CHAPTER 2

ARBITRATION OF JOB SECURITY AND OTHER EMPLOYMENT-RELATED ISSUES FOR THE UNORGANIZED WORKER

I. THE BRITISH EXPERIENCE WITH UNFAIR DISMISSALS LEGISLATION

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The Background

There has been legislation in Great Britain against unfair dismissals in operation since February 1972. Before then there was little protection for the unorganized worker.

The common law relating to termination of the contract of employment is somewhat more favorable to the employee in England and Scotland than in the United States. The English and (separate) Scottish courts never adopted the doctrine that the employer may terminate the contract of employment for an indefinite period at will. Notice is required, except in cases of gross misconduct. In the absence of express agreement, the period of notice may be fixed by the "custom of the trade," or otherwise is such period as is "reasonable" in the circumstances, depending on factors such as length of service, rate, and periods of payment. At common law this could be as long as one year in the case of the editor of a newspaper, and as little as two hours to terminate at the end of a workday in the construction industry.

There is, however, at common law no protection against abusive dismissals of the kind that has recently developed in several American jurisdictions. The courts have not been willing to apply either a prima facie tort theory or an implied contract theory to protect the employee who is dismissed for refusing to

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perform an act which is unlawful or contrary to established public policy. Nor does the common law require the employer to follow any particular form of procedural due process when dismissing an employee. In recent years some exceptions have developed to this general rule. In particular, when the person dismissed is what is known as an office holder (that is, someone holding a job involving the exercise of a public function), the rules of natural justice (that is, a fair hearing) must be complied with; and where a statute regulates the appointment and dismissal of the employee, the procedural requirements of the statute must be followed (for example, teachers, dock workers, most university teachers, etc.). Another important exception is where the contract of employment itself makes provision for a procedure to be followed, or for there to be "just cause" for the dismissal. In this respect the British courts have anticipated by some years decisions such as that in *Toussaint* v. *Blue Cross and Blue Shield of Michigan.*[1] The contractual provision may be express or it may be implied. Parliament has encouraged the express incorporation of procedural requirements since 1971 when the law first provided that every employer must present to his employees within 13 weeks of commencement of employment a written notice of any disciplinary rules and grievance procedures applicable to that employee, including an appeal procedure. Breaches of rules and procedures incorporated in the individual contract of employment in this way are construed by the courts as a breach of contract. However, the only remedy for breach is a claim for damages. The contract will be effectively terminated, even if in breach of procedure, and there is no possibility of reinstatement at common law. There is also very little taste for litigation of this kind among dismissed employees.

Although there is legislation against race and sex discrimination which parallels Title VII of the Civil Rights Act, this has been used only by those employees who, for one reason or another, do not qualify for protection under the unfair dismissal legislation (for example, because they have been employed for less than one year). The discrimination legislation is less favorable to the employee than the unfair dismissal legislation because the burden of proof to show "less favourable treatment" is on the employee, and, in general, discrimination can be shown

[1]408 Mich. 579, 292 N.W.2d 880 (1980).

only if a comparison can be made with a worker of the opposite sex or another racial group, as the case may be, and this is often not possible.

Turning to the organized sector of workers, it must be noted that the degree of unionization is considerably higher in Britain than in the United States, currently being about 60 percent of the workforce. Despite this, there was little collective bargaining before the 1970s on the question of disciplinary dismissals (that is, those relating to conduct or capability). In 1963 Frederic Meyers, in *The Ownership of Jobs: A Comparative Study,*[2] found that discipline was regarded among British employers as being a managerial prerogative, and he commented: "Surprisingly to the American observer, with the exception of victimization for union activity, this attitude of British employers was generally shared by union officials." He found that wildcat strikes by groups of workers were a common method of securing reinstatement for dismissed workers. However, it needs to be added that in the public sector (employing nearly one-third of the labor force) there have for a long time been negotiated procedures relating to discipline and termination. In the public sector there were also collective agreements for redundancy (that is, economic) dismissals covering matters such as selection procedures and severance pay. But there were relatively few schemes of this kind in the private sector before 1965, and most of these were not negotiated agreements.

It is against this background that legislation in Britain must be seen. In 1963 statutory minimum periods of notice, including a guarantee of earnings during the notice period, were introduced. As extended by later legislation and now incorporated in the Employment Protection (Consolidation) Act 1978,[3] these are currently (1) one week's notice if the period of continuous employment is four weeks or more, but less than two years; (2) one week's notice for each year of employment of two years or more, but less than 12 years; (3) 12 weeks' notice if the period of employment is 12 years or more.

In 1965 the Redundancy Payments Act, now incorporated with amendments in EPCA, Part VI, gave to employees dismissed by reason of redundancy (that is, the closure of their place of work or a diminution in the requirements for employees

[2]Los Angeles: Institute of Industrial Relations, University of California, Los Angeles, 1964.

[3]S. 49 (EPCA).

to do a particular kind of work), the right to lump-sum compensation assessed according to age and length of continuous employment, with a minimum qualification of two years' continuous employment. Currently, the maximum payment for an employee with 20 years' employment over the age of 41 is £3,900 (about $8,970). The payments are made by the employer, who can claim a rebate (currently 41 percent) from a fund to which all employers contribute. Less than one-third of all redundant employees have been eligible in practice, and the average lump sum paid to each employee is approximately one-fifth of the median adult male annual earnings. Because of the larger payments to older workers, the main effect of the act appears to have been to increase the significance of age as a criterion for redundancy. In this sense it has facilitated movement out of the labor force, but not mobility between jobs. It cannot be classified as a "job security" measure.

Two major pressures can be detected behind the movement toward the enactment of unfair dismissals legislation which took place in the Industrial Relations Act 1971. The first was international influences: One of these was the ILO Recommendation No. 119 of 1963 and the other was the precedent of laws against unjustified termination in most of the member states of the European Economic Community which Britain was then considering joining. The second was very strong domestic pressure in the 1960s for procedural reforms in industrial relations. These reforms were the main thrust of the Donovan Royal Commission on trade unions and employers' associations (1965–1968) which was heavily influenced by the statistics that showed that each year in the period 1964–1966 on average some 276 unofficial strikes (that is, wildcat) took place over dismissals, and 203 of these arose out of dismissals other than redundancies. As late as 1967 a tripartite working party of the Ministry of Labour reported against the introduction of legislation and favored voluntary reform, one of the major arguments being that a statute would increase legalism at the place of work, a prediction that has to some extent proved true. The Donovan Commission, however, believed that it was necessary to raise standards immediately and that legislation was the only way to do this. Starting from the proposition that legislation was necessary to protect those seeking to participate in union activities, the Commission decisively moved in favor of a general right against unfair dismissal for all employees, whether organized or not.

At the stage that the legislation was introduced, the unions were still very hesitant about it. Their attitude has now changed. Len Murray, General Secretary of the Trades Union Congress (TUC), said in a speech at Birmingham in April 1980:

> "I have to accept that there is no evidence that trade union membership has declined as the result of individual employment legislation: indeed the membership of our affiliated unions has risen from just over 8,000,000 in 1965 to over 12,000,000 today.
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> "And there can be no doubt that because of the law, unions are now able to offer better services in some respects to members in small and dispersed groups on whose behalf it had proved difficult to negotiate effectively. At the end of the day they can represent their members in cases before industrial tribunals and perhaps win compensation, whereas previously they could, in practice, do nothing. In short, our view is that the industrial tribunal system has been valuable insofar as it has provided workers with some protection against abuse in areas where trade union organisation is non-existent or ineffective."

In the organized sector the unions make use of the unfair dismissals legislation in some collective disputes. For example, in a wildcat strike situation the union official is now able to say to his members, "Don't strike about dismissal. We'll take it to an industrial tribunal." There does seem to have been some decline in the number of working days lost due to strikes over dismissals since the legislation was introduced and also a decline in the proportion of all strikes that are attributable to disputes over dismissal, although it would be impossible to say that the legislation, rather than a large number of other factors which have affected the strike pattern, is the cause of this change.

The major importance of the legislation, however, has been in the unorganized sector. Before considering the impact, it is necessary to say something about the content and scope of the legislation which is now embodied with amendments in EPCA 1978 Part V, as amended in 1980 by the Employment Act which restricts the application of the law in various ways, in particular as it affects short-service employees and those in undertakings with 20 or fewer employees.

The Meaning of Unfair Dismissal

Every employee, with certain exceptions, has the right not to be unfairly dismissed by his employer. The remedy is by way of

complaint to an industrial tribunal. The employee must prove that he was "dismissed," which includes actual termination by the employer, expiry of a fixed-term contract without renewal, and so-called "constructive" dismissal where the employee resigns because of a significant breach of contract by the employer going to the root of the contract (for example, unilateral reduction in pay, hours, or status or job-content, failure by the employer to investigate genuine grievances, harassment, or other unjustified or intolerable treatment).

It is then for the employer to show a set of facts known to him, or it may be beliefs held by him, at the time of dismissal which was the reason for dismissal. These facts must fall within one of the following categories: (1) "the capability or qualifications of the employee for performing work of the kind that he was employed by the employer to do" ("capability" is to be assessed by reference to skill, aptitude, health, or any other physical or mental quality); (2) "the conduct of the employee"; (3) the employee was "redundant" as defined in the redundancy payments legislation; (4) "the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under any enactment" (for example, a driving disqualification imposed on a truck driver); (5) "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." (Among such reasons have been held to be unreasonable refusal to agree to changes in employment terms, the temporary nature of the employment, structural reorganization, and irreconcilable conflict of personalities.)

Certain reasons render dismissal automatically unfair: trade union membership or activities, refusal to belong to a nonindependent trade union, refusal to belong to a union in certain "closed (union) shop" situations, refusal to belong to a trade union on grounds of conscience or other deeply held personal conviction, pregnancy and confinement, and selection of an employee for dismissal on grounds of redundancy in breach of an agreed procedure or customary arrangement relating to redundancy, or on grounds of trade union membership or activities.

In all other cases, where the dismissal is not automatically unfair, if the employer has shown a potentially fair reason, then the tribunal must determine whether, in the circumstances (in-

cluding the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating the potentially fair reason as a sufficient reason for dismissing the employee; and that question must be "determined in accordance with equity and the substantial merits of the case." Between 1974 and 1 October 1980 the burden of proof on this issue rested upon the employer. Under the Employment Act 1980, the pre-1974 position of the so-called "neutral burden" has been restored, but it has to be remembered that the industrial tribunal has no power to call witnesses or order production or discovery of documents on its own motion, the procedure being essentially an adversary one.

The "reasonableness" test has produced results probably not dissimilar from those under grievance arbitration in the U.S. The tribunals are reluctant to take a "second guess." The general approach is to ask, in the case of a dismissal on grounds of misconduct or incapability: (1) Was the employer's reason a genuine one? (2) Did the employer have reasonable grounds for his belief at the time of dismissal? (3) Did the employer conduct as much investigation as was reasonable in the circumstances, including giving the employee an opportunity to explain? (4) In the case of minor acts of misconduct, or alleged incapability, did the employer give the employee a reasonable opportunity to improve, for example, by administering oral and written warnings making it clear that the job was at risk if the employee did not improve? (5) Was the sanction of dismissal within the band of reasonable options open to the employer? If more than one option was reasonably open to the employer, then the dismissal will not be regarded as unfair. The tribunals give regard to agreed disciplinary procedures and also to a Code of Practice on Disciplinary Practice and Procedures in Employment issued by the Advisory, Conciliation and Arbitration Service (ACAS) which gives guidelines for disciplinary warnings and so on, prior to dismissal, but if the tribunal concludes that the employee would have been fairly dismissed even if proper procedures had been followed, the failure of procedure will not be fatal to the employer's case. In the case of redundancy dismissals, provided agreed procedures and customs have been followed regarding selection, it is rare for an employee to win on grounds of "unfair selection," although the employer is usually expected to take reasonable steps to help find alternative employment within the undertaking.

Excluded Categories

The following is a summary of those classes of employees who may not bring a complaint of unfair dismissal.

1. Employees who have been continuously employed for less than 52 weeks, unless the dismissal was for trade union participation (between 1975 and 1979 the period was 26 weeks).
2. Employees who commenced employment on or after 1 October 1980 and have been continuously employed for less than 2 years, if at no time in that period did the number of employees of the employer and any associated employer exceed 20.
3. Employees who have reached the age of 65 in the case of a man and 60 in the case of a woman, or who have reached the normal retiring age for the particular job.
4. Employees employed by their husbands or wives.
5. Registered dock workers (who have their own scheme).
6. Share fishermen.
7. Persons ordinarily working outside Great Britain.
8. Persons employed on United Kingdom registered ships wholly outside Great Britain and not ordinarily resident in Great Britain.
9. Persons employed under fixed-term contracts made before 28 February 1972, or fixed-term contracts for one year or more made after that date if they have waived their rights in writing.
10. Persons who do not present claims within three months of the date of termination, or such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of three months.
11. Employees dismissed "for purposes of safeguarding national security" (conclusively proved by a Minister's certificate).

Apart from these categories, an industrial tribunal may not determine whether a dismissal is fair or unfair where, at the date of dismissal, the employer was conducting a lockout or the employee was taking part in a strike or other industrial action, unless one or more employees who at any time took part in the strike or industrial action have not been dismissed, or have been offered reengagement, but the employee concerned has not

been offered reengagement. The effect is to make selective dismissals subject to the legislation. In determining whether a dismissal was fair or unfair, no account may be taken of pressure by strike or industrial action put on the employer to dismiss, but in certain closed (union) shop dismissals after 8 September 1980, a contribution or full indemnity may be sought by the employer from any person (including a union who exerted pressure) in respect of an award of compensation made against the employer.

It was always hoped that the organized sector would make their own arrangements for unfair dismissals more favorable than the legislation, but providing for an appeal to an independent arbitrator. Accordingly, the legislation allows the Secretary of State to grant formal approval for the replacement of the statutory provisions by collective agreements which improve on the statutory minimum standards. However, in the 16 years since the redundancy payments legislation came into force, only three such agreements have been approved, and in the nine years of the unfair dismissals legislation, only one agreement contracting out of that legislation has been approved. The latter agreement (1979) covers members of the Electrical Electronic Telecommunications and Plumbing Union who work for employers belonging to the Electrical Contractors' Association.

Remedies

When the legislation was first introduced, tribunals could only recommend, but not order, reemployment. But the primary remedies available since 1 June 1976 are (1) reinstatement, which means that the employer must treat the employee in all respects as if he had not been dismissed, restoring his pay, pension, and other benefits to him; and (2) reengagement, which differs from reinstatement in that the employee may be reengaged in a different job from that which he formerly held, provided that the new job is comparable to his old one or is otherwise suitable. Reengagement may be by a successor or associated employer. In exercising its discretion whether to grant reinstatement or reengagement, the tribunal must consider the complainant's wishes, whether he caused or contributed to the dismissal, and whether it is practicable for the employer to comply with an order for reinstatement or reengagement. The mere fact that the employer has engaged a per-

manent replacement does not automatically make these remedies "impracticable." If the employee is reinstated or reengaged, but the terms of the order are not fully complied with, the tribunal must award compensation to the extent that partial noncompliance has caused the employee's loss, with a maximum award of £6,250. If the order for reinstatement or reengagement is not complied with at all, then the tribunal must award a basic and compensatory award (see below) and an additional award of compensation which will be either between 13–26 weeks' pay, or, in the case of discrimination on grounds of race, sex, or trade union activity, 26–52 weeks' pay.

If orders for reinstatement or reengagement are not made, the tribunal must award compensation under two heads: (1) *A basic award.* This is calculated in the same way as a redundancy payment, subject to a maximum award of £3,900 (that is, a maximum weekly pay limit of £130 × 20 years' continuous service × 1½ weeks' pay for each year). A deduction may be made in respect of the contribution of the employee to his own dismissal, and any redundancy or other payment received will be deducted from whatever sum is awarded. (2) *The compensatory award.* This is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer. This is calculated according to principles laid down by the courts and includes benefits lost to the date of hearing and subsequently, loss of pension rights, and expenses. Reductions are made in respect of the employee's failure to mitigate his loss, the employee's contribution to his own dismissal, and any other payments received from the employer and earnings elsewhere. It will be seen that the maximum award which can be made amounts to £16,910 ($38,890), made up as follows:

Basic Award	£3,900	($ 8,970)
Compensatory Award	£6,250	($14,370)
Additional Award for failure to reinstate	£6,760	($15,550)

Statistics for 1979 (the latest available) show that 64.9 percent of all completed cases were conciliated. The proportion of conciliated cases has increased each year, and in most of these cases ACAS has been instrumental in securing a settlement or withdrawal. The statistics reveal the startling fact that only a tiny proportion of all complainants were reinstated or reengaged.

The proportion has declined since these were made the primary remedies in 1976. In 1973, 4.2 percent of those whose cases were settled before a hearing were given back their jobs. This percentage has fallen each year and was only 1.8 percent in 1979. Of those who went to a hearing, 2.3 percent were recommended to be given back their jobs in 1973. In 1977 (the first full year in which orders and not simply recommendations could be made), only 1.4 percent were reinstated or reengaged, and in 1979 this figure had declined to 0.8 percent. The median award of compensation in 1979 was just over £400 (about five weeks' net pay at the average wage). This should be compared to the national maximum award in 1979 of £14,800.

A number of reasons may be suggested for these statistics. It is generally believed, although there have been no firm statistics since 1967, that the proportion of employees reemployed after the use of agreed procedures in the organized sector is very much higher than that under the legislation. This reflects the difficulty of enforcing orders for reemployment without union support. The financial penalties for failing to comply with a tribunal order are apparently not costly enough to the employer to make reemployment the most attractive solution. It also has to be said that only a minority of employees wish to be reemployed after the unpleasant rupture of dismissal. This may have something to do with the hierarchical structure of the labor market. Those in relatively secure employment who are eligible to present a complaint under the legislation (at present, with one year or more of service) are usually able to find new employment within a relatively short period, a fact which is reflected in the apparently low level of awards by tribunals for future loss of earnings. In this situation, reinstatement is not particularly attractive. The payment of compensation as a lump sum instead of by way of periodical payments so long as the worker is unemployed is a disincentive. In 1979, in 18.7 percent of cases in which tribunals awarded compensation, only the basic award was made. As with redundancy payments, the allurement of even a small lump sum is enough to coax many employees to give up their wish to return to the job.

Handling of Complaints

The procedure for dealing with complaints of unfair dismissal is intended to be accessible, speedy, and informal. Within three months of a dismissal (a time limit that may be extended in

exceptional cases), the applicant presents a simple originating application setting out particulars of the grounds on which he seeks relief to the Central Office of Industrial Tribunal who sends it to the employer. The employer must send back its notice of appearance, setting out the particulars of its defense, within 14 days (which may be extended), and 14 days' notice of hearing (which may be shortened by agreement) is then given. The average time it takes to get a case heard by a tribunal is 8 to 10 weeks from the date the complaint was presented.

The tribunal has powers to order further particulars and, on application, may order discovery, inspection and production of documents, and the attendance of witnesses. Evidence is usually taken on oath or affirmation. The tribunals are tripartite, consisting of a legally qualified chairman, drawn from a panel appointed by the Lord Chancellor in England or Secretary of State in Scotland. There are about 66 full-time and 122 part-time chairmen. Two lay members sit with the chairman and have full voting rights. They are drawn by the tribunal staff from panels nominated by the Secretary of State for Employment after consultation with the Trades Union Congress (TUC) and the Confederation of British Industry (CBI), respectively. There are about 2,200 panel members in England and Wales. They are expected to act as independent, impartial judges and do not have any connection with the parties; quite often they are drawn from an industry different from the one in which the dismissal occurred. The cases are allocated to the 16 regional offices in England and Wales, or to Scotland, depending upon where the cause of action arose. Tribunals sit in these regional centers and also in other towns.

Applicants are represented in some 60 percent and employers in some 65 percent of all cases. In 1979, about 37 percent of all applicants and 54 percent of all employers had legal representatives at the hearing. Applicants were represented by trade union officials in a further 15 percent of cases. Legal costs are not normally awarded, each party being expected to bear his or her own expenses. Exceptionally, costs may be awarded against a party who unnecessarily causes postponements or who acts frivolously or vexatiously, or otherwise unreasonably. Parties and their witnesses may be paid traveling costs and small attendance allowances out of central government funds. The average cost to the taxpayer of a day's hearing in 1980 was estimated to be about £220 ($500).

An appeal from an industrial tribunal to the Employment

Appeal Tribunal (EAT) may be made on a question of law. The EAT consists of a judge, drawn from a panel of English High Court and Scottish Court of Session judges, and there are two to four lay members (with equal voting rights) sitting with him for each hearing. There may be a further appeal, with leave, to the English Court of Appeal (three senior judges) or the Scottish Court of Session, and with further leave from there to the House of Lords. In practice, most appeals do not go beyond the EAT. In 1978–1979 there were appeals to the EAT in about 4 percent of all tribunal cases that went to hearing. Of those that went to appeal, 13.6 percent were allowed, 12.7 percent were remitted for rehearing, 42.7 percent were dismissed, and 26.5 percent were withdrawn. Fifty-six percent of all appeals were lodged by employees. Industrial tribunals are bound by decisions of the EAT and of the higher courts.

All complaints of unfair dismissal are sent to the ACAS before being scheduled for hearing for conciliation. ACAS conciliation officers have a statutory duty to try to settle the complaint without the need for a tribunal hearing. As mentioned earlier, about two-thirds of all cases are conciliated.

The number of unfair dismissal applications to tribunals increased from 5,197 in 1972, the year the legislation became operative, to 34,180 in 1978. The increase arose primarily from the reduction in the length of service qualification for applicants, first from 104 weeks to 52 weeks in September 1974, and second, from 52 weeks to 26 weeks in March 1975. The qualifying period was again raised to 52 weeks with respect to dismissals on or after 1 October 1979. This led to a reduction to 33,383 in 1979 and a further reduction to 28,876 in 1980.

Statistics relating to the industrial, occupational, and earnings characteristics of tribunal applicants are available only for the period from 1972 to 1976; they are set out in Tables 1–3. They indicate that the industries which are overrepresented in unfair dismissal applications are generally those in which the density of union membership is relatively low and collective bargaining is relatively weak, and where there is a concentration of small employers and low-paid, short-service employees. These industries include agriculture, construction, distributive trades, and miscellaneous services. Industries which are underrepresented tend to be those where density of union membership is high and where there are large employers, such as mining, quarrying, gas, electricity, water, and public administration.

TABLE 1

UNFAIR DISMISSAL APPLICATIONS BY SELECTED INDUSTRIES AND UNION DENSITY, 1972–1976

Industry	Employees as % of Labor Force	Union Density	Percentage of All UD Applications
Agriculture, forestry, fishing	1.7	22.2 60.5	4.2
Mining and quarrying	1.5	96.2	0.6
Metal manufacturing and engineering	16.6	69.4	17.0
Construction	5.7	27.2	13.9
Gas, electricity, and water	1.5	92.0	0.5
Distributive trades	12.1	11.4	16.6
Insurance, banking, finance	4.9	44.8	3.2
Professional and scientific services	16.1	75.0	3.6
Entertainment		64.9	
Hotel and catering services	10.2	5.2	16.0
Public administration and defense	7.2	90.5	1.7

There are no overall statistics that enable one to say what proportion of all employees dismissed for cause present complaints. A survey of 970 manufacturing establishments with at least 50 workers, undertaken on behalf of the SSRC Industrial Relations Research Unit (Warwick University), indicated that in the years 1978 and 1979 from 2 to 3 percent of the total workforce covered by the survey had been dismissed (not including those made redundant). Of those dismissed, 9.8 percent made an application to an industrial tribunal. These figures provide some reflection of the situation, but probably underrepresent the proportion who complain in view of the predominance of

TABLE 2

OCCUPATIONAL ANALYSIS, 1972–1976

Occupational Group	Percentage of All UD Applications
Other managerial	10.2
Clerical	9.3
Selling	9.3
Catering	9.7
Processing (metal and electrical)	15.7
Painting and repetitive assembly	3.4
Construction	5.4
Transport	13.5

TABLE 3

ANALYSIS BY WORKFORCE SIZE, 1972–1976

Firm Size	Percentage of All UD Applications
Less than 20	22.0
20–49	16.5
50–99	14.0
100–499	23.4
500–999	8.2
1000 plus	15.9

Source: Department of Employment *Gazette.*

small private service establishments among unfair dismissal respondents.

Criticisms of the Law

The operation of the legislation has been subjected to considerable criticism, particularly by small employers. Among the main allegations are the following:

1. The legislation discourages recruitment, particularly in small businesses, and actually prevents the creation of jobs by employers. The only empirical evidence—a study commissioned by the Department of Employment and published in 1978 and

a study by the Department staff published in July 1979—does not support this view and indicates that only a relatively insignificant number of small employers regard the legislation as a factor inhibiting recruitment. The first of these surveys indicates that the legislation has made employers more careful about the *quality* of recruits, but not about the *numbers* employed.

2. The law is particularly burdensome to small employers who have to bear their own costs and who cannot be expected to have formal disciplinary procedures. (Over half of all complaints come from firms with less than 100 employees.) Recent research by the Warwick Industrial Relations Research Unit indicates that small firms are much less likely than large ones to have disciplinary procedures, and they do have a greater propensity than the large firms to dismiss employees. The Employment Act 1980 attempts to meet these criticisms by excluding employees with less than two years' service in firms with 20 or fewer employees, directing tribunals to have regard to the "size and administrative resources" of the employer, reintroducing the "neutral" burden of proof of reasonableness, and allowing tribunals to award costs and expenses in cases of "unreasonable" conduct by a party.

3. The tribunals have become too "legalistic." Originally, hearings lasted a few hours at the most, but in recent years the majority of cases have lasted a whole day or longer. The unions blame this primarily on the increasing use of legal representation. Undoubtedly part of the reason is the complexity of the statutes the tribunals have to apply and the many restrictions and "guidelines" imposed on them by the case law of the EAT. Recently the tribunal rules have been amended to make it clear that tribunals must avoid formality and are not bound by the rules of evidence in ordinary court proceedings. There is also a new procedure for "pre-hearing assessments" to weed out hopeless cases by advising the party concerned that an order for costs may be made if the matter proceeds.

4. The unions complain that the odds of the employee winning—1 in 4—are too low, and that the orders of reinstatement are too few and the level of compensation awarded inadequate.

Conclusions

The overall assessment of the legislation must be that it has not led to a flood of litigation. Indeed, the estimates of the

caseload of the industrial tribunals have always been considerably higher than what has materialized in practice. It was originally believed on the basis of a survey of manufacturing industry that about 3 percent of employees were dismissed for cause and about 10 percent of those were likely to complain. In fact, the caseload has never exceeded just over half the estimated figure. The actual size of the caseload depends upon factors such as the length of the qualifying period of service to get the statutory rights, bearing in mind that short-service employees are more likely to be dismissed than long-service employees; the size of establishments covered, bearing in mind that about 22 percent of all complaints come from firms with 20 or fewer employees; and also the extent to which employees may have available legal and other services.

I have already indicated that trade union fears about the consequences of the legislation have not materialized and, as the quotation from Len Murray indicates, the legislation is now generally welcomed and utilized by the trade unions. The fear among employers that the legislation would lead to a weakening of discipline has not proved to be well-founded. On the contrary, the legislation appears to have given employers an opportunity to introduce disciplinary rules and procedures which have legitimated managerial decisions and, through the use of fair procedures and severance payments, facilitated some kinds of disciplinary action and also dismissals on grounds of redundancy.

Labor laws are not for export. You may find some helpful ideas in the British experience, but the essential point that needs to be made is that any statutory scheme for protecting the unorganized worker will succeed only to the extent that it is organically related to the existing culture of industrial relations. One cannot transplant an organism which will be rejected because it is alien to the system.