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## A Comparative Analysis of Unfair Dismissal Law with Particular Reference to the Law as it Pertains to the South African Worker

Haydn T. Hillestad  
*University of Georgia School of Law*

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A COMPARATIVE ANALYSIS OF UNFAIR DISMISSAL LAW  
WITH PARTICULAR REFERENCE TO THE LAW AS IT PERTAINS  
TO THE SOUTH AFRICAN WORKER

by

HAYDN TRYGVE HILLESTAD

A Thesis Submitted to the Graduate Faculty  
of the University of Georgia in Partial Fulfillment  
of the  
Requirements for the Degree  
MASTER OF LAWS

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1988

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HAYDN TRYGVE HILLESTAD

Approved:

*Alan Beard* Date: 3/11/88  
Major Professor

*Cedric W. ...* Date: 3/9/88  
Chairman, Reading Committee

Approved:

*John Dowling*  
Graduate Dean

3-14-88  
Date

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CHAPTER I  
INTRODUCTION

The law pertaining to the dismissal of a worker from his employment has been the object of intense scrutiny, both on a national and international level, in recent years. While a number of countries have made significant strides in the area of job protection, standards worldwide are by no means uniform. It has been estimated that in the United States alone, there are at least fifty million private sector employees who are, for the most part, unprotected against unjust discharge.<sup>1</sup> It is projected by some that, of these, between fifty thousand and two hundred thousand are unfairly terminated each year.<sup>2</sup> Others would put the figure "at least in the neighborhood of 200,000."<sup>3</sup> It need hardly be said that the phenomenon is not unique to the United States.

This paper will begin with an investigation of the activity of the supra-national International Labour Organization (ILO) in this area of the law. Using this as a yardstick, a comparative analysis of the unfair dismissal laws of the United States and some foreign countries (mainly Western European) will be undertaken. Finally, the issue will be addressed in the South African context. An assessment will be made of the relative quality of the protection afforded workers in South Africa and, using

conclusions reached from the comparative study, the validity of calls for a general unfair dismissal statute in the country will be considered.

## NOTES

## CHAPTER I

1. Stieber, Introduction, Conference on Protecting Unorganized Employees Against Unjust Discharge, 1 (1983).
2. Stieber, The Case for Protection of Unorganized Employees Against Unfair Discharge, 32 Proc. Ann. Meeting Indus. Rel. Res. Ass'n., 160-161 (1980).
3. Remarks of Prof. Clyde Summers, Employment At Will in the 1980's: A Look Ahead - The Experts Predict, 224 Daily Lab. Rep. 25 (Nov. 19, 1982).



## CHAPTER II

### THE CONCEPT OF UNFAIR DISMISSAL LAW

"The law of unfair dismissal originated in the defects of the common law of wrongful dismissal."<sup>1</sup> In common law legal systems, as in most others, the employment relationship is, in the absence of statutory regulation, governed strictly by the law of contract. Employer and employee are viewed as contractors on an equal footing, both fully entitled (except in the case of definite duration contracts) to terminate their relationship at any time with virtual impunity.<sup>2</sup> No reasons are required of the terminating employer, let alone any form of justification. Nor are any rights accorded the terminated employee as far as ability to challenge the employer's motive or motivation for discharge is concerned. No cognizance need be taken of the effect the wage earner's termination would have on his dependents, because of the irrelevance thereof to the strict contractual nature of the relationship. The concept of unfair dismissal law was the obvious consequence of this harsh and often inequitable set-up. The idea was to provide employees with protection over and above that resulting from the contract of employment per se, a protection against termination which was arbitrary and without just cause.

## NOTES

## CHAPTER II

1. Cassim, Unfair Dismissal, 5 South African I.L.J. (1984) 275, 277.

2. In the United States, common law requires no notice period whatsoever. In countries such as the United Kingdom, Canada and South Africa, unless the dismissal is a summary dismissal, a notice period is required. In South Africa, a reasonable notice is required in the absence of a relevant custom or agreement, e.g., a month's notice when the worker is paid monthly. See *Tiopazi v. Bulawayo Municipality*, 1923 A.D. 317 (S.A.L.R.).

## CHAPTER III

### AN EXAMINATION OF ILO ACTIVITY IN THIS AREA

#### A. The 1950 Resolution

As alluded to earlier, very few countries had attempted to control the often unabridged discretion accorded managerial employees to terminate a worker. The Mexican Constitution of 1917 contained probably the first legal restrictions on an employer's right to dismiss a worker,<sup>1</sup> for it provided that an employer "who dismisses a worker without just cause...shall be obliged, at the election of the worker, to carry out the contract or compensate the worker in an amount of three month's wages."<sup>2</sup> Legislation in the USSR in 1922, in Mexico in 1931 and Cuba in 1934 similarly restricted the ability to discharge a worker when based on no valid reason.<sup>3</sup>

In 1950 the ILO, without any actual attempt to substantively address the problem, tried to begin the process by noting in the form of a resolution a lack of international standards on the termination of employment.<sup>4</sup> It was this seemingly insignificant resolution that paved the way for the far more important Recommendation 119 of 1963.

#### B. Recommendation 119 of 1963

Recommendation 119, Termination of Employment at the Initiative of the Employer,<sup>5</sup> provided the major impetus for

many legal systems (particularly in Europe) in their unfair dismissal legislation. Article 2(1) provided that an employee should not be subject to dismissal "unless there is a valid reason connected with the capacity or conduct of the worker, or based on the operational requirements of the undertaking, establishment, or service." Requiring an objectively valid reason for the termination of a worker was a "landmark substantive innovation"<sup>6</sup> in the industrial relations law of virtually all the countries implementing Recommendation 119.

The Recommendation also set some basic standards in regard to a worker's ability to challenge his termination. Article 4 provided that "[a] worker who feels that his employment has been unjustifiably terminated should be entitled...to appeal, within a reasonable time, against that termination...to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee, or a similar body." Furthermore, the Recommendation dealt with the remedies the above mentioned bodies should provide,<sup>7</sup> and imposed the necessary limitations on these bodies' power to interfere with the actual size of the workforce.<sup>8</sup>

Other matters considered in the Recommendation include the issues of notice periods, severance allowance and other forms of relevant income protection.<sup>9</sup> During the following two decades, many states enacted legislation in accordance with

the spirit of Recommendation 119 and provided protection against unjustified dismissal.<sup>10</sup>

### C. The 1982 Instruments

In the early 1970's, the feeling among a number of representatives of the ILO was that still more should be done in the area of job security. In 1974, it was proposed by the Conference Committee on the Application of Conventions and Recommendations that this matter should once again come before the ILO. By 1979 the ILO's governing body designated Recommendation 119 as an instrument deserving priority; within two years, the General Conference had adopted the first draft of the new Instruments.

Thus, in June 1982 the ILO approved Convention 158, Termination of Employment at the Initiative of the Employer.<sup>11</sup> One hundred and twenty-six countries voted on whether to adopt the Convention. Only nine representatives voted against adoption.<sup>12</sup> In eight of the nine instances, it was only the employers' representative that voted against adoption. The United States was the only country whose government representative also voted against adoption.

The Convention comprised three parts. Parts I and II related to issues involved in cases of individual discharge. Part III, a source of much discontent for a number of countries,<sup>13</sup> concerned termination of employment such as workforce reductions imposed for economic or technological reasons, or for reasons of corporate structure.

The guarantee of job security contained in Article 4 is the cornerstone of the Convention. The Article is fundamentally a reiteration of Article 2(1) of Recommendation 119, which provided for dismissal only when related to the capacity of the worker or when based on the operational requirements of the undertaking. Article 5 acts to further define Article 4 and lists several reasons ratifying countries should not accept as valid bases for termination, including factors such as union membership or activity, seeking office or acting as a worker's representative, filing complaints against the employer for breach of law or regulations, the worker's race, sex, color, or religion, and absence from work due to maternity leave. Article 6 touches on the issue of absence from one's place of employment due to temporary illness and provides that such "shall not constitute a valid reason for dismissal." The Article leaves it to the various states to determine by their national law and practice on the specific of this particular area of protection.

The scope of the protection is restricted to discharge, whether affecting individuals or groups of workers, and does not extend to activities such as promotion, hiring, etc.<sup>14</sup>

As for the extent of coverage, Article 2 states: "This Convention applies to all branches of economic activity and to all employed persons."<sup>15</sup> Article 2(2) permits a number of categories of workers to be excluded from coverage, including workers under limited duration contracts,<sup>16</sup> workers serving a

probation period,<sup>17</sup> and casual temporary workers.<sup>18</sup> The Convention also makes provision for the exclusion of workers with equal or greater protection from another source<sup>19</sup> and workers in enterprises where the size or nature of the undertaking mitigates against coverage.<sup>20</sup>

Articles 7 and 9 concern procedural rights to be accorded an employee. The employee due to be dismissed for alleged misconduct should be given an opportunity to respond to allegations made against him "unless the employer cannot reasonably be expected to provide this opportunity";<sup>21</sup> workers who believe their termination was arbitrary and unfair should be able to challenge by appealing to an "impartial body."<sup>22</sup> The worker is required to exercise his right to appeal "within a reasonable period of time after termination."<sup>23</sup>

Article 9 deals with the burden of proof and provides that the employee should never have to bear the onus alone. It is left up to the ratifying countries to either place the burden on the employer or to distribute it evenly. Part II pertaining to individual dismissals concludes with Article 11 providing that workers should be entitled to a period of notice or payment in lieu thereof unless termination is the result of serious misconduct. Article 12 provides for a severance allowance and other forms of income protection.

In the same year, Recommendation 166 concerning Termination of Employment at the Initiative of the Employer<sup>24</sup> was adopted. It was designed to appease various nations who felt

that some proposals, although similar in nature to those in the Convention, were too radical to be incorporated into the Convention, which is intended to directly influence legislation in ratifying countries. Throughout the course of this work, reference will be made to the Convention, with occasional regard to the Recommendation.

#### D. The Influence of ILO Activity

Recommendations of the ILO are in the nature of guidelines.<sup>25</sup> Conventions themselves cannot in the final analysis be enforced against member nations unlike, for example, EEC directives as between member states.<sup>26</sup> However, it is contended by scholars that the Recommendations and Conventions are not high level goals to aim at, but rather assertions of acceptable and practically attainable standards.<sup>27</sup> It is argued that the ILO standards on unfair dismissal involve merely the application of basic notions of justice to protect workers against arbitrary termination and that consequently their intent cannot be said to hinge upon the state of economic development of the particular country involved.<sup>28</sup>

Most Western European countries seem to regard their ILO obligations seriously and have reacted positively to ILO activity in the unfair dismissal arena, as will be seen later in the work. The United States has been one of the countries most loathe to comply with a great deal of ILO suggestions. Nowhere is this more evident than in the field of unfair dismissal law. This hesitancy is not merely the product of



stubbornness on the part of the United States, but largely the result of the legal history surrounding the employment contract in the country.

## NOTES

## CHAPTER III

1. Int'l Labour Office, World Labour Report, Vol. 2, 78 (1985).
2. Art. 12.
3. Int'l Labour Office, supra note 1, at 78.
4. See ILO Record of Proceedings, 33rd Session (1950), 579.
5. See Termination of Employment, International Labour Conference, 48th Session (1963), Recommendation No. 119.
6. Bellace, Employment Protection in the EEC, 20 Stanford J. Int'l. Law 413 at 444 (1984).
7. Art. 6.
8. Art. 5(1).
9. Art. 9.
10. For a report on the impact of Recommendation 119, see Termination of Employment: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Int'l Labour Organization, 59th Session (1974): Report III (Part 4B).
11. Termination of Employment at the Initiative of the Employer, ILO, 67th Session (1981): Report VIII (1) 1-3.
12. Brazil, Chile, Fiji, Grenada, Swaziland, United States and Switzerland had their employer representatives vote against adoption. See Larson & Barowsky, Unjust Dismissal, s. 2.01, footnote 3, (1986). For a full discussion of the 1982 Convention, see Bellace A Right of Fair Dismissal: Enforcing a Statutory Guarantee, 16 U. Mich. J. L. Ref. 207 (1983).
13. See Bellace, supra note 12, at 211, footnote 21.
14. See Bellace, supra note 6, at 444.
15. Art. 2(1).
16. Art. 2(2)(a).
17. Art. 2(2)(b).

18. Art. 2(2)(c).

19. Art. 2(4).

20. Art. 2(5).

21. Art. 7.

22. Art. 8(1).

23. Art. 8(3).

24. Recommendation concerning Termination of Employment at the Initiative of the Employer, ILO, 67th Session (1981): Report VIII (1) 1-3.

25. Cassim, supra Chapter II, note 1, at 278.

26. Bellace, supra note 6, at 445.

27. See Bellace, supra note 12.

28. See Yemin, Job Security: Influence of ILO Standards and Recent Trends, 113 Int'l Labour Review, 17 (1976). Yemin refers to over forty countries at differing stages of development, where Recommendation 119 could be said to have had a positive effect.

## CHAPTER IV

### UNFAIR DISMISSAL LAW IN THE UNITED STATES

#### A. The Development of the At Will Rule

In the United States the general rule as regards the employment relationship is that either party can terminate the association "for good cause, for no cause, or even for cause morally wrong."<sup>1</sup> This is commonly called the at will rule.

To fully understand the American rule, an investigation of the traditional English rule is appropriate. Originally it was presumed that employment contracts of indefinite length were to be of a year's duration, unless there was evidence to the contrary. Although the idea originated from the exigencies of the agricultural work-year, it was ultimately not limited to such. Even so, factors such as trade custom, notice period, and frequency of payment periods could alter the presumption. Even as late as 1823, it was criminal in England for an employee to prematurely terminate his employment contract.<sup>2</sup>

The Industrial Revolution changed the status of the employment association from a quasi-family relationship to a more strictly economic one where the duration of service depended on the dictates of product demand.<sup>3</sup> The "[m]aximization of wealth required that producers be free to

contract for labor on the value their product could command in the market place."<sup>4</sup>

In the United States there was a great lack of uniformity and no reported cases of the application of the English rule.<sup>5</sup> A fair number of courts used the presumption that the time period fixed for wage payment was the supposed duration of the contract. Most courts, however, did not use the presumption and merely took into consideration all the relevant circumstances, such as custom, prior dealings, etc.<sup>6</sup> The idea was prevalent that the duration of the contract "depended on the understanding and intent of the parties, which could be ascertained only by inference from their written and oral negotiations, the wages of the business, the situation of the parties, the nature of the employment and all the circumstances of the case."<sup>7</sup>

In 1877, in a Treatise on the law of master and servant, Horace G. Wood stated: "With us, the rule is inflexible that a general or indefinite hiring is "prima facie" a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."<sup>8</sup> This was obviously a major departure from the above mentioned case law of the day, yet Wood's "misstatement" was latched onto by the courts for a number of reasons.

Some cases cited the unsettled and widely contrary state of law as one of the reasons Wood's rule was generally adopted.<sup>9</sup> Other scholars claimed the exigencies of laissez-faire economic theory made an adoption of Wood's rule

necessary.<sup>10</sup> The idea was that both parties should contract on equal terms and that the contract should reflect nothing more than their mutually agreed upon terms. Some courts claimed the rule should be accepted on the basis that it benefited the employees every bit as much as it did the employers in that workers could claim their pro rata wage for work done, without having to labor the duration of the contract as it was determined by the courts.<sup>11</sup> Yet other scholars gave further reasons. Feinman says the rule was an "adjunct to the development of advanced capitalism in America" and necessary to endow industrial owners with absolute control of their businesses.<sup>12</sup> Very few jurists gave Wood's rule credit for stemming from valid abstract legal reasoning but rather asserted "...the alacrity with which the courts accepted Wood's Rule clearly had more to do with the imperatives of economic history than the persuasiveness of Wood's scholarship."<sup>13</sup>

In a sense, the at will rule was elevated to the status of a property right with constitutional protection in the cases of Adair v. United States<sup>14</sup> and Coppage v. Kansas.<sup>15</sup> Here the court thwarted an attempted infringement of the at will rule by invalidating a state legislative attempt to prohibit discharge for union membership. The attempt was proscribed as violative of due process in that it was an interference with the "right of a purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."<sup>16</sup>

## 1. The Extent of the At Will Rule Today

While the rigidity of Adair and Coppage has been somewhat softened today, South Dakota is the only state within the United States to enact a law significantly restricting the at will doctrine per se. A person on an annual salary is presumed to have been hired for a year in South Dakota. To be legally terminated within that period, the employer must be able to show "habitual neglect or continued incapacity to perform or willful breach of duty by the employee."<sup>17</sup>

The result is that today in the United States, besides statutory discrimination law and some other special purpose statutes, there is no general statute which alters the basic rule. Throughout the country, virtually all non-union private sector employees are at will workers, often subject to every whim of the employer.<sup>18</sup> The at will rule is obviously, by its very nature, a concept diametrically opposed to that contained in Article 4 of ILO Convention 158 or 1982. It was this patent contradiction in dismissal law ideology that ensured that the United States was the only country whose government representative voted against the above mentioned Convention.

### B. The Development of Exceptions

While the at will doctrine was and largely still is the general rule, there has at least been some statutory and judicial behavior which has brought the United States more in line with ILO standards. The erosion of the strict application of the at will rule began with defined groups of

employees. These groups comprised people such as civil servants and employees represented by trade unions. Historically discriminated against classes were also among the first to receive general protection in some areas of the employment relationship.

In 1912, federal employees were granted protection by the Lloyd-La Follette Act in that "cause" was required for their dismissal.<sup>19</sup> In time this basic protection was extended to all civil servants, whether on the federal, state or local level.

Employees represented by trade unions were given early protection too. In 1937, in the case of NLRB v. Jones & Laughlin Steel Corp.,<sup>20</sup> the Supreme Court upheld the National Labor Relations Act. This ultimately cut into the at will rule in two ways. First, employees could not be fired for union activity and, second, the Act protected the right of employees to engage in collective bargaining that would limit managerial discretion in terminating employees. In its statutory protection of unionized workers, the United States is in compliance with Article 5 of the Convention which lists "union membership or participation in union activities" as an invalid reason for termination.

However, even to this day, it is only these two above mentioned groups that have general "for cause" protection against unjust dismissal which would perhaps comply with ILO standards. While it is probably true that the "[d]evelopment of labor law around collective bargaining relieved social and



political pressure to change the law of individual employment relationships,"<sup>21</sup> it is equally true that this development exerted a large measure of influence on judges when it came to their willingness to accept the validity of lawyers attempts to convince them that there were necessary common law exceptions to the at will rule.<sup>22</sup> And so, while this work will generally not be looking at employment protection of public sector workers and those covered by collective bargaining agreements in the United States, it is important to realize the role these two groups played in the erosion of the unbending application of the at will rule. The statutes granting workers protection against discriminatory firings will be analyzed later, but these statutes too were obviously instrumental in making some judges more amenable to recognizing "judicial exceptions" to the at will rule. While it is generally true that the primary source of exceptions was statutory law, there were some early cases that permitted recovery for wrongful dismissal by allowing the plaintiff to prove facts that today would suffice for recovery in more liberal jurisdictions which recognize implied in fact contracts for employment tenure.<sup>23</sup> It is pertinent at this stage, therefore, to begin an inquiry in the present day judicial exceptions to the at will rule in the United States and to discover the role they have played in diminishing the problem of unfair dismissal in the country. By so doing, it can be determined to what extent, if at all, these decisions

have brought the United States more in line with ILO standards.

1. Judicial Exceptions

a. In contract.

A historical corollary of the at will rule was the proposition that an employer's promise of "permanent" or "life-long" employment was unenforceable because of either a lack of mutuality of obligation or for lack of independent consideration in return for such promise. This notion of unenforceability would also pertain to instances where the employer promised to terminate for cause only.

For such a promise to be enforceable, the employee would have to provide consideration beyond the renderence of his services, because these were deemed to be only "quid pro quo" for his wages or salary. These objections were until recently consistently applied, except where the contract was of definite and stipulated duration. Where "lifetime" or "permanent" contracts were involved, the courts construed this to mean merely a steady job as opposed to temporary employment. This stringent application of this rule has come under a lot of criticism.

Critics argue that the requirement of independent consideration is contrary to the now accepted rule that one consideration may support several promises<sup>24</sup> or as Corbin puts it: "A single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises."<sup>25</sup> One writer sees the

rule traditionally applied by the courts as the result of confusion of certain aspects of the parole evidence rule and the law of contract.<sup>26</sup>

Courts that today still strictly apply the independent consideration rule are at odds as to what exactly constitutes independent consideration. Some would say that it is sufficient that the employee gave up another job,<sup>27</sup> or relocated,<sup>28</sup> while others would directly disagree.<sup>29</sup>

A number of jurisdictions have now rejected the rigid independent consideration rule<sup>30</sup> and have asserted that the consideration and mutuality issues are, as in all other contracts, subsumed under the heading of contract construction and are not rules of substance.<sup>31</sup> Other courts still refuse to enforce employer promises of job security unless some additional consideration, above and beyond service, has been given. On occasion however, a fairly wide interpretation is given to the requirement of independent consideration.<sup>32</sup>

The requirement was, and in many circumstances still is, a hindrance when it comes to satisfying certain jurisdictions that there has been a valid express or implied in fact contractual exception to the at will rule.<sup>33</sup>

i. Express or Implied in Fact Contractual Exceptions

Strictly speaking, it is incorrect to speak of an express or implied in fact contract which provides some form of job security as being an "exception" to the at will rule.

Rather, what is involved here is an attempt on the part of the employer to show that the at will rule was not operative

at all; that the employer had given up. This "exception" to the at will rule is probably the least controversial judicial exception and is fairly uniformly applied in states that recognize judicial exceptions at all.

Such employment contracts limiting the power to terminate at will can be the result either of direct expressions of such a term or of terms implied by words, conduct or in some other way.

#### Oral Representations.

Occasionally, a direct oral promise can be shown to have curtailed an employer's right to fire at will. In the case of Terrio v. Millnocket Community Hospital<sup>34</sup> there was an oral statement by the agent of the employer that the plaintiff was secure in her job "for the rest of her life."<sup>35</sup> The court relied on this statement and declared that "her long service in a position of substantial authority...provided the critical evidentiary support for her contract claim."<sup>36</sup> The court accordingly declared that she could not be terminated without just cause.

Usually, however, plaintiffs can rarely rely on such direct assurances of job security and are forced to convince the court that the employer's words contained the implication of job security.

One of the leading cases in this regard is the case of Touissant v. Blue Cross & Blue Shield of Michigan.<sup>37</sup> In this case, the plaintiff employee alleged that he was told that he would be with the company "as long as I did my job,"<sup>38</sup> but

admitted that no mention had been made of "just cause" or of the need for "satisfactory" work. The Michigan Supreme Court instructed the jury that it could conclude that the employer's words meant that "the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause."<sup>39</sup> The court handled the consideration issue by stating that "the employee's action or forbearance in reliance upon the employer's promise constitutes sufficient consideration to make the promise legally binding."<sup>40</sup> The court had found an implied assurance of job security sufficient to be considered part of the employment contract itself.

Similarly, in the case of Robago-Alvarez v. Dart Industries, Inc.,<sup>41</sup> an implied promise of job security was found when the plaintiff testified as to the lengths the company had gone to make her leave her former place of employment and to the fact that she was assured her job at the company would be "permanent." She alleged that she was told that Dart Industries did not fire arbitrarily, but only for "just cause."<sup>42</sup> The California Court of Appeals concluded that these statements were sufficient to remove Robago-Alvarez from the at will class of employees.

While oral assurances of job security are fairly commonly accepted by some courts as removing the power to fire at will, problems of proof and recollection remain, particularly if the employee has been employed for a long time. More and more lately, employees are turning to written

materials such as personnel handbooks and to company practice to convince courts that their employment may be terminated only with cause.

#### Non-Verbal Representations.

In 1972 in the case of Perry v. Sinderman,<sup>43</sup> the court found a college professor could not be terminated where the employee handbook to which he was subject gave a different impression. This was probably one of the first "personnel handbook" decisions and sparked off a very controversial means of granting relief to employees terminated without cause.

Traditionally, handbooks had never been considered part of the employment contract because of the power of the employer to unilaterally amend its contents and because the employee hardly ever gave independent consideration for the terms contained therein.<sup>44</sup> Indeed, writers have criticized certain courts for finding agreements to limit the at will rule "under circumstances that would probably garner a first-year contracts student an F for saying that a contract was formed at all."<sup>45</sup>

Some cases do provide a fairly concrete basis for finding a contractual obligation. For example, in Weiner v. McGraw-Hill, Inc.,<sup>46</sup> the employment application stated specifically that the employment would be subject to the terms of the company handbook. Weiner, a high level employee, had been told to follow the handbook guidelines when he himself terminated employees. The court here had no hesitation in finding

Weiner's discharge contrary to the terms of the manual and a reason for recourse.

The other extreme is exemplified by the case of Novosel v. Sears, Roebuck & Co.<sup>47</sup> Here the application form specifically stated that termination could take place at any time and for any reason. The court held the handbook did not create any contractual obligation.

Most attempted uses of the manual provisions are not that clear cut however. The Touissant case<sup>48</sup> is again important in this regard. Here, on the basis independent from the aforementioned oral assurances, the court also relied upon the personnel policy manual to find a contractual agreement not to terminate without cause. The manual stated that it was "policy" to release an employee "for just cause only."<sup>49</sup> The court found that since the company had adopted such a policy and had established certain procedures by which to effectuate it, and since it had made known the policy to its employees, it had committed itself to just cause discharge with the proper procedures.<sup>50</sup>

The court defended its holding by stating that "[i]f there is in effect a policy to dismiss for just cause only, the employer may not depart from that policy on whim, simply because he was under no obligation to institute the policy in the first place."<sup>51</sup>

The court even went so far as to say, in dicta, that employer statements of policy in the form of guidelines and manuals can give rise to contractual rights of employee's

without evidence of mutual agreement on the terms thereof, and even if the employee learns of the guidelines after the hiring.<sup>52</sup>

The case of Pine River State Bank v. Mettille<sup>53</sup> also accepted the binding nature of certain representations in personnel handbooks, but was careful to distinguish between statements of general policy and the offer of specific rights. It concluded that vague and general policy statements were not specific enough to form a legally binding offer; nevertheless, specific terms could be construed to which acceptance was binding.<sup>54</sup>

Even where an employee has been fired for just cause, his termination may be held to be violative of the contractual undertaking if the procedure outlined in the manual has not been followed. In Yartzoff v. Democratic-Herald Publishing Co.<sup>55</sup> the handbook promised progressive discipline "in most cases." The court found that if the employee could prove his contentions, he could make out a case against the employer.

Occasionally the courts are prepared to go beyond the policy expressed in manuals and to accept alleged past practice as a sufficient indicium of company policy. In the case Hepp v. Lockheed-California Co.,<sup>56</sup> the plaintiff, in a non-union company, claimed it was the practice of the employer to give laid-off workers preference when it came to rehiring. After Hepp claimed he had been laid off without preference, the California Appeals Court said that if he could prove the existence of such a policy; that he knew of



such practice and that he had relied on such practice to his detriment, he could enforce his claim as a matter of contract.<sup>57</sup>

The case of Pugh v. See's Candies, Inc.<sup>58</sup> went so far as to say that besides oral and non-verbal assurances of job security, besides past practice, factors such as longevity of service could be considered in determining whether there exists an implied in fact promise for continued employment. The case is significant in that it considered an extraneous factor such as longevity of service as contributing to the establishment of an implied in fact contract, stating "the employer's conduct gave rise to an implied promise that it would not act arbitrarily in dealing with its employees. Usually longevity of service would be a factor in assessing whether or not the implied in law covenant of good faith had been breached.

We have thus seen how verbal and non-verbal expressions can impliedly become part of the employment contract and, in many situations, limit the employer's power to fire at will. The courts have, by recognizing such an exception, obviously limited employer discretion to some extent and "ipso facto" brought the United States somewhat more in line with Article 4 of the ILO Convention. What is essentially being witnessed, however, is an extensive judicial effort to discover isolated instances where the employer's power to fire at will could be said to have been contractually curtailed. Even the court's efforts in this regard have not

been without criticism. Despite this theory being the object of much criticism from both employers and some legal scholars, it presents less of a threat to the employers than the next two theories which will be considered. Here, the writer Perrit states,<sup>59</sup> the employer himself planted the seeds of liability and ultimately has only himself to blame. Employee job security under this theory is the result of reliance on the positive representations, however made, of the employer. However, liability does not always spring from so controllable a source. Often the law itself asserts that certain terms are necessarily part of the employment contract, whether specifically agreed to or not.

ii. Implied In Law ie. Covenant of Good Faith and Fair Dealing

Section 205 of the Contracts Restatements states that: "Every contract imposes on each party a duty of good faith and fair dealing in its performance and in its enforcement."<sup>60</sup> The Uniform Commercial Code also stipulates that the covenant be part of every commercial contract<sup>61</sup> and the principle has been expounded in case law for many years.<sup>62</sup>

While the covenant had long been applied to insurance contracts, its applicability to employment contracts was a source of difficulty in light of the at will rule. The extension of the covenant to express employment contracts of definite duration<sup>63</sup> or to situations where there was a promise of retention<sup>64</sup> where work was done "satisfactorily,"

was no major departure from accepted practice. However, the application of the covenant to pure at will contracts was a different matter. It was originally thought that once the employer decided to discharge the employee, the contract, including the implied covenant, came to an end. It was with the seminal case of Monge v. Beebe Rubber Co.<sup>65</sup> that certain jurisdictions began to use the covenant of good faith and fair dealing as a direct limitation on the employer's power to fire at will.

Before we consider the various interpretations the courts have placed upon the covenant in the employment context, it is necessary to allude to the disagreement prevalent in most jurisdictions on whether an action based on the covenant lies in contract or in tort. This inquiry is relevant to the damages issue. Compensation for pain and suffering and punitive damages are generally not available in actions based on contract.

Calamari and Perillo see the covenant remedy as conceptually on the borderline between tort and contract and assert that "[i]t is a non-contractual obligation that used to be treated procedurally as if it were a contract."<sup>66</sup> There is still extensive division among the different courts as to the exact nature of the action.

The Connecticut Court in 1980 saw it sounding purely in contract law.<sup>67</sup> The covenant was treated simply as an implied term which had been breached. The Montana Supreme Court, on the other hand, says that the actions sounds purely

in torts and that punitive damages are available.<sup>68</sup> It argued that although the duty arose from the employment relationship, it existed apart from the contract.

In the case of Cleary v. American Airlines<sup>69</sup> the California Court found that the employer was obligated to act in good faith by both the covenant and a resultant but separately existing duty and that breach sounded both in tort and in contract.

While the issue of the exact legal classification is significant as far as remedies go, it is of less importance in considering the extent to which it limits managerial discretion to fire at will.

There is a wide variety of opinions as to what employer actions are considered violative of the covenant of good faith and fair dealing. Even within certain jurisdictions themselves there is often little unanimity. In the early covenant cases such as the Monge case and the Petermann case,<sup>70</sup> no real limit to the scope of the implied covenant was suggested. The court merely asserted that the covenant was breached where the employee was terminated in "bad faith or malice or based on retaliation"<sup>71</sup> and it was left to the jury to decide what constituted this breach of faith. The protection offered to employees here was potentially very broad and courts in some jurisdictions took fright. In New York, the Court of Appeals in Murphy v. American Home Products rejected outright the implied covenant theory saying that "[i]t would be incongruous to say that an inference may

be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination.<sup>72</sup>

Between these two poles one could possibly place the case of Brockmeyer v. Dun & Bradstreet.<sup>73</sup> Here the court recognized the possibility of recovery under the implied covenant, but proceeded to restrict its application to instances where the dismissals were "contrary to a fundamental and well-defined public policy as embodied by existing law."<sup>74</sup>

As can be seen from the above case, there is some overlap and blurring of distinction between the implied covenant cases and the public policy tort exception cases to be considered later. The case of Petermann v. Teamsters where a Teamster was granted relief after being terminated after refusing to commit perjury, is sometimes considered the seminal "public policy exception" case, but was resolved on contract grounds.

The Beebe case was probably the first true "covenant" case. In this case a female employee was fired after refusing to respond to the sexual advances of her foreman. The court found the dismissal "...not in the best interests of the economic system or the public good and constitutes a breach of the employment contract."<sup>76</sup>

This was followed by the Massachusetts case of Fortune v. National Cash Register.<sup>77</sup> Here the employee was fired to prevent his collecting a \$90,000 commission which was owed to him. The court simply declared that when a commission was to be paid for work performed by an at will employee, the

decision to terminate must be made in good faith. The court had used the covenant to fashion a remedy against a specific employer abuse.

A case which was the source of much alarm among employees, particularly in California was that of Cleary v. American Airlines, Inc.<sup>78</sup> The significance of the implied covenant of good faith and fair dealing was expanded enormously. Here the employee claimed that he had been terminated without legal cause after eighteen years of satisfactory service. The court concluded that longevity of service and the employers adoption of a regulation that provided for an impartial hearing when the employee protested adverse personnel decisions, led to the conclusion that the covenant should apply and that the employer could not terminate "without good cause."<sup>79</sup> The case was disturbing to many in the sense that the court took the covenant to mean that discharge without good cause after lengthy service was ipso facto indicative of a breach of the covenant. It almost imposed on employers a good cause standard in regard to what were once pure at will employees.

While the Californian courts were giving this expansive reading to the covenant, the court in New Hampshire was retreating from the liberal stance it had adopted in the Monge case. In Cloutier v. Great Atlantic and Pacific Tea Co.,<sup>80</sup> the court demanded that not only should there be evidence of bad faith, but that at the same time, there

should be a violation of public policy sufficient to constitute a separate tort.

The Montana courts have been fairly active in granting employees relief by means of the covenant. In Gates v. Life of Montana Insurance Co.,<sup>81</sup> the court rejected the proposition that the personnel handbook formed part of the employment contract itself on the grounds that it was issued two years after the decision to hire and no independent consideration had been given. However, the court found that the employer was bound to follow the terms of the manual as a matter of the covenant of good faith and fair dealing. In Crenshaw v. Bozeman Deaconess Hospital,<sup>82</sup> the Montana Supreme Court unanimously found that even a probationary employee was owed a duty of good faith and fair dealing.

While the covenant theory of restricting arbitrary dismissal is fairly restricted as far as ILO standards are concerned and available only in certain jurisdictions throughout the United States, it is potentially very far reaching, as can be seen by the Cleary case.<sup>83</sup> Some legal scholars go so far as to say all common law theories used by the courts in the United States to restrict at will power should be subsumed under tortious breach of contract, i.e., the implied covenant theory.<sup>84</sup>

Others point to the problems involved if there is good faith in a discharge but no "just cause" and stress the difficulties in the factual ascertainment of the employer's motives.<sup>85</sup>

The implied covenant theory is far more practical a tool with which to impose a good cause standard than the implied in fact contractual exceptions examined earlier in this work. For while the latter theory required the courts to find the source of liability in the employer's own representations, the covenant theory potentially allows the courts to determine an acceptable standard. It remains to be seen whether the courts will use the covenant theory to bring the United States more in line with the spirit of Article 4 of the 1982 Convention and the legislation in this regard in many industrialized countries.

iii. Promissory Estoppel

Another legal doctrine which is occasionally utilized to provide relief from arbitrary employer behavior is that of promissory estoppel. Defined in section 90 of the Restatements,<sup>86</sup> it is invoked in circumstances in which courts conclude that it would be unfair for someone who has made a promise to renege. In D'Ulisse-Cupo v. Board of Directors,<sup>87</sup> the court held that a teacher, whose contract was not renewed, had stated causes of action for promissory estoppel for both failure to renew her contract and failure to rehire her in another position. She alleged that she had detrimentally relied on the principal's oral assurances and a posted notice that all present faculty members would be retained for the next year.

Other courts have concluded that the doctrine in no way detracts from an employer's right to terminate at will.<sup>88</sup>



b. In Tort

i. The Public Policy Exception

The tort doctrine provides the alternative common law mode of relief from arbitrary dismissal. Blades, in a 1967 law review article, was the first to suggest that the courts draw from tort theory to develop the new tort of abusive discharge.<sup>89</sup> Blades criticized the incongruity of the substantial protection offered private citizens against the abuse of government power in view of the rapid developments in constitutional law areas in the 1950's and 1960's and the complete lack of protection afforded workers against their private sector employers.

He saw possible contractual remedies as too difficult to achieve, and was convinced that state and federal legislatures would not rise to the challenge. Consequently, Blades suggested a tort remedy concentrating on wrongful motives as a mode of relief. What eventually emerged from this was the "public policy exception" to the at will rule.

The seminal public policy exception case could be said to be that of Peterman v. Teamsters in 1959.<sup>90</sup> Although the action was brought sounding in contract, the court found the Teamsters' employee's discharge for refusal to commit perjury actionable, saying "[t]he public policy of this state...would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury."<sup>91</sup> Subsequent public policy exception cases were almost unanimously held by state courts to sound in tort.

The disharmony among the various states as to recognition of the doctrine of the public policy exception and as to its scope, is as broad as the disagreement in regard to the implied covenant theory. On the one hand, there are cases such as the Cloutier case<sup>92</sup> where the court said, in regard to the determination of public policy, that it was "best to allow the citizenry, the institution of the American jury, to strike the appropriate balance in these difficult cases."<sup>93</sup> On the other hand, there is the case of Murphy v. American Home Products<sup>94</sup> where the New York Court of Appeals, while rejecting the implied covenant theory, simultaneously flatly refused to recognize the tort of abusive discharge, contending that the legislature was better equipped than the courts to consider the competing policy positions of various groups in society. Most instances would obviously fall between these two poles, and the court would be permitted as a matter of law to determine the public policy of the state.

Even within the states that do recognize the public policy exception, there are wide variances on the criteria for determining the particular public policy at issue. Some courts are perfectly at ease themselves defining public policy by examining legislation, administrative rules, judicial decisions and even professional codes of ethics.<sup>95</sup> Other courts would impose more rigid a criterion and demand that the public policy be evidenced either by the Constitution or by a statute and that, additionally, the employee point out a right attributable to him as a worker.<sup>96</sup>

Despite the differences as to criteria, it is generally accepted that there are three basic situations in which employees can have recourse to the public policy exception to the at will rule.<sup>97</sup>

The first of these circumstances is where the employee claims he was terminated merely because he exercised a legal right to which he or she was entitled. In Frampton v. Central Indiana Gas Co.<sup>98</sup> it was held that a cause of action for wrongful discharge had been stated where an employee claimed she had been fired for filing a workman's compensation claim. The court based its findings on analogies from landlord and tenant cases, but also found the action to be a violation of public policy. Some jurisdictions have viewed discharge to avoid paying pension benefits as violative of public policy and therefore supporting a suit for wrongful discharge. In Savodnick v. Korvettes, Inc.<sup>99</sup> the court found a "strong public policy...favoring the protection of integrity in pension plans"<sup>100</sup> embodied in the state constitution as well as in ERISA. Other courts have held differently on this issue.<sup>101</sup>

Other examples of rights protected from infringement under this doctrine would be the refusal to take a lie detector test where state statutory law does not condone an employer's right to use such or the right to join a labor union.<sup>102</sup>

The second set of circumstances in which the public policy doctrine could come to the aid of an at will employee would be where he was terminated for satisfying a legal obligation

placed upon him. One of the most significant cases in this area is that of Nees v. Hocks<sup>103</sup> where an employee was fired because of her refusal to seek to be excused from jury duty. The court held that a duty giving rise to tort liability was implied from the public policy in favor of jury service. The plaintiff was awarded both compensatory and punitive damages. In Alabama, however, the Supreme Court found in Bender Ship Repair, Inc. v. Stevens<sup>104</sup> that statutory protection from loss of usual compensation while serving on a grand jury did not stretch so far as to evidence a public policy against such discharge.

Another example of where protection is offered under this heading is in cases where patient care employees are required by statute to report instances of patient abuse and neglect. Occasionally employees are successful,<sup>105</sup> but courts are often hesitant to read into such statutes a restriction on the at will rule.<sup>106</sup>

The third instance in which recognizing the public policy exception would come to the assistance of the terminated worker is where the latter was discharged for his refusal to further an illegality. In the Pennsylvania case of Geary v. U. S. Steel Corp.,<sup>108</sup> the plaintiff was discharged when he objected to the safety of a particular product which was ultimately withdrawn. The court, while recognizing the validity of the public policy exception, found on the facts that Geary had made a nuisance of himself and that there was

no public safety threat and that no public policy was implicated.

The employee was more successful in Tameny v. Atlantic Richfield Co. Citing the non-essentiality of a statute to reflect public policy, the court offered relief to a worker terminated for refusal to participate in a price-fixing scheme stating: "[A]n employer's obligation to refrain from discharging an employee who refuses to commit a criminal act...reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes."<sup>109</sup> Relief is offered employees in analogous situations such as where there are consumer and competitor protection laws<sup>110</sup> or where there are refusals to violate administrative regulations<sup>111</sup> or a professional code of ethics.

In Sheets v. Teddy's Frosted Foods, Inc.,<sup>112</sup> a quality control director was fired after telling an employer about underweight materials and substandard raw materials in its food products. State law required accurate labeling and licensing. The court ruled for Sheets, reasoning that he should not have to choose between criminal sanction and employment. In another case, an employee was offered relief when he, a radiographer, was fired after refusing to operate a unit utilizing live radioactive cobalt in violation of Nuclear Regulatory Commission standards.<sup>113</sup> The Indiana Supreme Court in Campbell v. Eli Lilly & Co.,<sup>114</sup> tried to limit the scope of the public policy exception as it

pertained to refusals to further an illegality by limiting claims to firings in retaliation either for following a statutorily prescribed duty or for exercising a statutory right.

While the above mentioned aspect of the public policy exception is used by some states, a number of jurisdictions have legislatively protected the employment status to report their employers to authorities for violations of law or regulations. These whistle-blowing statutes are really a "variant of statutory anti-retaliation provisions that appear in specific contexts"<sup>115</sup> such as Title VII of the Civil Rights Act of 1967.

The federal government passed a whistle-blower statute protecting federal employees,<sup>116</sup> while Connecticut, Michigan and Maine<sup>117</sup> have similar statutes protecting employees at large. California, Indiana, Louisiana, Texas and Washington<sup>118</sup> have whistle-blower acts applying to state employees only. These statutes typically provide statutory redress in the event of any employee being discharged when he or she, in good faith, reports what he or she has reasonable cause to believe constitutes an employer violation of federal or state law. These statutes are very significant in that they comprise one of the very few statutory limitations on the at will rule not aimed at a particular type of discrimination. As one writer put it: "These statutes may be considered on the cutting edge of developing employment-at-will exceptions."<sup>119</sup>

On occasions a number of discharged employees have tried to use the public policy exception to circumvent procedural limitations imposed on circumstances that would otherwise entitle them to statutory relief. Employees attempt to invoke the policies encapsulated in these statutes in contexts outside the reach of the statutes themselves. The majority of courts have held the statutory remedy to be exclusive and to preclude a common law wrongful discharge action.<sup>120</sup> But in Williamson v. Provident State Bank<sup>121</sup> a woman, demoted from her position as president of a small bank because of the perceived need to have a "man up front," could not bring a Title VII action because the bank had fewer than fifteen employees. She brought a common law action alleging that the discharge violated Maryland's public policy. The court did grant her relief citing the statute as evidence of the public policy at issue. A number of other cases have allowed similar "circumventions."<sup>122</sup>

The public policy exception to the at will rule has forced employers in certain jurisdictions to more closely analyze their reasons for discharging employees. By the beginning of 1985 the courts in at least twenty-two of the states had recognized this exception in some form or other.<sup>123</sup> The exception has been criticized by some in that the worker's interest in his job is not the primary object of protection,<sup>124</sup> that, for example, in Nees v. Hocks it is the jury system that is being protected. The worker has to convince

the court that it is in the public interest that he be protected in his employment.<sup>125</sup>

The public policy exception has also been criticized from a number of other angles. For example, in situations where the employee has been terminated for refusing to commit an unlawful act, it is sufficient that the employee was in good faith although the employer's directive was legal? What if the employer reasonably believed his directive was legal?<sup>126</sup>

In whistle-blower cases, what if the accusation of illegality turns out to be erroneous? In "exercise of right" exceptions, as in the other two, there is the difficulty of establishing criteria for determining public policy. One frustrated commentator has suggested that all dismissals without "just cause" be actionable because "no matter how 'private' their motivation, [they] undermine the communities interest in economic productivity, stable employment and fairness in the work place."<sup>127</sup>

As far as bringing the United States more in line with ILO standards as espoused in Article 4 of the Convention is concerned, the public policy exception has a limited potential. Unless courts are willing to regard a firing without just cause as per se violative of public policy, workers are only going to find a modicum of relief in very restricted circumstances.

#### ii. Other Tort Remedies

While the public policy exception is the major form of tort relief available to aggrieved employees, there are a



number of miscellaneous tort remedies available to employees when the public policy exception is not appropriate. These can be invoked in addition to, or in the place of, wrongful termination theories and may provide a remedy for an employee even if the discharge is lawful.

1. "Prima Facie" Tort

This is less common but broader in concept than the public policy tort and allows recovery where an employee is dismissed with malice and no justification. Section 870 of the Second Tort Restatements<sup>128</sup> sets out the following essential elements: intentional infliction of harm; without excuse or justification; resulting in actual temporal damage; not classifiable as any other tort. The elements seldom seem to arise in wrongful discharge cases, but there have been a number of instances, particularly in New York, where the doctrine has been successfully called upon.<sup>129</sup>

2. Intentional Infliction of Emotional Distress

This tort, defined in the Restatements,<sup>130</sup> does not so much to the dismissal per se but to the mode in which this is effectuated. Since the outrage cannot be predicated on the dismissal alone, the employee must show that the employer intended to cause him or her distress or was reckless. An example of the successful use of this mode of relief is Agis v. Howard Johnson Co.<sup>131</sup> where a manager, unable to determine who was stealing food, started firing waitresses in alphabetical order. Some courts have criticized the remedy on the grounds that damages for emotional distress are available

in a wrongful discharge suit under the public policy exception.<sup>132</sup>

### 3. Intentional Interference with Contractual Relations

This is treated in Sections 766-767 of the Second Tort Restatements.<sup>133</sup> The major difficulty here is in attempting to convince the court that the theory can be utilized against a party to the contract which is allegedly being interfered with.

### 4. Fraudulent Misrepresentation

To recover on this ground, the employee must show a misrepresentation; known to be false at the time of the making; made for the purpose of inducing another to act on its reliance; action in reliance on the statement and resulting damage.<sup>134</sup> In Hamlin v. Fairchild Industries, Inc.<sup>135</sup> the plaintiff sued the employer for fraudulent misrepresentation where the employer told the plaintiff that his job would be permanent. The court found that, despite the fact that it was terminable at will, the employee could sue if the statement was made with no intent to perform. Some courts have held otherwise on this point.<sup>136</sup>

### 5. Miscellaneous Theories

Other tort remedies occasionally called upon in discharge situations are those of defamation, especially where references are involved,<sup>137</sup> invasion of privacy, usually with<sup>138</sup> respect to his<sup>139</sup> or her personnel files,<sup>140</sup> conspiracy or negligence.

## 2. Statutory Exceptions

As alluded to earlier, the erosion of the at will rule began not with judicial exceptions in contract or in tort, but by statutory protection of certain classes of employees. Civil servants and members of trade unions were protected from early on. It is, however, the unorganized private sector employee who is our present concern.

### a. Federal Statutes

There are several federal statutes which do protect the unorganized private sector employee against specific types of discharge. Most of these statutes provide protection against discrimination based on defined characteristics. This broad protection began in the public sector in 1933 with the "Unemployment Relief Act"<sup>141</sup> which prohibited certain types of discrimination. Later, broader protection was offered by E.O. 8587 of 1940<sup>142</sup> which prohibited race and religious discrimination in the federal civil service. In 1941, E.O. 8802<sup>143</sup> prohibited discrimination based on race, creed, color or national origin by employers who were granted war contracts. Nondiscrimination in the civil service was ratified by Congress in the Ramspeck Act.<sup>144</sup> Today, there are at least eight major federal statutory or regulatory enactments which provide some form of protection against unfair dismissal. This work will consider a number of these statutes from the point of view of unfair dismissal.

i. Title VII of the Civil Rights Act of 1964

The act<sup>145</sup> prohibits discrimination on the basis of race, color, sex, religion or national origin. It covers all employers in industries affecting commerce if the employer has fifteen or more employees as well as state and local governments,<sup>146</sup> labor organizations with fifteen or more members, labor organizations in industries affecting commerce<sup>147</sup> and employment agencies.<sup>148</sup>

Certain exemptions are provided for "bona fide" occupational qualifications" linked to religion, sex or national origin.<sup>149</sup>

A violation of Title VII is established wither by proving an intent to discriminate, I.e., disparate treatment,<sup>150</sup> or by proving that an employer policy has a disparate impact on a racial, sexual or other defined group.<sup>151</sup>

Section 704(a)<sup>152</sup> of the Act, an anti-retaliation provision, provides protection against dismissal where a worker is disciplined for participation in administrative or judicial hearings relating to an alleged Title VII violation. Workers who have opposed any discriminatory practice that violates Title VII are similarly protected from retaliatory firings.

If a worker is a victim of an unfair dismissal in violation of Title VII, the plaintiff can recover back pay for up to two years before the date of filing of the initial charge. This would include salary loss, compensation for lost overtime, shift differential and fringe benefits. No punitive or compensatory damages are available.<sup>153</sup>

ii. The Age Discrimination in Employment Act

The Act<sup>154</sup> prohibits discrimination because of age against persons over the age of forty. The Act applies to all employers in an industry affecting commerce with twenty or more employees<sup>155</sup> and to state and local governments.<sup>156</sup>

Once again, employers are permitted to discriminate on the basis of age where age is a bona fide occupational qualification and to observe the terms of a bona fide seniority system.<sup>157</sup>

The remedies resemble those provided for a violation of the Fair Labor Standards Act. Some courts have permitted damages for pain and suffering and mental distress,<sup>158</sup> though most authority is to the contrary.<sup>159</sup>

iii. Title 42 U.S.C. Section 1981 (Reconstruction Civil Rights Act)

Title 42 U.S.C. Section 1981 provides that:

"All...persons shall have the same right in every state and territory to make and enforce contracts...as is enjoyed by white citizens."

The term "white citizens" limits the Act's scope to discrimination on the basis of race and color and on the basis of citizenship. In Jones v. Alfred H. Mayer Co.<sup>160</sup> the Supreme Court held that the Civil Rights Act of 1866 covers purely private acts of discrimination also.

Section 1981 protection has application to unfair dismissal in the sense that by discriminatorily discharging an employee, the employer is, in fact, interfering with that

person's right to "make and enforce" (employment) contracts on the same footing as white citizens.

Section 1981 requires actual intent to discriminate<sup>161</sup> and remedies include injunctive relief and monetary relief akin to damages, including punitive damages.

iv. Title 42 U.S.C. Section 1983 (Civil Rights Act 1871)

Covered by the Act are any persons whose federal constitutional rights are violated under the color of state law or whose rights, guaranteed by federal law, are violated under the color of state law. The Act does not apply to violations under the color of federal law.

The Act has application to unfair dismissal law in situations where workers are terminated in contravention of a guarantee of an exercise of their rights.

Damages are compensatory damages, including mental and emotional distress, punitive damages and injunctive relief.

v. Title 42 U.S.C. Section 1985 (Ku Klux Klan Act of 1871)

The Act provides that two or more persons may not conspire to deprive any person or class of persons of equal protection of the law. There must be a conspiracy; intended to deprive the plaintiff of substantial federal rights afforded by the Constitution or a federal statute, other than Section 1985 itself.

In the case of Great American Federal Savings and Loan Association v. Novotny<sup>162</sup> the Supreme Court held that Section 1985 extends to purely private conspiracies arising in the employer-employee context. However, the plaintiff must be

able to prove a class-based, invidiously discriminatory animus behind the alleged conspiracy to discharge.<sup>163</sup> The Act has been successfully used in the employment context in cases of discharge based on sex,<sup>164</sup> religion,<sup>165</sup> national origin<sup>166</sup> and age.<sup>167</sup>

Relief can include out of pocket loss and compensation for mental and emotional distress. The award can include punitive damages.

vi. Rehabilitation Act of 1973

The Act<sup>168</sup> prohibits discrimination against handicapped individuals by federal contractors, recipients of federal grants and participants in federal programs.

The scope of private right of action is very limited in most jurisdictions,<sup>169</sup> but the Third Circuit has adopted a wider interpretation in this regard.<sup>170</sup>

Section 505 of the Act makes available the "remedies, procedures and rights" of Title VII of the Civil Rights Act of 1964.

vii. Executive Order 11246

E.O. 11246 requires Federal contractors to refrain from employment discrimination and to develop affirmative action plans. Most courts refuse to recognize a private right of action for violation of the executive order.<sup>171</sup> However, an individual may be able to seek a mandamus to compel administrative action.<sup>172</sup>

As a result of these aforementioned statutes, it is in the area of outlawing discrimination that the United States can

be said to most comply with ILO standards. While obviously none of the statutes contain the guarantee called for in Article 4 of the Convention, they at least cover a number of dismissals specifically outlawed in Article 5.

The limitations in coverage of a number of these statutes, such as firm size, managerial level of the employee, etc. are contrary to the general spirit of Article 2 which discourages exemptions for those reasons.

Nevertheless, the resort to an independent body to solve the problem and the favorable allocation of the proof burden can at least be said to be in accordance with the gist of Article 7 and Article 9 respectively.

#### b. State Statutes

There are extensive state statutes offering protection similar similar to that outlined above on the state level. New York, in 1945, was the first state to enact a Fair Employment Practice Statute and by 1964 more than half the states had such a statute.<sup>173</sup>

These statutes generally mirror the federal statutes, but often extend the scope of protection even further. For example, in California, the statute proscribes discrimination on the basis of medical condition, political affiliation and marital status among others.

About three-fifths of the states have, in addition to F.E.P. laws, enacted provisions protecting an employee who engages in civic duties such as jury service or voting. There are also provisions relating to the right of



association, the right to air one's political beliefs, etc. Also included in state statutory enactments are various anti-retaliatory provisions, covering a wide variety of laws. These are in essence the same as the "whistle-blower" provisions which have been considered earlier.

c. Federal and State Constitutions

Since historically the rights granted by the federal and state constitutions have been effective only for government employees in the employment context and a very few decisions have extended their protection to private sector employees, no attempt will be made to fully analyze their effect in this context. However, Cornelius Peck of the University of Washington argues that the federal constitution should be construed to protect unorganized private sector employees from at will discharge.<sup>174</sup> By use of the Fifth and Fourteenth Amendments, by finding "state action" in a private employer's discharge of his worker and by finding an absence of equal protection from arbitrary discharge for unorganized private sector employees, he concludes that these workers do have constitutional protection. While his argument seems to stand on rather flimsy ground, his approach is indicative of the mood among many legal scholars today of the need to bring the United States more in line with ILO standards by whatever means possible.

C. Opinions of Various Writers on Unfair Dismissal Law in the United States.

This paper has outlined, in quite some detail, the workings of unfair dismissal law in the United States and the extent to which it falls short of the ILO guidelines and standards. There are within the United States today as many opinions on the path the country should take in this regard as there are legal scholars interested in the subject.

Opinions range from the countless number who deem a statute the only solution for the inequities inherent in the at will rule to those who strongly support the retention of the pure at will rule. A major proponent of the statutory response is Clyde Summers who summarized his views in a 1976 law review article.<sup>175</sup> Anticipating that the courts would be slow to provide common law remedies, Summers proposed state level legislation channeling unfair dismissal cases into the arbitration process, in much the same way as in the organized sector. He advocated the establishment of arbitration panels for each state; the exclusion of organized and high level employees from coverage; a six-month probationary period for new employees with no exemption of small employers and promoted the value of reinstatement as a remedy when appropriate.

Other scholars have attempted to reach somewhat more of a compromise between the present American manner of dealing with the matter and the more demanding ILO standards. Perrit also advocates a statute, but suggests dismissals be made

prima facie illegal only if based on characteristics such as race, sex or age (i.e., the statutory exceptions); if based on a conduct protected by clear public policy, including policies embodied in the Constitution (i.e., the public policy exception); if they violate employer promises (i.e., the implied-in-fact contractual exception) or if based on private off-duty conduct.<sup>176</sup> He also suggests use of the arbitration procedure, the exclusion from coverage of organized employees and reinstatement as a primary remedy.

At the other pole are those who favor a return to the pure at will theory or at least attempt to point out that its merits exceed its demerits. Powers argues that further erosion of the at will rule will lead to the need for extensive structures to adjudicate on "just cause" issues in discharge.<sup>177</sup> He claims that it will lead to explicit expressions of the at will nature of the employment in the contracts; hirings for fixed terms, increased unionization and shutdowns.<sup>178</sup> He also argues that the at will rule may help the employee find the employment most suited to him and thereby increase productivity, efficiency and profits. Finally, he argues that an unfair dismissal would be "another step towards the legalization of American society."<sup>179</sup>

#### D. Politics of Statutory Reform

While legal scholars may debate over statutory and other responses to the unfair dismissal problem, legislation is almost invariably the result of an extended process which culminates in a balance of political power favoring change. At

the moment in the United States activity for unfair dismissal is in its early stages and the contrasting nature of the various interest groups involved would not seem to facilitate the situation.

#### 1. Position of Non-Union Employees

First of all, there are the unorganized private sector employees themselves. While this group is extremely numerous,<sup>180</sup> it is by its very nature "unorganized" and largely legally ignorant. To exacerbate the situation there are at will employees who have some degree of protection anyway by nature of their position in their respective firms.

#### 2. The Position of the Employers

Another interest group is obviously the employers themselves. Their position is eminently clear and was confirmed by the employers' representative vote on the ILO Convention of 1982. The group is also strong and well organized. While the group as a whole may oppose limitations on their at will power, it would seem that employers may prefer a statute in the face of the ever-expanding exceptions to the at will rule. For while the courts have often performed "a catalytic function of inducing legislatures to act,"<sup>181</sup> employers fear the unpredictability of the common law exceptions and the high damages awards. And so ironically, it could occur that in the near future advocating an unfair dismissal statute could reflect a reactionary stance attempting to stem unbridled judicial interference with the employment relationship.

### 3. The Positions of Trade Unions

It is commonly cited in the United States that trade unions oppose unfair dismissal legislation on the grounds that it would serve to undermine one of their primary functions, namely the preservation of job security, and therefore weaken their position in the labor field. In many instances unions are suspicious of alternative methods to their grievance procedures for, ironically, their "very success...providing those covered by collective bargaining agreements has deadened their demands for general legislation which would give to every employee the benefits which unions have achieved by collective bargaining."<sup>182</sup>

While it is really difficult to predict what the effect of legislation would be on unions, a look at the experiences in this regard in some foreign countries would be useful.

In Britain, where there has been unfair dismissal legislation since 1971, unionization is at sixty percent of the work force and there was absolutely no decline in the role played by unions as a result of the legislation has reduced the role of the collective bargaining process. While unions still handle their own grievances with regard to discharge, the unions also process the grievances of non-unionized employees as an organizational tactic to increase membership. In fact, from the mid-sixties to the mid-seventies, the unionization rate rose thirty percent, in large because the threat of employer retaliation against union activity (in the form of discharge) was reduced by the legislation.<sup>184</sup> In West

Germany too, where legislation did not affect the role of unions, assistance of non-unionized workers as an indication of what unions could do for them is common.<sup>185</sup>

The European experience has shown that union protection is always preferable to legislative protection anyway, and workers never feel impelled to leave unions in the knowledge that their position will be just as secure elsewhere.<sup>186</sup>

Despite the European experience in this regard, it would probably be simplistic to say that one could draw absolute conclusions occurrences there. Nevertheless, it is at least an indication of some sort that unfair dismissal legislation,<sup>187</sup> if it were ever passed, would not affect unions as adversely as some would imagine. In fact, there are some examples of organized labor supporting proposed unfair dismissal legislation. These instances, however, are few and far between.

#### 4. Positions of Other Interested Groups

There are other groups, such as the plaintiff's bar which would obviously favor legislation as a means of increased work and revenue, the defense bar which would have feelings concurrent with those of the employers, and the academic lawyers who have generally favored legislative initiatives to grant rights to previously unprotected citizens.

The analysis undertaken thus far has concentrated almost exclusively on unfair dismissal in the United States and on how the law has measured to ILO demands and guidelines. While it is obvious that the United States lags behind the

standards demanded of it by the ILO, it is necessary to investigate a number of foreign examples to see how they have responded to this issue. By so doing, it can at least be established whether or not the ILO standards are realistic.

## NOTES

## CHAPTER IV

1. Payne v. Western & Atlantic Railroad, 81 Tenn., 507, 519-20 (1984).
2. Perrit, Employee Dismissal Law, 2 (1984).
3. Ibid.
4. Id. at 4.
5. Larson & Barowsky, supra Chapter III, note 12, s.2.03 at 2-4.
6. See, e.g., Franklin Mining Co. v. Harris, 24 Mich. 115 (1871).
7. Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 59 (1870).
8. Wood, A Treatise on the Law of Master & Servant, s.134, at 272 (1977).
9. Martin v. New York Life Insurance Co., 148 N.Y. 117, 42 N.E. 416, 417 (1895).
10. Larson & Barowsky, supra Chapter III, note 12, s.2.04 at 2-7.
11. Boogher v. Maryland Life Insurance Co., 8 Mo. App. 533 (1890).
12. Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 131 (1976).
13. McCarthy, Punitive Damages in Unfair Dismissal Cases, xi (1985).
14. 208 U.S. 161 (1908).
15. 236 U.S. 1 (1915).
16. Id. at 10.
17. S.D. Codified Laws Ann. s.60-4-5 (1978).



18. An estimate puts between 61% and 66% of all American workers in the at will category. See Note, Reforming At Will Employment Law: A Model Statute, 16 U. Mich. J.L. Ref. 389 note 1 (1983).

19. *Bush v. Lucas*, 462 U.S. 1, (1983) (describing history of the federal civil service system).

20. 301 U.S. 1 (1937).

21. *Perrit*, supra note 2, at 7.

22. Id. at 12.

23. See, e.g., *Hoffman Speciality Co. v. Pelouze*, 158 V. 586, 594, 164 S.E. 397, 399 (1932); *Norfolk Southern Ry. v. Harris*, 190 V. 966, 967, 59 S.E. 2d 110, 115 (1950).

24. *Calamari & Perillo, The Law of Contracts*, s.75 (Hornbook ed. 1970).

25. *Pugh v. See's Candies*, 116 Cal. App. 3d. 311, 325-326, 171 Cal. Rptr. 917, 925 (1981) (quoting Corbin).

26. *Larson & Barowsky*, supra note 15, s.3.03 at 3-7.

27. *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 377 A.2d 807 (1977).

28. *Walker v. Modern Realty of Mo., Inc.*, 675 F.2d 1002, 1004 (8th Cir. 1982).

29. *Moody v. Bogue*, 310 N.W. 2d 653 (Iowa App. 1981).

30. See *Touissant v. Blue Cross and Blue Shield of Mich.*, 408 Mich. 579, 292 N.W. 2d 880, reh'g denied, 409 Mich. 1011 (1980).

31. *Pine River State Bank v. Mettille*, 333 N.W. 2d 622 (Minn. 1983).

32. See, e.g., *Lopp v. Peerless Serum Co.*, 382 S.W. 2d 620 (Mo. 1964).

33. *Baxter & Siniscalco, Managers Guide to Lawful Terminations*, 18 (1983).

34. 379 A.2d 135 (Me. 1977).

35. Id. at 138.

36. Ibid.

37. See supra note 30.
38. Id. at 904.
39. Id. at 895.
40. Id. at 900.
41. 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976).
42. 55 Cal. App. 3d 93, 127 Cal. Rptr. 224 (1976).
43. 408 U.S. 593 (1972).
44. See, e.g., Johnson V. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976).
45. Linzer, The Decline of Assent: At Will Employment as a Case Study of the Breakdown of the Private Law Theory, 20 Ga. L. Rev. 323, 345 (1986).
46. 59 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).
47. 495 F.Supp. 344 (E.D. Mich 1980).
48. See supra note 30.
49. 292 N.W.2d 880, 893.
50. Id. at 892.
51. 408 Mich. 579, 619, 292 N.W. 2d 880, 894-5. See also Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974).
52. 292 N.W.2d 880, 892, 408.
53. See supra note 31.
54. 333 N.W.2d 622, 630.
55. 576 P.2d 356 (1978).
56. 86 Cal. App.3d 714, 150 Cal. Rptr. 408 (1978).
57. 86 Cal. App.3d 714, 717, 150 Cal. Rptr. 408, 411.
58. 116 Cal. App.3d 311, 171 Cal. Rptr. 917 (1981).
59. Perrit, supra note 21, at 24.
60. Restatement (Second) of Contracts (1979).

61. U.C.S. s.1-203.
62. See, e.g., *Communale v. Traders General Insurance Co.*, 50 Cal.2d 654, 658, 328 P.2d 198, 202 (1958) where it states: "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other party to receive the benefits of the agreement."
63. *Rosencrans v. Intermountain Soap and Chemical Co.*, 100 Idaho 785, 605 P.2d 963 (1980).
64. *Crest Coal Co. v. Bailey*, 602 S.W.2d 425 (Ky. 1980).
65. 316 A.2d 549 (1974), 114 N.H. 130.
66. *Calamari & Perillo*, supra note 24, s.10, at 10.
67. *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38 (Super. Ct. 1980), 429 A.2d 492.
68. *Gates v. Life of Montana Ins.*, 638 P.2d 1063 (Mont. 1982).
69. 111 Cal. App.3d 443, 168 Cal. Rptr. 722 (1980).
70. *Petermann v. Teamsters*, 174 Cal. App.2d 184, 344 P.2d 25 (1959)..
71. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).
72. 58 N.Y.2d 293, 304-5, 461 N.Y.S.2d 232, 237, 448 N.E.2d 86, 91 (1983).
73. 335 N.W.2d 834 (Wis. 1983).
74. Id. at 840.
75. Supra note 70.
76. 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).
77. 364 N.E.2d 1257 (1977).
78. 111 Cal. App. 443, 168 Cal. Rptr. 722 (1980).
79. Id. at 729.
80. 121 N.H. 915, 436 A.2d 114 (1980).
81. Supra note 68.

82. 693 P.2d 487 (Mont. 1984). See also *Dare v. Montana Petroleum Mktg. Co.*, 687 P.2d 1015 (Mont. 1984).

83. See supra note 78.

84. *McCarthy*, supra note 13, at xv.

85. Power, A Defense of the Employment At Will Rule, 27 *St. Louis U.L.J.* 881 (1983).

86. Sec. 90, *Restatement (Second) of Contracts* (1979).

87. 6 *Conn. App.* 153, 503 A.2d 1192 (1986).

88. See, e.g., *Walker v. Modern Realty of Missouri, Inc.*, 675 F.2d 1002 (8th Cir.).

89. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 *Colum. L. Rev.* 1404 (1967).

90. See supra note 70.

91. Id. at 27.

92. See supra note 80.

93. 121 *N.H.* 915, 924, 436 A.2d 1140, 1145.

94. See supra note 72.

95. See, e.g., *Pierce v. Ortho Pharmaceutical Co.*, 84 *N.J.* 58, 417 A.2d 505.

96. *Baxter & Siniscalco*, supra note 33, at 27 and *Lopatka, The Emerging Law of Wrongful Discharge - A Quadrennial Assessment of the Labor Law of the 80's*, 40 *Bus. Lawyer* 1, 12.

98. 260 *Ind.* 249, 297 N.E.2d 425 (1973).

99. 488 *F.Supp.* 822 (E.D.N.Y. 1980).

100. Id. at 826.

101. See, e.g., *Moore v. Home Insurance Co.*, 601 F.2d 1072 (9th Cir.).

102. See, e.g., *Cordle v. General Hugh Mercer Corp.* No. C 937 (W. Va. S. Ct., July 13, 1984) (as adopted in *Law Alert*, 9/17/84) but cf. *Larson v. Motor Supply Co.*, 117 *Ariz.* 507, 573 P.2d 907 (App. 1977).

103. 272 *Ore.* 210, 536 P.2d 512 (1975).

104. 379 So.2d 594 (Ala. 1980).
105. See, e.g., Witt v. Forest Hospital, Inc., 115 Ill. App.3d 481, 450 N.E.2d 811 (1983).
106. See, e.g., Rozier v. St. Mary's Hospital, Inc., 88 Ill. App.3d 481, 450 N.E.2d 811 (1983) and Maus v. National Living Centers, Inc., 633 S.W.2d 674 (Tex. App. 1982) where the courts expressed reservations about usurping the legislative role in this area.
107. 456 Pa. 171, 319 A.2d 174 (1974).
108. 27 Cal.3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).
109. Id. at 1335.
110. Harless v. First National Bank in Fairmont, 246 S.E.2d 270 (W.Va. 1978).
111. Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1983).
112. 179 Conn. 471, 427 A.2d 385 (1980).
113. Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 373 (Ill. 1985).
114. 413 N.E.2d 1054 (Ind. App. 1980), petition for Transfer denied, 421 N.E.2d 1099 (Ind. 1985).
115. Larson & Barowsky, supra note 12, s.5.03 at 5-6.
116. See Civil Service Reform Act, 5 U.S.C. s.2301 (West. 1982).
117. Conn. Stat. Ann. s.4-61d (West Supp. 1983); Mich. Comp. Laws Ann. ss.15.361-15.369 (West. 1981); ME Rev. Stat. Ann. tit. 26, s.833 (supp. 1984).
118. Cal. Gov. Code ss.10540-46 (West. 1980), s.19683 (West. Supp. 1983); Ind. Code Ann. s.4-15-10-4 (Burns 1982); La. Rev. Stat. Ann. s.42:1169 (West Supp. 1984); Tex. Rev. Civ. Stat. Ann. art. 6252-17 (Vernon Supp. 1984); Wash. Rev. Code Ann. ss.42.40.010-42.40.900 (West Supp. 1983).
119. Larson & Barowsky, supra note 12, s.5.03 at 5-6.
120. See, e.g., Teale v. Sears, Roebuck and Co., 66 2d Ill. 1, 359 N.E.2d 473 (1976).
121. 7 Equal Employer s.276 (Cir. Ct. Caroline County, Md. Oct. 6, 1983).

122. See, e.g., *Pompey v. General Motors Corp.*, 385 Mich. 537, 189 N.E.2d 243 (1971); *Bruffet v. Warner Communications, Inc.* 692 F.2d 910 (3d Cir. 1982).
123. *Lopatka*, supra note 97, at 1.
124. Supra note 103.
125. *Blackburn*, Judicial Action, supra Chapter 1, note 1 at 31.
126. *Lopatka*, supra note 97.
127. Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931, 1948 (1983).
128. Restatement (Second) of Torts s.870 (1979).
129. *McCullough v. Certain Teed Products Corp.*, 70 A.2d 771, 417 N.Y.S. 2d 353 (1979); *Chin. v. American Tel. & Tel. Co.*, 410 N.Y.S.2d (1978), 96 Misc. 2d. 1070.
130. Restatement (Second) of Torts s.40 (1977).
131. 371 Mass. 140, 355 N.E.2d 315 (1976).
132. *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982) (applying Indiana law).
133. Restatement (Second) of Torts s.766 (1977).
134. Restatement (Second) of Torts s.525 (1977).
135. 413 So.2d 800 (Fla. App. 1982).
136. *Siver v. Mohasco Corp.*, 94 A.2d 820, 462 N.Y.S.2d 917 (1983) aff'd 62 N.Y.2d 741, 465 N.E.2d 362, 476 N.Y.S.2d 822 (1984).
137. See, e.g., *Duncatell v. Universal Life Insurance Co.*, 446 S.W.2d 934 (Tex. App. 1969).
138. See *Martin and Flicks*, Employee Privacy Rights: A Proposal, 47 Fordham L. Rev. 155 (1978).
139. See, e.g., *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964).
140. See *Chamberlain v. Bissell, Inc.*, 547 F.Supp. 1067 (W.D. Mich. 1982).
141. Act of March 31, 1933, 48 Stat. 22, 23.

142. 5 Fed. Reg. 4445 (1940).
143. 6 Fed. Reg. 3109 (1941).
144. 54 Stat. 1211 (1940).
145. 42 U.S.C. s.2000e-2.
146. 42 U.S.C.A. ss.2000e(b), 2000e-2(a) (West. 1981).
147. Id. ss.2000e(e); 2000e-2(e).
148. Id. ss.2000e(c); 2000e-2(b).
149. Id. s.2000e-2(h). See, e.g., *Dothard v. Rawlinson*, 443 U.S. 321 (1977), *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir. 1970), cert. denied 404 U.S. 950 (1971).
150. See, e.g., *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).
151. *Griggs v. Duke Power*, 401 U.S. 424 (1971).
152. 42 U.S.C. s.2000e-2.
153. *McCarthy*, supra note 13, at 281.
154. 29 U.S.C. ss.621-634 (1979 & Supp. 1982)..
155. Id. s.630(b).
156. Ibid.
157. Id. s.623(f)(1) and (2).
158. *Buchholz v. Symons Mfg. Co.*, 445 F.Supp. 706, 713 (E.D. Wis. 1978).
159. See, e.g., *Slatin v. Stanford Research Inst.*, 590 F.2d 1292 (4th Cir. 1979).
160. 392 U.S. 409 (1973).
161. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).
162. 442 U.S. 366 (1979).
163. Id. at 378.
164. See *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

165. See *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973).
166. See *Pavlo v. Steifel Laboratories, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 489 (S.D.N.Y. 1979).
167. *Carpenters v. Scott*, 463 U.S. 1, 103 S.Ct. 3352 (1978).
168. 29 U.S.C. ss.701 ff. (1975 & Supp. 1982).
169. See *Trager v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978).
170. *LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767 (3rd Cir. 1982).
171. See, e.g., *Weiss v. Syracuse Univ.*, 522 F.2d 397, 410 (2nd Cir. 1975).
172. *Legal Aid Society v. Brennan*, 608 F.2d 1319 (9th Cir. 1979).
173. *Perrit*, supra note 2, at 10.
174. *Peck*, The United States Constitution, supra Chapter I, note 1, at 25.
175. *Summers*, Individual Protection Against Unjust Discharge: Time for a Statute, 62 Va. L. Rev. 481 (1976).
176. *Perrit*, supra note 2, at 355.
177. *Powers*, supra note 85.
178. Id. at 891.
179. Id. at 899.
180. See supra page 1.
181. *Peck*, supra note 174, at 31.
182. *Summers*, Industrial Democracy: America's Unfulfilled Promise, 28 Clev. L. Rev. 28, 42 (1979).
183. See *Hepple*, Great Britain, supra Chapter I, note 1, at 26.
184. See *Treu*, Italy, supra Chapter I, note 1, at 59.
185. See General Discussion, supra Chapter I, note 1, at 19.



186. Perrit, in his book cited supra note, at 335, foot note 60, cites a student doing his S.J.D. thesis at Harvard University on the effect of the Canadian legislation on union organizing efforts who concludes such legislation has had no adverse affect on unionization.

187. Summer, Introduction, 16 U. Mich. J.L. Ref. 202 982/3).

## CHAPTER V

### A LOOK AT SOME FOREIGN EXAMPLES

#### A. EEC Activity

While the EEC has various directives in force relating to group employment security, it has not yet entered the field of individual protection against unfair dismissal.<sup>1</sup> This is largely because most EEC members regard the ILO standards as guidelines for their own development in this regard. Among the EEC countries, Belgium, France, West Germany, Ireland and Italy all endorsed the 1982 Convention by having their government workers' and employers' representatives vote in favor thereof. Denmark, Greece, Luxembourg, the Netherlands, and the United Kingdom had their government and workers' representatives vote in favor of the Convention, while their employers' representative abstained. Of all the ten members of the EEC, not one of them had any representative vote against the Convention. This immediately sets these countries apart from the United States, which had only its workers' representative vote in favor of the Convention. How have these EEC countries implemented the standards advocated by the ILO?

#### 1. The United Kingdom

##### a. The Common Law

At British Common Law, the employee is an at will employee, but is entitled to "reasonable notice" before

termination.<sup>2</sup> There were very few avenues for alleviating this problem since tort law could not be expanded to accommodate the problem and contract law remedies were sparse.<sup>3</sup>

b. Legislative Activity Begins

During the 1960's, there were two major impetus calling for an end to the common law rule. In that decade, there were numerous wildcat strikes in response to unfair dismissals, strikes which seriously affected the productivity and profitability of many businesses.<sup>4</sup> At the same time, Great Britain began seriously to seek ways to implement ILO Recommendation 119.<sup>5</sup> An unfair dismissal statute was the inevitable solution to this.

In 1964, the British government had announced that it had accepted and would conform to Recommendation 119. A Committee of the Minister of Labour's National Joint Advisory Council issued a report on the matter in 1967 and noted very few personnel policies governing dismissal and its procedures in the unorganized sector and varying effectiveness of such procedures in the organized sector.

In 1965, the Donovan Commission on Trade Unions and Employer's Associations, a separate commission with broad terms of reference involving labor-management matters in general, specifically called for unfair dismissal legislation.<sup>6</sup>

While the ruling Conservatives and the opposition Labor Party disagreed extensively on most issues, both parties agreed on the need for statutory protection against unfair

dismissal. This was finally achieved with the enactment of the 1971 Industrial Relations Act,<sup>7</sup> later the 1978 Employment Protection (Consolidation) Act,<sup>8</sup> as amended in 1980.<sup>9</sup>

c. The Statutory Guarantee

Section 22 of the original Industrial Relations Act declared: "In every employment to which this section applied, every employee shall have the right not to be unfairly dismissed by his employer." After making this general guarantee, the statute proceeds to specify valid reasons for discharge. These are set out in Section 57(2) of the EPCA and include:

- i. A reason related to the capability or qualifications of the employee for performing work of the kind which one was employed by employer to do.
- ii. A reason related to the conduct of the employee.
- iii. That the employee was redundant.
- iv. That the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under enactment.
- v. Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position that employee held.<sup>10</sup>

d. Coverage

While coverage is fairly broad, there are a number of qualified and absolute exceptions. Generally protection is granted to those who have been continuously employed for six

months in jobs with twenty or more employees. In firms with less than twenty employees, the employees must first have worked for two years before protection is extended to them, unless dismissal was a result of a workers trade union activities or was on certain medical grounds. Workers with fixed term contracts of one year or more, who have agreed to waive their protection rights, are also excluded.<sup>11</sup> However, refusal to renew a contract can be cause for complaint. Workers employed by their spouses are not protected, nor are those over the normal retirement age. There is no distinction between public and private sector workers, nor between unionized and non-unionized employees.<sup>12</sup>

While the latter may be true, and while employer and employee cannot generally contract out of the above protection, employers can substitute "dismissal procedures agreements" for statutory coverage if certain requirements are met. Under Section 65, the parties (the employer and the union) can jointly apply for a substitution order. There are two essentials which must be met before such a request can be considered. Firstly, remedies must be "as beneficial" as those provided for by statute<sup>13</sup> and secondly, there must be a provision for eventual impartial decision-making.<sup>14</sup> In fact, very few substitution orders are sought.<sup>15</sup>

#### e. Enforcement Procedures

The procedure for enforcement of one's protective rights is straightforward. Complaint forms must be filed within three months at the local offices of the Department of

Employment.<sup>16</sup> After the filing, an independent government body, the Advisory, Conciliation and Arbitration Services (ACAS) attempts conciliation by meeting with both the complainant and the employer (about sixty percent of the cases are disposed of at this stage).<sup>17</sup> If conciliation attempts fail, the case goes before the Industrial Tribunal. The Industrial Tribunal is a tripartite arbitration panel comprising a barrister or solicitor of at least seven years standing acting as chairman, a person from an employers' association and one from a union or workers' association. The two wingmen are not meant to serve as proponents of one particular standpoint, but rather as experienced laymen.<sup>18</sup> Lawyers are not typical, hearings are short and there are generally no post-hearing briefs.

Appeals on points of law lie in the Employment Appeals Tribunal. This is also a tripartite body, but has a high court judge acting as Chairman (approximately four percent of trial level hearings are appealed to this level).<sup>19</sup> There is theoretically an appeal from here to the Court of Appeals and then to the House of Lords. However, these would be considered most unusual.

f. Burden

The burden in these cases is essentially upon the employer in that he must come forward and present reasons to validate the discharge.

g. Remedies

The remedies entail either restatement, which is not common, or damages. The damages typically have two components; first, a "basic" award, which is computed by means of a statutory formula taking into account a number of work related factors. Second, a "compensatory" award under Section 74 which is "such amount as the tribunal considers just and equitable in all circumstances." The award is designed to cover expenses, etc. and sometimes emotional distress.

It is evident that Great Britain has come a long way in complying with ILO standards. Problems do still exist, however. Anderman<sup>20</sup> has suggested that the pattern of interpretation of the statute by the various adjudicating bodies indicates that too much room has been left for discretion. While Section 57 states that the tribunal must decide whether the employer's decision to terminate was "reasonable" in the circumstances and in accordance with equity and the substantive merit of the case, the Court of Appeals has held generally that good faith belief by the employer is sufficient.<sup>21</sup> It claims that this is too lax a standard. It also cites the problem of too broad exclusions from coverage.<sup>22</sup>

While some see a number of problems inherent in the statute, others point to the great changes in personnel practices that have occurred.<sup>23</sup> On the heels of legislative enactment, many companies reviewed their procedures on discipline and discharge. The result was that employers became better informed, and hiring and training procedures were

refined. It is perhaps this educative effect every bit as much as the substance of the Act which has helped improve job security in Britain.

## 2. West Germany

In Germany, "just cause" for dismissal in some form or other has been required since 1920.<sup>24</sup> Today, there are basically three statutes which are relevant to the issue of unfair dismissal in that country, namely the Civil Code, the Act on Protection Against Unfair Dismissals, and the Works Council Act.

### a. Civil Code

Section 626 of the Civil Code makes dismissal without legal notice only "if there are reasons which in view of all the circumstances of the case and in evaluating the interests of the two parties make in intolerable for one of the parties to fulfill the contract until the end of the period of notice." This Section applies to all labor contracts.

### b. Act on Protection Against Unfair Dismissals

The major source of job protection legislation is the Act on Protection Against Unfair Dismissals. This Act

#### i. Guarantee

Section 1 of the Act outlaws "socially unjustified" dismissals and defines them as those dismissals "not based on reasons connected with the person or conduct of the employee or an urgent operating requirement precluding his continued employment in the establishment."<sup>25</sup> It should be remembered that misconduct is a reason for summary dismissal under the



Civil Code. The misconduct referred to here is of lesser gravity and does not result in summary discharge, but termination after a certain notice period.

ii. Coverage

To be covered by this Act, the worker must have been working for the particular enterprise for at least six months. Furthermore, if a plant has five or fewer employees, there is no coverage. All that is provided these workers is the customary notice period. The higher level the employee, the less protection is accorded him or her against unfair dismissal.

iii. Enforcement

After an alleged unfair dismissal, the employee has three weeks to file a declaratory action in a local labor court challenging such dismissal. Before the case comes to a hearing, a conciliation session must be held. This is conducted by the professional judge who will chair the hearing if it comes to that. Between thirty and forty percent of all cases are settled at this stage.<sup>26</sup>

iv. Hearing

The dispute settlement bodies in dismissal cases are exclusively the Labor Courts. The lower level labor court is, as in Great Britain, a tripartite body comprised by the professional judge and two lay judges, respectively representing the employee and employer. The lay judges are appointed for a limited time and usually have other occupations, while the professional judge is legally trained and

appointed for life. An appeal from this level lies in the Labor Court of Appeals and then ultimately to the Federal Labor Court in Kassel. Appeals are on points of law only.<sup>27</sup>

v. Remedies

Remedies are not usually reinstatement, but more commonly compensation computed under a legislative formula. Where reinstatement is not feasible, the general rule is that a sum not exceeding twelve months' earnings are awarded by way of compensation. There are variations of the formula, depending on age and duration of employment.<sup>28</sup>

c. Works Council Act

The Works Council Act is an important part of the unfair dismissal machinery. Works councils are generally in existence in all firms where there are more than five employees. There should be a proportionate representation of both sexes and of wage and salary earners on the council.

The works council must be notified in writing of any proposed dismissal with notice, and the reasons for the dismissal. This should take place before the employee has been notified of the impending dismissal and discharged -- otherwise, the dismissal is illegal, irrespective of the reasons for it. The council, after considering the matter, can under Section 102(1) respond to the dismissal and may formally challenge the dismissal within seven days if it so wishes. It should convey its opinion to the employer in writing. If management refuses to concede to the challenge, the council may invoke review by a conciliation committee comprising an

equal number of council and management representatives. The committee then makes a final decision on the matter.

If the employee is dismissed over the council's objections, the employer must give the employee a copy of the council's statement for the employee's use in the labor courts, to which he still has direct access. However, when dismissal is over the council's objections, the employer must continue to employ the "terminated" worker until the labor court decision is final (an employer can be relieved of this duty by seeking an injunction in certain circumstances).

If the works council concurs in the employer's decision to terminate, all the employer need do is send official notice of the dismissal to the employee. The terminated worker still has access to the labor courts, but his chances of success in these circumstances are slim.

Where there is a dismissal without notice, i.e., a summary dismissal, the council must still be notified and now has three days to respond. The council's objection to a summary dismissal has the same effect as dismissals with notice. However, the employer is required to act no later than two weeks after becoming aware of the alleged misconduct.

The existence of the works council and their role as reviewers of employer action in dismissal matters serves as an incentive for employers to seriously consider the validity of their reasons before terminating a worker. While the councils cannot prevent dismissals, an employer is usually

anxious to secure their cooperation, for they do play other roles in the labor-management area.

This form of employee protection, as well as that provided by the two aforementioned acts, allow scholars to claim without exaggeration that "arbitrary dismissals are almost impossible."<sup>29</sup> This is not to say that the situation in the Federal Republic is ideal, for there are many shortcomings, most noticeable of which is the almost complete absence of reinstatement as a remedy. West Germany has nevertheless come a long way towards complying with ILO standards.

### 3. France

In France, "the employee has a right to unilaterally dismiss an individual contract of employment at any time, but he may do so lawfully only for a genuine and serious cause and by following a specific procedure."<sup>30</sup>

Dismissal for cause is regulated by Section 122-14 of the Labor Code and by precedent set by various court decisions interpreting the Code. While the dismissal must be for "genuine and serious" cause, the act does not define the term precisely and it has been left to the courts to decide what it means. It seems that no strict rules are applied and each case is tried on its own merits. "Genuine and serious" cause has been held to include factors such as incompetence, loss of physical ability to perform the work, corporate restructure, etc.

Coverage for most provisions is for those workers with two years' seniority in firms of ten or more employees. There is

coverage for various groups of less senior employees, however.

Even if there is real and serious cause, the proper procedure must be followed by the employer. Firstly, the employee about to be dismissed must be summoned to a hearing with the employer, during which the latter must inform the worker of the grounds of the dismissal. The idea is to allow for possible reconciliation at this stage.

If the employer persists with his intention to terminate, he must then notify the employee in writing of the real and serious grounds for dismissal if so requested. This is used by the employee if he wishes to take the matter further.

The employee would take his case to the labor court, competent to resolve all disputes between employer and employee regarding individual contracts of employment. The courts are composed of lay judges exclusively, equally split between the employer and labor sides. At the appellate level these courts branch out into the regular civil court system where professional judges sit. Access to the courts is easy and free.

If the courts find that the dismissal was for "genuine and serious" cause, it is held to be unlawful but not void. The court can therefore only recommend reinstatement. If reinstatement is refused, the court awards the employee compensation not less than the amount of six months wages, regardless of how soon he finds another job. Compensation can exceed six months pay depending on the extent of the

individual components that go up to make the damages, such as compensation in lieu of notice, severance pay, etc.

If the court finds that the employee was dismissed for real and serious cause, he must be continued in employment during the notice period or paid wages in lieu thereof. He is also entitled to severance pay and compensation for accrued severance leave. A worker dismissed for what the court considers a "grave" offense, can collect only compensation for leave not taken. An employee fired for what the court considers a "heavy" offense receives no compensation of any kind.

#### 4. Canada

Despite its geographical proximity to the United States, the Canadian law on unfair dismissal has far more in common with the Western European countries than with its North American counterpart.

Protection of unorganized workers was instituted by means of a Federal statute inserted into the Canadian Labour Code as Section 61.5.<sup>31</sup> Legislation at the federal level spawned an immediate problem in that the laws extend only to the work force which is regulated by federal laws, in effect only about 10% of the Canadian work force.<sup>32</sup>

The statute requires all employers covered by the legislation to show "cause" before dismissing the employee. The guarantee is not defined by the statute and it has been left to the adjudicators to define the extent of the protection encompassed thereby.

The scope of the protection extends only to dismissals themselves and not to issues such as discipline, hiring, etc. Those covered by the statute are workers within the federal jurisdiction who have been continuously employed in that enterprise for twelve months. People such as independent contractors are not covered, nor are high level employees such as managers and executives. The statute further provides that workers otherwise covered will have protection unless a "procedure for redress has been provided elsewhere in or under this or any other Act of Parliament."<sup>32</sup> This provision excludes workers covered by collective bargaining agreements with eventual recourse to an independent hearing.

If a worker feels that he has been unfairly dismissed, he must file a complaint with the Ministry of Labour within thirty days. Once the complaint has been received, there are two steps that have to be followed. Firstly, a conciliation hearing is held under the auspices of the Minister. At this stage, the employer is required to give written reasons for the dismissal so that the problem can be properly addressed. If no conciliation is achieved at this stage, the Minister may appoint anyone he considers suitable as an adjudicator to chair an inquiry into the justness of the dismissal.

If the adjudicator finds that there was no just cause for the dismissal, or even that there was such cause but it is established that no form of progressive discipline was involved, there are a number of remedies available. The adjudicator is entitled to order reinstatement and compensation

not exceeding that remuneration that would have been paid had the worker not been dismissed. The adjudicators award and the decision is largely insulated from judicial review and may be filed in the Federal Court of Canada in order to afford to it the same effect as a judgment of that court. Civil remedies which may be available are not destroyed by the statutory protection.<sup>34</sup>

#### B. General Characteristics of These Countries' Dismissal Law

The differences between the United States and the other countries that have been considered are very obvious. Observers disagree as to what they consider the most striking differences to be.<sup>35</sup> Nevertheless, there are a number of very significant characteristics of unfair dismissal law common to all the countries that have been considered other than the United States.

Perhaps one of the most significant characteristics of these countries is the impact supra-national bodies such as the EEC and the ILO have had on domestic legislation. It has already been observed what little effect, if any, the various ILO measures have had on the United States. In contrast, the ILO, particularly as far as the Western European countries are concerned, has been a very significant influence on the implementation of unfair dismissal laws in these countries. Bellace refers to a greater readiness in these countries to regard a job as the "property" of the employee.<sup>36</sup>



One obvious characteristic of these countries is the absence of the at will doctrine and the statutory regulation of unfair dismissal matters. Discharged employees very rarely have to resort to common law resolution of alleged wrongful dismissals.

Most of these countries guarantee protection against unfair dismissal statutorily. While a number of these countries, such as Britain, make some attempt to define what is meant by unfair dismissal, most countries provide for a vague prohibition and allow the courts or tribunals to determine the full extent of the protection afforded by the statute. This leaves room for development of the law to meet changing demands and avoids the problem of loop-holes being made available to employers.

There is generally some limitation on the extent of coverage provided to employees. There is usually provision for a probationary period which ranges from six months in Britain to up to two years in certain instances in France. Very small firms are commonly exempted, as are managerial employees. Workers covered by collective bargaining agreements are excluded in countries such as Canada where the union offers protection as one of its major functions and of a quality probably better than the statute. In Germany and Britain where unions are not very extensively involved in individual job protection specifically, the organized workers are drawn under the auspices of the general Act just like anyone else.

If a covered worker feels that he has been unfairly dismissed, there is uniformly provision for eventual referral of the matter to a special tribunal designed to deal with these issues. These tribunals however, are only drawn into the process after some form of conciliation has been attempted. It is a characteristic of these countries that an attempt is made to resolve the matter before there is need for a binding decision one way or the other. Many cases (up to 40% in Britain) are resolved at this stage, lessening the burden imposed on the eventual neutral tribunal.

The tribunals themselves are generally composed of one professional presiding officer and a number of lay judges who are intended to bring some sort of expertise into the field. While this is true of Britain and Germany, in Canada and France the first level hearing is entirely in the hands of lay people who have extensive experience in these matters.

At the hearing itself, the burden is generally lifted from the employee and evenly distributed, if not placed on the shoulders of the employer. The employer is generally called upon to present evidence of the just cause for the dismissal. Usually he must not only show just cause, but must also prove that he followed the necessary procedure when terminating the employer. Bellace sees the essential nature of this procedure as the "most striking difference" between the United States and the other countries that have been considered. It is felt that in these latter countries a rigid procedure when effectuating a dismissal will diminish arbitrary termination

and that it acts as a series of checks against unreasoned discharge.

Perhaps a defect of many of these states' unfair dismissal laws is the ineffectiveness of the reinstatement remedy. In France, reinstatement cannot be legally ordered, and even when it can, it is seldom done. Statutory formulae for compensation are meant to satisfy the claims of the workers who are not reinstated and are often used in a punitive manner.

## NOTES

## CHAPTER V

1. See Bellace, supra Chapter III, note 6, at 413.
2. Hepple, supra Chapter III, note 183, at 46.
3. Id. at 47.
4. Ibid.
5. See White Paper on International Labour Conf., CMD No. 2548, at 6-8 (1964).
6. See generally Bellace, supra Chapter III, note 12.
7. Section 22, Industrial Relations Act, 1971, Ch. 72, 41 Halsbury Statutes 2088 (1971 Cont. Vol.)
8. The Industrial Relations Act was repealed by the Labour Government and replaced by another Act. Various worker protection provisions were put together in 1978 as the Employment Protection Consolidation Act.
9. See ss.6-10, Employment Act 1980, 50(1) Halsbury Statutes 387 (1980 Cont. Vol.).
10. Section 57(2), Employment Protection Consolidation Act 1978, 48 Halsbury Statutes 506 (1978 Cont. Vol.).
11. Section 142.
12. See Sections 19 and 64(2), 64(3).
13. Section 65(d).
14. Section 65(e).
15. Bellace, supra Chapter III, note 12, at 230.
16. Section 57(3).
18. Id. at 229.
19. Ibid.
20. Anderman, The Weakened Edifice of Job Protection Laws in Britain, 20 Stanford J. Int'l. Law 393-411.
21. Id. at 401.
22. Id. at 408-9.

23. Bellace, supra Chapter III, note 12, at 230.
24. Weiss, West Germany, supra Chapter I, note 1, at 56.
25. Ramm, Federal Republic of Germany, Int'l Encyclopaedia for Labour Law and Industrial Relations, Ed. R. Blanpain, Supp. 11 (1979), para. 396.
26. Cassim, Unfair Dismissal, 5 South African I.L.J. (1984) 275 at 296.
27. Section 102(2) of Act on Protection Against Unfair Dismissals.
28. See Ramm, supra note 25, at para. 401.
29. Weiss, Protection Against Unfair Dismissal in Western Germany: Appendix C, supra Chapter I, note 1, at 157.
30. See generally Rojot, Protection Against Unfair Dismissal in France: Appendix B, supra Chapter I, note 1, at 147.
31. Canada Labour Code, Can. Rev. Stat. ch. L-1 (1970), as amended by Act of April 20, 1978, ch. 27, 1977-1978 Can. Stat. 607.
32. Simmons, Unjust Dismissal of the Unorganized Worker in Canada, 20 Stanford J. Int'l. Law, 473 (1984).
33. Canada Labour Code, 5 Can. Rev. Stat. ch. L-1, s.61.5(3)(b), 1977.
34. Id. at s.61.5(14).
35. See Weiss, supra note 24, at 56; Neal, Employment Protection Laws: The Swedish Model, 33 Int'l and Comp. Law Quart. 880 (1984); Bellace, supra note 6, at 416.
36. Bellace, supra Chapter I, note 6, at 416.

## CHAPTER VI

### UNFAIR DISMISSAL LAW IN SOUTH AFRICA

A worthwhile insight into unfair dismissal law in South Africa is impossible without a thorough consideration of a broader legal framework of which this concept is a part. South Africa's very dynamic socio-economic climate is reflected in the rapidly changing labor relations law which is in evidence at this moment.

Industrial relations in South Africa are regulated primarily by the Labour Relations Act of 1956. The Act has been amended on numerous occasions, but none have been more significant than the series of amendments which were instituted after the Wiehahn Commission tabled Part I of its report in Parliament on May 1, 1979.<sup>1</sup> The Commission was established on June 21, 1977, under the chairmanship of Professor N. E. Wiehahn. The lack of skilled manpower, the increasing demands of the black labor force and ever-expanding black trade unionism,<sup>2</sup> coupled with a series of massive work stoppages in the port city of Durban in 1973 and 1974,<sup>3</sup> played a significant role in motivating its establishment. The Commission was given wide terms of reference to inquire into and to make recommendations in connection with all existing legislation dealing with labor matters in the country.

The series of post-1979 amendments became known as the "new labour dispensation"<sup>4</sup> and introduced revolutionary changes in industrial practice and relations law.

Prior to 1979 only an "employee" as defined by the Act had access to the machinery of the statute and to its collective bargaining processes. Black workers, regulated by the separate Black Labour Relations Regulations Act 48 of 1953, did not fall within this definition. However, in 1979 certain black workers were included and the process was concluded in 1981 when this definition was further extended to include all workers irrespective of race.<sup>5</sup> As a result of this amendment, the Act which the legislature had been "at pains to free of all racial connotation,"<sup>6</sup> race was no longer an all-important disqualifier from access to the statutory machinery. In addition, the Act abolished job reservation for whites; established a National Manpower Commission comprising representatives from the state, employers and employees; constituted a new Industrial Court with significant novel duties and powers; and introduced to South African labor relations law the concept of "unfair labour practices."<sup>7</sup>

#### A. The General Structure of the Act

Since the 1956 Labour Relations Act is a long and complex document, there will be no attempt to analyze it in its entirety. An examination of various parts of the Act which will be relevant to dispute resolution, more particularly that involving unfair dismissal, will however be undertaken.

The Act makes provision for the office of the industrial registrar<sup>8</sup> whose duty it is inter alia to oversee the registration of trade unions and employer organizations who desire to be so registered. Registration is not a prerequisite to valid and legal existence of these bodies, but it is essential if the organization is to receive a number of important benefits. A union is registered if it is considered sufficiently represented in an industry and area in which it desires to operate.<sup>9</sup> General unions not confining their membership to a particular industry are not registrable.<sup>10</sup>

#### 1. Industrial Councils

Upon registration the trade union or employers' organization can partake in the formation of the important industrial councils. Industrial councils are permanent bodies formed by the association of one or more registered trade unions and one or more registered employer organizations. They are formed to operate in a particular location and in a particular industry.<sup>11</sup> The councils themselves have to be registered to obtain jurisdiction in their particular area and location.<sup>12</sup> The purpose of these industrial councils is "to take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest."<sup>13</sup> In other words, the function of the industrial council is to negotiate over matters such as terms and conditions of employment, wages, etc., much in the same way as the trade unions in the United States. More importantly, it is the task of the industrial council "within the undertaking, trade



or occupation and in the area, in respect of which it has been registered, (to) endeavor by the negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise."<sup>14</sup> These objectives are achieved primarily by the negotiation of industrial council agreements. These agreements are applicable to the registered trade unions and employer organizations party to the particular industrial council involved in the negotiation thereof.

The agreement negotiated by the parties only gains legal effect once the Minister has declared it binding in the Government Gazette.<sup>15</sup> Furthermore, the Minister may extend some or all provisions of the agreement onto "non-parties" to the industrial council who work in an industry and location within that council's jurisdiction. The Minister also has the power within limitations to declare an industrial council agreement binding on employers and workers in a related industry to that served by the council, but outside the actual jurisdiction of the latter.<sup>16</sup> The purpose of these extensions is to insure uniformity of service conditions and to prevent undercutting of wages by non-parties.

## 2. Conciliation Boards

There are many instances where, despite the existence of registered trade unions and employer organizations in a particular location and industry, no industrial council agreement exists.<sup>18</sup> This can be the result of weak unions or the development of alternative methods for conducting

labor-management affairs than is provided by the Act. The non-existence of an industrial council can be problematic if a dispute of whatever nature arises that can seriously disrupt labor-management relations, where there is no body to which the matter may be referred for resolution.

To accommodate situations such as these, the Act provides for the establishment of conciliation boards on application to the Minister.<sup>19</sup> A conciliation board is a temporary body established on an "ad hoc" basis for the purpose of settling disputes which may already have arisen. The membership of the conciliation board is open to a far wider list of parties than is the case with an industrial council. The statute stipulates that whenever a dispute arises between one or more trade unions and employees on the one hand, and one or more employer organizations or employers on the other, any such party may apply for the establishment of the conciliation board.<sup>20</sup>

A very important aspect of the machinery for our purposes is the availability of the conciliation process to unregistered organizations and to individuals with no union representation. For many years, only registered organizations could apply for the establishment of these boards, but in what Swanepoel calls a "cardinal departure from the previous philosophy of the Act,"<sup>21</sup> which sought to exclude unregistered trade unions from many benefits of the Act, the situation was changed by the Labour Relations Amendment Act 2 of 1983.<sup>22</sup> It would appear that the motive for this

innovation was the attempt to ease tensions with major black trade unions that refused to register for some reason or other and to bring them into the "more sociable atmosphere" of the Act.<sup>23</sup>

Individuals themselves cannot generally apply for the establishment of conciliation boards. The applicant must either be a registered trade union or a trade union that has complied with Section 35(14)(b). Compliance with this Section demands the submission by unregistered trade unions to the registrar of a copy of their constitution, as well as a list of names of their office bearers.<sup>24</sup> It is also required that there be a maintenance of a register of members, showing their names, their fees paid and the periods to which these payments relate.<sup>25</sup> The Section also requires that the unregistered union keep proper books of account and have its headquarters within the Republic of South Africa.<sup>26</sup> This trade union must also show that the individual on whose behalf it is applying was at all material times a member in good standing, and that the union is sufficiently representative of the applicant's fellow workers from the same class of workers as he, and that the individual gave authorization to the union.<sup>27</sup>

One occasion when an individual can make application on his own behalf is where the dispute involves an alleged unfair labor practice.<sup>28</sup> The importance of this exception for our purposes will become apparent later.

The Minister has a fairly wide discretion in deciding whether or not to accede to the request.<sup>29</sup> He may do so "if he deems it expedient."<sup>30</sup> There have until now been no indications of abuse of this discretion and the avenue to dispute resolution via the conciliation board system has provided a wide range of workers with a potential means of relief. Alleged unfairly dismissed workers have this above mentioned channel available to them.

### 3. Industrial Court Determination Under Section 46(9)

If a dispute has been referred to an industrial council and not settled within thirty days or a conciliation board has been approved and it has not resolved the issue in thirty days, the dispute must be referred to the industrial court for determination.<sup>31</sup> However, the dispute is only referred for final determination if it involves an alleged unfair labor practice.<sup>32</sup>

Resolution of alleged unfair practices is one of the statutorily prescribed functions of the Industrial Court and probably its primary function. The term "unfair labour practice" is defined in Section 1.<sup>33</sup> However, it is defined in extraordinarily broad terms and it is basically up to the court to decide the content and boundaries of the concept. Determinations of what labor practices are "unfair" and which are not, has become one of the most sensitive areas of the "new dispensation" and is of significance when specifically looking at the position of the unfairly dismissed worker.

#### 4. "Status Quo" Orders

One final institution should be mentioned. Section 43 of the Act makes provision for the granting of "status quo" orders by the Industrial Court. It often happens that once a dispute has arisen, a delay is experienced by the employee or employees before the case is resolved by the industrial council, conciliation board, or the Industrial Court itself under Section 46(9). To alleviate potential hardship to the employee during these times, the Act provides for the Industrial Court to make interim orders.

Provided the dispute relates either to a termination or suspension of labor,<sup>34</sup> a change in the conditions of employment,<sup>35</sup> or to an alleged unfair labor practice and provided the party aggrieved has referred the matter to an industrial council or made application for the establishment of a conciliation board,<sup>37</sup> that party may seek a status quo order freezing the position as it existed prior to the dispute. The Industrial Court determines the validity of the application for relief by applying the same criteria thereto as regular courts do when assessing requests for interlocutory interdicts.<sup>38</sup>

#### B. Recognition Agreements

Not all trade unions and employer organizations wish to make use of the collective bargaining offered by the Act. Indeed, in such major industries as gold and coal mining, the employers and trade unions have, for various reasons, found it unnecessary or undesirable to form industrial councils for

their industries. Many black trade unions, suspicious of government motives in making the machinery of the Act available to them, have chosen not to register, and thus are automatically excluded from participation in industrial councils.

Despite their reluctance to participate in the statutory structure, a new type of collective bargaining outside of this known as "the recognition agreements system" has arisen. These recognition agreements are usually the sole property of the stronger unions and have the same legal effect as common law contracts.<sup>39</sup> These agreements contain official recognition of the particular trade union involved and often include terms on working conditions and wages as well as a dispute resolution procedure. Experience has shown that it is the foreign businesses in South Africa that are most likely to enter into these types of agreements with the black unions.<sup>40</sup>

For workers in establishments covered by these recognition agreements, protection against unfair dismissal is regulated by the contents of each particular agreement, with the best of these including an eventual resort to an independent decision-maker.

It should be noted that registered unions too may form recognition agreements, distinct from their industrial council duties. This is done primarily to achieve a measure of in-plant agreement as opposed to the broad and general terms of an industrial council agreement.

### C. The Unfairly Dismissed Worker in South Africa

As the Labour Relations Act stands at the time of this writing, there is no specific mention of the concept of unfair dismissal at all.<sup>41</sup> In South Africa there has been a tendency to allege that an unfair dismissal constitutes an unfair labor practice. It will be remembered that one of the functions of the Industrial Court is to make determinations on alleged unfair labor practices after the industrial council or conciliation board has failed to settle the matter. Thus, by equating the concepts of an unfair labor practice and unfair dismissal, the court has effectively given relief to workers who were previously parties to at will employment contracts.

The extension of unfair labor practices to include cases of unfair dismissal is not in any way to be considered an unauthorized or unjustified one; indeed, the Wiehahn Commission itself recommended that the Industrial Court should inter alia investigate and hear cases of alleged unfair dismissals.<sup>42</sup>

It is proposed in the paragraphs that follow to consider various factors relevant to unfair dismissal, such as the nature of the guarantee, scope and coverage, methods of enforcement, the hearings and the remedies available in the South African context. By so doing, an evaluation can be made of the intrinsic and comparative worth of the present system.

It should be mentioned at this stage that although South Africa withdrew from the ILO in 1964, the Wiehahn Commission strongly recommended that South Africa make every effort to bring its labor legislation in line to the fullest extent possible with international labor Conventions, Recommendations, and other international instruments.<sup>43</sup> The Commission further suggested that South Africa begin once again the practice of submitting reports to the ILO in regard to Conventions that it had ratified. The Commission also wanted to explore ways in which South Africa could improve contact with international labor generally.

#### 1. The Guarantee

Workers who are covered by some collective bargaining agreement such as an industrial council agreement or a recognition agreement often have a dismissal standard and procedure in the particular agreement by which they are governed. These can vary depending on the nature of the agreement. However, even if a worker has applied to the industrial council for relief and no help has been forthcoming, he can eventually have the matter determined by the Industrial Court under Section 46(9) if he alleges his dismissal amounted to an unfair labor practice.

As mentioned earlier, there is no specific outlawing of unfair dismissal but rather an equating of the latter with an unfair labor practice and the offering of relief on that basis. "Fairness in this context has nothing to do with legality, but relates to the way the dismissal takes place,



the reasons for it and the effect that it has on the employee and the state of industrial relations within the company. The definition of unfair labor practices is alarmingly wide, and the allegation that by unfairly dismissing an employee an employer commits an unfair labor practice has established the concept of unfair dismissal in South Africa."<sup>44</sup>

In the number of cases presented to the Industrial Court thus far, the Court has usually considered the following aspects:

- i. Do the facts on which the employer relies to justify the dismissal actually exist?
- ii. Even if the facts have been established, did the employee's action justify dismissal?
- iii. Was the dismissal carried out in a fair manner and was a fair procedure followed? Generally this requirement demands that a worker had been given a hearing before his dismissal where the details of his proposed dismissal are put before him.<sup>45</sup>

Dismissals in contravention of industrial council are automatically unfair labor practices and there need be no regard to objective standards of fairness as espoused by the court.<sup>46</sup>

While the Labour Relations Act does not define unfair dismissal, unlike the statutes in many other countries we have considered, the Industrial Court, by means of the unfair labor practice procedure, has produced a guarantee against unfair dismissal largely in keeping with Article 4 of the

1982 Convention. The Industrial Court has generally found reasons for dismissal bearing no relation to the "capacity of the worker" or the "operational requirements of the undertaking"<sup>47</sup> to be unfair labor practices.<sup>48</sup> In fact, the Court has shown the compatibility of its decisions with Article 5 of the Convention by not only terminations based on race remediable, but even by declaring racial slurs to be unfair labor practices.<sup>49</sup>

The vagueness of the guarantee as offered in the context of an unfair labor practice may be an object of criticism. However, while there are admittedly some countries such as the German Democratic Republic and the U.S.S.R. which define the concept a valid reason for dismissal in detailed terms,<sup>50</sup> there are many countries where legislation is phrased in very general terms. France, for example, requires only a "genuine and serious" cause for a valid dismissal.<sup>51</sup> The Canadian Unfair Dismissal Statute similarly requires only "cause" and leaves it up to the adjudicators to give content to the concept.<sup>52</sup>

In South Africa the court has on occasion referred to various ILO Conventions and Recommendations in termination cases<sup>53</sup> and found the lack of definition no real obstacle. In fact, at the time of this writing, there is a draft bill before the House of Parliament in South Africa further amending the Labour Relations Act as it now stands.<sup>54</sup> This draft bill, which will be more fully examined later, would make

specific reference to unfair dismissal and give rather detailed definition thereof.

## 2. Scope

The concept of unfair labor practice and the vague statutory definition thereof, allows an applicant to claim that discipline short of discharge amounts to an unfair labor practice and consequently seek relief therefrom.

In many countries, unfair dismissal statutes are limited to just that, namely dismissal.<sup>55</sup> Often a worker would experience a disciplinary measure which would be as devastating as dismissal, but have no potential relief available. In South Africa, as long as the worker could convince the Industrial Court that a unfair labor practice had been committed, relief would be forthcoming.

## 3. Coverage

One of the major criticisms leveled against the South African law as it pertains to unfair dismissal is the issue of limited coverage. The Act applies to "every undertaking, industry, trade, or occupation."<sup>56</sup> There are no exclusions of businesses with limited workforces or which have been in existence for a limited period. There are, however, a number of workers who are absolutely disqualified from coverage by the Act. The statute does not apply to persons in respect of their employment in farming operations<sup>57</sup> nor to domestic service in private households.<sup>58</sup> State employees are also excluded as are voluntary workers in charitable institutions. People who are working in an undertaking as a means of

completing their education or university training are similarly excluded.<sup>59</sup>

Participation in industrial council agreements is open only to registered trade unions and hence, only members thereof are afforded the particular protection such an agreement may provide against unfair dismissal. The Minister does have the power to order an extension of some or all of the provisions to "non-parties," which may result in employees who are not members of registered unions being covered by the agreement.<sup>60</sup> It will be remembered that referral of a dispute to an industrial council is one of the two essential alternatives before a party can forward an alleged unfair labor practice to the Industrial Court for final determination under Section 46(9).

Cassim cites the fact that industrial council agreements regulating unfair dismissal do not apply to the many workers outside their scope and sees this as one of the primary reasons for the need for the implantation of an unfair dismissal statute.<sup>61</sup>

However, while it is to be admitted that a wide range of workers are excluded for various reasons from coverage by an industrial council agreement and hence a potential avenue by means of which an alleged unfair dismissal could come before the court, the conciliation board system goes a long way towards redressing this problem. As alluded to earlier, for a trade union to apply for a conciliation board on behalf of a member, it need not be registered. It need only comply

with Section 35(14) (b). Furthermore, if the dispute to be referred to the conciliation board involves an alleged unfair labor practice, the individual may apply on his own behalf, whether he is a member of a registered trade union or not. Coverage therefore is very extensive, and reaches out to workers in every "undertaking, industry, trade or occupation" who are not, by definition, excluded from the confines of the Act.

The wide range of occupations and industries to which the Act applies is in keeping with Article 2 of the 1982 Convention which requires that coverage extend to "all branches of economic activity." The Act does not exclude small firms from coverage, nor is there a specific length of time for which an employee must be employed before coverage extends to him. High level managerial employees are similarly not excluded from coverage. While a number of categories of workers are excluded contrary to the spirit of Article 2 of the Convention, the South African statute shows up better in the area of coverage than most of the countries that have been considered in this work.

It has been seen how, in Great Britain, a worker must necessarily have been continuously employed for six months in an establishment with twenty or more employees before coverage is extended to him;<sup>62</sup> in smaller firms the worker must have been employed for a minimum of two years. Workers under fixed term contracts are similarly excluded. West

Germany, France and Canada too have fairly stringent limitations on coverage.

This is not to say that coverage in South Africa is perfectly satisfactory. Many workers, while theoretically covered by the Act, simply lack the know-how to use the relief potentially available to them. The machinery of the Act is still very complex and shrouded in procedural obstacles. Often access to specialized legal counsel or a highly organized trade union is the only practical mode of implementing one's rights. With the large and often indigent black labor force in South Africa, this is obviously not always a viable alternative.

It is submitted that the establishment of a body similar in concept to the EEOC should be instituted. This body could process requests from unfairly dismissed workers for assistance and make application to the Minister on their behalf for the establishment of conciliation boards to whom the matter could be referred at the first level. The body would not usurp the role of the trade unions in this area, but merely act where the trade unions lack the means under Section 35(14)(b) to apply on behalf of an individual or where the individual may apply on his own behalf.

Another possible limitation on coverage is the virtually unfettered discretion of the Minister in deciding whether or not to grant a request for the establishment of a conciliation board or not.<sup>63</sup> His ability to dictate the terms of reference of these bodies once constituted is also possibly

limiting and may exclude the worker from having recourse to the Industrial Court by means of the unfair labor practice procedure.<sup>64</sup> This problem could be eliminated by setting out in the Act the objective jurisdictional facts that need to exist before the Minister MUST accede to the request and by allowing the board itself to decide the issue before it.

#### 4. Enforcement

The enforcement procedure for the resolution of an unfair dismissal in the guise of an unfair labor practice, has already been examined. Recourse must be had to the relevant industrial council, if one exists, or it must be sought by means of the establishment of a conciliation board. If these bodies are unable to settle the issue, the unfair dismissal, if it is alleged to be an unfair labor practice, is referred to the Industrial Court for final determination under Section 46(9).

Probably the major weakness inherent in the enforcement procedure is the previously mentioned lack of an administrative body that can be approached to aid the unfairly dismissed worker in processing his grievance through the statutory machinery. In the United States, where there are specific protections against certain types of unfair dismissals, there is the EEOC which processes grievances; in Britain, the local offices of the Department of Employment have jurisdiction over such agreements. These administrative bodies, which handle the grievances before they finally come to court, play an important role in assisting workers who

lack the know-how to process a claim right through the bureaucratic entanglements which often are present.

The 1982 ILO Convention makes no reference to these types of bodies. Article 15 of the 1982 Recommendation provides that "[e]fforts should be made by public authorities...to ensure that workers are fully informed of the possibilities of appeal at their disposal."<sup>65</sup> It is submitted that there can be no true compliance with this Article unless there exists a body to whom workers can refer to help process their grievance when there is no trade union which can perform the same function on their behalf.

#### 5. Hearing

The eventual forum for deciding an unfair dismissal when equated with an unfair labor practice is the Industrial Court. This body consists of a president, a deputy president, and any number of other members the Minister may determine. The officials are appointed "by reason of their knowledge of the law." Due to the dramatic increase in the use of the Court, the Minister has used his Section 17(6A) (i) power to appoint temporary ad hoc members who hear specific cases. These members are usually practicing lawyers or academics. Generally, cases are heard by one member. Rarely, two members may hear a case.

Usually, however, a case will be resolved at the industrial council or conciliation board level. Here an equal number of employer and employee representatives will decide a case.



These bodies are fully in accordance with the spirit of Article 8 of the 1982 Convention which states that a worker "who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body."

The burden at the industrial council or conciliation board level and at the Industrial Court level is not placed entirely on the shoulders of either party. The industrial or conciliation board is required to "settle" the dispute<sup>66</sup> and no party is called upon to discharge a burden. A decision is reached by a process of negotiation. This accords with the provisions of Article 9 of the Convention which requires that "the worker not have to bear alone the burden of proving the termination was not justified."<sup>67</sup>

#### 6. Remedies

At the industrial council and conciliation board level, the representative of the two sides can take whatever action they deem necessary for "settling" the dispute. In the case of unfair dismissals, this very often entails reinstatement. As regards the Industrial Court, the Act does not specify what action the Court make take to rectify or remedy an unfair labor practice, but rather requires only that the body "determine"<sup>68</sup> the dispute once it has been referred thereto under Section 46(9). The powers have to be inferred from the provisions of the Act itself. In various decisions, the Industrial Court has been known to order a party who has committed an unfair labor practice to refrain therefrom; held

that certain actions are null and void and, in the case of unfairly dismissed workers, reinstated employees. Cassim cites the limited remedies available to challenge dismissals of workers not "otherwise regulated by legislation"<sup>69</sup> as a reason why a general unfair dismissal statute is necessary. Since it has been shown that most workers are potentially covered by this legislation, the validity of this criticism falls away.

Another remedy provided by the Court is the status quo order issued under Section 43. This is a temporary order issued pending the outcome of the final decision, whether it be made by the industrial council, the conciliation board, or the Industrial Court itself under Section 46(9). Cassim also claims that status quo relief is only an interim measure which "does not by itself provide a remedy for unfair dismissal, unless the conduct of the employer constitutes an unfair labor practice."<sup>70</sup> It has been experienced, however, that where a worker has been reinstated temporarily under Section 43, there is often a climate more conducive to the settlement of the dispute than would be the case if the worker were to disappear from the scene completely. Since the Industrial Court has found most unfair dismissals to be unfair labor practices anyway and since the court has, justifiably or not, tended to look at the issue of fairness itself at the status quo hearing,<sup>71</sup> the value of a reinstatement under Section 43 cannot be underestimated.

Consequently , the "freezing" remedy has assumed an importance probably not envisioned by the drafters of the Act.

The emphasis on reinstatement as a remedy is in accordance with Article 10 of the Convention. This Article provides that only if adjudicating bodies are not empowered or find it impractical to order reinstatement, should payment of adequate compensation be deemed appropriate.

The value of the reinstatement remedy in South Africa compares favorably with that in most other countries we have considered. It was observed earlier that the inefficiency of the reinstatement remedy was one of the characteristics of the other countries that have been examined. In France, for example, by nature of the fact that an unfair dismissal is illegal but not void, reinstatement cannot be ordered.

The preceding sections have argued that the present protection of workers against unfair dismissal is not as tenuous as some would make out. In many areas, the law compares favorably with statutes found in many major industrialized powers.

A proposed amendment of the Act, due to be implemented during the 1987 session, would further improve the position of the unfairly dismissed worker.

#### D. Proposed Bill Amending the Labor Relations Act

While the Act as it presently stands protects the unfairly dismissed worker by equating the concept with an unfair labor practice, the unfairly discharged worker would be specifically protected under the proposed amendment.

The draft Bill would include a definition of the term "unfair dismissal" and no longer subsume it under the concept of an unfair labor practice. Section 1 defines a discharge as unfair it:

- i. an employee's employment is terminated without valid and fair reason;
- ii. reasonable notice has not been given beforehand by the employer to employees of the fact that the number of employees in the employ of the employer is to be retrenched and consultation with the employees or their trade unions has not taken place and the selection of employees to be dismissed is not reasonable;
- iii. the employer has not given the employee a fair opportunity to state his case prior to dismissal;
- iv. a procedure agreed upon has not been followed at termination of employment.

While the amendment would further define "unfair dismissal," it would appear that the principles that would apply would not differ much, if at all, from those presently applied. What results from an insertion of such a definition is perhaps a more clearly articulated compliance with the demands of Article 4 of the Convention.

The proposed amendment would retain the same first level dispute resolution mechanism such as the industrial councils and conciliation boards, but a new section, Section 45A, would provide a mechanism independent from that in unfair

labor practice disputes, whereby alleged unfair labor dismissals could eventually be adjudicated upon by the Industrial Court. The Section provides that if the industrial council or conciliation board fails to resolve the issue of the alleged unfair dismissal, the Industrial Court may, after considering a number of factors including whether "there are reasonable grounds for believing that said suspension or dismissal is not due to misconduct on the part of said individual...which justified such dismissal,"<sup>72</sup> may "arbitrate in respect of the dispute."<sup>73</sup>

An allegedly unfairly dismissed worker may still be able to obtain status quo relief under Section 43, but because of the redefinition of the term "unfair labor practice," are adjudicated upon as a separate body of claims and on their own merit.

The proposed Bill also provides for an appeal from the Industrial Court to the novel Special Labor Court.<sup>74</sup>

The proposed amendment would consequently have the effect of taking the concept of unfair dismissal and separating it out from the previously all-encompassing unfair labor practice concept. As a consequence, there would be specific protection of unfairly dismissed workers and specific channels for relief. No longer will the Industrial Court be open to suggestions that an unfair dismissal did not fall within the definition of an unfair labor practice and was therefore not remediable. In the final analysis, greater specificity can only lead to closer compliance with the standards of the

1982 Convention concerning Termination of Employment at the Initiative of the Employer.

## NOTES

## CHAPTER VI

1. RP. 47/1979.
2. Swandpoel, Introduction to Labour Law (2 ed.), 101 (1986).
3. Cassim, supra Chapter 2, note 1, 292 footnote 66.
4. DeKock, Industrial Laws of South Africa, 502 (1986).  
The Acts which go up to make up the new "dispensation" are:  
The Industrial Conciliation Amendment Act 94 of 1979; The Industrial Conciliation Amendment Act 95 of 1980; The Labour Relations Amendment Act 57 of 1981; The Labour Relations Amendment Act 51 of 1982; The Labour Relations Amendment Act 2 of 1983 and The Labour Relations Amendment Act 81 of 1984.
5. Labour Relations Amendment Act 57 (1981).
6. Swanepoel, supra note 2, at 40.
7. DeKock, supra note 4, at 502A.
8. Section 3(1).
9. Section 4(2)(c).
10. S.A. Industrial Union v. Registrar of Trade Unions, 1925 T.P.D. 703 (S.A.L.R.)
11. Section 18.
12. Section 18(1)(ii) and Section 19.
13. Section 23(1).
14. Ibid.
15. DeKock, supra note 4, at 562A.
16. Section 48(1)(b).
17. Swanepoel, supra note 6, at 53.
18. Unisa, Labour Law, 63 (1985).
19. Section 35.
20. Section 35(1).
21. Swanepoel, supra note 2, at 61.

22. DeKock, supra note 4, at 581.
23. DeKock, supra note 4, at 597.
24. Section 4A.
25. Section 8(5)(a)(i).
26. Section 11(4)(a).
27. Section 35(5).
28. Section 35(5)(a)(iii).
29. DeKock, supra note 4, at 589.
30. African Commercial and Distributive Workers' Union v. Schoeman, N.O., 1951 (4) S.A.L.R. 266 (T).
31. Section 46(9).
32. Section 46(9)(a).
33. An "unfair labour practice" is defined as:
  - (a) any labour practice or any change in any change in any labor practice other than a strike or a lockout which has or may have the effect that
    - (i) any employee or class of employees is or may be unfairly affected or that his or her employment opportunities, work security or physical, moral or social welfare is or may be prejudiced or jeopardized thereby;
    - (ii) the business of the employer or class of employers is or may be unfairly affected or disrupted thereby;
    - (iii) labour unrest is or may be created or promoted thereby;
    - (iv) the relationship between employer and employee is or may be detrimentally affected thereby; or
  - (b) any other labour practice or any other change in any labour practice which has or may have the effect which is similar or related to any effect mentioned in paragraph (a).
34. Section 43(1)(a).
35. Section 43(1)(b).
36. Section 43(1)(c).
37. Section 43(2).



38. The court in *Setlogelo v. Setlogelo* (1914 A.D. 221, 227) set out the following requirements for the granting of an interlocutory interdict:

- (i) a right which, though prima facie established, is open to some doubt;
- (ii) a well-grounded apprehension of irreparable injury;
- (iii) absence of any other remedy.

See also *Webster v. Mitchell*, 1948 (1) S.A.L.R. 1186, 1189 (W), and *Gumede & Others v. Richdens (Pty) Ltd.*, 1948 (5) South African I.L.J. 84.

39. Cassim, supra Chapter II, note 1, at 283.

40. Foreign countries in South Africa are usually requested to comply with some labor relations standard imposed in their own country. For example, the Australian Government set out the "Willesee's Code," while United States companies strive to comply with the Sullivan Principles. The Canadian Government also adopted a code of conduct concerning employment practices for companies operating in South Africa in 1978.

41. Levy, *Unfair Dismissal*, 7 (1986).

42. See Wiehahn, *The Complete Wiehahn Report*, 96/7 (1982).

43. Id. at 445.

44. Levy, supra note 41, at 8.

45. Unisa, *Labour Law*, 85 (1985). See *Van Zyl v. O'Kiep Copper Co., Ltd.*, (1983) 4 I.L.J. 125, *Wahl v. AECI Ltd.* (1983) 4 I.L.J. 298, *Nodlele v. Mount Nelson Hotel & Another* (1984), 5 I.L.J. 216.

46. *S.A. Diamond Workers Union v. The MasterDiamond Cutters Assoc.*, (1982) 3 I.L.J. 87, 114-20.

47. Art. 4 of the 1982 Convention on Termination of Employment.

48. See cases note 45.

49. See *United African Motor and Allied Workers Union & Others v. Fodens (SA) (Pty) Ltd.*, (1983) 4 I.L.J. 212.

50. See *World Labour Report*, supra Chapter III, note 1, at 79.

51. See supra page 69.
52. See supra page 71.
53. Van Zyl v. O'Kiep Copper Co., (1983) 4 I.L.J. 125, 135.
54. Draft Bill To Amend the Labour Relations Act, Government Gazette, 19 December 1986.
55. See Canada, for example.
56. Section 2(1).
57. Section 2(2).
58. Ibid.
59. Ibid.
60. Section 48.
61. Cassim, supra Chapter II, note 1, at 292.
62. Supra page 61.
63. See Raad van Mynvakbonde v. Die Minister van Mannekrag, 1983 (4) S.A.L.R. 29 (T); S.A. Defence & Aid Fund v. Minister of Justice, 1967 (1) S.A.L.R. 31 (C).
64. Raad van Mynvakbonde v. Die Minister van Mannekrag, supra note 63.
65. Art. 15 1982 Recommendation on Termination of Employment.
66. See Wilfred Rhodes v. S.A. Bias Binding Mfg. (Pty) Ltd., (1985) 6 I.L.J. 106.
67. Art. 9(2).
68. Section 17(11)(f).
69. Cassim, supra Chapter II, note 1, at 292.
70. Id. at 293.
71. See discussion on "fairness," DeKock, supra note 4, at 600.
72. See Draft Bill, supra note 54, Section 45A(3)(e).
73. Id. at Section 45A(3)(i).
74. Id. at Section 17A to 17D.

## CHAPTER VII

### CONCLUSION

It has been noticed that the common law or non-statutory law has traditionally been harsh on the employee as far as his rights to job security are concerned. In the United States, judicial activism in attempting to find common law exceptions to the at will rule has provided only sporadic and isolated instances of protection to the unfairly dismissed worker. Statutory protection in the United States is very specific and of limited value to employees who are the victims of arbitrary discharge. Any attempts to bring United States dismissal law in line with ILO standards, by finding common law exceptions to the at will rule, necessarily fall way short of the mark, as has been illustrated.

The foreign experience in Canada and Western Europe offers a stark contrast. Statutory enactments, coupled with a genuine attempt to comply with supra-national standards, have allowed a methodical development of dismissal law largely in keeping with ILO standards.

Considered against this background, dismissal law in South Africa is not as limited as some would suggest. Despite the absence at the present moment of a specific reference to unfair dismissal, workers are nevertheless protected by the

unfair labor practice concept. In the area of the guarantee offered, scope of protection, coverage, the hearing and remedies, the worker in South Africa enjoys a protection of a standard in keeping with the Western European countries, Canada and the guidelines of the ILO itself.

The proposed amendment due to be implemented shortly can serve only to improve the position of the unfairly dismissed worker and make calls for a general unfair dismissal statute less weighty than at present.

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