COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

EMERGING PROCEDURAL REQUIREMENTS UNDER SECTION 117 OF THE INDUSTRIAL RELATIONS ACT 1973

The Arbitration Court and its predecessors have been deciding cases of "unjustifiable" dismissal under section 117 of the Industrial Relations Act 1973 for the past six years. In that time little attempt has been made to give content to the term "unjustifiable" beyond stating that the concept is distinct from the common law of wrongful dismissal, the authorities on which have been described as having "little or no application" to the legislation.[1] Several reasons have been advanced by the Court for the refusal to set boundaries to what is unjustifiable and these are dealt with later in this note. Nevertheless, despite the uncertain state of the law, the time seems ripe to examine one issue of practical significance to the parties under New Zealand's industrial relations system and to those advising them: this issue is the emphasis placed by the Court upon the procedural fairness of dismissal when deciding whether it was unjustifiable. In doing so some analysis will be made of trends in the drafting of current awards, which reflect an increasing concern with this question on the part of trade unions and employers.[2]

The Role of Precedent

A problem that must be faced before examining the Arbitration Court's approach is the attitude taken by that Court to its own previous decisions. Subsection 4 of section 48 of the Industrial Relations Act confers a wide discretion on the Court to decide cases "as in equity and good conscience it thinks fit." In *Taranaki Amalgamated Society of Shop Assistants and Related Trades IUW* v *CC Ward Limited*[3] Horn CJ remarked that

> [section] 117 of the Industrial Relations Act 1973 does create some measure of job security but it is ill-defined and the Court proceeds to look at each case on its merits and should not set down rigid rules by way of precedent. The legislature has not seen fit to define unjustified dismissal and the Court draws the inference that each case must be considered individually taking into account all surrounding circumstances.

1 See *Boswell (Wellington, Marlborough, Westland, Nelson and Taranaki Local Bodies Officers IUW)* v *Wellington Regional Hydatids Control Authority* [1977] Ind Ct 141; *Oakman* v *Bay of Plenty Harbour Board* [1979] Arb Ct 15; *Auckland Local Authorities Officers Union* v *Waitemata City Council* [1980] Arb Ct 35.

2 The awards referred to will be those contained in the Book of Awards for 1979 and the case law stated as at 1 January 1981. No attempt will be made to analyse the various procedures statistically; for a statistical analysis of 1977 awards see Department of Labour, Industrial Relations Division, *Personal Grievance Procedures* (1978).

3 [1980] Arb Ct 123, 124.

The Court's view that it was "unwise (if not impractical) to lay down any guidelines of significance" in dismissal cases due to the need for a "pragmatic" approach was slightly modified in *Auckland Local Authorities Officers Union* v *Waitemata City Council*[4] where Horn CJ stated that it was for the Court to give content to the term "unjustified" "refraining (*to a degree*) from laying down too early or too rigidly defined principles. The industrial scene has manifold and diverse circumstances."

Whilst one may accept the difficulties facing the Court in this field, it is respectfully suggested that four principal criticisms can be levelled at the approach outlined in these statements.

Firstly, whilst the Arbitration Court draws the inference from the failure to define "unjustifiable dismissal" that no guidelines should be set down, it is difficult to find support for such an inference in established rules of statutory interpretation.[5] It might also be argued to the contrary that it is precisely because the statutory wording is ambiguous that the Court should establish guiding principles, so that those affected by the section (including chairmen of grievance committees) know where they stand. Such guidelines need not lead to undue rigidity in the sense that to ignore them would be an error of law; instead they might consist simply of tests or suggested methods of approach which would enable a desirable measure of certainty to be achieved, a measure of certainty moreover which no legislative definition could adequately achieve. Secondly, although the Court has emphasised the need for pragmatism in deciding dismissal cases, such an approach has not prevented other courts in the same field from establishing general principles for the future guidance of those appearing before them. For example, under the Employment Protection (Consolidation) Act 1978 (UK) industrial tribunals considering cases of "unfair" dismissal in that jurisdiction are required broadly to have regard to "common sense and common fairness eschewing all legal or other technicality, by reference to the circumstances known to the employer at the date of dismissal".[6] Despite the inherent difficulties in such a task something approaching a settled jurisprudence on the meaning of "unfair" has emerged, which nevertheless allows for the individual circumstances of each case to be considered.[7] Thirdly, because decisions by chairmen of grievance committees are published only to the immediate parties, the decisions of the Arbitration Court represent the only available guide to the operation of section 117; inevitably, those affected have adopted these decisions for guidance and will probably continue to do so.[8] Finally there remains the paradox that, despite its disavowal of rules or guidelines, the Court does on occasion cite and give weight to its own previous decisions in unjustifiable dismissal cases when considering, for

4 [1980] Arb Ct 35, 36. [Emphasis added.]

5 For alternative approaches to the legislative use of "vague words" see Thornton, *Legislative Drafting* (2nd ed 1979) 13-15 and Payne, "The Intention of the Legislature in the Interpretation of Statutes" [1956] Current Legal Probs 96, 107 et seq.

6 The view of the National Industrial Relations Court in *Earl* v *Slater Wheeler (Airlyne) Ltd* [1973] ITR 33, 37, commenting on the counterpart of the Employment Protection (Consolidation) Act 1978, s 57(3) (UK). Though see the views of Philips J on the effect of the statutory definition in *W Devis & Sons Ltd* v *Atkins* [1976] ITR 15, 22.

7 See eg the detailed treatment of unfair dismissal in Hepple and O'Higgins, *Encyclopaedia of Labour Relations Law* (1972) ch 17.

8 The Court's decisions are heavily relied on in New Zealand Employers Federation, *Hiring, Firing and Suspension—A Guide to Employers* (1979).

example, the need for a hearing or the question of appropriate penalty,[9] although stressing that individual cases are decided upon their own facts.

What follows must be read subject to the Court's arguably self-imposed restraint on the application of its own decisions. Nevertheless it will be seen that, insofar as procedural aspects of dismissal are concerned, certain common factors have emerged; whether the usefulness of discussing these factors lies in their forming an exception to the Court's restraint on laying down principles or simply in providing possible lines for argument remains a matter for speculation.

When do Procedural Issues Come into Play?

Under section 117, as under the common law relating to wrongful dismissal, it has been made clear that dismissal for a single act of misconduct may be justified. The test in cases under section 117 appears to be substantially that of the common law, namely whether the misconduct is such as to show the worker to have disregarded the essential conditions of the contract of service so as to be "destructive" of it.[10] Such misconduct is difficult to identify with any certainty since decisions in other cases are of little relevance when each case is decided according to its own surrounding circumstances. A number of award clauses however specify in some detail the offences which will lead to summary dismissal or provide that dismissal will follow "misconduct" or "serious misconduct".[11] The effect of the former type of clause remains to be litigated; nevertheless where a collective agreement gave an employer power to dismiss a worker for "misconduct", being silent as to what might constitute misconduct, the Court held that the onus of proof of misconduct rested on the employer and that the question was not whether there had been misconduct as such, but whether the degree of misconduct justified dismissal.[12] Although it would be misleading on present authority to draw a sharp distinction between justification on substantive grounds and justification on procedural grounds it might be asked whether, if the substantive ground for dismissal is justifiable, failure to follow a fair procedure may in itself render the dismissal unjustifiable. In three recent decisions the Court appears to be moving towards a position where this will be the case. In the first decision a worker was dismissed by a store manager "for refusing to carry out a proper instruction given by an appropriate officer of the company." There was a written agreement between the union and the company covering dismissal procedures, which included written warnings and the involvement of a job delegate. Williamson J commented that:[13]

9 Infra.

10 *Wellington Road Transport and Related Industries Motor and Horse Drivers and their Assistants IUW* v *Shell Oil (New Zealand) Ltd* [1980] Arb Ct 217, 219.

11 See eg *Rangipo Tailrace Tunnel Construction Project Employees Composite Agreement* (1979) 79 BA 2031, clause 20. Some awards specify in detail the misconduct which will lead to summary dismissal (see the Department of Labour *Report* supra n 2 at 30-32).

12 *Parisian Coat Manufacturing Co Ltd* v *Auckland Clerical and Office Staff Employees IUW* [1976] Ind Ct 55.

13 *Northern Industrial District United Storemen and Packers and Warehouse Employees (other than in Retail Shops) IUW* v *Rex Consolidated Ltd* [1979] Arb Ct 351. [Emphasis added.]

> The existence of this agreement was known to [the store manager] and he had read its terms. He acknowledged that he was rusty about the terms and had not followed the agreed procedures. *We must therefore regard the dismissal as unjustified in these circumstances.*

By analogy, although it has been held that "redundancies are obviously justifiable"[14] three recent cases suggest that where the employer dismisses workers for redundancy in a procedurally unfair manner, this renders the dismissals unjustifiable.[15] Whilst the existing authority must be treated with some caution, particularly in view of what appear to be conflicting decisions on the issue,[16] it is submitted that such a principle is sound and consistent with the aim of the section which is to encourage the following of set procedures in such cases, free from the trammels of the common law approach.[17] The "technical" nature of the lack of justification might then be considered when the question of a remedy arose.[18]

The question of procedural fairness becomes more important where the worker's conduct would not in itself justify dismissal, but may justify dismissal if it is a repetition of prior misconduct. Under section 117 the question has been examined in terms of firstly, the worker's past record, secondly whether a warning has been given and thirdly whether a fair hearing has taken place.

(a) Past record.

So far as the worker's past record of employment is concerned the Arbitration Court has stressed that although employers in personal grievance cases must establish an independent ground "sufficiently serious to raise the possibility of dismissal" they are entitled, before making a final decision, to "call to mind" the worker's previous record including any warnings[19] and could be said to be "under a duty" to do so.[20] Whilst originally such consideration was expressed in terms of the desirability of leniency in the case of "a man with an unblemished record"[21] it has more recently been expressed in the converse sense, that "an employer might equally feel that severe measures were necessary if the . . . worker

14 *Auckland Local Authorities Officers Union* v *Waitemata City Council* supra n 1 at 36 per Horn CJ.

15 This appears to be the effect of *Auckland Amalgamated Society of Shop Assistants IUW* v *Shrimpi's Fashions Ltd* [1978] Arb Ct 277; *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades IUW* v *OA and AM Burm, trading as Lincoln Road Motors (1979) Ltd* [1980] Arb Ct 305; *Auckland Clerical and Office Staff Employees IUW* v *OA and AM Burm, trading as Lincoln Road Motors (1979) Ltd* [1980] Arb Ct 309.

16 Compare the approach to a procedurally unfair redundancy in *Auckland Amalgamated Society of Shop Assistants IUW* v *Curtain Styles Ltd* [1978] Arb Ct 53.

17 See Government Memorandum to the Industrial Relations Bill 1972, para 7.

18 Whilst failure to follow a proper procedure might result in a dismissal being held to be unjustifiable which, if the procedure had been followed, would have been held to be justifiable it may be that no remedy would follow since such awards are discretionary under s 117(7).

19 *Otago Road Transport and Motor and Horse Drivers and their Assistants IUW* v *St John Ambulance Association* [1976] Ind Ct 217, 220 per Jamieson J. The need to consider past record has achieved limited recognition at common law; see *Pepper* v *Webb* [1969] 1 WLR 514, 517 per Harman J and *Wilson* v *Racher* [1974] ICR 428, 433 per Edmund Davies LJ.

20 *Airline Stewards and Hostesses of New Zealand IUW* v *Air New Zealand Ltd* [1976] Ind Ct 187, 189 per Jamieson J.

21 Ibid at 189.

had in fact had an unsatisfactory record prior to the final event."[22] The need to prove a "proximate proved specific complaint"[23] leads to the requirement that before past conduct can be invoked in justifying dismissal it must be in the mind of the person responsible for terminating the employment at the relevant time. Thus where previous warnings had been delivered to a worker but the manager concerned was unaware of them at the time he dismissed that worker, the warnings were discounted.[24] Similarly, repetition of conduct in respect of which the worker has received proper prior warning must be distinguished from the well-known phenomenon of retrospective justification; resentment on the part of an employer who feels justified in having dismissed an employee but is then faced with litigation commonly leads to a position where "the whole career of the employee during the course of the employment is gone into in painful detail, and much is sought to be made of minor matters."[25] The Arbitration Court and its predecessors have consistently rejected attempts to aggregate past complaints with the event which precipitated the dismissal so as to produce a generalised substantive reason for dismissal unless those complaints have been referred to and discussed with the worker in question at the time they occurred;[26] failing this they cannot be raised as ex post facto justification for dismissal.

(b) Warnings.

In a recent decision of the Arbitration Court, Horn CJ noted that "[i]t has not been uncommon for the Court to say that, where an employee's conduct is deteriorating, a warning could well be given so that the employee knows that his job is on the line if he persists."[27] In cases of dismissal for alleged incompetence the essential requirement so far as warnings are concerned, in the absence of any contractual procedure, appears to be that the worker be "told in a formal manner that his work performance was such that, without an improvement, his employment would be in danger."[28] A sensible provision contained in some current airline awards to ensure such notification states that "any adverse written report which might prejudice the promotion and/or future of an officer shall be communicated to him in writing by the company within thirty days of such report being made"; the provision is linked with a clause allowing

22 *Boswell* supra n 1 at 142, applying *Turner* v *Wadham Stringer Commercials (Portsmouth)* [1974] IRLR 83.

23 *Vial* v *St George's Private Hospital* [1979] Arb Ct 53.

24 *Hawke's Bay Road Transport and Motor and Horse Drivers and their Assistants IUW* v *Direct Transport Ltd* [1979] Arb Ct 329.

25 Harrison, "Termination of Employment" (1972) 10 Alta L Rev 250, 268.

26 See *McDonald* v *Hubber* [1976] Ind Ct 161, 162; *Wellington District Hotel, Hospital, Restaurant and Related Trades IUW* v *Barretts Hotel Ltd* [1978] Arb Ct 143, 145; *Auckland Clerical and Office Employees IUW* v *Universal Business Directories Ltd* [1978] Arb Ct 175, 177 and *Wellington District Hotel, Hospital, Restaurant and Related Trades IUW* v *College Dairy (1978) Ltd* [1978] Arb Ct 203, 204.

27 *New Zealand Insurance Guild IUW* v *Cornhill Insurance Co Ltd* [1980] Arb Ct 433, 434. There is no general requirement to warn at common law (*Pepper* v *Webb* supra n 19) but see *Manning* v *Surrey Memorial Hospital* (1975) 54 DLR (3d) 312.

28 *Boswell* supra n 1 at 143; *Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers IUW* v *The Tile Centre Ltd* [1978] Arb Ct 241, 243; though contrast *Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers IUW* v *Langley, Twigg & Co* [1980] Arb Ct 361.

the workers concerned to inspect their personal files and employment records.[29] The test for alleged misconduct is similar to that relating to incapacity.[30] In some cases, such as a suspicion of "pilfering" at work, a strict warning to all staff has been suggested as being proper before any dismissals take place.[31]

The existence of a prior warning however is not in itself sufficient to perfect a dismissal under the section. The Court has also asked how close in time the warning was to the event which precipitated the dismissal so that when a considerable time has elapsed since the warning, a dismissal might be regarded as summary and thus too severe,[32] the warning presumably lapsing by effluxion of time. No guidance is apparent on what time span will suffice in general terms although some disciplinary procedures in awards specifically provide for expiry of warnings after defined periods (usually twelve months)[33] or at the discretion of management.[34] It might also be asked how close in kind was the subject of the warning to the event which precipitated the dismissal. Thus, where a written warning concerned abruptness, inefficiency and a poor relationship with other staff but dismissal followed an unrelated complaint the warning was apparently discounted.[35] This general approach may be affected by trends in the drafting of current awards since it is becoming increasingly common for awards to set out detailed warning procedures for offences regarded as constituting "less than serious misconduct". Under the procedure, for a first offence a written[36] or oral[37] warning is delivered which is recorded in the worker's personal file (occasionally the warning is required to be delivered in the presence of a union delegate[38]); for a second offence a reprimand is given with a copy placed in the worker's personal file, the worker being told in the presence of a union official and an approved management representative that it is a final warning and that any further offence will render him or her liable to dismissal; for a third offence the worker is dismissed (occasionally with notice[39]) and the union is notified in writing. Whilst some procedures specify that the offences

29 See eg Air New Zealand Ltd (Overseas) Pilots and Navigators Award (1979) 79 BA 1019, clauses 2.9.0.0. and 2.11.0.0.

30 See *Vial* supra n 23.

31 *Wellington Amalgamated Society of Shop Assistants and Related Trades IUW* v *Wardell Bros & Co Ltd* [1977] Ind Ct 13, 15 per Jamieson J; applied in *New Zealand Baking Trades Employees IUW* v *Ford Bros Bakery Ltd* [1980] Arb Ct 443; contrast *Wellington Road Transport and Related Industries Motor and Horse Drivers and their Assistants IUW* v *Fletcher Construction Ltd* [1979] Arb Ct 157.

32 *Leaupepe (New Zealand Harbour Boards Employees IUW)* v *Wellington Harbour Board* [1977] Ind Ct 197, 199.

33 A common provision in the wool industry. See eg Nelson Industrial District Knitted Garments and Hosiery Factory Employees Award (1979) 79 BA 755, clause 9(b). Such a step is recommended by the New Zealand Employers Federation in their Manual, supra n 8.

34 See New Zealand (except Auckland 25 mile radius) Passenger Transport Drivers Award (1979) 79 BA 2317, clause 18.

35 *Auckland Hotel, Hospital, Restaurant and Related Trades Employees IUW* v *Auckland Travelodge Hotel* [1980] Arb Ct 387.

36 See supra n 34.

37 See supra n 33.

38 See Ford Motor Co New Zealand Ltd, Wiri Plant Employees Composite Agreement (1979) 79 BA 6353, clause 11.

39 See supra n 33.

must each be for the "same misdemeanour"[40] it is more common for the award to specify that the provisions "are not restricted to repetitions of a specific form of offence but can be applied to separate offences of a clearly dissimilar nature."[41] The latter type of award term would almost certainly affect the attitude of the Court to the question of whether, in order to be effective, warnings need be directed at behaviour which is close in kind to that which ultimately gives rise to dismissal.

There remain two other possible avenues of challenge even where the two-tier warning system is established as a term of the relevant award. The first is to make use of the personal grievance procedure itself to challenge what is regarded as an unjustified warning. Subsection 1 of section 117 defines "personal grievance" as meaning, inter alia, action by the employer other than unjustifiable dismissal (not being action of a kind applicable generally to workers of the same class employed by the employer) which affects the worker to his or her disadvantage. There can be little doubt that as drafted this subsection would cover a formal warning, given the potential impact of such a warning on the worker's employment, although there are no reported cases where the grievance procedure has been used in this way. Uncertainty surrounds the nature of the remedies available where this part of the subsection is relied upon,[42] but it would appear to be open to the Court to make at least a persuasive finding in such a case which would suffice for the purpose of any grievance based upon the propriety of the warning.[43] Resort to the grievance procedure in such cases might well cause concern to those administering the Act in view of the large number of potential cases which would result from its routine use in this way. Secondly, the justification for any warning may always be challenged at a hearing based upon subsequent alleged unjustifiable dismissal. On occasion the Arbitration Court has examined the basis of prior formal warnings and, where necessary, disregarded them.[44] Nevertheless in tactical terms it seems unwise to allow what is regarded as an unjustified warning to go unchallenged, whether the dissent takes the form of a personal grievance hearing or a more informal approach. It might be argued in any case that the two cannot be separated to any satisfactory degree since the first three steps in the standard procedure for settling personal grievances under subsection 4 of section 117 do in fact consist of an informal mechanism for solving such issues.

40 See eg R & W Hellaby Ltd (Mt Richmond Division and Onehunga Bacon Division) Voluntary Collective Agreement (1979) 79 BA 8703, clause 17; sometimes this arises by implication, as in eg Kinleith Site Contractors Boilermakers Voluntary Collective Agreement (1979) 79 BA 6379, clause 14.

41 See eg Prestige Holeproof New Zealand Ltd Chemical Fibres Division Employees Voluntary Collective Agreement (1979) 79 BA 1161, clause 17.

42 Section 117(7) provides remedies only for unjustifiable dismissal although s 117(4)(i) which applies both to unjustifiable dismissal and disadvantageous action, states that the Court "may make a decision or award by way of a final settlement which shall be binding on the parties." In *New Zealand Insurance Guild IUW* v *Insurance Council of New Zealand* [1976] Ind Ct 173, 179 Jamieson J remarked that unless the grievance concerns unjustifiable dismissal no more can be done than to "make a persuasive finding". However, in *New Zealand Bank Officers IUW* v *Bank of New Zealand* [1980] Arb Ct 155 Horn CJ inferred from s 117(4)(i) that the Court has "wide but unspecified powers" in such cases.

43 *New Zealand Insurance Guild IUW* ibid at 179.

44 *Hawke's Bay Road Transport and Motor and Horse Drivers and their Assistants IUW* v *Direct Transport Ltd* supra n 24; *Otago and Southland Amalgamated Society of Shop Assistants IUW* v *Estelle Rose Ltd* [1980] Arb Ct 425.

(c) A right to be heard.

Since at common law the employee is not entitled to be given reasons for dismissal at the time he or she is dismissed[45] it follows that there is generally no common law requirement that the employer grant the employee a hearing before dismissal takes effect.[46] Little has been made of the right to know immediately reasons for dismissal in New Zealand and this perhaps marks a lacuna in award negotiation, particularly since in the short term the reasons for dismissal will affect the worker's right to an unemployment benefit and information supplied by the employer to the Department of Social Welfare on this question is regarded as confidential to the Department;[47] it might be noted that some journalists' awards do confer the right to the provision of a written statement of the reasons for dismissal either to a union representative[48] or to the worker concerned,[49] on request. The question of a hearing prior to dismissal, at which the worker is able to present his or her side of the events precipitating dismissal, has received more attention. Some awards provide for formal hearings in respect of alleged misconduct or breach of discipline,[50] occasionally providing for a right to legal representation[51] or an internal appeal from the decision at the hearing.[52] Breach of such a clause may lead to a finding that the worker was unjustifiably dismissed. An ambulance drivers' award provided that, should any complaint in writing be lodged with the employer by any member of the public, the worker concerned and the union would be given written particulars of the complaint within forty-eight hours and that the worker concerned would not be interviewed by the employer until he or she had union representation. The employer departed from the procedure in not referring a complaint to the worker concerned; the worker was subsequently dismissed on the basis of that complaint, which followed a written final warning, without a hearing involving the union. It was held that the departure from the

45 *Ridge* v *Baldwin* [1964] AC 40, 65 per Lord Reid.

46 Ibid; confirmed by the Privy Council in *Pillai* v *Singapore City Council* [1968] 1 WLR 1278, 1284 per Lord Upjohn. For discussion of the principles applying to the various exceptions to this general rule see *Heenan* v *Broadcasting Corporation of New Zealand* unreported, Supreme Court, Wellington, 30 May 1979, A 159/78, Vautier J; Freedland, *The Contract of Employment* (1976) 283-284. The principle has been departed from in Canada; see *Reilly* v *Steelcase Canada Ltd* (1980) 103 DLR (3d) 704.

47 Social Security Act 1964, s 60 as amended by Social Security Amendment Act 1976, s 11(1), confers a discretion on the Social Security Commission to postpone the commencement of an unemployment benefit for a period of up to six weeks where, inter alia, "the applicant has lost his employment by reason of any misconduct as a worker". The Department's form UB5, which requests the former employer to state the circumstances under which the worker's employment was terminated, is regarded as confidential to the Department.

48 New Zealand (except Northern Industrial District) Private Radio Journalists' Award (1979) 79 BA 1675, clause 22.

49 New Zealand Truth Journalists' Award (1979) 79 BA 2087, clause 21.

50 For variations on this right see eg Wellington District Rubber Workers' Award (1979) 79 BA 1793, clause 10; Christchurch Officers (other than Clerical) and Library Employees Voluntary Collective Agreement (1979) 79 BA 5251, clause 5; Kinleith Site Contractors Boilermakers Voluntary Collective Agreement (1979) 79 BA 6379, clause 14.

51 Nelson City Council Officers Award (1979) 79 BA 9821, clause 15.

52 For variations see Air New Zealand Ltd (Overseas) Pilots and Navigators Award (1979) 79 BA 1019, clause 17; Air New Zealand Ltd Flight Engineers Award (1979) 79 BA 7411, clause 17; Air New Zealand Ltd (formerly NAC) Pilots Award (1979) 79 BA 8821, clause 28.

procedure rendered the dismissal unjustifiable. In asking whether a hearing would have made any difference to the outcome, Jamieson J suggested that it would have to be shown that there was "no possibility" of a different result;[53] it seems that this will be a fairly difficult test to meet in practice. Whether the question would be decided in quite the same way where no set disciplinary procedure exists is uncertain. In *Barnham* v *Crothall & Co Ltd,* where the termination of the applicant's employment was carried out in a generally confused fashion, Jamieson J remarked that "[t]he fact that we have to criticise the manner in which the termination was carried out does not bear upon the real question, which is whether [the applicant] was 'unjustifiably dismissed'."[54] Nevertheless in subsequent cases the failure to afford the worker an opportunity to be heard has inclined the Court towards a finding of unjustifiable dismissal.[55] Nor, it seems, can the employer safely delegate such an inquiry, even where the allegation is one of theft and the police are investigating.[56] In such cases it is incumbent upon the employer to make his or her own inquiries which "need not go to the full extent of the proof required in criminal proceedings but . . . must at least . . . be clearly upon the grounds of probability."[57] Whilst the nature of the test to be applied in cases where no hearing takes place and there is no established disciplinary procedure remains unclear, once the need for a hearing has been established there seems to be no reason why the test applied in cases of written procedures should not be adopted. It may be noted in passing that this formula closely resembles the "inevitability" test first put forward in the United Kingdom in *Charles Letts & Co Ltd* v *Howard,*[58] under which employers were required to show that, if they had followed the appropriate procedure when contemplating dismissal, the result would inevitably have been the same. This test was subsequently doubted and not followed in *British Labour Pump Co* v *Byrne*[59] in which case the court posed the following two questions. Firstly, have the employers shown on the balance of probability that they would have taken the same course had they held an inquiry and received the information which that inquiry would have produced? Secondly, have the employers shown—in the light of information which they would have had, had they gone through the proper procedure—that they would have been behaving reasonably in still deciding to dismiss?

Conclusion

Personal grievance disputes are now the largest single category of cases reaching the Arbitration Court. Whilst many of the problems giving rise to personal grievances might be resolved by written disciplinary procedures, awards making such provision are in a minority.[60] Whether this

53 *St John Ambulance Association* supra n 19 at 220.
54 [1976] Ind Ct 97, 98.
55 *Boswell* supra n 1; *Auckland Clerical and Office Staff Employees IUW* v *Vacation Hotels Ltd* [1979] Arb Ct 81; *Rex Consolidated Ltd* supra n 13.
56 *Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers IUW* v *JN Anderson & Son Ltd* [1979] Arb Ct 333.
57 *New Zealand Baking Trades Employees IUW* v *Ford Bros Bakery Ltd* supra n 31 at 445.
58 [1978] IRLR 248.
59 [1979] ICR 347.
60 See the Department of Labour *Report* supra n 2 at 29-35.

arises from the conservative tradition of award drafting in New Zealand or the real difficulties of reaching agreement on elements of procedure[61] remains unclear. In the long term the provision of a statutory Code of Practice on disciplinary practice and procedures in employment, along the lines of that operating in the United Kingdom, may be one answer.[62] Industry codes may be another.[63] In the short term, however, it is to be hoped that the Arbitration Court will end some of the uncertainty that surrounds the ambit of the section at present, with or without the aid of clarifying legislation.

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61 See Thomson and Murray, *Grievance Procedures* (1976) particularly ch 6.
62 See Szakats, *Introduction to the Law of Employment* (1975) ch 24.
63 See eg the suggestions for the freezing industry by Sir William Dunlop, *The Application of Penalty Provisions in the Industrial Relations Act* (Department of Labour 1978) Annex 5.

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