JENNA REID

THE EVOLUTION OF UNJUSTIFIED DISMISSALS IN NEW ZEALAND

LLM RESEARCH PAPER

LAWS 532

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CONTENTS

I ABSTRACT

This paper follows the evolution of the personal grievance for unjustified dismissal, from its roots in the Common Law action for wrongful dismissal into its introduction into legislation and through to its current form in the Employment Relations Act. Throughout this time the term 'unjustified dismissal' has never been defined and so the substantive law in this area is Judge made. This paper therefore also regards the different approaches and interpretations that the Courts have taken to the term 'unjustified dismissal'.

Though originally interpreted in a "benevolent" manner when first introduced in 1973, unjustified dismissals have since been increasingly interpreted in a more strictly contractual way, favouring the employer and the employment agreement. This has been seen in the test for an unjustified dismissal, which at present is whether the decision to dismiss was one that a fair and reasonable employer could have taken. It has yet to be seen whether the approach of the Court of Appeal will change under the Employment Relations Act, which has a significantly different object to its predecessor.

In order to promote both the object of the Employment Relations Act and the purpose of personal grievance provisions, which is to provide employment protection, the test needs to be a neutral one. The ninety day limitation on raising a personal grievance must also be extended so as to provide an effective remedy for a person who has had their employment unjustifiably terminated.

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II INTRODUCTION

Prior to the 1970's employment legislation, the common law action of wrongful dismissal was the only option for workers who believed they had been unfairly dismissed. However, the wrongful dismissal action was severely limited in both its coverage and its remedies. It also proved to be inadequate in granting workers employment security. This meant that workers had to rely on their unions for support.

During the 1960s the international community decided that workers were entitled to certain employment rights, including employment protection. These rights were encapsulated in the International Labour Organisation (ILO) Conventions. In the early 1970s the New Zealand government decided that legislation was needed to create a system to process personal grievances, particularly dismissals. Their first attempt in 1970 did little to change the situation for workers who felt that they had been unfairly dismissed. However, three years later the government created a process to redress personal grievances, including unjustified dismissals.

Though subsequent legislation has greatly enlarged the number of workers covered by the personal grievance procedure, the core provisions have remained constant since 1987. Also, the concept of 'unjustified dismissal' has never been defined in legislation; rather it has been left up to the courts to determine. For this reason the substantive law in this area has been created by the courts.

This paper will review the changes to the law of unjustified dismissal in New Zealand, both in legislation and in case law. The paper will also evaluate whether the current law is sufficient or is in need of change. To do this it must first be determined what the purpose of the personal grievance provisions are and what is trying to be achieved through them.

A Purpose of Personal Grievance Provisions

The reason for having personal grievance provisions is to protect the employee from being unjustifiably dismissed. The underlying rationale is employment

protection or employment security. However, as a concept employment security is controversial, drawing polar opinions on its relative value[1]. On the one hand there is the claim that employers should be able to run their business as they choose, because of the need for an economically efficient labour market. On the other there is the claim that employees invest much time and energy into their employment and that it therefore requires protection[2]. The employment relationship is a reciprocal relationship with both parties gaining something from it. However the employee is in a weaker position. This is because the employer has the ability to terminate the employee's employment, but the employee has no equivalent power over the employer. It could, however, be argued that the employee's power comes from their ability to disrupt the employer's business through strike action.

Opponents of employment security argue that employers should be able to dismiss an employee without reasons on the contractual period of notice required, which is usually reasonably short. This is the approach traditionally taken by the common law[3]. Supporters of employment protection conversely argue that an employer should not be able to terminate an employee's employment without a good reason and after following a fair process. This is the approach taken in New Zealand and encapsulated in the ILO Convention 158 on the Termination of Employment at the Initiative of the Employer[4].

The argument for employment security appears stronger as the effect of a dismissal on the employer is far less than the effect on the employee. This is most apparent in the wages of the employee. While it may be an inconvenience, or even a financial burden, for the employer to continue to pay the wages of the employee for a time, it is far more severe on the employee who very likely relies on their wage as their sole source of financial income. Because of this economic need for an income a person's employment opportunities should not be unduly constrained or terminated because of unjustifiable conduct by the employer[5].

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[1] Robyn Mackay (ed) *Employment Law Guide* (4th ed, Butterworths, Wellington, 1998) 212
[2] Mackay (ed), 1998, above, 212
[3] Mackay (ed), 1998, above, 213
[4] Mackay (ed), 1998, above, 213
[5] Mackay (ed), 1998, above, 213

Due to the precarious situation that an employee may find himself or herself in if the employment is "at will", there needs to be some form of employment protection. Clearly a balance must be struck between protecting employees from having their positions unfairly and unnecessarily taken from them, and the right of the employer to rid the company of workers who commit misconduct or do not have the capacity to perform the job. An employer should also retain the ability to structure their business as they so choose, however, if the employer does decide to make some employees redundant there should be compensation for the loss of their employment. This is more so the case because the loss of position is in no way connected with any misconduct or incapacity on the part of the employee.

This paper therefore proceeds with the proposition that personal grievance provisions are necessary for employment security, and that they are an important way of protecting the employee's employment and financial income from unjust interference.

B Unjustified Dismissals

The substantive law on unjustified dismissals has remained mostly constant since its introduction in 1973. The Employment Law Guide has set out the standard elements of an unjustified dismissal claim:[6]

> Having established that there is a dismissal the employer must show that the dismissal was justified. Justification has two elements, and the failure to prove either will result in the dismissal being held to be unjustifiable. First it must be shown that the substantive reasons for the dismissal were sufficient to justify the dismissal. Second it must be shown that the procedure the employer followed in making the decision to dismiss was unfair…In practice, the two elements may merge

Though relatively small, the changes that have been made in legislation and case law represent a significant difference to personal grievances. Recently this has been in the more restrictive interpretation of unjustified dismissals by the Court of Appeal.

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[6] Mackay (ed), 1998, above, 226

This paper will look at the progression of the unjustifiable dismissal through New Zealand legislation, from its introduction to its current state in the Employment Relations Act 2000. It will then cover judicial changes in interpretation of unjustifiable dismissals throughout that period. Most of the cases reviewed are Court of Appeal decisions as it has the most influence on the law of unjustified dismissals as the highest appellate court for employment cases. This paper will then go on to look at possible future changes to the provisions.

III HISTORY

A Wrongful Dismissal

Before the introduction of the personal grievance procedures, a dismissed worker had only two legal avenues: to gain the support of their union in order to acquire reinstatement or compensation for the worker, or to take a common law action for wrongful dismissal against their former employer[7]. Wrongful dismissal was an extremely limited action. It only provided a guarantee that an employee was given the period of notice provided for in their employment contract, or if none were provided, that a reasonable notice was given[8]. Payment in lieu of notice was accepted as an alternative to the working out of notice[9]. After the decision of *Addis*[10], damages were limited to the amount that would have been paid had the required notice been given[11].

This action was therefore only helpful to those workers who had long notice periods in their contracts, or who were very highly paid and could therefore gain more for a payment of their contractual notice period.

The wrongful dismissal action did not ensure a worker's employment was secure. An employer was under no obligation to give reasons for or to justify the

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[7] Gordon Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) 13 NZJIR 257, 259
[8] Anderson, above, 259
[9] Anderson, above, 259
[10] *Addis v Gramophone Co Ltd* (1909) AC 488

dismissal[12]. Therefore, as long as the requisite notice was given to the employee, they had no real opportunity of receiving more compensation through the common law.

B ILO Conventions

During the 1960's there was an increased appreciation of the inadequacies of the common law wrongful dismissal action[13]. In 1963, the ILO decided that it was necessary to give greater protection to workers. This was encapsulated in the ILO Recommendation No 119 on the Termination of Employment at the Initiative of the Employer. Convention 158 and Recommendation 166 of 1982 have since superseded the 1963 Recommendation.

1 Convention 158 provisions:

Article 4 states that the employment of a worker may not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the business. Article 5 gives reasons that do not constitute a valid reason for dismissal under Article 4, including union membership, sex, race or marital status. Article 7 provides that the worker must be given an opportunity to offer a defence before a dismissal. Article 8 states that where a worker believes that he or she has been unjustifiably dismissed they are entitled to appeal to an impartial body, and that the burden of proof must not fall on the worker alone (Article 9).

The increase from a Recommendation to a Convention also shows the importance that the ILO places on employment security and the workers rights in relation to that employment[14]

C The Introduction of Personal Grievance Procedures into New Zealand

With only a right to bring a wrongful dismissal action, New Zealand was becoming aware that the country was falling significantly behind the developments of

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[11] Anderson, above, 259
[12] Anderson, above, 259
[13] Robyn Mackay (ed) *Employment law Guide* (5th ed, Butterworths, Wellington, 2001), 464

other nations by the beginning of the 1970s[15]. It had become apparent to the New Zealand government that changes to the current scheme were necessary. The first of these changes came in the Industrial Conciliation and Arbitration Amendment Act 1970, which introduced a procedure for the settlement of a personal grievance. The then Minister of Labour, the Right Hon J R Marshall, stated that the reason for this was because[16]:

> "These matters, particularly alleged wrongful dismissals are a constant source of industrial disputes leading to work stoppages. About 11% of stoppages are caused by this type of grievance. One reason is the absence of a simple procedure, speedily available, for the handling of personal grievances"

However, because the personal grievance was only for 'wrongful dismissals', workers were only covered for dismissals that were unlawful at common law[17]. This was, however, a conscious decision on behalf of the government to retain "the right of the employer to hire and fire"[18], though it was not what employers intended for the provisions.

The 1970 amendment therefore offered little new protection to a worker who had been unfairly dismissed. However it was the first step in the creation of the personal grievance provisions. As Gordon Anderson notes, the introduction of personal grievance procedures had little to do with individual employment security, or compliance with ILO standards (neither of which were mentioned in the Ministers speech), but rather as a response to a political concern with the increasing number of strikes attributable to dismissal disputes[19].

IV INDUSTRIAL RELATIONS ACT 1973 (IRA)

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[14] Anderson, above, 259
[15] Anderson, above, 257, e.g. by the 1960s countries such as France, Italy, Netherlands and Spain already had legislative protection for workers
[16] (10 September 1970) 368 NZPD 3127
[17] Anderson, above, 260
[18] (12 September 1970) 369 NZPD 4072
[19] Anderson, above, 261

A Legislative Changes

The 1973 Act extended the personal grievance provisions to cover workers who had been unjustifiably dismissed or had any other unjustifiable action made against them by an employer (section 117(1)). Interestingly, no reason was given for the extension. However, it could be assumed that the change was necessary because the 1970 legislation did little to prevent the industrial unrest or provide the speedy resolution of disputes it was enacted for, as it did not substantially change the law.

This new legislation offered greater protection to workers and was a great improvement on the previous legislation, though it was only a minor part of the Act, taking up just one section.

The procedure for dealing with personal grievances (set out in section 117(4)) was very simple. It allowed for workers to initially raise their grievance with their immediate supervisor and to try to settle the problem individually. If this failed or was inappropriate in the circumstances, the worker had to raise the matter with his or her union representative. It was up to the representative to take the grievance up with the employer "if he considers there was some substance" in the grievance (section 117(4)(c)). This severely limited the worker, as they did not have the right to raise the grievance with their employer unless their union representative believed that it was worthwhile. This also meant that the right to invoke the personal grievance procedures was vested in the worker's union, not in the workers themselves[20]. Although the Act did allow a right of appeal against the union's decision (s.117 (3A)). It was possible for the employees to bring a grievance themselves with the leave of the Industrial Court if they could show that they were unable to have their grievance dealt with because of a failure on the part of the union[21].

The worker was further limited by the requirement that the worker be bound by an award or a registered agreement. This had the effect of excluding a considerable number of workers from the personal grievance provisions[22]. For

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[20] Robyn Mackay (ed) *Employment law Guide* (5th ed, Butterworths, Wellington, 2001), 469
[21] *Hori v NZ Forest Service* [1978] ACJ 35, 39 per Judge Jamieson
[22] Anderson, above, 262

example many clerical workers were not covered, because they earned more than the relatively low maximum wage in the Clerical Workers Award, above which coverage ceased[23], and therefore had only the common law action for wrongful dismissal to fall back on.

The position was softened a little by the fact that the Courts allowed for dismissed workers to join a union after their dismissal and make use of the grievance procedures[24]. However, this was only an issue between 1983 and 1985 when voluntary union membership was introduced[25]. During the time of compulsory union membership this requirement was not a burden on the employee, but nor did it soften the impact of the requirement for coverage by an award.

The remedies available were reimbursement for lost wages, reinstatement and/or compensation. This was a vast improvement on the common law action for wrongful dismissal, which allowed only compensation for the given or reasonable notice period. In particular the remedy of reinstatement was not usually available at common law[26] and therefore created greater job security for workers by giving them the opportunity to be reinstated into their previous position.

The definition of "worker" was limited under the Industrial Relations Act to any person of any age of either sex to do any work for hire or reward. The IRA left undefined the concept of 'unjustified', or even 'dismissal'. It was left up to the Courts to decide what constituted an unjustified dismissal. The legislation gave no indications as to what situations these provisions should cover or what actions were to be targeted.

B Judicial Decisions on 'Unjustified' Dismissal

With the introduction of the Industrial Relations Act the courts created the basic principles relating to unjustified dismissals. Firstly the courts distinguished the

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[23] Anderson, above, 262
[24] Anderson, above, 263
[25] John Hughes *Labour Law in New Zealand* (The Law Book Company ltd, Christchurch, 1990), 3928
[26] *Ogilvy & Mather (NZ) Ltd v Turner* [1994] 1 NZLR 641, 643 per Cooke P

new action for 'unjustified' dismissals from the narrower action for 'wrongful' dismissasl[27]. In 1982 the Court of Appeal held that:[28]

> "It is plain …that the word 'unjustifiably' in s.117 (1) of the New Zealand Act is not confined to matters of legal justification. If it were so the section would add only a claim to reinstatement in the law."

The Court then went on to give some guidance as to the definition of unjustified dismissals: [29]

> "In the context of s.117 we think 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 unjustifiable when that which is done cannot be shown to be in accordance with justice or fairness."

Though the word 'unjust' has been described as having the connotation of "unfair, without due cause, unreasonable, improper, unwarranted or arbitrary"[30], the Courts have never given a solid definition or detailed test for unjustified dismissals. The Court of Appeal considered that 'unjustified dismissal' could not be defined precisely as a matter of law and that whether a dismissal is unjustified must be considered "virtually as an issue of fact"[31]. For a concept such as unjustified dismissal it would be difficult to create a watertight test that can be used in every case without causing arbitrary decisions. In spite of this difficulty, Judge Williamson gave a non-exhaustive list in *Wellington Road Transport Union v Fletcher Construction* of matters that should be taken into account: [32]

> "… the 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. The Court also has regard to good industrial practice which includes some consideration of the moral and social

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[27] For example *Hori v NZ Forest Service* [1978] ICJ 35
[28] *Auckland City Council v Hennessey* [1982] ACJ 699, 703 per Somers J (CA)
[29] *Auckland City Council v Hennessey* [1982] ACJ 699, 703 per Somers J (CA)
[30] *Wellington Road Transport Union v Fletcher Construction Co* [1983] ACJ 653, 666 per Judge Williamson
[31] *BW Bellis v Canterbury Hotel etc IUOW* [1985] ACJ 956, 960 (CA)
[32] *Wellington Road Transport*, above, 666

> attitudes of the community. The Court considers ILO Recommendations and Conventions. The Court also has regard to its own earlier decisions and to the decisions of other Courts, both New Zealand and foreign."

The Court of Appeal agreed with the lower courts that they should refrain from laying down too early on or too rigidly defined principles as to the meaning of 'unjustified' as each individual case must be treated on its merits[33]. Later, Cooke P indicated that general rules were inappropriate where there are duties of fairness and reasonableness[34]. However commentators have criticised this approach because other courts in the same positions have established general principles to assist in the construction of vague statutory terminology[35].

The Court of Appeal stated that the Arbitration Court had given s.117 a benevolent construction and that since the Industrial Relations Act had the purpose of improving industrial relations (as provided in the long title) the Court of Appeal should not derogate in any way from that general approach[36]. The Court went on to state that the issue is not whether the worker has established that he or she was unjustifiable dismissed, but whether the employer had shown that the dismissal was justified[37]. This confirmed that the evidential burden was on the employer to justify the dismissal once the employee had raised the issue by showing that they had been dismissed.

The Courts also confirmed that a constructive dismissal came within the concept of a dismissal for the purposes of the personal grievance provisions[38]. That the dismissal must be carried out in a substantively and procedurally fair manner, so that at the time of the dismissal the employer had clear and reliable evidence, or had carried out a reasonable inquiry so as to support the decision to dismiss[39]. The Courts

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[33] *Wellington Road Transport Union v Fletcher Construction Co* [1982] ACJ 663, 665 per Woodhouse P (CA)
[34] *Marshall Cordner & Co v Canterbury Clerical Workers Union IUW* [1986] 2 NZLR 431, 434
[35] John Hughes *Labour Law in New Zealand* (The Law Book Company Ltd, Christchurch, 1989) 1928-9
[36] *Wellington Road Transport Union v Fletcher Construction Co*, above, 666 (CA)
[37] *Wellington Road Transport Union v Fletcher Construction Co*, above, 666 (CA)
[38] *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA)
[39] *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* [1990] 3 NZLR 549 (CA)

also stated that the justifiability of the dismissal is judged at the time the action of dismissal was taken[40].

The Court of Appeal later suggested that the requirement for fair and reasonable treatment might quite readily be found in "private contracts of employment not subject to the 1973 Act"[41]. The reason given was that "fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in a contract of service"[42].

V LABOUR RELATIONS ACT 1987 (LRA)

A Legislative Changes

The 1987 Act created a much more extensive and comprehensive legislative system for personal grievances. Instead of a single section in the Act, as was the case under the IRA, the LRA dedicated a whole part to personal grievances, spanning twenty sections. Firstly the Labour Relations Act extended the definition of "worker" to include a home-worker and a person intending to work (section 2). The Act also set out the objects for the personal grievance provisions (section 209). The objects stated that the provisions were not limited to unjustifiable dismissals, that personal grievances were distinguishable from disputes of rights, that access to personal grievance provisions was a benefit of union membership and that the provisions were an alternative to a complaint made under the Human Rights Commission Act 1977 or the Race Relations Act 1971.

The personal grievance provisions were extended to cover discrimination, sexual harassment and duress (section 210). The Act also extended coverage to all union members, whether or not they were bound by an award or agreement. These changes had the potential to greatly increase the number of workers covered by the personal grievance procedures because many workers were not within the award

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[40] *Northern etc Butchers etc IUOW v Peach and Vienna Foods Ltd* [1982] ACJ 379
[41] Sir Ivor Richardson, 'The Role of the Court in Industrial Relations' (1987) 12 NZJIR 113, 117
[42] *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, 383 per Cooke J

system, such as the white-collar workers, managerial employees and the clerical workers mentioned above[43]. The Labour Relations Act also carried over the principle of compulsory union membership from when it was reintroduced in 1985[44].

The LRA also set out that a statement of reasons must be given for a dismissal (section 225), and that the primary remedy for an unjustified dismissal was to be reinstatement (section 228).

The new legislation was much more descriptive and comprehensive than the personal grievance procedures under the IRA. However, like the Industrial Relations Act, the Labour Relations Act left undefined the term 'unjustified' and again the Courts were required to interpret the intentions of Parliament. As the Court of Appeal noted:[45]

> "We draw attention to the words "the worker has been unjustifiably dismissed" and would contrast them with "the worker's dismissal was unjustified". If the latter words had been used in the Act there would be a narrow question simply whether on the facts as known to the employer at the time of the dismissal was justified. But the words of the section are different and must be applied by the Court. They are wider and require the employer to prove on the balance of probabilities that on the facts as they emerge... the dismissal has been shown to be justifiable"

B Judicial Comment On The New Legislation

In an overview of the new legislation Richardson J stated that[46]:

> "Clearly Parliament has departed from the common law approach not only in relation to procedures and remedies but also in formulating the basic concept of unjustifiable conduct within the employment relationship under the Act. 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

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[43] Gordon Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) 13 NZJIR 257, 262
[44] John Hughes *Labour Law in New Zealand* (The Law Book Company ltd, Christchurch, 1990), 3928
[45] *Airline Stewards etc IUW v Air New Zealand Ltd* [1990] 3 NZLR 549, 554 per Bisson J (CA)
[46] *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275, 285

> 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.

Here Richardson J emphasised the balanced approach that the courts should take to the provisions under the Labour Relations Act. The Court of Appeal has recognised the conflicting interests of both parties as well as their common obligations of mutual trust and confidence, all of which these need to be considered in an unjustified dismissal action.

C Judicial Decision on 'Unjustified' Dismissal

There was little change between the Industrial Relations Act and the Labour Relations Act and decisions made under the new Act were in keeping with those of the previous legislation. In *Airline Stewards etc IUW v Air New Zealand Ltd*[47] the Court of Appeal stated that:[48]

> "We agree with the [Labour] Court that 'the real test is whether the employer has shown that the decision to dismiss was in the circumstances and at the time a reasonable and fair decision'...The decision must be looked at from two points of view, that is, fairness to the employer and fairness to the employee"

Adding more detail to the meaning of an unjustified dismissal Richardson J stated[49]:

> "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. Where it does not meet that test and the primary remedy of reinstatement is not available, the awarding of compensation recognises the reality that the employment is at an end and life must go

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[47] *Airline Stewards etc IUW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA)
[48] *Airline Stewards etc IUW v Air New Zealand Ltd*, above, 555-6 per Bisson J
[49] *Telecom South Ltd v Post Office* Union, above, 285-6

> on. And a just and reasonable award must reflect the circumstances and the legitimate interests of both parties." (Own emphasis)

Both of these comments quotes emphasise the balance necessary between the interests of the employer and the employee, both before and after the dismissal takes place.

The Court of Appeal restated its position that a definition of unjustified dismissal was not possible because it was always a matter of degree[50]. However the Court did go on to note that usually what is needed for a case of misconduct to justify a summary dismissal is "conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship"[51]. The Court also stated that once it has been shown that the breach of trust was serious and of such a nature as to warrant a fair and reasonable employer deciding that the employee should be dismissed the Court may not then substitute its judgement as to what penalty should or should not actually have been imposed[52]. Therefore once an employer could show that the decision to dismiss was one a fair and reasonable employer would have made, the court must accept the decision was justified, even if it would have also have been possible for the employer to make another decision.

VI EMPLOYMENT CONTRACTS ACT 1991 (ECA)

A Legislative Changes

Under the Employment Contracts Act 'employees' were given the same definition as 'workers' under the Labour Relations Act. Although at the time that the Act was passed the Business Roundtable and Employers Federation argued that the personal grievance procedures should be abolished so that employers could return to their previous ability to hire and fire with little difficulty[53], the 1991 Act in fact extended coverage to all workers by removing the requirement of union membership.

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[50] *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487 (CA)
[51] *Northern Distribution Union v BP Oil NZ Ltd*, above, 487 per Hardie Boys J
[52] *Northern Distribution Union v BP Oil NZ Ltd*, above, 488 per Hardie Boys J affirming the statement made in *Read v Air New Zealand* [1991] 3 ERNZ 139, 146
[53] Robyn Mackay (ed) *Employment law Guide* (5th ed, Butterworths, Wellington, 2001), 463

Apart from this and some other relatively minor changes, the ECA virtually reproduced the personal grievance provisions of the LRA.

With the removal of the union requirement, the right to bring a personal grievance was vested in the individual, not in their union. The Act required that every employment contract (both individual and collective) must include an effective procedure for the settling of a dispute. This extended coverage to more senior employees not previously protected[54]. The only limiting factor of the 1991 legislation was the requirement for the grievance to be raised within ninety days with the employer. This was a new provision, and one that distinguished the ECA from the LRA, as the LRA contained no equivalent statutory time limit.

The ECA maintained the remedies of previous legislation, but removed the preference for reinstatement. This left the remedy totally at the discretion of the Court.

B Judicial Comment On The New Legislation

In the 1995 of *Brighouse Ltd v Bilderbeck* the Court of Appeal stated that "the 1991 Act did not in general curtail the personal grievance provisions which in one form or another have been part of New Zealand statute law since 1970"[55]. The Court noted that a feature of the ECA is its extension of personal grievance jurisdiction by making the personal grievance procedure "available under every employment contract, no matter how senior the employee and no matter whether or not he or she is a union member"[56]. While it is true that the ECA in fact extended the personal grievance provisions by granting the right to bring an unjustified dismissal action in the employees themselves, the ECA did nonetheless curtail the grievance procedures by enacting the ninety-day rule. This severely limited the ability of an employee to get redress because if they failed to raise the grievance within ninety days, except in rare circumstances, they would be left only with the common law action for wrongful dismissal. The Court then went on to state that " the emphasis on efficiency and

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[54] Mackay (ed), 2001, above, 469
[55] *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158, 163 per Cooke P (CA)
[56] *Brighouse Ltd v Bilderbeck*, above, 163 per Cooke P

market forces is thus accompanied and in a sense balanced by a reaffirmation and broadening of the scope of personal grievance remedies"[57].

In 1998 in the case of *Aoraki* the Court of Appeal, under the presidency of Sir Ivor Richardson, stated accurately that the 1991 Act "represents a substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining"[58]. The Court went on to note that the personal grievance procedures were extended to cover all employees, but that "the context in which they operate is sharply changed by the emphasis in the 1991 Act on contractual freedom"[59]. However the Court then stated that the "personal grievance provisions are part of the overall balance reflecting the special characteristics of employment contracts and under which... employees and employers have mutual obligations of confidence trust and fair dealing"[60]. While it seems that Richardson P very aptly described the Act in the description of free bargaining, the description of the overall balance of the Act appears, with respect, to be somewhat of an anomaly. It is very difficult to see how the Act does in fact balance these two things. The removal of the union membership requirement seems more likely to have been done primarily to take power away from the trade unions by investing that power in the individuals, not to extend the personal grievance provisions to everyone. The Court of Appeal, in fact, uses the philosophy and principles of the ECA to limit the scope of the personal grievance provisions for employees.

Though both Judges noted the extension of the personal grievance provisions, it is somewhat difficult to how they were then able to come to such completely different interpretations of what the meaning of the Act was. Under the presidency of Lord Cooke, the Court of Appeal gave a more liberal interpretation to the ECA, as seen in decisions such as *Brighouse*, whereas under the presidency of Sir Richardson the Court of Appeal gave very conservative interpretations to the Act, seen in such cases such as *Aoraki*.

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[57] *Brighouse Ltd v Bilderbeck*, above, 163 per Cooke P
[58] *Aoraki Corporation v McGavin* [1998] 1 ERNZ 601, 611 (CA)
[59] *Aoraki Corporation v McGavin*, above, 612

C Judicial Decision on 'Unjustified' Dismissal

The greatest distinction in decisions came after the introduction of the ECA and a change of direction by the Court of Appeal towards the later part of the 1990s. The new Act was more conservative, adopting a more contractual approach to the employment relationship. This conservative approach was only picked up by the courts in relation to unjustified dismissals at a later date. There was clearly a shift in the Court of Appeal as to the meaning of justification over the nine years that the ECA was legislation. In 1992 the Court stated in *Northern Distribution Union v BP Oil NZ Ltd* that[61]

> "In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances"

It was therefore up to the Court to determine whether a fair and reasonable employer would have dismissed the employee. If dismissal was just one of the options open to the employer, it will not necessarily mean that the Court will decide that the decision was justified[62].

In *Brighouse v Bilderbeck* Cooke P adopted Richardson J's statement quoted above from *Telecom South*, which related that an unjustified dismissal must be determined by considering and balancing the interests of the worker and the employer[63]. In this case the Court held that employees may have a right to compensation for redundancy, even where none was provided for in their employment contract. However in the later decisions of *Aoraki* and *Thwaites*[64] the Court took a more restrictive approach to personal grievances and extended what was acceptable behaviour by the employer.

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[60] *Aoraki Corporation v McGavin*, above, 612
[61] *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487 per Hardie Boys J (CA) – though was decided under the Labour Relations Act
[62] Robyn Mackay (ed) *Employment Law Guide* (4th ed, Butterworths, Wellington, 1998) 227
[63] *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158, 166 per Cooke P (CA)
[64] *NZ Fasteners Stainless Ltd v Thwaites* (17 May 2000) Court of Appeal CA 10/99

In *W & H Newspapers ltd v Oram*[65] the Court of Appeal emphasised that the opinion of the court should not supplant that of the employer[66]. Gault J went on to state that even if the decision seemed harsh, the court should only decide whether the dismissal was an option open to the employer acting fairly and reasonably[67]. The Court stated that[68]:

> "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 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"."

This modifies the *BP Oil* test stated above and widens the available actions of an employer that will be found to be justified. In doing so it narrows the provisions of unjustified dismissal and what will be held to be unjustified.

Although the test seems to be very broad and relatively vague, the courts have put restrictions on what the presiding judge should take into consideration. Thomas J pointed out in *Hagg* that it was wrong for the Employment Court Judge to "apply a broad test of 'fairness'" because such as approach results in the court not focusing on the critical matters of whether there was a dismissal and whether that dismissal was unjustified and the contractual basis of the employee's employment[69].

D Was the Court of Appeal's Reinterpretation Justified?

Though the Employment Contracts Act changed the focus of labour law onto the contract made between the employer and employee, the personal grievance provisions remained largely the same as under the Labour Relations Act. John Hughes noted that where new legislation re-enacts the provisions of the earlier legislation that it is replacing, it is assumed that Parliament was aware of the courts

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[65] *W & H Newspapers ltd v Oram* (3 May 2001) Court of Appeal CA 140/00
[66] *W & H Newspapers ltd v Oram*, above, 17 per Gault J
[67] *W & H Newspapers ltd v* Oram, above, 17 per Gault J
[68] *W & H Newspapers ltd v* Oram, above, 13 per Gault J
[69] *Principle of Auckland College of Education v Hagg* [1997] 2 NZLR 537, 555 per Thomas J (CA)

interpretation of those provisions, and by not changing them, was endorsing that interpretation[70].

According to this approach therefore when Parliament enacted the Employment Contracts Act it was endorsing the approach that the courts had taken in interpreting unjustified dismissals. The changes that the Employment Contracts Act made to personal grievances did not affect the substantive law on unjustified dismissals, but rather extended the personal grievance coverage to certain workers not previously covered[71]. The other changes affected only procedural matters[72]. The significant changes that the Employment Contracts Act made to previous legislation was to the negotiation of employment contracts, including whether to have representatives and the right of the parties to choose the type of contract[73]. These changes are encapsulated in Part II of the Employment Contracts Act.

In the past the Court of Appeal were innovative in employment matters and were supportive of the liberal approach taken by the lower courts to the legislation[74]. However, the Court of Appeal has recently taken "an increasingly orthodox approach to labour law"[75]. The orthodox approach tends to favour a pro-employer view of the employment relationship and to see employment in purely contractual terms[76]. This has been particularly the case in relation to redundancy cases.

Richardson J's comments in *Aoraki* quoted above, that the context in which the personal grievance operate is "sharply changed by the emphasis in the 1991 Act on contractual freedom"[77], seem less convincing given that the provisions themselves were changed very little since the Labour Relations Act. There seems no justification therefore for the Court's modification of the *BP Oil* test made in *Oram*, as the personal grievance provisions had not substantially changed. Had Parliament

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[70] John Hughes "The Employment Court, 'Judicial Activism' and the Coalition Agreement" (1997) 28(1) CWILJ 167, 187
[71] Gordon Anderson "Interpreting the Employment Contracts Act: Are the Courts Undermining the Act?" (1997) 28(1) CWILJ 117, 135
[72] Anderson, 1997, above, 135
[73] Anderson, 1997, above, 125
[74] For example *Brighouse* and *Hennessey*
[75] Anderson, 1997, above, 118
[76] Anderson, 1997, above, 118
[77] *Aoraki Corporation v McGavin* [1998] 1 ERNZ 601, 612 (CA)

intended to grant employers greater freedoms in dismissing employees then the personal grievance provisions should have been so amended.

Therefore, while it may have been correct for the Court of Appeal to change its approach to areas of labour law that were clearly changed by the Employment Contracts Act, there does not appear to have been any reason for such an approach to have been taken with the unjustifiable dismissal provisions. Parliament did not abolish the personal grievance procedures as requested by the new right[78], and there was no introduction to employment "at-will"[79]. There is a strong argument that the Court should have adopted different approaches for different parts of the Act[80]. The Court of Appeal should have maintained the Courts earlier decisions.

VII EMPLOYMENT RELATIONS ACT 2000 (ERA)

A Legislative Changes

The Employment Relations Act has extended the coverage of the personal grievance provions mostly through the widening of the definition of 'employee' and limitation on the use of fixed term contracts. The definition of 'employee' extends on the basic form used since the LRA, and now allows the courts to determine the true nature of the relationship to decide whether or not the person is an 'employee' for the purposes of the Act, irrespective of the labels the parties had previously given themselves. This should extend the coverage of the personal grievance provisions to people who are employees in all but title, for example those employed as 'independent contractors' who are in reality employees. Previously these employees would not have been covered, because of the strict contractual approach taken by the Court of Appeal[81]. This was introduced to try to stop employers employing people under different titles so as to limit or absolve themselves of liability under the personal grievance provisions.

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[78] This term is used as shorthand for the groups such as the Business Round Table and Employers Federation who hold neo-classical economic beliefs.
[79] Anderson, 1997, above, 117
[80] Anderson, 1997, above, 124
[81] *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA)

The most recent labour relations legislation has not affected the range of employee access to the personal grievance procedures, but has changed the process for resolving the grievance. The 2000 legislation abolished the common law action for wrongful dismissal for employees covered by the personal grievance procedures. Although, as the personal grievance procedures offer so much more to a dismissed worker, it is not in reality a large loss for most employees' ability to gain compensation.

The ERA extends the meaning of personal grievance to cover racial discrimination, and includes a list of exceptions in relation to discrimination (section 106), for example where it is done for religious purposes.

Reinstatement has been reintroduced as the primary remedy available for an unjustified dismissal. The ERA has also included a section that sets out that compensation will be reduced if there is contributory behaviour by the employee.

However, employees are still limited in their right to bring an action by section 114, which reiterates the ECA section 33, that a personal grievance must be raised within ninety days. This severely limits an employee's ability to bring an action. This issue will be returned to later.

1. Fixed Term Contracts

In order to restrict the use of fixed term contracts, which limited or absolved employers of responsibility under the personal grievance provisions, the ERA introduced section 66. The new section provides that fixed term contracts can only be used when there is a legitimate need for one, such as when the position is only available for a fixed period of time. The explanation for the original clause in the Employment Relations Bill was that it was:[82]

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[82] Questions to officials from the Department of Labor in letter from Hon. Richard Prebble to Graham Kelly, Chair of the Employment and Accident Insurance Legislation Committee, dated 28 April 2000, as quoted in John Hughes, Paul Roth and Gordon Anderson, *Personal Grievances* (loose-leaf, Butterworths, Wellington) para 3.27 (last updated 30 June 2002)

> "...intended to stop the use of fixed tern contracts as a device to effect termination without responsibility and to deny employees access to employment protection such as the personal grievance provisions...[the section] is also intended to prevent the situation of precarious employment, where the employee is employed on a series of fixed term contracts that are continuously rolled over..."

The implementation of section 66 overrides the decision in *Hagg*, which allowed for rolling over fixed term contracts and held that the expiry of a fixed term contract was not a dismissal and therefore could not be an unjustified dismissal. However it does not confirm whether or not the expiry of a fixed term contract that cannot be justified under section 66 will constitute an unjustified dismissal. John Hughes suggests that if the fixed term contract cannot be justified and the expiry of the contract is the only reason why the employer is terminating the employment relationship, the person will be able to claim that it was an unjustified dismissal[83].

Section 66 also brings New Zealand legislation more into line with ILO Convention 158, Article 4, which states that there must be valid reasons for the termination of an employee's employment.

B Judicial Decision on 'Unjustified' Dismissal

Although the ERA has changed the shift away from the employment contract to the employment relationship and has given the key principles of good faith and fairness, it has yet to be seen whether the Court of Appeal will change its decisions on what is to be accepted as an unjustified dismissal.

The only case that has been appealed to the Court of Appeal under the 2000 legislation is *Coutts Cars ltd v Baguley*. That case maintained that the redundancy decisions of *Aoraki* and *Thwaites* should still "provide guidance on the applicable principles" as the new legislation did not introduce any significantly different obligations that the courts have not already placed on the parties to an employment contract[84]. The Court stated that they "did not find in the new provisions a warrant to introduce into what is still a contractual relationship terms and conditions the parties

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[83] Hughes, Roth and Anderson, above, para 3.27

have not agreed to"[85]. If this is indicative of all unjustified dismissal cases the new legislation may make little difference to employees who have been unjustifiably dismissed.

Although it has also been noted that in both the pre and post Employment Contracts Act decisions emphasis was laid on the interpretation of the personal grievance procedures in the wider context of the aims of the legislation[86]. Following this reasoning, the Court of Appeal should take a more liberal approach to personal grievances in line with the aims of the 2000 legislation. However the recent decision of *Coutts Cars v Baguley*[87] shows that the Court of Appeal is maintaining its conservative approach to redundancy personal grievances.

C *Should the Court of Appeal Take a New Approach to Unjustified Dismissals?*

If the Court of Appeal was not justified in changing their approach under the Employment Contracts Act, it appears that the Court would be even less justified in continuing with that interpretation under the Employment Relations Act. However, it could be argued that because Parliament re-enacted the personal grievance provisions from the ECA they were endorsing the approach that the Court of Appeal had taken under the previous legislation.

However, Parliament did enact another provision, which may give guidance as to the approach that they intended the Court of Appeal to take. In 2000 section 216 (b) was added to the legislation. It states that the Court of Appeal must have regard to the "object of this Act and the objects of the relevant Parts of this Act". The stated object of the Act being 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"[88]. This is markedly different from

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[84] *Coutts Cars ltd v Baguley* [2002] 2 NZLR 533, 545 per Gault J (CA)
[85] *Coutts Cars ltd v Baguley*, above, 545
[86] Mackay (ed), 2001, above, 469
[87] *Coutts Cars v Baguley* (21 December 2001) Court of Appeal CA 102/01
[88] Employment Relations Act 2000 Section 3(a)

the object of the Employment Contracts Act which was to promote an efficient labour market.

If the Court of Appeal changes its approach in regard to unjustified dismissals in line with the object of the ERA, a more liberal interpretation will result. It has yet to be seen whether section 216(b) will make a difference to the Courts approach.

VIII JUDICIAL DECISIONS ON UNJUSTIFIED DISMISSALS

> "The concept of unjustifiable dismissal which gives rise to a personal grievance is a creature of statute. Its elements are accordingly a question of statutory interpretation"[89]

A Unjustified by whose standard?

In the earlier decisions it was held that "in the ultimate, the test of justification …is the opinion of the court"[90]. This infers that a neutral, reasonable person test was being used to establish whether or not a dismissal was justifiable[91]. However, this later changed to whether it "was open for a reasonable and fair employer to do in the particular circumstances"[92]. This moved the standard away from a reasonable person, and on to a fair and reasonable employer.

However, in recent Court of Appeal cases the Court appears to have watered down the 'reasonable standard' by making the acceptable standard broader, which would mean that more actions would be encompassed within the options open to a fair and reasonable employer.

This is quite a large move away from the court's opinion as being the most important one. It has yet to be seen, however whether the reasonable employer

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[89] *Ark Aviation v Newton* [2002] 2 NZLR 145, 147 per McGrath J (CA)
[90] *Wellington Road Transport*, above, 666 per Judge Williamson
[91] Mackay (ed), 2001, above, 536
[92] *BP Oil v Northern Distribution* [1989] 3 NZLR 580, 582 per Cooke P

standard will change under the 2000 legislation, which arguably expects more from employers through its aims and objectives than previous legislation has.

There appears to have been a move towards the United Kingdom approach of the "reasonable employer" as the standard used in the test for whether or not a dismissal is unjustified[93]. The United Kingdom courts use the 'range of reasonable responses' test to determine whether the dismissal was unfair or not[94]. If the dismissal was within a band of reasonable responses to the employee's conduct that a reasonable employer might have adopted, the dismissal will usually be found to have been fair[95]. It has yet to be seen whether the New Zealand courts will move away from this approach under the new employment legislation.

In *W & H Newspapers ltd v Oram*[96] the Court of Appeal emphasised that the opinion of the court should not supplant that of the employer[97]. Although this was settled law and held to be the correct approach to unjustified dismissal cases in *BP Oil* where Hardie Boys J stated that[98]:

> "The factors the [Labour] Court identified were at best mitigating factors: in the sense that they were factors an employer might take into account in deciding whether despite the conduct being such as to justify summary dismissal, the worker should nonetheless cot be dismissed. But for the court to enter upon that territory was to usurp the responsibility and prerogative of the employer."

The move away from the Courts opinion of whether the dismissal was justified and the fact that the Court has stated that it should not supplant its view for that of the employer means that more weight is given to the employer's decision than was previously given by the Courts. The emphasis on a fair and reasonable employer "incorporates a distorting element into the test of justification"[99]. Commentators have suggested that bias towards employer standards has the effect of discounting the

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[93] Gordon Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) 13 NZJIR 257, 267
[94] Lord Mackay of Clashfern (ed) *Halsbury's Laws of England* (4th ed, Butterworths, London, 2000 reissue) 448
[95] Lord Mackay (ed), above, 448
[96] *W & H Newspapers ltd v Oram* (3 May 2001) Court of Appeal CA 140/00
[97] *W & H Newspapers ltd v Oram*, above, 17 per Gault J
[98] *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487-8 per Hardie Boys J (CA)
[99] Robyn Mackay (ed) *Employment law Guide* (5th ed, Butterworths, Wellington, 2001), 537

effects of the dismissal on the employee, and that the most balanced approach is that of *Wellington Road Transport v Fletcher*, that the Court must ultimately decide in its opinion whether it was a justified dismissal[100].

Commentators have criticised the approach of the Courts as being part of a general tendency in Common Law countries to interpret employment contracts and statutes on the basis that the correct perspective is that of the employers[101]. If the purpose of personal grievance provisions is to offer greater employment protection for employees then the employer's perspective cannot be the correct one to take. The Court should always be the ultimate judge of whether the decision to dismiss was a fair and reasonable one to take in the circumstances.

B "Harsh but Fair" Decisions

The concept of the "harsh but fair" decisions has been in New Zealand case law since the 1980s. There followed a string of cases which stated that though a decision to dismiss appeared to be harsh it was nonetheless open to the employer to do and therefore was not an unjustified dismissal.

The latest of these cases was the decision of *Oram*. In the *Oram* decision Gault J stated "[the] dismissal may have seemed harsh, but the correct issue is whether it was open to the employer, acting fairly and reasonably, to have seen that as a reasonable response to Mr Oram's conduct".

It is interesting that in *Tasman Paper Pulp Co Ltd v Hei Hei*[102] Judge Colgan stated that is was not possible to have a 'harsh but fair' dismissal as the legislation at the time (the ECA) prohibited "harsh and unconscionable behaviour"[103]. In that decision Judge Colgan denied that a dismissal was within the reasonable range of options open to an employer.

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[100] Mackay (ed), 2001, above, 537
[101] Mackay (ed), 2001, above, 537
[102] *Tasman Pulp and Paper Company Ltd v Hei Hei* (23 May 2000 Employment Court Auckland AC 39/00)

There is no doubt that this is a difficult area and that a balance is needed between the conflicting sides. On the one hand employees require employment security and it should not be acceptable for an employee to loose their position for a seemingly trivial matter that the courts find was justified even though a harsh decision. However, if the action of an employee, however trivial, has been sufficient as to destroy the trust and confidence necessary for an employment relationship, the employer should not be forced to retain the employee in their employ.

If a court decides that the action taken was not within the range open to a fair and reasonable employer in the circumstances, will the court then be substituting its own view for that of the employer? If this is the case, though according to *Oram* the court should not substitute its own view, does the Court in fact mean that the court must only supplant the view of the reasonable employer with that of the actual employer? It appears that in looking at whether the decision to dismiss was within the range of options open to an employer acting fairly and reasonably in all the circumstances it will be difficult to do without the Court supplanting their own views. This can be seen in decisions such as *Tasman Pulp* where Judge Colgan stated that Mr Hei Hei's misconduct was insufficiently serious to warrant dismissal as a fair and reasonable consequence.

In *Auckland Local Authorities IUOW v Northland AHB* Goddard CJ stated in relation to harsh decisions that:[104]

> "There are many cases in which the Court refuses to disturb an employer's decision to dismiss even if other alternatives were available to the employer because there may be a wide range of decisions available to a reasonable and fair employer. But that is not to say that the Court will never substitute its own view where it considers that dismissal was inappropriate to the gravity of the offence or offences committed – in other words, that it constitutes harsh treatment. It is precisely the function of the Court…to adjudicate on whether the circumstances of a particular case are such that it can be said of them that the dismissal was in those circumstances justifiable or otherwise"

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[103] John Hughes, Paul Roth and Gordon Anderson, *Personal Grievances* (loose-leaf, Butterworths, Wellington) para 3.36 (last updated 30 June 2002)

The current state of allowing 'harsh but fair' dismissals also fails to satisfy ILO Convention 158 where it is stated that employment should only be terminated on valid grounds connected with the conduct or capacity of the worker. If the matter is only a trivial one it would be likely to be insufficient for this Convention. For example, using the facts from *Tasman Pulp* where Mr Hei Hei was dismissed after being 40 minutes late for work, though he did not cause any damage, harm or potential injury to his workmates. The fact of being forty minutes late is a trivial matter, neither sufficient to break the trust and confidence of the employment relationship nor connected with the conduct nor capacity of the worker. For this tardiness Mr Hei Hei should at most have been given a written warning, not a summary dismissal.

As Judge Colgan noted a "harsh" dismissal is unlikely to be a fair and reasonable one and is therefore likely to be unjustifiable[105]. A fair and reasonable employer should not make harsh dismissals. It is incompatible with being fair and reasonable.

C New Zealand and International standards

ILO Convention 158 sets out the minimum acceptable standards for protection against unjustified termination of employment[106]. Although New Zealand has not ratified this convention it should nonetheless be used as one of the factors to take into account when interpreting the law[107]. The Court of Appeal has endorsed the use of international instruments in aiding the interpretation of law[108]. Therefore the fact that New Zealand has not ratified Convention 158 should not mean that it is irrelevant in the interpretation of unjustified dismissals.

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[104] *Auckland Local Authorities IUOW v Northland Area Health Board* [1991] 2 ERNZ 215, 222
[105] *Tasman Pulp and Paper Company Ltd v Hei Hei* (23 May 2000 Employment Court Auckland AC 39/00), Appendix 1, Judge Colgan
[106] Robyn Mackay (ed) *Employment Law Guide* (4th ed, Butterworths, Wellington, 1998) 216
[107] Mackay, 1998, above, 216
[108] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) – found that the Minister was not entitled to ignore international instruments, also *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 (CA) – found that international conventions can be used in the appropriate circumstances. Though note that later cases have been less enthusiastic about the use of international instruments.

Over the previous 29 years legislative changes have brought New Zealand law more into line with the ILO standards. However it seems that judicial decisions on unjustified dismissals have not increased New Zealand's compliance with international conventions. As the Chief Judge noted of the Court of Appeal's decision in *Oram* that misconduct need not be proved, it is a far way from the full appeal contemplated by Convention 158[109]. The recent Court of Appeal decisions have not increased an employee's job security, but have conversely made it easier for an employer to terminate an employee's employment. This is because the Court is now accepting a dismissal as being justified if it were an option that a fair and reasonable employer could have taken, even if the decision to dismiss was harsh[110].

Though Parliament has not put as much emphasis on Convention 158 as it has on Conventions 87 and 98, which are included in the object of the Act as being promoted by the Act, Convention 158 should nonetheless be used to interpret unjustified dismissals in New Zealand, and to bolster employment protection.

D The Court of Appeal

Most industrial disputes are settled before they get to court, even less are appealed from the Employment Tribunal to the Employment Court and fewer still go on to the Court of Appeal. However, it is the highest of these courts that has the greatest impact on the interpretation of industrial relations legislation.

In 1987 Sir Ivor Richardson wrote an article about the role of the Court of Appeal in industrial relations. His Honour stated that[111]:

> All in all, my impression is that the Court of Appeal has had a distinctly limited influence on the interpretation and application of the industrial relations legislation. That may reflect a particularly cautious approach on the part of the court or, as some might say, an unwillingness to respond to social change in this area. It may even suggest that the specialist court arrangements are working particularly well. In any

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[109] *Peterson v BOT of Buller High School* from John Hughes, Paul Roth and Gordon Anderson, *Personal Grievances* (loose-leaf, Butterworths, Wellington) para 3.38 (last updated 30 June 2002)
[110] See *W & H Newspapers ltd v Oram*
[111] Sir Ivor Richardson, 'The Role of the Court in Industrial Relations', (1987) 12 NZJIR 113, 117

> event it seems consonant with the scheme and policy of the legislation that a court functioning as an appellate and review body on matters of law only should have a low, non-activist profile.

Since this article was written the Court of Appeal has taken on a much more active role in shaping the law of industrial relations in New Zealand. The approach of the Court of Appeal under the Industrial Relations Act was reasonably liberal, suggesting, even that the duties of procedural fairness required under the Act may also be imputed into employment contracts not covered by the Act, and that the benevolent interpretation taken by the Arbitration Court should not be derogated from. This approach to industrial legislation continued under the Labour Relations Act, as evidenced by the statement quoted above by Richardson J that a balancing act was necessary between the legitimate rights of an employee to employment security and the rights of an employer to organise their business as they so choose.

Initially under the Employment Contracts Act the Court continued to actively aid the development of the industrial legislation with decisions such as *Brighouse v Bilderbeck*, which gave employees the right to compensation, even if none were provided in their contract of employment. However, under the later decision of *Aoraki v McGavin* the Court of Appeal took a more restrictive approach, overturning part of *Brighouse* and more strictly following a contractual approach to the legislation. It has yet to be seen how the Court of Appeal will deal with the new employment legislation for conduct and capacity cases, though it has been seen that for redundancy cases the Court's approach has not changed from that taken under the Employment Contracts Act. In any event it is clear that the Court has not had a limited influence on in the interpretation and application of industrial legislation, but quite the opposite has taken place.

It has yet to be seen what to what extent the Court of Appeal will use s.216 (b) for the interpretation of unjustified dismissals. By looking at the object of the Act and the object of the personal grievance provisions a more generous interpretation should be given.

IX PARAMETERS OF AN UNJUSTIFIED DISMISSAL

A Requirements of a Dismissal

In order to have an unjustified dismissal, a dismissal must in fact have taken place. However, it is sometimes difficult to know whether or not a 'dismissal' has occurred. This is particularly the case when the employee has resigned from their position, and so prima facie were not dismissed from their employment. However, the courts have long recognised that a dismissal includes a constructive dismissal, and therefore an action for unjustified dismissal will not be denied simply because the employee resigned.

In 1985 the Court of Appeal held that constructive dismissals include, but are not limited to, cases where[112]:

a) An employer gives an employee a choice between resigning and being dismissed;

b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and/or

c) A breach of duty by the employer causes an employee to resign.

Where a constructive dismissal has taken place the employee's resignation will be treated as a dismissal by the employer. This will mean that an employee can make a personal grievance claim for unjustified dismissal having fulfilled the requirement of having been dismissed. The two concepts are sometimes placed together in a case so that the employee is claiming a constructive unjustified dismissal or an unjustified (constructive) dismissal.

However, just because an employee feels that they have been forced to resign, it will not necessarily follow that they have been constructively dismissed, or unjustifiable dismissed. For example where misconduct on the part of the employee leads to that employee being requested to transfer there may be no constructive

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[112] *Auckland etc Shop Employees IUOW v Woolworths (NZ) ltd* [1985] 2 NZLR 372, 374-5 per Cooke J

dismissal[113]. Or where the employer acts on an honest and reasonable belief that the person is not in an emotionally fit state to work there may be no constructive dismissal[114].

The Court of Appeal has held that an employee may not use the possible future conduct of an employer as causing their resignation[115]. Also, where there has been a genuine resignation not forced by the behaviour of the employer there will be no constructive dismissal.

What therefore has been held to constitute a constructive dismissal has been where the employer failed to provide a safe workplace[116], where there have been false accusations of misconduct made against the employee[117], or where there has been a unilateral variation of the employment contract by the employer[118]. There may be occasions where the dismissal of the employee was justified because that person was no longer fit to work, however if that unfitness to work can be attributed to a breach of the employer's duties, that dismissal will be unjustified[119].

B Procedural Fairness

Often what makes a dismissal unjustifiable is that it was not carried out in a procedurally fair manner. By 1982 in the case of *Hennessey* the Court of Appeal required that a dismissal must be carried out in a substantially and procedurally fair manner[120].

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[113] *Northern Clerical etc Workers IUOW v Riverslea Trading Society ltd* [1986] ACJ 586
[114] *Cole v Signwise ltd* 29/5/96, CEC13/96
[115] *Business Distributors Ltd v Patel* 13/8/01, CA220/00
[116] *Auckland etc Local Authorities Officers' IUOW v Auckland Electric Power Board* [1992] 2 ERNZ 87
[117] *Parlane v NZ Police* [1991] 3 ERNZ 721, *STAMS v Denhards Bakeries Co* (No1) [1991] 3 ERNZ 939
[118] *NZ Performance & Entertainment Workers Union v 93FM Independent Broadcasting Co Ltd* [1991] 1 ERNZ 774
[119] *Comissioner of Police v Cartwright* [2000] 2 ERNZ 106 (CA)
[120] *Auckland City Council v Hennessey* [1982] ACJ 699, 703 per Somers J (CA)

Phillip Bartlett and others identify the four elements required for procedural fairness[121]. The first requirement is warning. The employer must warn the employee of the conduct (unless it is serious misconduct warranting a summary dismissal) and require the employee to improve his or her conduct. At this point the employee should be made aware that the employer is considering dismissal if there is not sufficient improvement. The second requirement is an investigation. The employer must carry out an investigation of the relevant facts before terminating the employment of the employee. The findings from the investigations should be communicated to the employee. The third requirement is that reasons be given to the employee for the dismissal. This must be done prior to the employment being terminated. Finally the fourth requirement is the employer gives the employee the opportunity to be heard. The employee must be given a real opportunity to be heard and to offer an explanation for the conduct before the decision to dismiss is made.

Goddard CJ also set out the principles of procedural fairness in *NZ Food Processing Union v Unilever*[122].

The requirement for procedural fairness does not however mean that the Court should subject the employer's investigation to "minute or pedantic scrutiny", but that the Court should ensure that the employee has been treated reasonably and with fairness during the whole process leading up to and including the dismissal[123].

Although there are elements to procedural fairness, sometimes the Court will simply look at the facts as a whole to determine whether the dismissal was unjustifiable. As the Court of Appeal stated that when considering a case of unjustifiable dismissal[124]:

> "...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"

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[121] Phillip Bartlett and others *Brookers Employment Law* (Brookers, Wellington, 2000) para ER103.08 from *htpt://Jupiter.brookers.co.nz* (last accessed 09/11/2002)
[122] *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35
[123] *Air New Zealand Ltd v Sutherland* [1993] 2 ERNZ 10, 18

C Misconduct and Incapacity

It has therefore been established that whenever an employer dismisses an employee, he or she must do so in a procedurally fair manner. The Courts have set out that when the party who is claiming the unjustified dismissal has gone beyond the mere making of the claim so as to establish a prima facie case of unjustified dismissal, the onus then shifts to the employer to justify the dismissal[125]. It is then up to the Court to decide whether the dismissal was in fact justified. Although this must be done on a case-by-case basis there remains the need of the conduct or capacity to be of a sufficiently serious nature so as to justify the dismissal.

The employer does not need to prove beyond a reasonable doubt that the alleged misconduct was done by the employee, but that they based their decision on a reasonably founded belief, honestly held, that on a balance of probabilities the misconduct took place[126].

As Phillip Bartlett and others note, there can be a number of reasons for dismissing an employee ranging from serious offences warranting summary dismissal to less serious offences requiring warnings before the dismissal takes place[127]. It is not always clear what behaviour will justify a summary misconduct, as the Court of Appeal noted in *Northern Distribution Union v BP Oil NZ Ltd*[128]:

> "Definition [of the kind of conduct that will justify summary dismissal] is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship"

The following are different types of conduct and capacity with varying levels of seriousness, which are used to justify summary dismissal. Through these examples the parameters of unjustifiable dismissal can be seen.

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[124] *Nelson Air ltd v NZALPA* [1994] 2 ERNZ 665, 668 per Hardie Boys J (CA)
[125] *Airline Stewards etc IUW v Air New Zealand Ltd* [1990] 3NZLR 549, 552 (CA)
[126] *Airline Stewards etc IUW v Air New Zealand Ltd*, above, 553-556
[127] Phillip Bartlett and others *Brookers Employment Law* (Brookers, Wellington, 2000) para ER103.09 from *htpt://Jupiter.brookers.co.nz* (last accessed 09/11/2002)
[128] *Northern Distribution Union v BP Oil Ltd* [1992] 3 ERNZ 483, 487 per Hardie Boys J (CA)

1. Serious Misconduct

As the title suggests the misconduct of the employee must be serious in nature before a dismissal will be justified. An example of such misconduct is a theft; this will be dealt with under the following heading of 'dishonesty'. Other likely misconduct is an assault or violence directed against a co-worker or supervisor.

However not all assaults would justify a dismissal. The misconduct must be sufficient as to deeply impair or destroy the trust and confidence of the employment relationship. This would occur in more serious cases of assault, or where the employee has breached the employers' trust and confidence by leaking confidential information, documents or trade secrets. This would result in the destruction of the trust necessary for an employment relationship and would likely make summary dismissal justifiable.

The misconduct may also be a breach of the employee's work rules. Some examples of these are possession of drugs, intoxication at work, unauthorised possession of company property, or wilful destruction of company property. As Phillip Bartlett and others note, a breach of work rules will not necessarily establish substantive justification for a dismissal. This is because the test is whether the dismissal was unjustifiable, not whether there was a breach of work rules or some other contractual term[129].

Misconduct outside of work hours has also been held to justify a dismissal where it undermines the employer's confidence in the employee to such an extent as to destroy the trust necessary for the employment relationship, or where the employee's actions bring the employer into disrepute[130]. Examples of such misconduct are fraud[131], assault[132], vandalism[133], or a conviction for a criminal offence.

2. Dishonesty

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[129] Phillip Bartlett and others, above, para ER 103.11
[130] Phillip Bartlett and others, above, para ER 103.11
[131] *NZ Bank Officers IUOW v BNZ ltd* [1984] ACJ 641
[132] *Northern Hotel etc IUOW v Premier Liquor Retailers Ltd* [1990] 1 NZILR 357
[133] *Mussen v NZ Clerical Workers Union* [1991] 3 ERNZ 368

The act of dishonesty most likely to occur in the workplace is theft. If an employee steals from his or her employer it is likely to destroy the trust and confidence necessary to the employment relationship. However not all acts of theft will result in a justified dismissal. As his Honour Hardie Boys J pointed out in *BP Oil* it is a matter of degree. If, for example, the employee had taken a pen from their place of employment without authorisation and with the intention to keep it, while it may strictly speaking be theft, it is not of such a serious degree as to justify a dismissal.

For more trivial acts of dishonesty a warning may be appropriate, however if the employee decides that a summary dismissal is the appropriate reaction then the act of dishonesty must be of a sufficiently serious degree as to warrant summary dismissal. For example in *Maxwell v Taranaki Sawmills Ltd*[134] an employee was summarily dismissed after eating five biscuits from an open packet on a table in the staff cafeteria because it was in violation of the house rules. The Tribunal found that though the dismissal was procedurally fair it was an "extravagant overreaction" and was an unjustified dismissal[135].

As with acts of serious misconduct, serious allegations of theft might involve police investigations and criminal charges[136]. In this case for the purposes of procedural fairness the employer should not make his or her final decision until the investigations are complete. In *Ropiha v Weddel Crown Westfield Ltd*[137] it was held that a dismissal for alleged unauthorised possession of company property was unjustified.

3. Unsatisfactory Work Performance

If an employee's work performance is unsatisfactory they must be warned and given an opportunity to improve, with further training if necessary. If this process was not followed a dismissal would be likely to be unjustified because of lack of procedural fairness.

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[134] *Maxwell v Taranaki Sawmills Ltd* 2/4/01, WT24/01
[135] *Maxwell v Taranaki Sawmills Ltd*, above, per K Johnston (adjudicator)
[136] Phillip Bartlett and others *Brookers Employment Law* (Brookers, Wellington, 2000) para ER103.12 from *htpt://Jupiter.brookers.co.nz* (last accessed 09/11/2002)
[137] *Ropiha v Weddel Crown Westfield Ltd* [1989] 1 NZILR 668

The case of *Trotter v Telecom Corp of NZ Ltd*[138] sets out some of the inquiries that a court should make in determining whether a dismissal for unsatisfactory work performance can be justified. These are based around the fairness and reasonableness of the employer's process leading up to the dismissal and the opportunities given to the employee to improve.

4. Injury or Illness

While an employee who can no longer work because of injury or illness cannot have their employment terminated immediately simply because they are unable to work, an employer also does not need to hold their position open for them forever. The inquiry into whether a dismissal is justified will be what was fair and reasonable in all the circumstances. In *Motor Machinists Ltd v Craig* the Court summarised the position when an employee is dismissed for an injury or illness:[139]

> "...where illness or injury occurs which prevents the employee from returning to work, the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss, its action must be justified at the time ... That is, the employer must have substantive reasons for the dismissal, and must show that the procedure it followed was fair. This ensures the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated"

Where the illness or injury has resulted from a breach of the employer's duties a claim can be made for loss of earnings even where the dismissal was justified[140]. Illnesses that can render a person unfit for work include stress[141].

5. Other Reasons

Phillip Bartlett and others identify some other reasons that may give rise to a dismissal[142]. These include conflict of interest, personal and/or unprofessional

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[138] *Trotter v Telecom Corp of NZ Ltd* [1993] 2 ERNZ 659
[139] *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585, 592 per Goddard CJ
[140] *Commissioner of Police v Cartwright* [2000] 2 ERNZ 106 (CA)
[141] See *Commissioner of Police v Cartwright*, above, and also *Benge v A-G* [2000] 2 ERNZ 234
[142] Phillip Bartlett and others *Brookers Employment Law* (Brookers, Wellington, 2000) para ER103.15 from *htpt://Jupiter.brookers.co.nz* (last accessed 09/11/2002)

relationships, repeated absenteeism or abandonment of work. It is also possible to dismiss an employee justifiably if there is a serious incompatibility between the employee and the employer. For example in *Schlooz v NZ Apple and Pear Marketing Board*[143] the dismissal of an employee was held to be justified because she had created an inharmonious working environment to the extent that her supervisor was considering resignation.

In general what is needed is misconduct that seriously impairs or destroys the relationship of trust and confidence between the employer and the employee. As with all dismissals the test remains, at present to be, that it will be justified if it was open to fair and reasonable employer in all the circumstances.

D Redundancy

Under the Labour Relations Act 1987 redundancy was defined in section 184(5) as a situation where

> "a worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer"

No definition of redundancy is included in the Employment Contracts Act or the Employment Relations Act. It is therefore up to employers and employees to create an agreement about redundancy in the employment contract.

A redundancy is not an unjustified dismissal if it was done for genuine redundancy reasons[144]. There are two factors that the court will usually look at to determine whether the redundancy constituted an unjustifiable dismissal: the genuineness of the redundancy and whether the dismissal was carried out in a procedurally fair manner[145].

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[143] *Schlooz v NZ Apple and Pear Marketing Board* [1991] 3 ERNZ 728
[144] *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, 155 (CA)
[145] Phillip Bartlett and others, above, para 13.17

The form that a business decides to take is determined by the management, and the Court has held that it is not for the courts to substitute their business judgement for that of the employers[146]. However the courts are able to review the decisions that the employer makes and to decide whether or not the decision to make a redundancy was a genuine one. For example in *NZ Nurses Union v Air NZ Ltd*[147] the Employment Court decided that although Air New Zealand had established that there was a genuine commercial need to reduce costs, it had not established that there was a genuine commercial need to make redundancies. This does however appear to be the court substituting its own business views for that of the employer. On strict interpretation once a court has decided that there was a genuine commercial reason to reduce costs, they should not then decide how those cost cuts should come about.

Even if the redundancy is made for genuine reasons, it must be done in a procedurally fair manner. In the latest case under the Employment Relations Act on redundancy, *Coutts Cars v Baguley*, the Court of Appeal has continued along the lines of *Aoraki*. The Court has confirmed that the relationship between the employer and employee rests on the employment agreement, that the duty to consult is the same as required under *Aoraki* (desirable but not always necessary, such as in mass redundancies), the duty of good faith does not introduce any significantly different obligations than that which were implicit in the old legislation for redundancies and that compensation will only be paid if it was expressly provided for in the employment agreement[148]. Commentators have stated that the Court in effect turned the clock back to the principles it established in several cases under the ECA[149].

It is not clear why the Court of Appeal has continued to take this contractual approach under the Employment Relations Act, which has a markedly different object to that of the Employment Contracts Act. It does not seem to be in accord with the legislation.

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[146] *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW*, above, 155
[147] *NZ Nurses Union v Air NZ Ltd* [1992] 3 ERNZ 548
[148] *Coutts Cars ltd v Baguley* [2002] 2 NZLR 533, 545 per Gault J (CA)
[149] Phillip Bartlett and others, above, para 103.22A

X PROPOSALS FOR FUTURE CHANGES

A Proposed Test for Unjustified Dismissals

As previous Courts have stated, it is not preferable to lay down rigid rules as to the definition of a word such as 'unjustifiable', however, it is necessary to give clear guidance as to what the Court should have regard to in making their decision. As the Court of Appeal appear to be taking a strict contractual interpretation of the Employment Relations Act, it may be necessary for Parliament to offer more guidance as to what their intentions are in relation to personal grievances.

There should remain the requirement of conduct or capacity of the worker that is of a sufficient seriousness as to deeply impair or destroy the trust and confidence of the employment relationship. Anything less should not constitute a valid reason for dismissal.

In accordance with the Interpretation Act 1999 the Courts should ascertain the meaning of the enactment from its text and in the light of its purpose[150]. Given that the purpose of the legislation is to provide employment protection and to ensure that employee's do not have their employment terminated without a valid reason, there should be a move away from the test being whether it was open to the fair and reasonable employer to dismiss the employee to being "the opinion of the Court"[151]. The Courts should be the ultimate judges in deciding whether the decision to dismiss was justified. Otherwise, if the decision of *Oram* is followed, an employer will be allowed to dismiss employees because it was open for him or her to do so, even if the decision was a harsh one to make. This does not promote employment protection, which is the purpose of the personal grievance provisions, or promote the principles or objects of the Employment Relations Act, which are to encourage trust and confidence in employment relationships. It in fact frustrates the principles of the ERA. It is possible that the Court of Appeal will take a different approach to misconduct cases than it has to redundancy cases, however thisseems unlikely.

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[150] Interpretation Act 1999 section 5(1)

In 1980 Dr Mathieson referred to the Court's failure "to do what Parliament intended that it should do, namely construct and develop a body of case law that would enhance predictability and reduce the number of references actually reaching the Court"[152]. The vague test of a fair and reasonable employer has done little to aid the predictability of cases since 1980, however it would be very difficult to create a test that was sufficiently descriptive so as to be helpful, without making it too arbitrary. The most appropriate test is to look at all the circumstances of the case, because every case is different and all must turn on its own facts. However, in doing so the courts should have regard to the non-exhaustive list made by Williamson J in *Fletcher Construction*, which includes the conduct of the parties, the nature of the industry and its customs and practices, ILO Conventions and good industrial practice, which includes some consideration of social and moral attitudes[153].

The nature of the misconduct must be of a sufficient seriousness as to deeply impair or destroy the trust and confidence of the employment relationship. However the Courts should also decide whether the employer could have adopted a different approach, for example by demoting or moving the employee if the misconduct were not sufficiently serious. In a case where the misconduct was not sufficiently serious, or highlighted a fault within the companies own system the dismissal should be held to be unjustified. For example in the case of *Oram*, Mr Oram's failure to check the identity of the person in the photograph was not sufficient so as to deeply impair or destroy the employment relationship, it seemed more to be a mistake that highlighted the newspapers inadequate system for checking items before publishing them. The dismissal should have been held to have been unjustified, as the employer should have given him a warning, or moved him to less important news items. This is especially the case since Mr Oram had an otherwise unblemished work record.

In order to give effect to the purpose of the personal grievance provisions, namely employment protection, the Courts need to return to a benevolent interpretation of unjustified dismissals, so that the dismissal is only justified by a valid reason due to a sufficiently serious act of misconduct or incapacity of the employee.

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[151] *Wellington Road Transport Union v Fletcher Construction* [1983] ACJ 653, 666 per Williamson J
[152] Dr Mathieson "The lawyer, industrial conflict and the right to fire" [1980] NZLJ 216, 218
[153] *Wellington Road Transport Union v Fletcher Construction*, above, 666

B Other Legislative Change

The personal grievance procedures have been pushed out to include most employees. Presently workers have a relatively secure position under employment legislation. This however may not be maintained if the Court of Appeal continues to take a restrictive and conservative approach to employment relations, favouring the employer and the employment agreement.

An amendment should be enacted to abolish the ninety day rule, as that is one of the remaining legislative limitations on a workers ability to invoke the personal grievance procedures. It seems incongruous to have a six-year statute of limitations for tort actions, but only ninety days to raise a personal grievance for employment. Given that employment is of such great importance to most people, being their sole source of financial income, ninety days seems too short a period of time. It is unfair on employees to be so constricted in their ability to raise a personal grievance. Over the previous 23 years Parliament has steadily increased the availability of the personal grievance jurisdiction to cover more and more employees. The final step should be taken in giving employees their rights by increasing the time period that an employee must raise their grievance.

According to the current situation, if someone was to back into person A's car, they would have six years in which to bring their action, however if person A was dismissed, they would have only ninety days to raise a grievance with their employer. This does not take into account the intense feelings that are likely to be involved with a dismissal, especially if that person believes that the dismissal was unjustified. It puts too heavy a burden on the dismissed employee who must deal not only with a dismissal and trying to find another job and manage the financial side of life, but in addition must also raise the grievance with the person who has just dismissed them.

Although it could be argued that because employment is so important and because reinstatement is one of the key remedies for an unjustified dismissal then it is only fair to both parties for the issue to be raised and resolved quickly. Also it should be noted that the employee only has to raise the issue with their employer within

ninety days and they then have three years to bring the actual complaint. It is also necessary to have time limitations on these matters so that issues are dealt with quickly and resolved without dragging on for years on end. Therefore, if an employee wants to be reinstated they should perhaps be required to raise their grievance within ninety days, but the time period should be longer for reimbursement or compensation.

Though there is not scope in this paper for a full discussion on redundancy, there needs to be reform in this area. Redundancies are very different to other dismissals because there is no conduct or capacity to link the dismissal to the employee. By definition a redundancy removes the position not the person. For this reason it does not fit, therefore, to have redundancy as part of unjustified dismissals. Redundancies should have an Act governing the requirements of a redundancy, the employer's duties and what compensation an employee should be entitled to.

XI CONCLUSION

The 'unjustified' principle in employment law has evolved from its roots in the Common Law action for wrongful dismissal to the substantial and developed area of statute law and case law now available to dismissed employees.

The Industrial Relations Act was a substantial change in labour law for workers, granting rights not previously available. The incorporation of unjustified dismissals meant that workers were able to take a grievance for more than compensation for lack of the contractual or reasonable notice period, but for acknowledgement that the employer was not justified in dismissing the worker and that they were therefore entitled to reimbursement, reinstatement or compensation. However the worker was nonetheless restricted by the necessity to be covered by an award or agreement and be a union member. There was then the further restriction that only the union representative could bring the personal grievance, although there was also a right of appeal against the union's decision.

The government at the time was clearly concerned with the rate of strikes and the disruptions they were causing. They gave no indication, however, as to why they

backtracked on their previous comments on not wanting to restrict an employer's ability to hire and fire. Though, since the 1970 legislation changed the position of unjustly dismissed employees so little, it was necessary, in order to curtail the number of strikes, to introduce measures that could do just that. It appears from the Parliamentary debates that little consideration was given to the introduction of the word 'unjustified' in place of 'wrongful'

These restrictions were lessened with the introduction of the LRA which substantially extended the provisions of the action, not only by abolishing the need to be covered by an award or agreement but also by providing a detailed and comprehensive legislative framework for the unjustified dismissal and unjustifiable action provisions. Though the worker remained limited by the need for union membership and for the union representative to bring the grievance. The provisions were given flesh under the LRA and rather than being almost an afterthought, they constitute a main part of the labour legislation.

However, during compulsory union membership the requirement of membership was not a burden, as all workers had to belong to a union regardless of whether or not they had a personal grievance claim.

It was only with the introduction of the Employment Contracts Act, with its emphasis on the individual and the new right economic theory that employees were able to bring their grievance themselves. However, the new Act was harsh in its own ways, restricting the grievance by needing it to be raised within ninety days of the grievance occurring. This shows the influence of the new right and the pro employer stance that the Act takes. Though the employee finally had the personal grievance procedures vested in them, the limitation on that right is a great one.

While the ERA has aimed to extend the personal grievance provisions to people actually working as employees through the new definition of an 'employee' and the limitation on fixed term contracts, there still remains the restriction of the ninety day rule. With the current Court of Appeal, the legislation may not have gone far enough to satisfactorily protect people's employment, as the restrictive approach

of the Court of Appeal under the ECA has continued under the ERA, even though the two pieces of legislation are so clearly philosophically distinct.

The current test for unjustified dismissals must be taken from the latest Court of Appeal decision, which stated that the question was whether the decision to dismiss was one that a fair and reasonable employer could have made, even if the decision was harsh.

However, this test should be changed under the Employment Relations Act with its object to promote mutual trust and confidence in all aspects of the employment relationship. The current test fails to comply with this object as it allows harsh dismissals so long as they were within the range of possible decisions of a fair and reasonable employer. In order to promote the object of the Act, and the object of the personal grievance provisions, there needs to be a greater emphasis on employment protection and on the impact of the decision on the employee. For these reasons the test must be a neutral, objective standard where the Court relies on their own opinion as to whether the dismissal could be held to be justifiable. In doing so the Court should have regard to the conduct of both parties and balance the conflicting rights of the employee to employment security and the employer to organise their business. If the reasonable employer is used as the benchmark, it pushes the test too far in favour of the employer. A neutral standard is fair to both sides by favouring neither.

The underlying principle must be that a person's employment can only be terminated for a valid reason connected with that person's misconduct or incapacity that is of a sufficiently serious nature. To accept a lesser standard would undermine employment protection in New Zealand.

In order to promote employment protection and effective remedies for workers whose employment is unjustifiably terminated the ninety day limitation must be greatly extended. In its current state it puts too great a restriction on an employee in gaining redress for an unjustified dismissal.

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