Dismissals and the Law — An Overview

by

Julienne Chan

I. INTRODUCTION

What are the rights and obligations of employers and employees in respect of dismissal from employment? Much will depend on whether or not the employee is a member of a union and is covered by an award or agreement registered under the Industrial Relations Act 1973. If he is, the employment relationship will be governed by the terms of the award or agreement and by statute. If he is not, then how and when the employment may be terminated will depend upon the terms of the contract of employment entered into between the employer and employee, and the common law.[1]

The purpose of this paper is to give an overview of the law relating to dismissals from employment, from the common law position through to the present statutory provisions of the Industrial Relations Act 1973.[2] The first part of the paper outlines the common law concept of wrongful dismissal and the remedies available. The second part briefly describes the development of a statutory overlay on the common law by the introduction in 1970 of the personal grievance procedures in the Industrial Conciliation and Arbitration Amendment Act 1970 (now repealed). The final part of the paper examines the current provisions of the Industrial Relations Act 1973 relating to dismissals. These are the section 117 personal grievance procedure for unjustified dismissal, and the section 150 victimisation provisions.

[1] See M.A. Wilson, "A few Observations on the Law Relating to Security of Employment", included in *The Industrial Law Seminar* (Legal Research Foundation Inc., 1979) 2.

[2] For a fuller treatment of the subject generally see A. Szakats, *Introduction to the Law of Employment* (Butterworths, 1975), Part IV. See also the article by R.J. Katz "The Right to Hire and Fire" (1973) 2 A.U.L.R. 35.

II. THE COMMON LAW 'WRONGFUL DISMISSAL':

> The transitory character of the employment contract is strikingly demonstrated by the right of either party to terminate the relationship without committing a breach thereby.[3]

At common law a contract of employment may lawfully be terminated in either of five ways: by the mutual consent of the parties, by operation of law (for example upon frustration of the contract, or upon the death of the employee); by the giving of due notice, by wages in lieu of notice or by summary dismissal (without notice) for cause. Where the contract is terminated on one of these grounds an employee will generally have no remedy for his loss of employment. However the employee will have a cause of action for wrongful dismissal where his employer terminates the contract of employment without giving adequate notice and is unable to point to any breach by the employee of the contract sufficient to constitute good cause.

In the case of termination by notice, the length of notice required to be given may be expressly provided for in the employment contract itself, or laid down in the relevant award or collective agreement, or may, in certain industries, be regulated by a recognised custom.[4] In the absence of an express provision or binding custom the common law always implies a term that the employment contract is "only determinable by reasonable notice".[5] In determining what constitutes 'reasonable notice' the Courts have generally acted on the rule of thumb that notice need not be more extensive than the pay period, although each case depends upon its own facts and factors such as the character of the employment, the position held and length of service are taken into account when deciding what is reasonable.[6]

Notice may be given orally or in writing; and the employer is not required to give reasons for the termination. Provided due notice is given the reasons for the dismissal are irrelevant; the employer in fact need not have a reason.

The right to summarily dismiss for cause arises where there has been a breach of the contract of employment. As in other contracts the unjustifiable failure or deliberate refusal by one party to carry out his obligations under the employment contract gives the other party the right to treat the contract as repudiated. Thus, where an employee acts in such a way as to amount in law to a repudiation of his employment contract the employer is free to accept that repudiation and dismiss the worker without notice. It has been held that in order to justify

[3] A. Szakats, *op. cit.*, 268.
[4] For examples of custom recognised in New Zealand see *Whitcombe & Tombs Ltd.* v. *Taylor* (1907) 27 N.Z.L.R. 237; *Black* v. *Falconer* [1916] G.L.R. 627.
[5] *James* v. *Thomas H. Kent & Co. Ltd.* [1951] 1 K.B. 551 at 556 (per Denning, L.J.).
[6] Szakats, *op. cit.*, 313.

dismissal for breach the employee must be guilty of "either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect".[7] It was recognised, however, that "there is no fixed rule of law defining the degree of misconduct which will justify dismissal".[8]

> The type of conduct which can amount to a repudiation must necessarily depend on the circumstances of each individual case. It is a matter of fact and a matter of degree. It must be related to the situation at the time and the particular personalities involved.[9]

The onus of proving the existence of misconduct amounting to a repudiation lies on the defendant employer.[10] It should be noted, however, that the employer need not have a sufficient cause at the actual time of the summary dismissal. It is enough if he can establish at the time of the hearing that a sufficient cause existed.[11]

Where there has been summary dismissal without good cause or dismissal without the appropriate period of notice the action by the employer will itself amount to a breach of the contract of employment entitling the dismissed employee to a common law action for wrongful dismissal.

The common law remedy normally available to an employee who is wrongfully dismissed is an action for damages. However, unless the contract of employment specifically provides for the payment of liquidated damages in the event of wrongful dismissal, the measure of damages recoverable by the dismissed employee is generally limited to the amount of wages which would have been earned during the period of proper notice. Hence, where an employer elects to pay wages in lieu of notice action is generally precluded because the employer is in effect paying the measure of damages in advance.

Compensation for the manner of dismissal, for injured feelings, or for the fact that the dismissal makes it more difficult to obtain other employment, cannot be claimed. This was held by the House of Lords in *Addis* v. *Gramophone Co. Ltd*,[12] a case in which it was further observed that any claim based on malice, fraud, defamation, or violence connected with a breach of contract can be recovered only in an action in tort.[13]

The starting point in assessing the measure of damages is the total net amount of wages or salary the employee would have earned had proper notice been given, to which may be added the value of any benefits he would be legally entitled to claim under his contract had it

[7] *Callo* v. *Brouncker* (1831) 4 C. & P. 518; 172 E.R. 809.
[8] *Clouston & Co. Ltd.* v. *Corry* [1906] A.C. 122 at 129 (P.C.).
[9] *Gorse* v. *Durham County Council* [1971] 2 All E.R. 666 at 671 (per Cusack, J.).
[10] *Browne* v. *Commissioner of Railways* (1935) 36 S.R. (N.S.W.) 21.
[11] *Boston Deep Sea Fishing Co.* v. *Ansell* (1888) 39 Ch.D. 339.
[12] [1909] A.C. 488. The plaintiff in this case, who was dismissed from his managerial position, sued not only for lost wages and commission but also for damages for the abrupt and oppressive manner of dismissal.
[13] *Ibid.*, 493-497 (per Atkinson, L.J.).

been peformed. But he cannot claim extra benefits which the contract did not oblige the employer to confer even though the employee might reasonably have expected his employer to confer them on him in due course.[14] An exception, where damages beyond the actual loss of wages may be recovered, is found in cases concerning theatrical and artistic employees who, by the special nature of their employment contracts may recover damages for loss of chance or publicity and reputation.[15]

A wrongfully dismissed employee is under a duty to mitigate his damages by taking all reasonable steps to try and obtain other similar employment. He is not obliged, however, to accept any job, nor accept a job which is inferior to his former status and position. But an offer of re-employment by the former employer should be accepted unless the relationship is such that a future working relationship would be impossible.[16] Where there has been an unreasonable refusal to accept an offer of suitable employment or a failure to use due diligence to obtain alternative employment, a sum representing the amount the employee might have earned during the period will be deducted from the total amount recoverable. The onus of establishing the facts going to mitigation of damages is on the defendant employer, the basic issue being whether the employee has acted reasonably or not in refusing other employment.[17]

Where alternative employment is found during the period between dismissal and the action, the amount of damages recoverable will similarly be reduced by what was earned in the alternative employment, together with deductions of income tax and any sums paid to the employee at the time of the dismissal. Any income derived from an unemployment benefit will also be deducted.[18] It follows that an employer who wrongfully dismisses an employee may gain some pecuniary advantage by waiting and paying damages rather than paying out wages in lieu of notice at the time of dismissal.

A dismissed employee may in certain circumstances obtain from the Court a declaratory order[19] that the dismissal was invalid and that the contract of employment still subsists. From the line of cases, however, it would appear that the Court will exercise its discretion to make a

[14] *Clark* v. *Independent Broadcasting Co. Ltd.* [1974] 2 N.Z.L.R. 587. The Supreme Court held that, while a dismissed chief announcer was entitled to damages for failure by his employers to give adequate notice, together with a further sum for the loss of overtime, he was not entitled to compensation for loss of potential benefits which he might otherwise have expected during the course of employment.

[15] See A. Szakats, *op. cit.*, 295.

[16] See *New Zealand Fruit & Produce Co. Ltd.* v. *Taylor* (1908) 11 G.L.R. 43.

[17] *Ibid.*, 44.

[18] *Parsons* v. *B.N.M. Laboratories Ltd.* [1964] 1 Q.B. 95.

[19] The High Court is empowered to make declaratory orders under the Declaratory Judgments Act 1908.

declaration only where the employment is derived from a statutory scheme or public authority under which the employee enjoyed a status of which he has unlawfully been deprived, and for which damages are inappropriate.[20] In an ordinary relationship of employer and employee, termination of the contract of employment will "never be a nullity"[21] and the dismissed employee may have his only remedy in an action for damages.

The equitable remedies of specific performance and injunction have traditionally been refused by the Court to support an employee who was wrongfully dismissed, the underlying reasons being that once mutual confidence has been destroyed following a breach by one of the parties to the employment contract it cannot be restored by judicial decree; nor is the Court ever in a position to continually supervise performance of the contract.[22] It is of interest to note, however, that the English Courts in more recent times have inclined towards the more flexible view that "the so-called rule [against granting the equitable remedies of specific performance and injunction] is plainly not absolute and without exception".[23] But, like the declaratory order, it is only in the exceptional case that the Courts are likely to consider the equitable remedies. In the ordinary contract of employment the Courts will in most cases accept the termination of the contract and allow damages as the only remedy where the dismissal is found to be wrongful.

In summary, the conclusion to be drawn is that at common law there is in effect no security of employment. A job is only as secure as the length of notice required to terminate it. The common law remedy for wrongful dismissal is tied to notice. Provided proper notice is given the dismissed worker has no remedy. No account can be taken of the arbitrariness or the injustice of the dismissal, nor of the fact that the rules of natural justice have not been observed by the employer. Where proper notice is not given (for instance where there has been a summary dismissal without sufficient cause) the wronged worker can, as a general rule, recover no more than the net wages due for the period of notice in an action for damages for his wrongful dismissal. For many, the attendant time and expense involved in pursuing court action to recover what may amount to no more than a week's wage would simply not be worth it.

[20] See *Vine* v. *National Dock Labour Board* [1957] A.C. 488 (H.L.); cf *Forbes* v. *Johnston* [1971] N.Z.L.R. 1117.

[21] *Vine* v. *National Dock Labour Board,* supra., 507.

[22] For an exception to the general rule, where the Courts have granted an injunction to enforce a negative covenant, see *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604; *Warner Brothers Pictures Inc.* v. *Nelson* [1937] 1 K.B. 209.

[23] *C.H. Giles & Co. Ltd.* v. *Morris* [1972] 1 All E.R. 960 at 969. See also *Hill* v. *C.A. Parsons & Co. Ltd.* [1971] 3 All E.R. 1345.

However, an interesting point does arise with the very recent advent of the Small Claims Tribunals.[24] These tribunals have jurisdiction in respect of, inter alia, a claim founded on contract where the total amount claimed does not exceed $500. A priori a dismissed employee, who for some reason is denied a statutory remedy, could, provided he claims no more than $500, perhaps avoid the legal and other expenses involved in pursuing a District Court action for wrongful dismissal by lodging a claim for breach of contract in the Small Claims Tribunal. Moreover, where the Tribunal is unable to bring the parties to a dispute to an agreed settlement it is empowered to determine the dispute according to the substantial merits and justice of the case, and, while it is required to have regard to the law, it is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities;[25] accordingly, the Tribunal Referee would not be strictly bound to consider only whether adequate notice was given in the particular circumstances, but could consider all the merits of the case including such factors as the manner of the dismissal, any hardship, hurt feelings, or indignity suffered, and whether the dismissed employeee was given the opportunity to put his side of the story before the decision to dismiss was made.

III. The Industrial Conciliation And Arbitration Act 1954, Section 179

The introduction in 1970 of section 179 of the Industrial Conciliation and Arbitration Act, as inserted by section 4 of the Industrial Conciliation and Arbitration Amendment Act 1970, gave for the first time in New Zealand statutory recognition of the need to provide an aggrieved worker with a speedy, inexpensive and standardised procedure for the settlement of personal grievances. The new legislation stemmed from a realisation that too often personal grievances, particularly alleged wrongful dismissals affecting one man were a constant source of industrial disputes leading to work stoppages affecting a large number of men and therefore it was "clearly sensible to have a standard procedure to avoid that situation and to settle quickly the grievances that may arise".[26]

Section 179 overlaid the common law; it did not replace it. The standard procedure set out in the section could be invoked only by those workers who belonged to a union and whose contract of employment did not preclude the adoption of the statutory procedure. Workers who were precluded from relying on the statutory provisions had to

[24] These Tribunals are established under the Small Claims Tribunals Act 1976.
[25] Section 15(4).
[26] (1970) 369 *New Zealand Parliamentary Debates* (hereafter referred to as N.Z.P.D.), 4046.

resort to the common law. But the legislation, like the common law, was still concerned with the concept of wrongful dismissal and because 'wrongful dismissal' was nowhere defined in the legislation those invoking the statutory provisions had to fall back on the common law definition. Consequently, only those cases involving improper notice could be successful in obtaining a remedy under the Act. Thus the only advantage of the statutory overlay over the common law, to those able to invoke the provisions, lay in the quick and relatively straightforward procedure it provided, and in the greater range of remedies which could be imposed on a finding of wrongful dismissal.

The standard procedure provided by section 179 diverted the aggrieved worker away from the Court and, where he was unable or unwilling to personally settle his grievance, channelled him through his Union. The worker could not personally invoke the statutory procedure. Unless the Union considered there was "some substance" in the worker's grievance and was prepared to act on his behalf the worker had no statutory remedy and could rely only on the common law if he wished to pursue his claim. If the Union agreed to act but was unable to settle the matter by negotiation with the employer it was to be referred to the tribunal or body specified in the award or industrial agreement covering the worker. In the absence of such provision, the matter was to be referred to an independent arbitrator mutually agreed upon by the parties or, failing that, to an arbitrator appointed by the Minister of Labour. Any decision or award made by the tribunal, body or arbitrator was binding on all the parties.[27] Where a claim for wrongful dismissal was made out the remedies available under the section included not only re-imbursement for lost wages but also compensation and reinstatement.[28] It is of note, however, that the remedies were purely at the discretion of the adjudicating body. It could order one or more of the remedies or decline to order any. By contrast, once dismissal is found to be wrongful at common law, the plaintiff is almost automatically entitled to recovery of wages lost during the notice period.

The statutory provisions allowing for orders of reinstatement and compensation represented a significant departure from the common law stance. Reinstatement is in effect none other than a statutory recognition of specific performance, and its inclusion reflects a recognition by the legislature that the worker's employment may be a lot more important to him than compensation for its loss.[29] Compensa-

[27] Industrial Conciliation and Arbitration Act 1954, s.179(2)(f), as inserted by s.4 of the Industrial Conciliation and Arbitration Amendment Act, 1970.
[28] *Ibid.*, s.179(5).
[29] A. Szakats, *op. cit.*, 310.

tion, in contrast to reimbursement, contemplates a monetary payment for such things as inconvenience, injured feelings, or for loss of employment, as distinct from loss of wages.

It can be seen that the 1970 amendment to the Act with its simple, speedy and inexpensive standard procedure and its more satisfactory range of available remedies provided for a considerably improved alternative to the common law action for wrongful dismissal. But its shortfalls were equally evident. It did not cover all workers. Those not belonging to a Union or whose industrial award or agreement precluded the use of the procedure could rely only on the common law. Remedies remained tied to the common law concept of wrongful dismissal. Provided proper notice was given or the summary dismissal founded on good cause the worker had no remedy for his dismissal. Still no account could be taken of any unfairness or injustice in the employer's actions. And on a finding of wrongful dismissal the remedies available were totally at the discretion of the adjudicating body. There was no guarantee of a remedy to the aggrieved worker. Nor had he any appeal rights. The decision of the body was final and binding. Security of employment remained almost as tenuous as in the common law, notwithstanding the more readily available remedy of reinstatement. This remedy was seldom granted in practice, mainly because a working relationship between employer and employee was often no longer viable.

IV. The Industrial Relations Act 1973, Section 117:

In 1973 the Industrial Conciliation and Arbitration Act and its amendments were replaced by the Industrial Relations Act 1973. Section 117 of the Industrial Relations Act replaces the former section 179, as inserted by the 1970 amendment. Section 117, however, makes several significant changes to the former personal grievance provisions.

The first and most consequential alteration is the change of wording from "wrongfully dismissed" to "unjustifiably dismissed". It has been accepted by the Courts that "the change of words was deliberate and the common law authorities on 'wrongful dismissal' have little or no application to the concept of 'unjustified dismissal' ".[30] Indeed, the expressed intention of the legislature was "to widen the previous provisions which were confined to a consideration of whether notice was properly given".[31] The legislature, however, gave no statutory definition of 'unjustifiably dismissed'. It has been suggested[32] that the

[30] *Auckland Local Authorities' Officers' Union* v. *Waitemata City Council* [1980] N.Z. Arbitration Court Judgments (hereafter referred to as Arb. Ct.) 35.
[31] (1973) 385 N.Z.P.D. 3042; *Mazengarb & Smith's Industrial Law* (4th ed. 1980) 125.
[32] *Mazengarb & Smith's Industrial Law,* 124/2.

term imports the notion that not only should the form or manner of the dismissal be scrutinised but also the fairness of the dismissal in determining whether it was justified or not.

The Court's approach to the issue of unjustified dismissal was discussed in *Auckland Local Authorities' Officers' Union* v. *Waitemata City Council.*[33] In that case Chief Judge Horn expressed the view that in giving content to the term the Court took a pragmatic approach, "treating individual cases on their merits", but that the practice of the Court so far had been "to judge each dismissal with reference to the conduct of the parties and to the reasons, if any, advanced by the employer for dismissal".[34]

The reasons for dismissal do not have to relate solely to the employee's conduct. Dismissal may be justified for reasons associated with business operations such as redundancy, or for other economic reasons;[35] or because the employee has reached normal retiring age;[36] or due to operation of law.[37] But an employer cannot rely however on ex-post-facto reasons to justify subsequently a dismissal made on other grounds.[38]

As to the effect of section 117 upon dismissal on notice, the Court in the *Waitemata City Council* case held that where reasons are given for a dismissal, and whether the dismissal is summary or on notice, a claim for unjustified dismissal may be found. In other words, if reasons for the dismissal were given by the employer then it was those reasons alone which determined whether the dismissal was justified or not; the form of the notice was irrelevant.[39] A similar approach was

[33] *Auckland Local Authorities' Officers' Union* v. *Waitemata City Council,* supra.

[34] *Ibid.,* 36.

[35] *Idem.* For other examples of economic factors justifying dismissal see *Templeman* v. *Farmers' Aerial Top Dressing Co.* (1975) 75 B.A. 6561; *Taranaki Amalgamated Society of Shop Assistants and Related Trades I.U.W.* v. *C.C. Ward Ltd* [1980] Arb. Ct. 123.

[36] *Taranaki Amalgamated Society of Shop Assistants and Related Trades I.U.W.* v. *C.C. Ward Ltd* [1980] Arb. Ct. 115.

[37] *New Zealand Commercial Pilots' I.U.W.* v. *Napier Aero Club Inc.* [1980] Arb. Ct. 315. A flight instructor with a 'Category C' rating was held to be justifiably dismissed following a Civil Aviation directive requiring the full-time employment, on the same airfield, of a senior instructor to supervise all category C instructors.

[38] *Wellington District Hotel, Hospital, Restaurant and Related Trades Employees' I.U.W.* v. *College Dairy (1978) Ltd.* [1978] Ind. Ct. 203. In this case the employer attempted to rely on complaints about the dismissed employee's attitude allegedly made to him after termination of the employment to justify the termination. The Court, in disallowing the ex-post-facto complaints, found the real reason for the dismissal was the employee's seeking of union assistance in respect of her contract of service and communicating that fact to her employers. The dismissal was held unjustified.

[39] The Court did not consider the situation where no reasons for the dismissal are given by the employer. Where this is the case it would appear that the Court is left with the task of trying to determine the real reason for the dismissal from the evidence before the Court. See, for example, *Auckland Amalgamated Society of Shop Assistants' I.U.W.* v. *Curtain Styles Ltd.* [1978] Ind. Ct. 53.

taken in *Oakman* v. *Bay of Plenty Harbour Board.*[40] In that case a Harbour Board gatekeeper was summarily dismissed for watching television during evening shift, contrary to his employer's instructions. The Court paradoxically took the view that although summary dismissal was not justified, nevertheless dismissal was justified because the plaintiff chose to ignore a direct and clear instruction, but, because section 117 makes no distinction between summary dismissal and dismissal, the Court could make no award.

It is submitted that this interpretation of section 117 is illogical. Reasons for dismissal cannot be looked at in isolation from the form of dismissal, for it will often be the case that the form of dismissal, in relation to the professed reasons, will be highly relevant in determining whether the dismissal was unjustifiable or not.[41] In other words the reasons for the dismissal should justify the form or manner of the dismissal and the Court should consider both in determining whether or not dismissal was unjustified. If in the Court's opinion the reasons for summary dismissal do not justify the summary dismissal, then, notwithstanding an opinion that dismissal on notice would have been justified, a finding of unjustified dismissal should be made and, where appropriate a remedy (such as the amount of wages the worker would have earned during the period of adequate notice) given. The fact that section 117 is 'no longer confined to a consideration of whether notice was properly given' does not mean that *no* regard can be had as to whether adequate notice was given in the particular circumstances of the case.

A further significant effect of the change of wording in section 117 is that the term 'unjustifiably dismissed' incorporates by implication a requirement that the rules of natural justice be observed. While the Courts have not expressly considered the application of the rules as such to unjustified dismissal, there nevertheless has been a general requirement, particularly in the case of summary dismissal for misconduct, that the worker be entitled to know exactly what the allegations against him are, and be given the opportunity to put his side of the story before the decision to dismiss is made.[42]

The employer is under a further obligation when deciding whether

[40] [1979] Arb. Ct. 15.

[41] For instance, dismissal in summary fashion on the grounds of redundancy obviously would not be justified, yet dismissal on adequate notice for the same reason would be justified.

[42] *Wellington etc. Local Bodies' Officers' I.U.W.* v. *Wellington Regional Hydatids Control Authority* [1977] Ind. Ct. 141; *Wellington, Taranaki, Caretakers Cleaners and Lift Attendants and Watchmen's I.U.W.* v. *Night Security Services Ltd.* [1977] Ind. Ct. 119; *Wellington etc. Clerical, Administrative and Related Workers' I.U.W.* v. *J.N. Anderson & Son Ltd.* [1979] Arb. Ct. 333; *Auckland Hotel, Hospital, Restaurant and Related Trades Employees' I.U.W.* v. *Auckland Travelodge Hotel* [1980] Arb. Ct. 387.

or not to dismiss an employee for a particular piece of misconduct to take into account the past work record of the employee.[43] And any previous warnings cumulating in the ultimate dismissal must have clearly indicated to the employee that his employment was in jeopardy unless his work performance or attitude improved.[44]

A second notable change from the previous legislation governing personal grievance procedure is the statutory requirement that the standard procedure set out in section 117 (or some other written and court-approved procedure for the settlement of personal grievances) be included in every award or collective agreement. The parties can no longer agree to preclude any provision for the settlement of personal grievances as they formerly could. It must be noted, however, that the personal grievance machinery imposed by the statute still remains available only to those workers covered by an award or collective agreement.[45] Thus, the only remedy open to a dismissed employee whose service contract does not incorporate an award or agreement, even though he may belong to a trade union, would be a common law action for wrongful dismissal unless he is able to bring himself within the special victimisation provisions of section 150 of the Act. While union membership is not an express prerequisite to invoking the section 117 machinery the section itself strongly implies that before a worker can rely on the statutory procedure the two elements of award coverage and union membership will need to exist.[46]

The standard procedure in section 117 remains substantially the same as in the former section 179. However, there are some points of departure worthy of mention. Under section 117 stronger emphasis is placed on settling the grievance rapidly and as near as possible to the point of origin. The worker is required, as a first step, to attempt to settle the grievance himself by direct discussion with his immediate supervisor. It is only where the attempt to settle fails or the grievance is such that it would be inappropriate to attempt to settle it directly between the worker and his supervisor that the Union is notified. If, upon considering there is some substance in the grievance, the Union is unable to dispose of the matter in discussion with the employer,[47] a

[43] *Airline Stewards and Hostesses of New Zealand I.U.W.* v. *Air New Zealand Ltd.* [1976] Ind. Ct. 187; *Wellington etc. Local Bodies' Officers' I.U.W.* v. *Wellington Regional Hydatids Control Authority,* supra.

[44] *Wellington etc. Local Bodies' Officers' I.U.W.* v. *Wellington Regional Hydatids Control Authority,* supra; *Vial* v. *St. Georges Private Hospital* Arb. Ct. 53.

[45] *Auckland Freezing Works and Abattoir Employees' I.U.W.* v. *Te Kuiti Borough Council* [1977] 1 N.Z.L.R. 211.

[46] An applicant must also be a "worker" within the meaning of the Act before a claim for alleged unjustified dismissal can be made under s.117. A mere contract to employ which is terminated before employment actually commences does not give a right to claim under the Act. *Auckland Clerical and Office Staff Employees' I.U.W.* v. *Wilson* [1980] Arb. Ct. 357; [1981] N.Z. Recent Law 54.

[47] In *Jones* v. *Home Bay Cottage* [1980] Arb. Ct. 61 the Court held that "disposed of" in s.117(4)(d) did not necessarily mean 'disposed of to the worker's satisfaction'.

written statement containing full details of the grievance is referred to a grievance committee and, if the matter remains unresolved, it is ultimately dealt with by the Arbitration Court.[48]

It is expedient to note at this point that the Crown is not bound by the Industrial Relations Act.[49] Consequently, the protection accorded by section 117 does not extend to government employees notwithstanding any agreement covering the employee which purports to incorporate the statutory personal grievance procedure. The right to invoke the procedure is dependent upon the agreement made between Union and government department being registered under the Act.[50] Because the Crown cannot be bound, the agreement is not registrable under the Act and, accordingly, the Arbitration Court has no jurisdiction to deal with the application.[51]

A significant amendment to the legislation specifically "designed to protect the rights of the individual worker"[52] was introduced in 1976 with subsection (3A) of section 117. The subsection represents a departure from the general thrust of the Act which is clearly directed "towards the regulation of collective relationships".[53] Until its introduction in 1976 the individual worker was unable to take his grievance through the various levels of the personal grievance procedure except through the patronage of his trade union which might or might not choose to pursue his claim on his behalf. If a union declined to act that was the end of the matter, the worker could resort only to the common law for his remedy. Now, under subsection (3A), a worker who is unable to have his grievance dealt with or dealt with promptly in accordance with the personal grievance procedure may, with the leave of the Arbitration Court, personally refer the matter to that Court for settlement.

However, section 117(3A) has been interpreted by the Court as requiring "actual membership of the appropriate trade union as a prerequisite before a worker can, as an individual, invoke the provisions of subsection (3A)".[54] But it would appear that non-membership of the appropriate union at the time the personal grievance arose may not be fatal to a worker's claim under subsection (3A) provided he does

[48] It will be remembered that under the old s.4 a worker, while free to do so, was not obliged to try to resolve his grievance personally, and the ultimate adjudicator under that section was an independent arbitrator instead of the Court.
[49] Industrial Relations Act 1973, s.218.
[50] See s.2 definition of 'agreement'.
[51] *Hori* v. *New Zealand Forest Service* [1978] Ind. Ct. 35.
[52] (1976) 408 N.Z.P.D. 3948.
[53] See M.A. Wilson, *loc. cit.*, 2.
[54] *Muir* v. *Southland Farmers Co-operative Assn. Ltd.* [1979] Arb. Ct. 49. The dismissed worker in this case unsuccessfully sought leave to proceed under s.117(3A) following the refusal by the union approached to act on his behalf. The union had declined to act because, despite an unqualified preference clause in the award under which the worker claimed to be covered, the worked had not joined the union.

have union-membership status before attempting, first through his union, and ultimately as an individual, to invoke the personal grievance procedure.[55] Before the Court will grant leave to an applicant to proceed on an individual basis under section 117(3A) it must be satisfied that the applicant has first approached his union and that it had failed to act or to act promptly on his behalf.[56]

It is to be noted that section 117, unlike section 150 of the Act, contains no provisions placing the burden of proof on the employer. The question of onus was canvassed in the *Waitemata City Council* case.[57] The Court expressed a reluctance to define the borderlines of onus with great precision but considered that, while the onus was not wholly on the employer, if the worker could establish a reasonable sense of unfairness or lack of minimal justification then an evidentiary onus fell on the employer to show his decision was justified.[58] Where dismissal is found to be unjustified the Court may in its discretion order all or any of the remedies of reimbursement, reinstatement and compensation. Reimbursement is expressly defined in the Act as "a sum equal to the whole or any part of wages lost",[59] thereby equating with common law damages for wrongful dismissal. The Act gives no guidance as to the assessment of compensation; but it would appear from the cases generally that the conduct of the respective parties is the principal influencing factor in determining whether or not compensation will be awarded. When reinstatement is ordered the Act requires that the worker be reinstated in his former position or in a position not less advantageous to him. In practice, the Court has generally ordered reinstatement only where a compatible working relationship between the parties is likely to be restored.

V. Section 150

Section 150 is concerned with victimisation. Its basic purpose has been described as being[60]

> . . . to impose a deterrant on employers against dismissing or otherwise prejudicing the employment of workers because they are active in union affairs or had made claims under an award. Clearly the intention of the section is to provide some protection against reprisals on workers who wish to employ the industrial law in relation to their employment.

Under section 150 any worker dismissed (or prejudicially affected in his employment) within twelve months following his involvement in any of the activities as defined in the section may, through an Inspec-

[55] *Madden* v. *Peak, Rogers & Co.* unreported (1981) Arb. Ct. 38/81.
[56] *Hori* v. *New Zealand Forest Service,* supra.
[57] *Auckland Local Authorities' Officers' Union* v. *Waitemata City Council* [1980] Arb. Ct. 35.
[58] *Ibid.,* 37.
[59] Industrial Relations Act, s.117(7)(a) and s.150(4).
[60] *Inspector of Awards* v. *Hastings Glass Co. Ltd.* (1974) 74 B.A. 691 at 692.

tor of Awards or his own trade union, bring a court action against the employer for victimisation.

The action is quasi-criminal in nature; before a breach under the section can be established it is necessary to show the motive or intent of the employer in dismissing the employee. A prima facie breach is established once it is proved that dismissal took place within twelve months of the worker's participation in any of the seven activities enumerated in section 150(1). By section 150(2), however, it is a defence to the employer if he can prove that the worker was dismissed for a reason other than for his industrial activities. Thus the onus falls on the employer "to establish on the balance of probabilities that the motivating reasons which actuated him were for something independent of the industrial action".[61] Apropos, the employer must show not merely that an independent reason existed but that he in fact dismissed the worker for that independent reason. The test is:[62]

> Taking into account all the circumstances, has the employer shown on the balance of probabilities that the worker would have been dismissed even if he had not taken part in union or industrial activity?

However, it would appear that providing there was an independent reason it is irrelevant under section 150 whether the independent reason was a sufficient reason. In *Cornhill Insurance Co. Ltd.* v. *New Zealand Insurance Workers I.U.W.*[63] Sir Clifford Richmond, P., after reviewing the authorities, concluded:[64]

> . . . [A]s a matter of law all that the employer need prove is that he dismissed the worker whether lawfully or not for a reason independent of the worker's industrial action. . . . [A]n employer under s. 150(2) is not required to establish that the action he took against the worker was legally and factually justified".

The test is clearly a subjective one, and it is probable that the employer need not even go as far as showing an independent reason existed; it may be enough merely to show that he honestly believed an independent reason existed and that he acted bona fide in that belief.[65] However, as acknowledged by the Courts, it may not be an easy task for an employer to prove than an insufficient or inadequate reason is the true reason which motivated the dismissal, particularly where the actions of the employee "clearly annoyed the employer".[66]

The interpretation placed on section 150 highlights a significant difference between section 117 and section 150. Under the former the onus is on the employer to prove that the reasons for the dismissal were sufficient to justify the dismissal. Under the latter, it does not

[61] *Idem.*
[62] *Inspector of Awards* v. *Tractor Supplies Ltd.* [1966] N.Z.L.R. 792 at 796.
[63] [1980] 1 N.Z.L.R. 322 (C.A.).
[64] *Ibid.*, 326.
[65] See the comments of McMullin, J. in the *Cornhill Insurance* case, supra, n.63.
[66] *Otago Road Transport and Motor and Horse Drivers' and their Assistants' I.U.W.* v. *F.A. Willetts Ltd* [1979] Arb. Ct. 197 at 200; *Cornhill Insurance Co. Ltd.* v. *New Zealand Insurance Workers' I.U.W.*, supra.

matter whether the reasons relied on justify the dismissal or not; the employer need only prove that the dismissal was not victimisation for union activity but arose from an independent reason.

The types of industrial involvement protected under section 150(1) range from direct union involvement through to the mere giving of evidence in any proceedings under the Act. Paragraphs (d) and (f) of subsection (1) relate to claims under awards, and to submissions of personal grievances respectively, and have been particularly the subject of judicial interpretation. In the leading case of *New Zealand Insurance Guild Union of Workers* v. *Insurance Council of New Zealand*[67] the Court adopted the view taken in *Inspector of Awards* v. *Tractor Supplies Ltd.*[68] that:

> . . . the purpose and meaning of paragraph (d) is to protect the worker who makes reasonable respresentations about his Award whether or not his law or the interpretation of the Award turns out to be correct.[69]

The scope of paragraph (d) therefore is to 'throw a broad cloak of protection' over all workers bona fide and reasonably claiming or supporting any claim, albeit mistakenly, in respect of an award or agreement.

Paragraph (f) was similarly given a broad construction by the Court. It held that the personal grievance referred to in the paragraph was not limited to a grievance properly submitted for consideration in accordance with the section 117 procedure. Thus, provided a worker could show that he had, within 12 months prior to the dismissal, submitted any personal grievance to his employer, he would be covered by the 'protective cloak' of section 150.

Hence the effect of the decision in the *New Zealand Insurance Guild* case is that, unlike section 117, section 150 is not limited to workers covered by an award or agreement and that action on the grounds of victimisation may be commenced by any worker on the strength of the section itself.[70] Nor is actual union membership a necessary prerequisite to invoking it. The section clearly extends protection to the pre-union or pre-award situations, where, for example, a worker is

[67] [1976] Ind. Ct. 173.
[68] [1966] N.Z.L.R. 792.
[69] *New Zealand Insurance Guild Union of Workers* v. *Insurance Council of New Zealand,* supra., 181.
[70] A judgment in which a contrary view of the scope of s.150 is expressed, is found in *Canterbury Clerks', Cashiers' and Officers Employees' I.U.W.* v. *South Canterbury Public Relations Assn. Ltd.,* [1980] Arb. Ct. 109, where Horn, C.J., without reference to the decision in the *New Zealand Insurance Guild* case, suggested that the personal grievance referred to in s.150(1)(f) pertained only to a s.117 personal grievance. Although expressly leaving open the question, he also expressed the view that s.150 may not be applicable in respect of a worker who is outside the scope of an Award. It is submitted that the decision of Jamieson, J. in the *New Zealand Insurance Guild* case represents the correct view of the law. (See the comments in [1980] N.Z. Recent Law 287.)

involved in petitioning for an award, or is in the process of forming a union, and is victimised for his activity.[71]

It is to be noted that actual Court action under section 150 may be brought only at the suit of an Inspector of Awards and Agreements, or the worker's own trade union; the worker himself has no locus standi. If the worker did not belong to any union at the time the victimisation giving rise to the action was committed then the Inspector of Awards only can institute proceedings.[72] It will be remembered that under section 117 a worker may have locus standi, but only in limited circumstances when his union fails to act promptly on his behalf.

Although there are many cases to which only one of sections 117 and 150 will apply, clearly there are some cases which fall within the ambit of both sections. If the case is one to which both section 117 and section 150 apply then, by subsection (3) of section 150, the worker may take proceedings under either one of the sections but not under both.[73] The subsection has been construed as meaning that "when proceedings have been brought and taken to a conclusion under one section, a remedy under the other section is no longer available".[74] However, if proceedings are taken under one section but the Court on hearing the evidence finds it has no jurisdiction in respect of the application, the application is effectively rendered a nullity, leaving the applicant free to pursue a claim under the other section.[75]

A final area of comparison between sections 117 and 150 lies in the remedies available under the respective sections. Section 117 remedies it will be recalled are purely discretionary. By contrast, under section 150 reimbursement for lost wages must be awarded to a worker found to have been victimised. The imposition on the employer of a penalty, and the other remedies of compensation and reinstatement, however, do remain discretionary under section 150.

Because of the differing results of the two sections the problem which confronts every worker to whom both sections apply is to decide which is the better remedy to pursue in his particular case. As regards dismissal, it would appear that unless victimisation is clearly the reason behind the dismissal the worker would be advised to pursue his remedy under section 117. The advantage of section 117 over section 150 is that the employer must show that the dismissal was justi-

[71] See *New Zealand Workers' I.U.W.* v. *Waitakere Hatchery Ltd.* [1979] Arb. Ct. 209.
[72] *Ibid.*, 210.
[73] Industrial Relations Act 1973, s.150(3).
[74] *New Zealand Insurance Workers' I.U.W.* v. *Cornhill Insurance Co. Ltd.* (1980) unreported Arb. Ct. 145/80.
[75] *Wellington etc. Clerical, Administrative and Related Workers I.U.W.* v. *V.V. Greenwich,* (1981) unreported Arb. Ct. 17/81. The Court declined jurisdiction in respect of an application by the applicant union under s.117, on the grounds of the lack of award coverage, but rule that, in those circumstances, the applicant was not prevented by s.150(3) from recommencing proceedings under s.150.

fied, whatever the reasons. Its disadvantage is that none of the remedies are guaranteed. Under section 150, on the other hand, if victimisation is found the worker is, at least, assured of reimbursement for lost wages. But the overriding disadvantage of section 150 lies in the fact that if victimisation is not established, the dismissed worker has no remedy under the Act notwithstanding the dismissal was unjustified. His only recourse would be to pursue a common law action for wrongful dismissal; an action where redress may not be found, because while dismissal may have been unjustified it may nevertheless fall short of being wrongful.

CONCLUSION

The Industrial Relations legislation has, for many workers, assured some measure of security of employment by providing an effective deterrant against victimisation and against arbitrary and unjustified dismissal. But, in the words of James Farmer,[76] it is still "clearly far from satisfactory that the individual worker must still look to the ordinary courts (with the attendant delays and expense involved) for his legal protection and to the common law for his rights—rights that in many cases are hardly attuned to the conditions of modern industrial society."

[76] James Farmer, "The Legal Framework", *Industrial Relations in New Zealand* (Methuen, 1978) 59.