ACTION ON UNFAIR DISMISSALS

Disputes over dismissals are a significant source of industrial unrest in New Zealand.[1] In many overseas countries, a worker who considers that he has been unjustly dismissed from his employment may have recourse to a grievance procedure. But, in New Zealand a dismissed worker has no effective redress at all.

In the United Kingdom some of the problems connected with the termination of employment have attracted considerable attention. The Contracts of Employment Act 1963[2] prescribed fixed periods of notice. The allied problem of compensation for redundancy was tackled by the Redundancy Payments Act 1965.[3] In 1964 the Labour Government accepted in principle Recommendation 119 of the International Labour Conference[4] and later received a report on dismissal procedures from the National Joint Advisory Committee ofthe Ministry of Labour.[5] Then, in 1969, the Government promised[6] to implement the main recommendations contained in the report of a Royal Commission (hereinafter "the Donovan Report") which studied the problem of unfair dismissals *inter alia.*[7] This promise was fulfilled by the Industrial

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1. The following figures illustrate the significance of the problem in practice:

	1968	1969
Total number of work stoppages	153	169
Number of stoppages caused by disputes over dismissal	28	22

The 22 stoppages caused by dismissal disputes in 1969 occurred in the following industries: Building and Construction 11; General Engineering 3; Meat Freezing 2; Road Transport 2; Hospital Board 2; Shipping 1; Paper Mills 1; Total 22. Source: Department of Labour.
These figures may not be strictly accurate since a "stoppage" may have causes other than the dispute over a dismissal, which merely precipitates the stoppage. It should also be noted that the figures do not distinguish between "wrongful" dismissals and "unfair" dismissals.
For 1961-1964 figures seen Green, *Procedure to Settle Disputes Over Alleged Wrongful Dismissal* (Department of Economics, V.U.W., 1966) p. 2.
2. The Act requires a minimum period of notice determined by length of service to terminate employment and requires employers to give employees written particulars of terms of employment.
3. An employee may qualify for redundancy payments by employers if dismissed by reason of redundancy. But dismissal through redundancy has received a restricted interpretation. See *Hindle* v. *Percival Boats Ltd.* [1969] 1 All E.R. 836.
4. *Record of proceedings 47th Session of International Labour Conference,* 1963, pp. 658-665. The Recommendation lays down the principle that dismissals must be due to a valid reason connected either with the worker's conduct or operational requirements, and called for a procedure to hear complaints within a reasonable period before an arbitral body.
5. *Report of the National Joint Advisory Council Committee on Dismissal Procedures,* Ministry of Labour (H.M.S.O. London, 1967). See Reid, "Report of the N.J.A.C.C. on Dismissal Procedures", (1968) 31 M.L.R. 64.
6. *In Place of Strife,* January 1969. Cmd. 388, paras. 103-104.
7. *Royal Commission on Trade Unions and Employers' Associations,* 1965-1968. Cmd. 3623, Ch. IX.

Relations Bill 1970.[8] In New Zealand one has to look back to 1964 to find any similar governmental proposals. In that year, the Minister of Labour approached employers' and workers' organisations to ascertain their views on the possibility of statutory machinery for handling disputes over dismissals.[9] It is submitted that as disputes over dismissals often cause, or help to cause, work stoppages, a problem exists which demands immediate consideration in this country.[10]

Disputes in the industrial arena may be classified into two categories. Firstly, there are "rights disputes" which are disputes concerning the interpretation and application of existing rights and obligations, for example, the provisions of awards and industrial agreements or of other formal or informal agreements specifying terms and conditions of employment. Secondly, there are "interests disputes" which are disputes relating to what employers' and employees' rights and obligations should be in the future, for example, what the terms of a new award or industrial agreement are to be. One may categorise a dispute over a dismissal as a "rights dispute" since the existing rights and obligations of employers and employees in relation to dismissal are found in the common law, in the Industrial Conciliation and Arbitration Act 1954, and in awards and industrial agreements. However, the common law is failing to meet modern demands; the provisions of the Industrial Conciliation and Arbitration Act 1954 as regards victimisation are severly limited; and dispute clauses in awards and industrial agreements are generally not applicable. The consequence is that when employer-employee or employer-union negotiations over a dismissal dispute break down, the union concerned may decide to call a strike which the existence of a better legal machinery might have obviated.

The aim of this paper, after a brief examination of the current state of the law and present practice, is to suggest a possible procedure to handle dismissal disputes, one effect of which would be to reduce the number of work stoppages. Any proposal in this area involves the

8. Published 30 April, 1970. See Clauses 33-56. With the Dissolution of Parliament before the British General election in May 1970, this Bill lapsed. It was however re-introduced by the new Conservative Government in a different form. At the time this paper was written a copy of the new Bill was not available in New Zealand.
9. Apparently the reaction of both employers and workers was unfavourable. See Green, Loc. cit. supra, pp. 21-25.
10. Since the first draft of this paper was prepared the Minister of Labour, Mr. Marshall, announced the Government's intention of introducing legislation to provide for a standard procedure for the settlement of personal grievances. *Evening Post,* 25 July, 1970. This procedure was enacted in the Industrial Conciliation and Arbitration Amendment Act 1970 on 17 October 1970. It is an indication that the problem has gained the attention of Government but it is submitted, not to a sufficient extent. By way of addition and amendment to this paper, an analysis and assessment of the standard procedure to settle personal grievances is contained in note 69 to this paper. Other amendments have been made to the law by the I.C. & A. Amendment Act 1970 and they have been outlined in footnotes where necessary.

task of striking a balance between competing interests, the employer's prerogative to hire and fire on the one hand, and the worker's interest in security of employment on the other.

I THE CURRENT STATE OF THE LAW AND ACTUAL PRACTICE

A. The Common Law[11]

The employer has the right to hire and fire subject, when an award or industrial agreement applies, to any limitation placed on that right in such a document. Awards and industrial agreements are superimposed upon the contract of service and specify, *inter alia,* the notice required for the termination of the contract. The basis usually is that a weekly worker must receive a week's notice; the hourly worker two hours' notice; or in both cases, payment of wages in lieu of notice. At common law contracts for indefinite periods of service are terminable by "reasonable notice".[12] However, a worker may be summarily dismissed for:

> ". . . any *moral misconduct,* either pecuniary or otherwise, *wilful disobedience,* or *habitual neglect,* . . ."[13]

The Privy Council has held that there is no rule of law defining the degree of misconduct justifying summary dismissal.[14] But behaviour which has been held to constitute "misconduct" includes: assaulting a fellow-employee and insulting an officer of the employer;[15] and, coupled with earlier disobedience, a comment by a gardener to his employer that he "couldn't care less about (the employer's) bloody greenhouse or (his) sodding garden."[16] The action of a female servant who left her employment to see her sick mother after having been refused permission by her employer, was once held to amount to "wilful disobedience" justifying instant dismissal.[17] Similarly, irregular attendance by an employee may constitute sufficient "neglect".[18] When a worker is summarily dismissed without justification or when the appropriate notice has not been given, the damages that may be recovered are the wages that would have been earned during the period of notice. Compensation will not be paid for the manner of

11. For a complete discussion see Mathieson, *Industrial Law in New Zealand.* Vol. 1, pp. 40-53.
12. *Re African Association Ltd. and Allen* [1910] 1 K.B. 396, *James* v. *Thomas A. Kent & Co. Ltd.* [1951] 1 K.B. 551.
13. *Callo* v. *Brouncker* [1831] 4 C. & P. 518, 519.
14. *Clouston & Co. Ltd.* v. *Corry* [1906] A.C. 122.
15. *Tomlinson* v. *L.M.S. Railway* [1944] 1 All. E.R. 537.
16. *Pepper* v. *Webb* [1969] 2 All. E.R. 216. In this context see also *Orr* v. *University of Tasmania* (1958) 100 C.L.R. 526, *Sinclair* v. *Neighbour* [1967] 2 Q.B. 279.
17. *Turner* v. *Mason* [1845] 14 M. & W. 112.
18. *Beattie* v.*Parmenter* (1889) 5 T.L.R. 396. There is a possibility of confusing decisions on particular facts with rules of law. It has been submitted that there is no such thing as a misconduct case decided on its peculiar facts, and that there are a great many fixed rules, capable of being classified in a logical fashion, as to what constitutes misconduct. See Avins, *Employee Misconduct,* Pub. Law Book Co., Allahabad, India, 1968.

dismissal, injured feelings, or the fact that alternative employment may be difficult to secure.[19] Sums paid to the employee upon his dismissal may be deducted as may any amount earned, or which could have been earned, had he made diligent attempts to find suitable employment.[20] The courts have adopted the attitude that neither specific performance nor an injunction nor a declaratory judgment[21] is available to the wrongfully dismissed worker, and that his remedy is an action for damages.

The limitations are obvious. Since little or no satisfaction may be obtained by an action for damages, there is little to encourage a wrongfully dismissed employee to bring an action. Reinstatement, which is what an employee may really want, will not be ordered by the courts. Instead of going to court the employee or his union will probably seek redress in some other manner. But perhaps more important, the common law has no regard for "unfair" dismissals as distinct from "wrongful" dismissals. An employer may terminate an employee's contract of service in a legal manner by giving him the proper period of notice, but in circumstances that may be considered to be "unfair". That is, it is an alleged "unfair" dismissal, whereas an alleged "wrongful" dismissal refers to the complaint that a worker was dismissed in breach of contract. Both types of allegations provoke industrial unrest. It is accordingly intended to discuss the possibility of a procedure applicable to both.

B. Industrial Conciliation and Arbitration Act 1954, s. 167

Section 167 provides that where an employer dismisses a worker or alters any worker's position in his employment to his prejudice within twelve months of his being an official or representative of a union, or acting as an assessor on a Council of Conciliation, or representing a union in any negotiations between employers and workers, or making any claims for some benefit or an award, order or agreement, he shall be liable to a maximum penalty of $50. But it is a defence for the employer to prove that the worker was dismissed or that the worker's position was altered for a reason other than that the worker acted in any of the above capacities.[22] The primary purpose of the section is to prevent "victimization", that is, dismissal because of union activities. However, it has been suggested that the provision is a "dead letter".[23] Firstly, even if the employer is convicted

19. *Addis* v. *Gramaphone Co.* [1909] A.C. 486.
20. *Monk* v. *Redwing Aircraft Co. Ltd.* [1942] 1 K.B. 182.
21. *De Francesco* v. *Barnum* (1890) 45 Ch.D. 430. See *post* p.63. A modern statement of the law may be found in *Francis* v. *Municipal Councillors of* Kuala Lumper [1962] 3 All E.R. 633.
22. I.C. & A. Act 1954, s. 167, proviso.
23. Green, *Supra,* p. 5. See also Woods, *Report on Industrial Relations Legislation 1968,* Department of Labour, p. 18, wherein s. 167 is described as being "virtually useless". These descriptions may be too strong in light of a recent case where a claim, brought under s. 167 for the penalty, was successful. *Marlborough Clerical I.U.W.* v. *Barraud & Abraham Ltd.,* noted in *Evening Post,* 3 March, 1970.
See also. *Insurance Guild I.U.W.* v. *Guardian Assurance Co. Ltd.* 13 M.C.D. 28, where a similar claim failed.

under the section there is no provision for any redress for the dismissed worker. Secondly, the penalty is too small to be a real deterrent. It may be more profitable for an employer to incur the penalty than to continue to employ a vigorous unionist. In *Inspector of Awards* v. *Tractor Supplies Ltd.*[24] the Court of Arbitration said of the employer's burden of proof:

> "The employer must establish on the balance of probabilities that an independent ground brought about the dismissal . . . the test may be put simply as follows: Taking into account all the circumstances, has the employer shown on the balance of probabilities that the worker would have been dismissed even if he had not taken part in union or industrial activity."[25]

Thus thirdly, to dismiss an active unionist and avoid the effect of section 167 an employer merely has to establish an alternative reason for dismissal and represent it as the relevant ground. Finally, as section 167 relates primarily to dismissal due to union activity, it is to that extent limited in its application.[26]

C. Dispute Clauses in Awards and Industrial Agreements

Section 176 of the Industrial Conciliation and Arbitration Act 1954 enables clauses setting up disputes committees to be incorporated in awards and industrial agreements. These committees deal with matters arising out of the awards or industrial agreements. A typical dispute clause provides that in the event of a dispute all work shall continue and that the dispute must be referred to a committee composed of two representatives from each side and an independent chairman. The chairman is to be mutually agreed upon and, in the event of a failure to reach agreement, to be appointed by a Conciliation Commissioner. The committee must either decide the dispute or refer it to the Court of Arbitration. Either party has a right of appeal to the Court against a decision of the committee.[27]

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24. [1966] N.Z.L.R. 792.
25. *Ibid.*, 795-796, per Blair J.
26. However, s. 167(1)(d) can be taken advantage of by the most apathetic union member and in this respect the protection afforded by s. 167 extends beyond active unionists. See *Insurance Guild I.U.W.* v. *Guardian Assurance Co. Ltd., supra,* and *Marlborough Clerical I.U.W.* v. *Barraud & Abraham Ltd., supra.*
27. See, for example, the N.Z. General Metal Trades Employees' Award 1964, Clause 22:64 B.A. 929, 947. A fuller discussion of dispute clauses can be seen in Green, *loc. cit. supra.* pp. 5-7; see also Brissenden, "Settlement of Justiciable Labour Disputes in New Zealand", (1967) 19 Pol. Sci. 40, especially 44-47, 56-57. It is submitted that Brissenden may be incorrect in some parts as it appears that he has not fully understood the I.C. & A. Act 1954.
Due to the recent Industrial Conciliation and Arbitration Amendment Act 1970 (see n. 10 *supra*) a disputes clause very similar to that outlined is now deemed to be part of every award and industrial agreement. See ss. 177, 178.

Although the language of a disputes clause may seem to cover disputes over dismissals, in practice it is assumed that this is not so.[28] Awards and industrial agreements are explicit as to the length of notice required upon termination of employment, and preserve in varying terminology the employer's right of summary dismissal for cause.[29] Disputes over termination of employment are treated in practice as being specifically dealt with by awards and industrial agreements. They are not, on this interpretation, disputes over:

> ". . . any matter whatsoever arising out of or connected therewith and not specifically dealt with in this award."[30]

Although awards and industrial agreements may be clear as to notice and the employer's right of summary dismissal, they make no detailed provision as to what is to constitute "misconduct", "wilful disobedience" or "habitual neglect": they are content to incorporate the common law. Nor do they establish any criteria to assess the "fairness" of an employer's action.

Employees in the State Services and in some semi-public organisations are often covered by an appeal procedure which provides for a review of allegations of "wrongful" dismissal. For example, under the Harbours Act 1950, a Harbour Board employee may appeal against dismissal, disrating, fines and other punishments, reduction in pay, and unreasonable withholding of promotion.[31] The appeal is heard by an Appeal Board consisting of a representative of the Harbour Board, a representative of the employees of that Harbour Board and a magistrate as chairman.[32] The decision of the Board is binding on the parties and is enforceable at law.[33] A similar procedure has been established under the Tramways Act 1908.[34] But most of the workers in New Zealand have no recourse to any such machinery.

D. Actual Practice[35]

At the present time if a worker feels that his notice of dismissal or summary dismissal is unwarranted he informs his job delegate or union secretary. If the union believes the worker's complaint to be justified, a union representative may attempt to negotiate with the management; if so, he will usually seek the worker's reinstatement.

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28. Brissenden, *supra,* p. 56, n. 95. This is not now the case with allegations of "wrongful" dismissal, as distinct from allegations of "unfair" dismissal. Section 179 of the I.C. & A. Act 1970 provides that allegations of "wrongful" dismissal may become before a disputes committee. See notes 10, 27, 69.
29. See, for example, the N.Z. Motor Trade Employees' Award 1961, Cl. 23, 61 B.A. 527, 356.
30. N.Z. General Metal Trades Employees' Award 1964, *supra.*
31. Harbour Act 1950, s. 45(1).
32. *Ibid.,* s. 45(2).
33. *Ibid.,* s. 45(6).
34. Tramways Amendment Act 1910, s. 6.
35. The writer is indebted to Green for his treatment. See Green, *supra,* p. 8.

If the management will not compromise or negotiate and the union still considers the complaint justifiable, there is normally a stop-work meeting. This will be followed by further demands for reinstatement or by a request or demand for independent arbitration. If the request is refused a work stoppage may occur. Either side may then appeal to the Department of Labour for its intervention. This may take the form of persuading the parties to meet each other or to agree to submit the dispute to some form of arbitration.[36]

The reason for the substantial number of work stoppages caused by disputes over dismissals is evident. The present practice is, in fact, conducive to work stoppages. The common law has failed to cope with the problem, section 167 of the Industrial Conciliation and Arbitration Act 1954 offers little assistance and dispute clauses are generally not applicable. A union seeking an adequate remedy for its member has no alternative but to bargain directly with employers, and if that fails, it is likely to resort to industrial war or the threat of it. It is submitted that there should be an alternative. But what form should that alternative take?

II A POSSIBLE PROCEDURE FOR ALLEGED WRONGFUL AND UNFAIR DISMISSALS

The Freezing Industry[37] provides an illustration that raises pertinent issues. The latest Award[38] in this industry contains a disputes clause which is revolutionary in that it includes a specific procedure for alleged "wrongful" dismissals.[39] Clause 29.12 provides:

> "In the event of a worker being summarily dismissed for an offence or an alleged offence the union may within one working day dispute the dismissal and refer the case to the Freezing Industry Disputes Committee under the following conditions:
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> 1. Normal work to continue.
> 2. The dismissed worker shall be placed on standby and his pay be accrued.
> 3. The dispute hearing to be held as soon as possible but no later than five working days after the appeal being lodged.

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36. For conciliation and arbitration proceedings to be invoked under the I.C. & A. Act 1954, there must be an "industrial dispute" as defined in s. 2. This definition does not cover "rights disputes".
37. The Freezing Industry is a major source of industrial unrest in New Zealand. From 1956-1966, 69% of man-days lost through work stoppage was lost in the coal mining, building, waterfront and meat freezing industries. See *Report on Industrial Relations 1968, supra,* p. 9.
38. N.Z. Freezing Workers' Award 1970.
39. As clause 29(12) relates solely to "offences" the procedure does not extend to "unfair" dismissals.

4. The decision of the Disputes Committee to be final.
5. In the event of the dismissal being endorsed by the Disputes Committee the worker's employment is terminated as from the date of the dismissal without the accrued pay.
6. In the event of the dismissal not being endorsed by the Disputes Committee the worker's employment is not terminated and he is paid the accrued earnings he would have obtained had he not been dismissed.
7. The Disputes Committee may impose a lesser penalty than dismissal."

The provision was soon put to the test. One of Messrs. Thomas Borthwick & Sons (Australasia) Ltd.'s freezing works was closed for several days at Easter 1970, when 500 men walked out in protest against a dismissal of a worker who had threatened to strike a foreman. Clause 29(12) was not initially invoked. The work stoppage was resolved upon the assurance that the disputes committee would consider the dispute. The committee decided not to endorse the dismissal but imposed a penalty of suspension from work without pay and said it had been more lenient than it would have been otherwise because of the worker's record of good service and behaviour.[40]

The following points arise:

(a) The Freezing Industry Disputes Committee is composed of one representative from the workers' union, and one representative of the employers' association together with a chairman to be agreed upon.[41] Is a tribunal the most appropriate body to consider such cases? If so, is it best composed after the model of clause 29(12) of the Freezing Workers' Award?

(b) The Award provided that the worker had to be reinstated if his dismissal was not endorsed by the committee. Should there be an option of compensation available to either the employer or the worker?

(c) The Award provided for a right of appeal to the Court of Arbitration against a decision of the committee[42] on matters other than dismissals.[43] Is there any justification for this distinction? Should a worker or employer have a similar right of appeal against the committee's decisions on dismissals?

(d) Although the award required normal work to continue, in the first case which arose 500 workers went on strike for several

40. *The Dominion,* 6 April, 1970, p. 19.
41. N.Z. Freezing Workers' Award, *supra,* Clause 29(2).
42. *Ibid,* Clause 29.3.
43. *Ibid.,* Clause 29.12.4.

days. The prime objective is the reduction of work stoppages. If such a procedure is adopted should there be an adequate sanction to ensure compliance with it?

Each of the above points are to be considered in our discussion of a possible procedure for alleged "wrongful" and "unfair" dismissals. Basically, it is submitted that legislation should be enacted to provide: that a tribunal be convened expeditiously upon notice of a complaint; that the tribunal have the power to reinstate at its discretion; that all work continue and that any breach should attract heavy penal sanctions; and that the tribunal's decision be final.

A. The Cause of Action

What exactly is an "unfair" dismissal? There must obviously be some criteria to guide a tribunal's assessment of an employer's action and to form the basis on which the dismissed employee may lay his complaint. Criteria of an "unfair" dismissal are included in the Industrial Relations Bill 1970[44] and it is suggested that they are of equal relevance to New Zealand.

The Bill provides that a dismissal will be held to be unfair unless the employer can show that it was for reasons related to the employee's capability or conduct or because he was redundant.[45] Where the employer has shown such a reason to be the reason or principal reason for the dismissal, the dismissal will not be held to have been unfair unless the tribunal is satisfied that, in the circumstances of the case, the employer acted unreasonably in dismissing the employee.[46] When the reason is redundancy and it is shown that the circumstances which gave rise to the redundancy applied equally to other employees in the same undertaking who held similar positions and have not been dismissed, the dismissal will be held to be unfair.[47] The following are "disqualified" reasons which will never be accepted as reasons for dismissal on grounds of conduct or selection for redundancy; being a member of a union or refusing to join a non-independent union; taking part in union activities; making a complaint in good faith against an employer alleging infringements of the law; being of a particular colour, race, national or ethnic origin; sex or marital status; professing or practising a particular religion or belonging to or upholding a political party.[48]

If this approach were followed the employer would be obliged to state and substantiate an admissible ground of dismissal, while it

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44. *Supra,* N. 8.
45. Industrial Relations Bill 1970, clause 35(2).
46. *Ibid.,* Clause 35(3).
47. *Ibid.,* Clause 35(4).
48. *Ibid.,* Clause 36(1). Clauses 35 and 36 follow closely the recommendations of the *Donovan Report, supra,* para. 545. That Report in turn adopted the specific invalid reasons for dismissal outlined in Recommendation 119 of the I.L.O., *supra.*

would be for the employee to prove any special grounds on which a dismissal would be deemed unfair. Although the first "disqualified" reason is inappropriate, due to the existence of unqualified preference clauses in awards and industrial agreements, the criteria are otherwise admirably suited to New Zealand. They are accordingly adopted as the basis upon which the proposed tribunal should approach its task and reach its decision.

B. The Tribunal

The explosive nature of a dismissal dispute calls for its immediate consideration by the adjudicating body. The Court of Arbitration and the Magistrate's Court, due to time lost in filing an application and fixing a date of hearing, are inappropriate as the issue would be left unresolved, increasing the possibility of a work stoppage. The same problem arises with Councils of Conciliation which are designed to conciliate "industrial disputes".[49] The process by which Councils are constituted is too cumbersome. The worker's union and the employers' association must appoint "assessors", await the Conciliation Commissioner's approval of appointments, and then his appointment of the day and place of hearing.[50] It is submitted that a new statutory tribunal is the most appropriate body. It must be able to be convened speedily upon notice of a complaint.

Not only must the composition of the tribunal allow expeditious formation, it must also have expert knowledge of the special problems of different industries. A hybrid between an *ad hoc* and a permanent tribunal meets these requirements. A distinction may be drawn between disputes over dismissals in "non-white collar" industries from those in "white collar" industries. Dismissal disputes in the former are sufficiently similar to allow a permanent tribunal to adjudicate them all. For these industries[51] the tribunal should consist of one workers' representative, one employers' representative and a chairman. The representatives would be appointed for a term, say four years, and would be permanent members of the tribunal when it was hearing allegations arising out of "non-white collar" industries. In "white collar" industries, if it is to understand the causes underlying a dispute, it will usually need to have special knowledge of the industry concerned. To adjudicate upon the dismissal of an accountant for negligent accounting practice the tribunal would need knowledge of accounting practice. Consequently, it is suggested that in these industries the tribunal should form on an *ad hoc* basis. It would consist of a representative appointed by the employer and a representative appointed by the employee or his union. The same chairman would preside over both types of tribunals, thus ensuring continuity. The system has an

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49. See n. 36 *supra.*
50. I.C. & A. Act 1954, Part VI.
51. The writer has in mind those industries generally regarded as "strike-prone". For an indication see notes 1 and 37, *supra.*

additional advantage. In the "'non-white collar" industries, it is more important that the tribunal should quickly convene to hear the dispute. With a permanent tribunal there would be no delay in appointing representatives, whereas some delay may be tolerable if the industry is not "strike-prone".

The tribunal would consider both allegations of "wrongful" dismissal and allegations of "unfair" dismissals. It is therefore necessary that the chairman should be a man of legal qualification and practice, possibly appointed under the Judicature Act 1908.[52] In both types of allegations the full tribunal would sit. But upon an allegation of "wrongful" dismissal, the chairman would first give judgment. If the dismissal is found to have been "wrongful", the tribunal would decide upon the remedy. If it is found to be not "wrongful", the whole tribunal would proceed to consider whether it was "unfair" as it would if that was the only allegation.

It is envisaged that the onus would be on the worker or his union to notify the chairman within one working day[53] of the dismissal that a hearing is requested. Failure to give such notice would be deemed a forfeiture of the right to a hearing unless the employee or union was prevented by a reasonable cause. After due notice had been given, the responsibility would then shift to the chairman. It would be his duty to convene the tribunal and notify its members of the place and time of the hearing. The tribunal should be required to convene and hear the allegation at a place reasonably near the dismissed employee's place of employment or residence.

C. The Remedies—Reinstatement

In the New Zealand Freezing Workers' Award it was provided[54] that if a dismissal was not endorsed by the committee the employee must be reinstated. Whether a system should so rigidly require reinstatement is open to doubt. However, there is no doubt as to the value of reinstatement as a remedy.[55]

The Donovan Report was convinced that reinstatement was the ideal remedy.[56] But after noting the practical problems involved it finally recommended;

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52. See ss. 6 and 8. This is giving the chairman the status of a judge. It may perhaps be more advantageous to provide that he would be appointed for a set term.
53. Cf. *Donovan Report, supra, para.* 546. A period of 5 working days was suggested. Industrial Relations Bills 1970, *supra,* Cl. 34(2) provides for a 15 working day period. The N.Z. Freezing Workers' Award, *supra,* cl. 12.9 specified a one working day period.
54. *Supra,* cl. 29.12.6.
55. See a study by Ross, "The Arbitration of Discharge Cases: What Happens After Reinstatement", in *Critical Issues in Labour Arbitration* [U.S.] Bureau of National Affairs 1957, cited by Clark, "Unfair Dismissal and Reinstatement" (1969) 31 M.L.R. 532 ,545-546.
56. *Supra,* para. 551.

> . . . it would be more in accord with reality, and in our view therefore preferable to lay down an order for compensation as the primary relief, with the order lapsing in the event of both parties exercising the option of reinstatement within a brief time limit.[57]

The Courts have consistently refused to order the specific performance of contracts of employment. Fry L.J. expressed the view:

> For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous, personal relations with one another to continue those personal relations . . .[58]

Clark argues that this reasoning has little relevance to the conditions of modern large scale industry.[59] But in many instances, the employee's immediate supervisor has the power either to dismiss or to recommend dismissal. There is still the possibility of personal conflict making reinstatement undesirable as a remedy. However, Clark did not recommend reinstatement as the sole remedy. He suggested it was reasonable to allow the worker the option of compensation.[60]

The following possibilities may be considered: the Donovan Report's recommendation that compensation be primary and that reinstatement be available only at the option of both parties; the Industrial Relations Bill's provision that reinstatement be granted when deemed to be appropriate and if the worker agrees, otherwise, compensation.[61] Clark's suggestion that compensation and reinstatement be available, the latter only at the worker's option; or that reinstatement be mandatory, as provided in the Freezing Industry's Award.

The difficulties are considerable. If reinstatement is mandatory, the event of personal conflict between the employer or his agent and the worker could make their position intolerable. It might be provided that either party could apply to the tribunal after a period[62] for the discharge of the reinstatement order. A compensation order may then be made but only if the tribunal was satisfied that reasonable efforts by both employer and employee had been made to overcome the difficulties. However, in some instances, the necessity of such a procedure could be averted by reinstating the employee under a different supervisor. If the choice between compensation or reinstatement lies with the employer, he may in effect "buy out" an employee. In the case of the worker alone having the option and where reinstatement was imposed on an unwilling employer, a pretext might be found to dismiss the employee again. Clark's remedy is to allow the worker to apply

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57. *Ibid.*, para. 552.
58. *De Francesco* v. *Barnum* (1890) 45 Ch D 430, 438.
59. *Supra,* p. 534.
60. *Ibid.*, p. 541.
61. *Supra,* cl. 37, 38.
62. Clark suggests a period of 4 weeks. *loc. cit. supra,* 541.

to the tribunal again or, as in the United States of America, to provide that disobedience of a reinstatement order be treated as contempt of Court.[63]

It is submitted that the best relief for the worker is that which is the most appropriate in the circumstances of the case. The above repercussions are less likely to ensue if the relief granted is the most satisfactory having regard to all the circumstances. The tribunal can confer the most appropriate remedy only if it has an unfettered discretion. It should be free to consider any cirucumstances it may deem relevant, for example, the worker's age, seniority and pension rights, the prospect of alternative employment, the circumstances of dismissal and the extent to which the employee's actions were blameworthy. But if a reinstated worker has been dismissed for the second time, Clark's former remedy should apply. If the worker or his union believe the re-dismissal to be unjustified, he or it should be able to request another hearing before the tribunal. To make an employer liable for contempt of court for non-compliance with a reinstatement order would be superfluous. A second dismissal may be quite justified and in order to determine the employer's liability, the merit of the re-dismissal would have to be investigated. However, it should be provided that if an employer has twice been found to have "unfairly" or "wrongfully" dismissed the same employee, a presumption arises. Upon the third hearing he should be presumed to be "victimising" the employee rendering himself liable to a substantial penalty. The presumption should be rebuttable by proof of a reasonable and independent reason for dismissal which is not "unfair" within the proposed criteria.

D. A Right of Appeal

The question whether there should be a right of appeal against a decision of the tribunal brings to bear the reasons for the necessity of a procedure whereby allegations can be heard as soon as possible. The issue or dispute must be finalised quickly. If it is left unresolved, it is an incentive to resort to, or to continue a work stoppage. It is therefore submitted that there be no right of appeal.

E. Sanctions against Strikes

An important question which must be faced is whether employees should be free to strike in protest against dismissals or against decisions of the tribunal. Emotionally and politically charged, the question is difficult to consider objectively. Moreover, a complete discussion of the merits and the possible effectiveness of various sanctions is too broad to undertake here. But it should be provided, in the writer's view, that

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63. *Ibid.*, 537. For a comparative study of the law in the U.S.A. and England see Levy, "The Role of the Law in the United States and England in Protecting the Workers from Dischargement and Discrimination", (1969) 18 I. C.I.Q. 558.

work must continue and that any stoppage of work whether an application for a hearing has been made or not, should be deemed an illegal strike.

Provisions similar to the penalties under the Industrial Conciliation and Arbitration Act 1954 would then apply.[64] Difficulties raised by the present provisions have been revealed and possible improvements suggested. The penalties presently apply only to the one party whereas both parties may have contributed to the cause of the strike. Woods remarks:

> "If we are to prosecute for a strike situation should we not, in equity, bring both parties before the Court if we have reason to believe that both contributed to the situation that has arisen?"[65]

Under the proposed procedure it is the tribunal's purpose to consider both sides. But submission of disputes to the tribunal would not be compulsory and the parties would be free to bargain. If a union rejects the procedure, it rejects an investigation into the merits. Consequently, if the union calls a strike the fault can reasonably rest on that union alone.

The trade union movement considers the right to strike to be a fundamental human freedom, but it may nevetheless regard a particular stoppage as unfounded. As soon, however, as prosecution is threatened the issue ceases to be one of an unjustified work stoppage and becomes the principle of the "right to strike". The trade union movement may therefore act against the threat of prosecution even though it may have previously wished to dissociate itself from the stoppage. This difficulty could be diminished if the point of commission of the offence was shifted from the act of stopping work, to the act of refusing to resume work after the cause of the stoppage has been investigated, or appropriate means of settling the dispute have been provided.[66] This is effected under the proposed procedure. Any work stoppage in protest against a decision of the tribunal would be a refusal to work after the cause had been fully investigated. A stoppage in protest against a dismissal would be a refusal to continue work after an appropriate means of settling the dispute has been provided at the option of the parties.

Under the present system, practical difficulties arise in relation to evidence. Woods has reported that in most cases lack of evidence precludes the possibility of proceedings against a union executive or individual officials.[67] They are able to provide evidence that they gave

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64. I.C. & A. Act 1954, ss. 192, 193 provide for a maximum penalty of $100 for workers and employers, $1,000 penalty for a union and $500 penalty for a union official, who has incited, instigated or aided any strike.
65. Woods, *loc. cit. supra,* p. 17.
66. *Ibid.,* pp. 25-26.
67. *Ibid.,* pp. 24-25.

a warning that the stoppage was illegal but were over-ruled on a motion from the body of the meeting. An action against the workers is precluded by their numbers and the small penalty that the Court would impose for a first offence. It has been suggested that the fact that an illegal strike has occurred should *prima facie* be evidence that the union was responsible. The onus would be on the union to prove that its officers, officials and delegates were in no way involved. The unions would thereby be encouraged to promote responsibility amongst their members and thus avoid "wild-cat" strikes.[68] This would be a substantial improvement and would overcome the difficulties mentioned. Thus, it is suggested that the sanction against strikes should take the form of substantial penalties imposed upon the union, unless it is proved by the union that it was not implicated.

The success of the procedure here proposed in contributing to the reduction of strikes must nevertheless rest, not on any sanction, but on the degree of confidence it generates. The only real weapon against work stoppages is a legal procedure which is seen to possess greater advantages than a stoppage. A tribunal which is representative of the interests of the parties involved, speedily convened near the dismissed worker's place of employment or residence, and having a complete discretion in its choice of remedy, must surely go some distance towards providing the necessary alternative.[69]

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68. Luxford, "Submission to Government Concerning Industrial Legislation and Procedures", N.Z. Employers' Federation (Inc.) 25 May, 1970, p. 8.
69. As pointed out in note 10 to this paper the Government has taken some action on this problem. It will be seen from the following that it is the writer's basic submission that the points made in this paper are still valid and that legislation is still required.

    Section 4 of the I.C. & A. Amendment Act 1970 provides that s. 179 is to be inserted in the principal Act. Section 179 outlines the standard procedure of the settlement of personal grievances. Nothing in this procedure is to be construed as preventing the worker first bargaining directly with his employer (s. 179(2)(a)). The procedure is that the worker first informs the secretary or the branch secretary of his union of his complaint, who then takes the matter up with the employer (s. 179(2)(b)), it is then referred to the disputes committee or if such is not provided for in the award or industrial agreement, to an arbitrator mutually agreed upon (s. 179 (2)(c)). If no arbitrator can be mutually agreed upon the Minister will appoint one (s. 179 (2)d()). Either side may refer the matter to the disputes committee or the arbitrator (s. 179(2)(e)), and the decision given is final (s. 179(2)(f)). If this standard procedure is not included in the award or industrial agreement and a dispute over a personal grievance has caused partial or total discontinuance of employment and settlement has failed, the Minister may declare that the procedure will apply to the dispute (s. 179(4)). The worker merely has to notify his union "as soon as practicable after the personal grievance arises" (s. 179(2)(b)). There is no time limit nor any guarantee that the procedure will be speedily put into effect. For example, the choice of an arbitrator could involve precious time. The new s. 179(1) defines "personal grievance" 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 . . . a kind applicable generally to workers of the

same class employed by the employer) affects his employment to his disadvantage".

The definition includes "rights" disputes and this has necessitated a change in the definition of an "industrial dispute". For the purposes of ss. 177-180 "industrial dispute" is defined as "any dispute arising between one or more employers and one or more workers' unions". (s. 176) This may be compared with the definition in s. 2 of the principal Act which does not include "rights" disputes. Thus one has the position whereby the words "industrial dispute" having two meanings within the same Act. Expressly included in the above definition is the allegation of "wrongful" dismissal but not "unfair" dismissal. Does this mean that allegations of "unfair" dismissal are not included in the standard procedure? Such allegations are possibly covered in the second part of the definition but in light of s. 179(5) it seems that the question must be answered in the affirmative. Section 179(5) provides that only in the case where the worker has been "wrongfully" dismissed may he be reimbursed for wages lost, reinstated, or at his option, receive compensation. The worker "unfairly" dismissed is excluded from these remedies. The problem of "unfair" dismissals has been ignored by this legislation and it will continue to be a source of industrial unrest.