[I]t is precisely the function of the employment institutions to examine whether a dismissal or other action was unjustifiable in the light of all of the facts. This inevitably involves some "substitution of judgement", but one based on an objective assessment of what a fair and reasonable employer would do in the circumstances.

While it will remain for the employer to determine the facts of the case and make a decision on them, it is to be hoped that this decision will now be properly reviewed, with fairness to both parties in mind, and if the judgment of the employer is found to have been defective, or the facts on which they made it unreasonably found, the employee must be compensated or re-instated.

The proposed subsection 2 has caused some confusion, and has been opposed, albeit for different reasons, by employer groups,¹⁰⁵ unions,¹⁰⁶ and the Employment Court judges.¹⁰⁷ If the employer's actions are reviewable, to ensure that they are 'fair and reasonable to both parties in all the circumstances', then surely the employer will have had to consider and balance both parties' 'legitimate interests'. The requirements on employers in subsection 2 naturally stem from the powers of the Authority and the courts in subsection 1, and thus are redundant. The separation of the requirements on the reviewing body and the employer also seems unnecessary.

While it has been argued that subsection 2 is intended to ensure that consideration is only had of legitimate interests – for example that an employee's partner is ill is not a legitimate consideration¹⁰⁸ – this is not a particularly controversial area: that certain interests are not legitimate was settled more than twenty years ago.¹⁰⁹ Therefore the best approach would be, as suggested by the Council of Trade Unions, to remove subsection 2.

¹⁰⁴ Employment Relations Law Reform Bill 2003, no 92-1 (Explanatory Note) 6.

¹⁰⁵ Business New Zealand Submission to the Transport and Industrial Relations Select Committee on the Employment Relations Law Reform Bill (Wellington, 2004) <www.businessnz.org.nz> (last accessed 31 August 2004).

¹⁰⁶ New Zealand Council of Trade Unions *Submission to the Transport and Industrial Relations Select Committee on the Employment Relations Law Reform Bill* (Wellington, 2004) <www.union.org.nz> (last accessed 31 August 2004) 61-65.

¹⁰⁷ Paula Oliver "Judges say jobs law not clear" (24 March 2004) *The New Zealand Herald* Auckland.

¹⁰⁸ *Wellington Road Transport Etc IUOW v Fletcher Construction Co Ltd*, above n 2, 684-5.

¹⁰⁹ Hughes et al, above n 103, chapter 2.43.

Also confusing and unnecessary is the need to consider “the employer’s actions and how the employer acted”. Surely considering one or other of these would be sufficient – the employer’s actions and how they acted are the same thing!

The Bill also proposes changes to the references made in the ERA to good faith and the mutual obligations of trust and confidence: Clause 5 would make the object of the Act to “build productive employment relationships through the promotion of” good faith rather than the ERA’s “mutual trust and confidence”. It would also replace “by recognising that employment relationships must be built on good faith behaviour” with “by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour” as the first of the ways that objective is to be achieved.

Clause 6 adds to section 4 (which defines good faith) a new subsection 1A:

The duty of good faith in subsection (1)—

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative, and supportive; and
- (c) without limiting **paragraph (b)**, requires an employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the employment of his or her employees to provide to the employees affected—
 - (i) access to relevant information about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

The mutual obligations have always underlain the interpretation of the personal grievance provisions, and thus requiring both parties to act in good faith, a concept now clearly wider than the mutual obligations of trust and confidence, may widen the extent to which the Court of Appeal will require true fairness. Oddly, this ‘widening’ may merely have the effect of restoring what those obligations originally required. The proposed subsection 1A(a) thus serves as a legislative ‘we mean it’— an indication that the ERA was intended to remove some of the more extreme employer-focus of the ECA, and that this extends to the personal grievance provisions. Good faith continues to be a very broadly defined concept, but this subsection may be an ‘out’ for the Employment Court – a way to take a fresh look at how the personal grievance provisions are interpreted, without being instantly reigned in as occurred in *Coutts*.

The effect of the proposed paragraph (c) would be to require consultation in all dismissal situations, a change that, for the reasons mentioned above, is a positive step for both employers and employees, albeit one that will have some cost in time and money.

Missing from the proposed changes is a specification of the level of misconduct required to justify dismissal. As noted above, this would make it clear that such a serious step must not be taken lightly, and would avoid the level becoming another area of disagreement between the courts. As shown by *Coutts*, clarity in changes is desirable.

Also absent is a requirement, such as that proposed by Anderson,¹¹⁰ that other positions have been considered before an employee is redundant, or a higher (and perhaps politically more costly) standard, like that required in *McKechnie*, by which if another suitable position exists, the employee *must* be offered it. This could prevent unfair decisions like *Thwaites*, and discourage dismissals for other reasons being disguised as redundancies.

The Bill does not propose to require compensation when this is not a contractual term, as was briefly the law under *Bilderbeck*. While this is understandable, for the reasons outlined above, such a requirement is desirable. Similarly absent, probably with the same fears of spooking business in mind, is any guidance on the level of awards made for successful claims: as noted by Thomas J in *Thwaites*,¹¹¹ and Anderson in his review of the provisions,¹¹² current awards are often disproportionately low relative to the costs of taking a claim.

Thus, although going some way to return balance to personal grievances, the proposed changes are relatively modest, and do not even represent even a return to many of the Court of Appeal's previous, less employer-favouring, requirements. With some modification to improve their clarity, the proposed changes will slightly improve the lot of employees making personal grievance claims, but could, and should, go considerably further.

¹¹⁰ Anderson, above n 5, 20.

¹¹¹ *New Zealand Fasteners Stainless Ltd v Thwaites*, above n 79 Thomas J.

¹¹² Anderson, above n 5, 22-24.

VIII CONCLUSION

Given the largely constant nature of the personal grievance statutory provisions, there has been a large amount of change in the courts' approach to them over the past two decades. Influenced by the free-market philosophy of the ECA, and an understandable reluctance to increase costs and decrease flexibility for businesses, the Court of Appeal has shown increasing reluctance to interfere with the decisions of employers in order to protect the interests of employees. This has resulted in law which is overly employer-focussed, and which takes insufficient notice of the very serious social and economic consequences of dismissal on employees.

Making a number of changes to the statutory scheme, it is to be hoped that the ERLRB will shift the approach of the Court of Appeal back towards some sort of balance. However, as is traditional with employment law statutes, many of the changes are by implication (for instance the expansion of the overarching requirement of good faith), and others (such as the test for justification) are confusingly worded. Although many of the possible, though not proposed changes would merely represent a re-establishment of requirements that operated without disastrous consequences in the not-too-distant past, it is probable that a reluctance to appear biased in favour of employees (despite the ECA having been, as admitted even by its supporters,¹¹³ a large leap the other way) has meant that the more controversial, but possibly more effective in restoring balance, options for reform have not been included in the Bill.

Thus the need for some changes has been recognised, and some will most likely be made, but even if they are enacted in their current form, they are unlikely to go far enough to properly ensure fairness for both employers and employees.

¹¹³ Baird, above n 7, 47.

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