INTRODUCTION

The purpose of this paper is to consider the recent developments in the law relating to security of employment. The subject of security of employment is one of considerable interest not only to workers but also to employers. Traditionally the respective rights and obligations of workers and employers have been laid down in the contract of employment. The assumption has been that the individual worker and employer would negotiate between them satisfactory terms for employment. While this is the legal position, in practice this situation is rarely to be found except amongst some highly skilled technical or executive staff.

The unequal economic position of the parties meant that a contract was imposed by an employer upon an individual worker. This was and is the position for those sectors of the workforce where there is no trade union coverage. In order to rectify their unequal bargaining position, workers formed trade unions on the very sensible principle that it is easier to bargain collectively than individually. The rise of trade unions and the development of the award and collective agreement has meant that for most workers in New Zealand the contract of employment is of minor importance.

What is interesting is that the common law continues to assume the supremacy of the contract of employment. It has proved incapable of providing an adequate remedy for what may be considered one of the greatest loss most people could experience, that is, the loss of their employment. This paper is not concerned with the reasons for the common law failure to accommodate what was happening in society in the 19th century. This question has been very well discussed by Otto Kahn-Freund in his article "Blackstone's Neglected Child: The Contract of Employment".[1] It is important for an understanding of the law today however to realise that through the inability of the common law to cope with the changes in employment that accompanied the industrial revolution, the workers themselves were forced to find a remedy for themselves. That remedy being not only the formation and development of trade unions and the consequent development of the collective agreement, but also a reliance upon legislation to regulate the employment relationship.

It is important to note however that legislation in New Zealand has been directed towards the collective relationship. The Industrial Conciliation and Arbitration Act of 1894 was concerned with the development of trade unions and the settlement of disputes through legal procedures and agreements. The same is true of the present Industrial Relations Act 1973. The individual contract of employment has almost been ignored by the legislation. For example under s.231 of the Industrial Relations Act 1973 states that if there is any inconsistency between an existing contract of employment and an award or collective agreement, then the award or agreement is to prevail. The terms of the award or agreement are incorporated into the contract.[2] While then not totally overriding the contract of employment, for those workers within the jurisdiction of the Industrial Relations Act 1973 the contract of employment is almost irrelevant. The award or agreement effectively determine such matters as security of employment.

For those workers not covered by the Industrial Relations Act 1973 the contract of employment is still the only means by which they can provide for their security of employment in New Zealand. [It has been decided that this paper will be confined to New Zealand because the special nature of industrial legislation makes law in other countries of academic interest only.] It is not proposed in this paper to concentrate upon the security of employment terms of the contract of employment. The reason for this is that this aspect of the law has been fully covered elsewhere.[3] Also it is proposed in this paper to approach the whole question of security of employment from the point of view of whether the law provides an effective remedy for those who lose their employment.

This may be a pragmatic approach but it is submitted it is a realistic one. This is what the client normally wants to know. Will he or she get their job back, or are damages available to compensate for the loss of that job? If this is the question to be answered then the common law provides little comfort for the person who loses a job. There is no question of regaining previous employment regardless of the grounds for loss of employment. Damages as a remedy is also normally inadequate as it relates to the period of notice that should have been legally given.[5] A recent New Zealand example of the court's approach to such a question is to be found in Clark v Independent Broadcasting Co.[6] In this case a chief announcer was given one months notice instead of the three months that would have been expected for such a position.

The failure to give the required notice resulted in $260.00 damages, being the difference in salary between what he was receiving in his new job and the amount he should have received for two months extra notice.

For those persons who are not covered by the Industrial Relations Act 1973 there is as much security of employment as there is bargaining strength. When and how employment can be terminated will depend upon the terms of the contract negotiated with the employer. There are not statutory provisions that are incorporated into the contract, or statutory obligation which the employer is bound to observe. The law provides those in a weak bargaining position with little protection. It seems to be almost assumed that one's employment interests will now be protected by a collective organisation whether it be trade union, society, or association. This is a fact which more higher paid workers are coming to recognise. Just as lower paid lower workers in the 19th century were forced by the common law to seek safety in collective action, so today the common law is assisting with the organisation of professional and managerial workers.

Because it seems just a question of time before many persons at present not covered by the provisions of the Industrial Relations Act 1973 become so covered, it is proposed to concentrate upon two situations in which a worker covered by the Act may find his or her employment terminated unilaterally. The first is when the worker has been dismissed; and the second is when the worker has been made redundant.

STATUTORY PROTECTION OF EMPLOYMENT

As has been noted New Zealand's industrial legislation has been largely directed towards the regulation of collective relations. It is assumed that the individual's interests will be taken care of by the collective. To some extent this was true, with wages and conditions of employment generally improving because of trade union involvement. There was one area however which remained contentious and beyond the influence of trade unions. That was the dismissal of workers. Unions failed to negotiate any improvement upon the common law position. If a worker was dismissed, there was no established procedure for handling the matter. In these circumstances often the workers took direct action as a means of trying to prevent the dismissal coming into effect. The strike statistics prior to 1970 illustrate that dismissals made

a major contribution to a number of strikes.[7] In an effort to overcome the necessity to resort to strike action it was decided to introduce a statutory dispute procedure for the settlement of such disputes in the 1970 Amendment to the Industrial Conciliation and Arbitration Act 1954.

THE INDUSTRIAL CONCILIATION AND ARBITRATION AMENDMENT ACT 1970

The primary reason for the Amendment was the prevention of strikes and not the improvement of the worker's security of employment. This is clear from the Parliamentary debates on the Amendment. For example, the then Minister of Labour, Rt.Hon. J.R. Marshall stated when introducing the Bill:

> "These matters [i.e. personal grievances], particularly alleged wrongful dismissals are a constant source of industrial disputes leading to work stoppages . . . . One reason is the absence of a simple procedure for the handling of personal grievances".[8]

It is not surprising then the emphasis in the Amendment was upon the procedure and not the protection of the workers' employment.

For our purposes the main points to note about the Amendment were first, it provided for the settlement of "personal grievances" which were defined as:

> "any grievance that a worker may have against his employer because of a claim that he has been wrongfully dismissed, or that other action by the employer [not being an action of a kind applicable generally to workers of the same class employed by the employer] affects his employment to his disadvantage."[9]

The section applied then to wrongful dismissal and it was clear from the Parliamentary debates that the common law definition of "wrongful" was to remain. The second point to note was the provision for a standard procedure to be followed in the case of a personal grievance. Such procedure was not mandatory in all awards or agreements, but in the event of a discontinuance of employment, the Minister of Labour could invoke the procedure. The third point was that the procedure could be invoked by the union or employer only. The individual worker had no direct access to the procedure and the remedies contained in the Amendment. Which brings attention to the fourth point, namely, the power of the arbitration body that decides the dispute to give

one all three of the following remedies - reimbursement of lost wages; reinstatement to the former position or one not less advantageous; and compensation.[10] Obviously this provision was a major departure from the common law in so far as it provided the dismissed worker with some hope of regaining his or her employment. Much of the effectiveness of these remedies were curtailed however by the fact that a worker had to be wrongfully dismissed before they were available. Therefore if a worker was given the correct notice by the employer, there was little that could be done.

INDUSTRIAL RELATIONS ACT 1973 - s.117

In 1973 there was a redrafting of our Industrial legislation which resulted in the Industrial Relations Act 1973. It is arguable that this new Act did not depart greatly from the traditional method of regulating industrial relations in New Zealand. It's most notable feature was the continuation of the trend towards mandatory dispute procedures. This was seen as a means by which to prevent disputes resulting in industrial stoppages. As with other procedures, the personal grievance procedure was amended in an effort to make it more effective.

Before discussing s.117 in detail, a few general comments will be made. First, the definition of a personal grievance was amended to replace the words "wrongful dismissal" with "unjustifiable dismissal" [s.117(1)]. This was seen as a major departure from the common law because it now extended to type of dismissals for which the statutory remedies of reimbursement, reinstatement and compensation were available. What is meant by the term "unjustifiable" was not stated in the Act. This has meant that each case has to be decided on its facts and while it is difficult to predict what may be considered "unjustifiable", there is now sufficient case law to give some guidance, which will be considered in a moment.

Secondly, the standard procedure for settlement of a personal grievance dispute was now mandatory and had to be included in all awards or collective agreement. If the parties were not satisfied with the standard procedure they could devise their own procedure, but it had to be approved by the Arbitration Court. It is interesting to note that a survey of awards and agreements conducted by the Department of Labour showed that only 49 documents contained a variation on the standard procedure.[11] There are approximately 1000 documents registered at any one time.

While it is not necessary for our purposes to examine the standard procedure in detail [see Appendix A], a third point to note is that if the parties are unable to settle the dispute at the disputes committee stage, there is a right of appeal to the Arbitration Court [s.117(4)(9)]. The reference may be made by the employer or the union and there is no statutory time limit within which the appeal must be referred to the Court [s.117(4)(h)]. Although there is no such time period, delay is not looked upon with favour by the Court, nor be in the interests of the client. This was illustrated clearly in the case of General Motors Ltd. v Lilomaiva[12] where the dispute committee hearing took place within two days of dismissal but the Court Hearing took six months. In such circumstances the remedy of reinstatement becomes almost impractical. This point was noted in McHardy v St.John Ambulance Association,[13] where although the grievance committee chairmen had recommended reinstatement and the Court agreed with this, it felt that because of the delay between dismissal and the hearing, the remedy was not in the best interests of the parties. One further point to note is that if there is undue delay there may be difficulties in calculating damages because of the worker's duty to try and mitigate any loss by finding other employment.

The fourth general point to note about s.117 is that although the 1973 Act provided for personal grievance procedure being invoked by a trade union or employer only, in 1976 there was an amendment to the principal Act which inserted subsection 3A into s.117. This subs.3A provides that any worker who considers he or she has grounds for a personal grievance, but is unable to have the matter dealt with promptly because of the actions of the union or employer or any other person, then that worker may with the leave of the Arbitration Court refer the matter directly to that Court for settlement.

The reason for the introduction of this subsection was to protect the individual worker's remedy if a union refused to act on behalf of the worker, or was slow in so acting. This would appear to be a very sensible amendment from a practical point of view. From a conceptual perspective it does present some difficulties. The Industrial Relations Act and its predessors have always been concerned with collective relationships only. The individual has had no rights under this industrial legislation. The inclusion of subsection 3A is therefore a major departure of principle. The only comment that will be made at this stage is that if the legislature intends to further extend the rights of individuals to appear before the Arbitration Court in their own right, then it may be advisable to consider separate legislation

dealing with all aspects of the individual contract of employment so that all workers, and not only those covered by the Industrial Relations Act may acquire equal protection. The English Contract of Employment Act 1972 may provide a useful model for such an exercise in law reform in New Zealand.

SECTION 117(3A)

Section 117(3)(A) is of particular interest to practitioners because it is only if a worker is unable to obtain relief from the union that a lawyer is normally likely to be consulted. When the Court is considering whether leave should be granted to proceed with the case, it requires to be established the fact that the union or employer were first consulted - Hori v N.Z. Forest Service.[14] This may seem a sensible requirement but there is the difficulty that arose in the Hori Case, namely there was an internal split within the union and in this case the breakaway group had good reason for believing the union would not support it's action. Regardless of this type of situation however, it is essential that the aggrieved worker can show that the union's assistance was sought in the matter.

Not only must the plaintiff show that the union's assistance was sought or that the employer refused to cooperate by participating in the disputes procedure, as was the situation in Dee v Kensington, Haynes and White,[15] but it must also be established that the union or employer failed to act promptly. In Oakman v Bay of Plenty Harbour Board[16] the union had taken up the aggrieved worker's complaint but there was considerable delay in communicating the decision of the union to the worker, so the Court held that leave should be granted. In the words of the Court, "We consider that the union, having taken the matter up, must still act promptly to complete the procedures laid down so far as they are applicable".[17]

It would appear from reading the cases that the Court will normally treat an application for leave sympathetically, but it is also true that in most cases where the union refused to proceed with the matter the Court has found the dismissal was justifiable. The Court seems anxious to ensure that every person has their day in Court, but a day in Court does not normally result in success for the applicant.

Before the law on s.117(3A) is left, attention must be drawn to the recent case of Muir v Southland Farmers Co-operative Association Ltd.[18] Mr. Muir sought leave to proceed under s.117(3A) because the union covering his industry declined to act for him when he was dismissed. The award contained the usual standard procedure clause and an unqualified preference clause. Despite his obligations under the unqualified preference clause, he failed to join the union, so as the Court noted, it was not surprising the union refused to pursue his grievance. The question before the Court was whether lack of union membership was sufficient to deprive a worker from relief for unjustified dismissal under s.117(3A). After considering the matter carefully and fully the Court decided:

> ". . . we are of the opinion that actual membership of the appropriate union is a prerequisite before a worker can, as an individual, invoke the provisions of subs.3A."[19]

The Court was fully aware of the implications of this decision and agreed to state a case to the Court of Appeal if the parties so desired. If the decision of the Arbitration Court is upheld then the collective nature of the legislation will be preserved. If however the decision was overturned, it may mean that the path is open for more individual actions before the Arbitration Court. It is submitted, such a situation is undesirable unless legislation specifically direct to this situation is enacted so all terms of the contract may be considered by the Arbitration Court.

JURISDICTION OF THE ARBITRATION COURT

The question of whether or not the Arbitration Court has jurisdiction to determine a personal grievance had arisen in cases prior to the Muir Case. The principal authority on this question is the Court of Appeal decision in Auckland Freezing Works and Abattoir Employees V.U.W. v Te Kuiti.[20] The question before the Court of Appeal was whether the standard procedure set down in s.117(4) was available to workers who were not covered by an award or agreement, but were voluntary members of the union. The cause of action arose from the defendant Council dismissing two employees who were voluntary members of the union and not covered by the provisions of any award or collective agreement. The Court of Appeal held that the standard procedure did not apply to workers who were not covered by an award or agreement. The standard procedure in s.117(4) was not a general remedy for all workers, but was in fact a clause in an award or collective agreement so therefore could only apply to those covered by such documents.

Although this decision may seem restrictive it is consistent with the concept that the Industrial Relations Act 1973 is concerned with collective rights and obligations. If these rights and obligations are to be applied to individuals, then the law should state this specifically. It is submitted that if the law is found wanting in its ability to provide for the needs of individuals in the employment relationship, and the writer believes it is so wanting, then do not graph new individual rights and obligations onto the collective tree. If this is allowed to happen then the fruit of the tree may make painful eating for everyone. The Court of Appeal is endeavouring to maintain a separation of individual and collective rights, it is now up to the legislature to undertake positive law reform and provide individuals with legal protection in their employment relationship.[21]

PERSONAL GRIEVANCE - DEFINITION

To return to s.117 of the Industrial Relations Act 1973, if the Arbitration Court does have jurisdiction to determine an appeal from a disputes committee on a personal grievance, the question arises whether the grievance falls within the definition of s.117(1). Although personal grievances are not confined to unjustifiable dismissals the majority of cases relate to dismissals. Very few cases of matters other than dismissals have come before the attention of the Arbitration Court. The first case came to Court shortly after the section came into force and the reluctant attitude of the Arbitration Court to consider the matter may have unfortunately deterred other cases. The case in question was Auckland Regional Authority Officers Industrial Agreement - Application for Interpretation.[22] The question before the Court here was whether a non-promotion was a grievance within s.117. The Court did not consider such a matter fell within the definition of personal grievance and expressed their opinion in very negative terms as follows:

> "It appears to us that if the legislature had intended to embrace the non-promotion complaint it would have said so in specific language. As we have endeavoured to show, the non-promotion complaint is essentially different from the ordinary sort of employer/employee dispute and we have said also that the non-promotion complaint requires special procedures. We are of the opinion that s.117 is not aimed at grievances relating to promotion appointments."[23]

The somewhat unwise way in which the Arbitration Court handled the matter has been commented upon elsewhere.[24] The above statement appears to be that of

a Court not well versed in the determination of matters relating to white-collar employment. It is submitted that in view of the increasing unionisation of this sector of the workforce, plus the fact that this sector is more inclined to use the Court than other sectors, it may be time for the Court to broaden its horizen on what type of matters fall within the definition of a personal grievance.

UNJUSTIFIABLE DISMISSAL

The majority of cases before the Arbitration Court involved the determination of the question whether a dismissal was unjustifiable. The lack of a statutory definition of unjustifiable has the advantage of allowing each case to be decided on its own facts and merits, and the disadvantage of being unable to predict what form of conduct is likely to result in a claim for unjustifiable dismissal being upheld. The only certainty in these cases is uncertainty. Any analysis of the cases is also further hampered by the lack of detail in the judgment as to fact and law. This may be understandable because of the personal nature of much of the evidence and the fact that most appeals from the disputes committees do not involve questions of law, but merely a rehearing of the facts.

Some matters have become clear and limited guidance may be obtained from a review of the cases. The Arbitration Court established early in its jurisdiction over these matters that the onus was on the employer to prove on the balance of probability that there were adequate grounds for terminating the employment - see Scholes v AA Mutual Insurance Co.[25] The worker then must establish that he or she has been dismissed and then it is up to the employer to show the dismissal was justified. It should be noted here that the Court has held that sometimes a resignation may in effect be a dismissal - Wellington etc. Clerical Workers I.U.W. v Barraud & Abraham; Auckland etc. Shop Employees Union v Smith & Smith Ltd.[27]

When determining whether or not particular conduct justified dismissal the Court appears to consider both the actual conduct and the way in which the dismissal took place. Misconduct is considered a justified ground for dismissal, but only if it is substantial - Cook v North Shore Ferries Ltd.[28] Bell v Air New Zealand.[29] In Bates v Dunlop (N.Z.) Ltd.[30] and Wellington etc. Drivers I.U.W.v Fletcher Construction Ltd.[31] however one act of misconduct was held

to be sufficient to justify dismissal. In both cases there may have been some element of an example being made to deter other workers. In the former case the worker was caught smoking in a non-smoking area, while in the latter wire mesh was removed from a construction site. In another case - Wellington etc Hotel I.U.W. v Barretts Hotel[32] - a worker dismissed for fighting was found to be unjustifiably dismissed after the full facts of the case were considered. The court's willingness to look at all the surrounding circumstances of a case is illustrated in Auckland Clerical etc. I.U.W. v Vacation Hotels Ltd,[33] where a night telephone operator was found asleep at his job and dismissed. After a consideration of the facts, and in particular the working conditions, the Court held the dismissal was unjustified. It can be seen that much can depend on the facts.

The same situation applies where a worker is dismissed for incompetence. This must be established clearly by the employer. In the recent case of Vial v St. George Private Hospital[34] the Court heard extensive evidence on the allegation of incompetence. It was obvious from the case, as with many personal grievance cases, a clash of personalities was a contributing factor in the situation that led to the dismissal. After considering all evidence and not only the actual incident that led to dismissal the Court found the dismissal was unjustified. It is interesting to note however that if the respondent had clearly warned the applicant that instances of incompetence would lead to dismissal, the matter may have resulted differently. In Auckland Clerical I.U.W. v Universal Business Directories Ltd,[35] the Court also commented upon the fact that if the plaintiff's conduct had been as bad as alleged then a warning to this affect may have been expected. In this case the court held the dismissal was unjustified and that the worker had been dismissed principally because her employer's pride had been hurt over an incident in the office.

There is one ground for dismissal that the Arbitration Court had seemed to accept justified dismissal and that was redundancy - Templeman v Farmers Aerial Topdressing Co. Ltd;[36] Auckland etc Shop Assistants I.U.W.v Curtain Styles Ltd.[37] The Arbitration Court has been reluctant to interfere with the running and organisation of a business. Yet it seems if the circumstances are obviously unjust, the Court may be prepared to find a dismissal on such grounds unjustified. In Auckland etc Shop Assistants I.U.W. v Shrimpi's Fashions Ltd,[38] the respondent wanted to reorganise his

business and to effect this he dismissed the applicant. It was the manner in which he did this that led the court to hold that the dismissal was unjustifiable and award $400 for loss of wages. Also in New Zealand Insurance Guild I.U.W. v Guardian Royal Exchange Assurance Co. Ltd,[39] when the company dismissed a worker shortly after he had joined the staff, because it found itself over-staffed, the Court held the lack of planning by the company did not justify the dismissal of the worker. Compensation of $3000 was awarded for loss of wages and $1000 for loss of employment and expenses.

Although it may be difficult to assert definite principles upon which the Arbitration Court will determine what constitutes an unjustifiable dismissal, certain guidelines for practice may be tentatively suggested. If your client is an employer the obvious advice is to institute clear procedures for dismissal. If a worker's performance is unsatisfactory be sure to notify that worker, preferably in writing. When a worker is dismissed be sure it is for a substantial reason and give the grounds for dismissal. An employer is not required in New Zealand to give grounds for dismissal, but if they are not given the Court may not be impressed with what sounds like an after-thought. If you act for a worker the best advice is to ensure that evidence of good work performance is available and that efforts are made immediately to initiate the standard procedure if dismissal takes place. If the union is reluctant to act then s.117(3A) should be implemented as soon as possible. This is important because as indicated previously the remedy available may depend upon the delay involved between the dismissal and the Court hearing.

REMEDIES

On the question of remedies, the cases are of little guidance. As noted under s.117(7) the worker, if found to have been unjustifiably dismissed is entitled to reinbursement of wages, reinstatement or compensation or all three remedies. Although reinstatement was considered impossible under common law, the Arbitration Court has considered in certain cases it is an appropriate remedy. Industry today does not necessarily involve close working relationships. Quite the contrary in fact. The most notable case where the court ordered reinstatement was The New Zealand Guild Union of Workers v The Insurance Council of New Zealand.[40] This case involved the dismissal of a technical officer with the defendant Council. Although the nature of the employment involved a reasonably close working relationship with others, the

Court upon deciding that the dismissal had been unjustifiable under s.150 of the Industrial Relations Act 1973, ordered his reinstatement. It was considered here that there had not been undue delay in bringing the proceedings, and that the parties were mature enough to accept reinstatement. These are the two factors that seem of importance in any decision as to reinstatement.

In cases where close working relationships do not exist, reinstatement may seem more appropriate. An example of the Court exercising it's discretion of reinstatement is Doyle v Dunlop (N.Z.) Ltd,[41] where dismissal had arisen out of collective action and reinstatement had already taken place because of agreement with the union. Reinstatement is sometimes not appropriate or desired by the worker - see Dee v Kensington Haynes & White.[42] The employment situation seems to have deteriorated to the point where neither party felt reinstatement was desirable. When taking an appeal to the Arbitration Court on an unjustifiable dismissal, it should not be forgotten that the Court may order reinstatement even if one of the parties does not want the remedy. For example, in Harpur v N.Z. Aluminium Smelters Ltd.[43] reinstatement was ordered even though the company argued its trust in the worker was so affected his employment as a security officer could not be successful.

Apart from reinstatement the Court may award damages for lost wages. Often after hearing a case and deciding the worker has been unjustifiably dismissed, the Court will merely award that the wages should be reimbursed for the period during which the correct notice was not given. This is similar to the common law position. In some cases however the Court will award more than what would be considered the equivalent to the appropriate period notice to given. Although the rationale of the Court is difficult to follow, two factors seem important - the nature of the employment and the cause of the dismissal. For example, in Smith v Crown Crystal Glass[44] the type of employment was manual and cause of dismissal an altercation. It appears therefore that while the dismissal was found to be unjustifiable, the Court had little sympathy for the worker who was in part the author of his own misfortune. In the Dee Case[45] however the employment was clerical, and the behaviour of the employer in the whole matter left something to be desired in the view of the Court, so $500 was awarded. This sum seems to have included some element of compensation. In the Vial Case[46] the dismissed worker was a midwife of some experience to whom the Court awarded payment of

lost wages from the time of dismissal until the date of judgment - a period of seven months. Often a sum is awarded which takes into account wages earned in other employment as in the McHardy Case.[47] There is of course a duty upon the dismissed worker to mitigate any loss. This was clear from General Motors Ltd. v Lilomaiava[48] where the worker did not find new employment but reported to his old job each morning and the court reduced the claim for lost wages from $2242 to $1500.

The remedy under s.117(4) which causes most difficulty is that relating to the right of the Court to award compensation. It is very difficult to discern what criteria if any the Court applies when making such awards. There is authority to suggest that distress caused by the dismissal may justify compensation - McDonald v Hubber.[49] Often however the Court gives no indication for the amount of damages awarded. In the Vial Case,[50] the Court merely stated: "We also award the sum of $1000 compensation". In the New Zealand Insurance Guild I.U.W. v Guardian Royal Exchange Assurance Co. Ltd,[51] where the company's lack of planning caused the worker's redundancy, the Court awarded ". . . $1000 for loss of employment and expenses".

Although the more highly skilled the employment the more likely a worker appears to be to receive compensation, an exception to what may be a rule is Auckland Clerical etc I.U.W. v Universal Business Directories,[52] where a receptionist was awarded $2000 to compensate for loss of wages and $1000 for loss of employment. The totally unreasonable attitude of the employer seems to have contributed to the amount of compensation awarded. Perhaps the closest one can get to discerning the principles that guide the Court in this matter is contained in the McHardy Case[53] where the Court after being referred to English authority on the subject commented:

> "Section 117(7) contains no such express provision, but it does entrust a wide discretion to the Grievance Committee and the Court to decide whether, even if unjustifiable dismissal be found, any order should be made in respect of lost wages and compensation, and as to the quantum of both if an order is made. We conclude that the Court when exercising that discretion should take into account along with the other facts, the conduct of the worker."[54]

The Court refused however to accord priority to any one factor.

Section 150 of the Industrial Relations Act 1973

No discussion of remedies for personal grievances under the Industrial Relations Act 1973 is complete without reference to s.150. This section is designed to protect workers from victimisation for involvement in trade union activities, or activities associated with the pursuance of matters specified in the section. [See Appendix B]. An offence is committed against this section if a worker engages in one of the activities specified and is dismissed by the employer within the 12 months of the involvement. If a worker has been wrongfully dismissed under this section then the same remedies as provided under s.117(7) are available to the Court (s.150(4)). These remedies are in addition to the imposition of a fine up to $100 (s.150(1)).

Before the cases decided under this section are considered, a few general points will be noted. First, the onus of proof is upon the employer to prove the employee was dismissed or his or her position altered for a reason other than engagement in one of the specified activities - see Inspector of Awards v Tractor Supplies Ltd.[55] Secondly, if an action may be brought under either s.117 or s.150, an election must be made as to which section upon which to base the action. Thirdly the action can be brought at the suit of an Inspector of Awards or trade union only. An individual has no standing under this section and there is no equivalent to s.117(3A). The fourth point to note is that a worker may not have to be covered by an award or agreement to be eligible for a remedy.

This last point was considered in detail in the leading case on s.150 - The New Zealand Insurance Guild Union of Workers v The Insurance Council of New Zealand.[56] A detailed consideration of this case has already been made[57] so it need only be stated here that the Court was prepared to give a liberal interpretation to the section to enable a worker who was not covered by an award but honestly believed that he was so covered, to be reinstated after being dismissed for claiming a benefit under an award (s.150(1)(d)) and pursuing a personal grievance (s.150(1)(F)). Since the above case, there have been several cases brought under s.150. In two cases - Northern etc Butcher I.U.W. v Cooks Trading Co. Ltd;[58] and Auckland etc Shop Assistants I.U.W. v Smith & Smith[59] the employers discharged the onus of proof and the application dismissed. In Otago Driver I.U.W. v Willetts[60] the Court found that a worker had been dismissed for pursuing a claim for meal money while a job delegate. The employer's member on the Court

dissented from the decision on the facts. This is a good case to illustrate the type of matter for which the section was designed to protect.

Although s.150 may appear an attractive remedy, it is submitted that if there is a choice of remedy between s.117 and s.150 the former is preferable. It not only enables the dispute to be settled in the disputes committee, the union member on the Court in the Smith & Smith case noted that s.117 should be used in the majority of cases.[61] Presumably this advice also seeks to preserve s.150 for clear cases of victimisation.

REDUNDANCY

Although security of employment is often thought of in terms of security from dismissal, a greater threat in the future to security of employment will be redundancies. Not only the economy, but the introduction of the new technology or the "chip" revolution as it is now called, will radically alter the nature of employment. It is probably already too late to warn the decision-makers that new policies and strategies are needed to cope with this new challenge. If the energy crisis is any indicator of the ability to plan, there is much trouble ahead for us in New Zealand.

It would be tempting to devote a great deal of time to the general question of the future of employment.[62] This paper is concerned with the law however so it shall concentrate upon what legal response if any has been made to prevent, or regulate redundancies. Answer to this question is short - very little. Mathieson[62] has argued that the inclusion of a term in a contract providing for redundancy payments, may not be valid because the obligation to perform arises after the contract has been terminated. While this may be legally correct, the market place has not been concerned with such niceties and has embarked upon the process of negotiating redundancy agreements.

These redundancy agreements have resulted in many industrial stoppages including the longest stoppage in New Zealand - Mangere Bridge. Some agreements have been negotiated separate from the award or collective agreement, while many documents now include a clause relating to redundancies. The legality of these agreements and clauses has yet to be challenged. There would seem to be little doubt the redundancy clauses in registered documents would not be enforceable. The unregistered agreements however, rely more upon industrial might than legal right for their enforceability.

As has been already noted, there is little likelihood of a remedy under s.117 of the Industrial Relations Act 1973 if employment is lost due to redundancy. The only statutory provisions relating to redundancy are contained in the Wages Adjustment Regulations 1974, Part IIIA,[63] and these relate to control the amount that can be paid by way of redundancy payments. An economic measure only.

It may be argued that what is needed in New Zealand is comprehensive legislation dealing not only with redundancies, but also retraining and employment. In 1975 a Severance and Re-Employment Bill was introduced into Parliament, but was not pursued with the change of government. In 1976 the then Minister of Labour, promised that the matter would be considered with a view to action.[64] Nothing has resulted. It appears as though a familiar pattern is emerging. As the common law and legislature appear unable to devise rules to regulate redundancies, the people directly involved seem forced to find their own solutions. These solutions will involve more industrial unrest as this is the only tactic available in many circumstances. This does not seem to be a very constructive approach to a national problem, but redundancy is another of those issues upon which the decision makers have displayed inertia.

CONCLUSION

This paper was intended to pass a few observations upon the role of the law in security of employment. It is easy to become lost in the minutia of cases so perhaps I can conclude with this general observation. If it is considered a desirable value in our society that people should have security of employment, then it is time we turned our attention to enacting basic rights and obligations to be observed by all when they enter the employment relationship. At the moment the only effective protection is left to those who belong to trade unions. While the role of trade unions is crucial in any democratic society, must those who are unable to belong to trade unions be deprived of the same protection as those who do? The answer to this question would appear to be yes. If this is to be the case then, I predict the expansion of white collar unionism in the very near future and urge all who have any sense of insecurity in their employment to join a union quickly.

FOOTNOTES

1. (1977) 93 L.Q.R.508. See also "A Note on Status and Contract in British Labour Law", Otto Kahn-Freund, (1967) 30 M.L.R.635.

2. See D.L. Mathieson, Industrial Law in New Zealand 24 for a discussion of s.231.

3. See Alexander Szakats Introduction to the Law of Employment, D.L. Mathieson, Industrial Law in New Zealand, "Termination of Employment", Rowland J. Harrison, (1962) Vol. X Alberta Law Review, 250.

4. Southern Foundries (1926) Ltd. v Shirlaw [1940] A.C.701. For a discussion of recent developments of the law on this question see D.L. Mathieson, Industrial Law in New Zealand, Supplement.

5. Addis v Gramophone Co. Ltd. [1909] A.C.488, Cowles v Prudential Assurance Co. Ltd.(1957) N.Z.L.R. 124.

6. [1974] 2 N.Z.L.R. 587.

7. The following table illustrates the percentage of stoppages due to dismissals:

1967	1968	1969	1970	1971	1972	1973	1974
22.5%	18.9%	15.4%	11.8%	6.7%	13.4%	10.7%	6.3%

1975	1976	1977
10.8%	5.3%	8.0%

Source: Department of Labour Reports.

8. N.Z.P.D. (1970) Vol.368 P.3127.

9. Industrial Conciliation and Arbitration Act 1954, s.179(1).

10. Ibid, s.179.

11. Department of Labour, Personal Grievance Procedures (1978)

12. (1977) I.C. 34/77.

13. (1976) I.C. 66/76.

14. (1978) I.C. 2/78.

15. (1977) I.C. 21/77. See also Szakats, "Trade Unions and the Legal Profession - Or Rule of Law and Unjustifiable Dismissal," (1977) N.Z.L.J.319.

16. (1979) A.C.2/79.

17. Ibid, p.3.

18. (1979) A.C. 27/79.

19. Ibid, p.3.

20. [1977] 1 N.Z.L.R. 211.

21. Other cases involving questions of jurisdiction are:

(a) Hori v N.Z. Forest Service (supra) - Court felt it may not have jurisdiction in this case because under s.218 the Industrial Relations Act 1973 does not bind the Crown so the Forest Service may not be bound by the Agreement.

(b) Palmerston North Newspapers Ltd. v Pywell (1976) I.C. 53/76 - illustrates the case where the parties excluded from their award the Arbitration from hearing appeals on personal grievances.

(c) Parisian Coat Manufacturing Co. v Auckland Clerical I.U.W. (1976) I.C. 23/76 - unless the correct procedure is chosen under the Industrial Relations Act 1973, the Court will not hear the case.

22. (1974) 74 B.A. 531.

23. Ibid.

24. G.J. Anderson, "An Examination of Section 117 of the Industrial Relations Act 1973" Industrial Relations Centre Monograph No.4(1978).

25. (1975) 75 B.A. 5515.

26. (1970) 70 B.A. 347.

27. (1979) A.C. 62/79.

28. (1974) 74 B.A. 2473.

29. (1976) I.C. 63/76.

30. (1975) 75 B.A. 11155.

31. (1979) A.C. 71179.

32. (1978) A.C. 30/78.

33. (1979) A.C. 23179.

34. (1979) A.C. 35/79.

35. (1978) A.C. 21/78.

36. (1975) 75 B.A.

37. (1978) A.C. 3/78.

38. (1978) A.C. 35/78.

39. (1978) A.C. 28/78.

40. (1976) B.A. 173.

41. (1975) 75 B.A. 2883.

42. Supra.

43. (1977) I.C. 56/77.

44. (1974) 74 B.A. 3781.

45. Supra.

46. Supra.

47. Supra.

48. Supra.

49. (1976) I.C. 52/76.

50. Supra.

51. Supra.

52. Supra.

53. Supra.

54. Supra, p.6.

55. (1966) N.Z.L.R. 792; See also The New Zealand Insurance I.U.W. v Cornhill Insurance Co. Ltd. (1979) A.C. 6/79.

56. Supra .

57. Szakats, "Unjustified Dismissal: Grievance and Victimisation," (1977) N.Z.L.J. 348.

58. (1979) A.C. 56/79.

59. (1979) A.C. 62/79.

60. (1979) A.C. 72/79.

61. The Workers member on the Court, Mr. Jacobs did not dissent from the judgment but made a separate comment which have become quite quite common amongst members of the Court, which seemed intended to deter actions being commenced under s.150, as opposed to s.117.

62. For a detailed analysis of redundancy in New Zealand see R.L. Towner, Redundancy in New Zealand: An Evaluation of Industrial Practice and Public Policy, (1979), LL.B.(HONS) Dissertation.

63. S.R. 1978/226.

64. J.A. Farmer, "Legislation on Redundancy," (1976) 1 N.Z.J. of Industrial Relations, 41.