Law and economics: A hidden rationale for unfair dismissal

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Mum and Dad thank you for the unconditional support, I hope it was worth it.

Claire, just the first of many adventures. I wouldn't want to do it alone.

Law and Economics: The 'hidden' rationale for unfair dismissal

Jonathan Wood

Statutory unfair dismissal legislation has been around since 1971[1], yet 34 years on the core principles and rights remain unchanged, still suffering from a lack of credibility and certainty. There is much confusion and unhappiness from both sides as to how decisions are made and how a balance between the interests of employers and employees is to be struck. There seems to be little certainty as to the application of justice in dismissal, with employer and employees alike feeling aggrieved. The seeming lack of coherence in the judiciary's approach results in damage to the legislations certainty and credibility.

This thesis will suggest a new way of looking at unfair dismissal, one that provides coherency and consistency. It will look in depth at the most contentious problem areas and sustained criticisms associated with the legislation, before suggesting that a rationale can be brought to the judiciary's approach when reference is made to the doctrine of Law and Economics. It will seek to show that the principle of efficiency is highly influential in judicial decision making and that this can be traced to a law and economics ideology. The basics of the doctrine of law and economics will be explained and an example of it in action will be given. This it is hoped will provide the reader with enough information to be able to engage with a law and economics analysis of the contentious areas of unfair dismissal in the subsequent chapters.

[1] Industrial Relations Act 1971, now found in the Employment Rights Act 1996

The thesis will suggest the Band of Reasonable Responses Test is not an unruly beast as it is controlled by efficiency. Building on this it will show how the rise in the use of Some Other Substantial Reason can be understood in a similar way. The thesis will then address the problems pertaining to job security and remedies and seek to answer the critics by showing what the legislation originally intended and that the judiciary's approach is rooted in efficiency. Lastly it will deal with the growing calls for the common law action of wrongful dismissal to be used to remedy the inherent weakness in the unfair dismissal statute. Using law and economics it will be shown why this is not in the interests of efficiency and therefore is unlikely to occur, whilst further buttressing the contention of the thesis that law and economics is at the root of the judicial approach to dismissal.

The thesis will seek to bring a fresh perspective into a debate which whilst remaining contentious has become stuffy and stagnant with regard to realistic suggestions for reform. It does not seek to offer comment on the correctness of the judiciary's approach or suggest any radical reforms. It seeks to bring a fresh understanding of a hidden rationale which can be seen to encapsulate the judicial approach to dismissal and further stimulate debate which will enable proponents of change to explore other avenues.

Chapter 1 – Dismissal and the Economy

'Employment law requires a balancing of interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human right, the point at which this balance should be struck is a matter for democratic decision.'[2]

Introduction

1.1 A legitimate private hobby

Should a legitimate private hobby done outside of work hours constitute a valid reason to dismiss? What if, in the opinion of the employer, the hobby harms the business? Should the employer be allowed to interfere with employment status because of activities in an individual's private life?

Mr Pay found himself facing this situation in 2001[3]. He had been employed as a probation officer for Lancashire Probation Service for 18 years and was well regarded for his work with sex offenders. In 2000 the Probation Service became aware of Mr Pay's role as a director of an internet company specialising in the selling of products associated with bondage, domination and sado-masochism. Furthermore he also performed a fire act[4] in hedonist and fetish clubs. Pictures were available of him in this guise on the Internet and the employer took the view that these were in the nature of soft pornography. The employer dismissed him for misconduct, stating his activities were incompatible with the role of any probation officer. The employers

[2] Per Lord Hoffman – Johnson v Unisys Ltd [2001] IRLR 279; para 37
[3] Pay v Lancashire Probation Service [2004] IRLR 129
[4] Which the tribunal held was not offensive and had been performed at Office open days

were particularly worried about the impression that might be given to victims of the offenders who Mr Pay would be working with and feared confidence in the probation system may be undermined as a result.

Mr Pay claimed unfair dismissal, arguing that Articles 8 and 10 the Human Rights Act 1998 (that is the right to a private life and freedom of expression) meant that when an employer was deciding whether to dismiss, the decision had to be 'reasonable' in light of taking into account the Human Rights protection. He contended that this had not happened, that the decision was not 'reasonable' and therefore he had been unfairly dismissed.

The tribunal in the case held that Article 8 was not engaged because the information about his activity was on the Internet and therefore in the public domain. They also held that there had been no 'unjustified' interference with Article 10 because '*a probation officer must expect to have some limitation on his freedom of expression.*'[5] This left the tribunal with the task of having to decide whether the dismissal was fair, in line with the 'Band of Reasonable Responses Test' (herein after "BORRT"). The tribunal held that because of the issue surrounding the protection of public confidence, the employer had acted within this band of reasonable responses and therefore it could not say the decision was unreasonable. This decision was held to be correct at the appellate tribunal.

[5] ibid at page 130

The underlying reasoning of the Tribunals was that there was a legitimate '*pressing social need for the [employer] to dismiss [Mr Pay]*'[6] in order to avoid undermining public confidence in the Probation Service. Whilst the justification for this approach can be understood, it is important not to miss the very tangible sense of injustice Mr Pays must feel. Could it not be just as persuasively argued that there is a pressing social need to protect the legitimate private interests of individuals?

Mr Pays lost his source of income and all the associated trappings because in the Tribunal's opinion other employers could have behaved as the Probation Service did, regardless of whether the action was "fair". Losing ones job as a result of a private legal hobby because there is a reasonable chance other companies would also take a negative view of your activities and not have the tribunals, the supposed arbiters of fairness, make their own subjective opinion as to whether it was fair treatment could undermine faith in the application of the unfair dismissal legislation. Not simply the decision, but the process through which the decision is reached amplifies this perception of injustice and leaves a tangible dilemna: How can the correct balance between individual fairness and economic competitiveness be adjudicated when both have equally compelling yet opposed needs?

1.2 The importance of the employment relationship

We will return to Mr Pay's case later but in order to fully appreciate this dilemna it is necessary to spend a brief time contextualising the industrial environment and the differing pressures involved in industrial relations. This will aid our understanding of the complexities of industrial relations and inform any analysis.

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[6] ibid at page 136

The importance of the employment relationship cannot be overstated. It provides the framework for individuals to work and it is accepted that:

> 'Work is the economic motor of any society and the single most important element – not only in quantitative terms – of the lives of the vast majority of people.'[7]

The employment relationship has developed, but perhaps not as radically as would be first assumed, from the Victorian[8] idea of 'Master and Servant'. The fundamental aspects of the wage/work bargain have not changed and are still present in the modern employment relationship. What has changed however is the involvement that the employee has over the construction of the terms of the wage/work bargain. Under the traditional master/servant relationship, it was precisely that of master and servant. This meant that there was no protection for, what we now term, basic social rights. The rise of unions in the late 19th and early 20th Century was in part a response to this lack of protection against the market forces. This rise resulted in the area of the employment relationship (and the wider labour law) being controlled by the principle of *collective laissez faire*[9]. The UK government through the process of legal abstention chose

> 'a bare minimum of State intervention in the individual employment relation, which was to be regulated instead by the autonomous collective organisations.'[10]

However '*the idea of the State maintaining equilibrium between the social forces through legal abstention was simply a myth*'[11] and as such it could not and did not

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[7] MacMillan, J.K – (1998) Employment Tribunals: Philosophies and Practicalities; at page 55
[8] This idea can be traced back further but it was given definite judicial support in the Victorian era.
[9] An apt phrase coined by Kahn-Freund
[10] Lewis, R – (1979) Kahn-Freund and Labour Law: an Outline Critique; at page 209
[11] ibid at page 218

continue past the early 1970s. In part this was because the disequilibrium between unions and employers was too large, with the unions becoming too strong resulting in the employment relationship becoming too inflexible and expensive for employers to maintain, leading to a decreased demand for labour[12]. There was also a secondary need to intervene because of the United Kingdoms obligations to international labour treaties and as time has continued, to the European Community labour directives and regulations[13].

The Government intervention into this abyss of statute started in 1965 through the introduction in of the Redundancy Payment Act and then the very influential Industrial Relations Act in 1971. This Act has proved to be the foundational source of employment protection since its inception, but there is much criticism of its effectiveness[14]. Its aim was to give individuals rights in order to protect their position in the employment relationship, the most prominent being the right to not be unfairly dismissed. This meant that they did not have to rely on trade unions to bargain for protection. Fundamentally it aimed to equalize the individuals bargaining disproportion in order to give some level of job security[15] to the individual and through this allow stability in the employment relationship through increased mobility and flexibility[16]. Throughout the 1980's, 1990's and this decade there has been an increasing amount of statutory regulation enacted, much of it designed to protect the individual employment relationship[17].

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[12] See for example – Ewing, KD – (1990) Economics and Labour Law in Britain: Thatcher's radical experiment

[13] Davies, P and Freedland, M – (1993) Labour Legislation and Public Policy; at page 25

[14] For example Hepple says it has fallen into ''disrepute' amongst academics: (1992) The rise and fall of Unfair Dismissal

[15] Job security is an ambiguous phrase which we will attempt to define in chapter three

[16] See Davies and Freedland (1993); at page 194

[17] For example the 1980's saw a large amount of regulation over the conduct of trade unions, culminating in the Trade Union and Labour Relations (consolidated) Act 1992. 1998 saw the

The employment relationship is to many individuals about more than simply monetary gain.

> 'A worker can come to treat his job as a valuable possession: Apart from the income it yields, it can provide personal satisfaction, enhanced personality, and a source of companionship through shared work experience.'[18]

A job can give an individual, dignity, worth and purpose. Indeed society places much value on being in employment. The converse result of this societal judgement is that unemployment can lead to social problems; on an individual level of feelings of failure and depression and on a collective level, social depravation and crime.

The employment relationship is also vitally important for the economy; it is the driving force behind a stable State. Employment fundamentally means income and subsistence for individuals. This relieves the burden on the Welfare State and also contributes to its upkeep through the payment of taxes. A thriving employment sector is indicative of the State having a flexible and skilled workforce which is efficient and able to be competitive both nationally and globally, thus bringing more investment into the economy. This can have the further effect of leading a drive to innovation, which naturally leads to greater expertise and increased demand. Put simply, a crucial building block in a State's economic well-being is the employment relationship.

It is appropriate to look a little more in depth at the role and pressures on the employment relationship from the perspective of economy.

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introduction of the Working Time Regulations and 2002 saw a new Employment Act. Despite this, Tony Blair was still able to boast in the seminal white paper, *Fairness at Work* that the UK still had the most lightly regulated labour market of all leading economy countries.

[18] White, P.J – (1984) Unfair Dismissal legislation and property rights: some reflections; at page 98

1.2.1 The role of employment in the economy

There are various actors who all have legitimate yet often diametrically opposed concerns when it comes to defining the role of the employment relationship in the context of the economy. The first major actor is the employer. Without them, there would be no framework for the production of goods or supply of services, no investment and ultimately no jobs. Their major concern is over the cost of employment. This includes wages, statutory liabilities (for example annual paid leave) and the ability to hire and fire at will. In order to be competitive they want to reduce as much of the externality cost[19] as possible.

The second major actor is the employees themselves. Without them there would be no labour, hence no production or supply of services. Their primary concern is to be paid a fair wage and to be protected from the inequality in the operation of market forces. They see their value as more than a commodity or a factor in production.

Thirdly there is the Government. They have the difficult task of facilitating economic growth and stability whilst ensuring adequate social protection. It is not in the Government's interest to have businesses which are uncompetitive due to high employment cost (often as a result of regulation) yet it does not want to be saddled with the large social costs of unemployment or industrial unrest if employers can utilise their much larger bargaining power to the detriment of worker interests.

The fourth actor has a small role, yet the role it plays ensures there is greater prominence given to the employee than there would be if it were not involved. It is

[19] That is cost which is not directly related to the manufacturing process

the trade unions which are concerned with giving a collective voice to individuals in order to try and readdress the balance in the bargaining position between the employee and employer. They are not the force they used to be with only 29.1%[20] of the UK workforce being a member of a trade union, but with the creation of 'Super Unions'[21] they still have a considerable influence in some areas. The aims of trade union's aims are to attain the best possible terms for their members and to ensure they are treated fairly. They have a number of tools available to 'cajole' employers into listening with the most severe being full industrial action. Industrial action can have major repercussions both for the employer and the State's economy as the 'winter of discontent in 1978' bares testament[22]. Their influence can also be undesirable because it can act as a distortion in the free market and some have argued that ultimately '*they are the chief cause of inefficiency, poverty and unemployment*'.[23]

This leaves us with a hypothetical model framework that places the employers on one side and the employees and trade unions on the other and the government in the middle attempting to keep a foot in both camps in order to appease everyone. But whose interests should they give greater value to? Is there an ideal and efficient solution which can bring about the dual goals of fairness and competitiveness?

Economists suggest the employment relationship can be viewed as an economic model in order to find the ideal balance. Economic analysis can however be divided

[20] Labour Force Survey 2004 -DTI
[21] For example the amalgamated public service union Unison has over a 1 million members
[22] A more recent example is that of the sympathy strike by baggage handlers who worked for British Airways in August 2005. Despite the strike being in support for workers sacked from a different company and only lasting 48hrs it is estimated it will cost the company £40 million in short-term loss – Daily Telegraph 04/10/05
[23] This is the view of Hayek in Clark, J and Lord Wedderburn –(1983) Modern Labour Law: Problems functions and policies; at page 135 in *Labour Law and Industrial Relations: Building on Kahn-Freund* eds Clark, J, Lewis, P and Lord Wedderburn

into two traditions of discourse; that of Institutional and Welfare analysis. An institutional (sometimes referred to as a positive) economic analysis *'deals with objective or scientific explanations of the working of the economy.'*[24] The aim of institutional economics is to explain how society makes economic decisions and with this knowledge be able to:

> 'Judge the usefulness of a model by its ability to predict outcomes and behaviour more accurately or at least better than any competing theory.'[25]

Welfare economic analysis (also commonly referred to as a normative analysis) on the other hand is concerned *'not with description of how the economy works but with **how well** it works.'*[26] This in essence means that welfare economics is concerned with the goals of allocative efficiency, the identification of situations where efficiency is not achieved and prescribing alternative corrective solutions.

It has been said of their interrelationship that:

> 'Positive economics can be used to clarify the menu of options from which society must eventually make its normative choice.'[27]

As such both branches of analysis could be useful in our analysis of the unfair dismissal from an economic perspective and it is appropriate to bear their differing attributes and roles in mind when considering an ideal model.

Essentially an ideal model is one where the market forces have enabled the market to be *Parito-efficient.* This is where both parties are at an impasse where it is impossible

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[24] Begg, D, Fischer, S and Darnbrusch, R – (2003) Economics; at page 11
[25] Veljanovski, C – (1980) Economic approach to Law: A critical introduction; at page 165
[26] Begg, Fischer and Darnbrusch, (2003); at page 257
[27] Ibid at page 13

to reallocate resources without making one party worse off. The market has reached a point where it has fulfilled its maximum potential for the balance. It can be argued that under certain conditions this will come about:

> 'If every market in the economy is a perfectly competitive free market, the resulting equilibrium throughout the economy will be Parito-efficient.'[28]

This is essentially a formalising of Adam Smith's radical *Invisible Hand* which suggested that under a free market the results were guided by the 'invisible hand' to be for the social good. But it must be noted that this is only true under 'certain' conditions. The nature of those 'conditions' also relates to the value judgements the Government makes as to whose interests should be of greater value when reaching the point of balance.

The overriding desire of a Government should be to implement policies that *'are just as desirable on economic grounds as they are social grounds'*[29] and one way of advancing towards this is for the labour market to be at a level of equilibrium employment with a stable economy. This means; making sure no party has too strong an influence, encouraging individuals to seek work[30], giving incentives to companies to employ increased staff and increase productivity[31]. Equilibrium employment is where the demand for labour is met equally by the supply, but it is important to point out that equilibrium employment does not necessarily mean that each individual business is at its most efficient, it is the total labour force which is at equilibrium.

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[28]Ibid at page 259

[29] HC Debs 711 [26.4.65] 37, during a discussion on the Redundancy Payments Act 1965

[30] The current Labour governments policies of Welfare to Work and Making Work Pay are good examples of this.

[31] This is often in the form of tax incentives or loans but these actions result in the market no longer being an entirely free enterprise. This is due to interference from the Government trying to coax a more socially and economically desirable state of affairs.

Balancing all these pressure is not an easy task; the Government therefore has to face the challenge of:

> 'How to reconcile the various demands upon [it] in relation to industrial society, within a framework of reasonably acceptable, democratic, representative and humane labour law.'[32]

The role the employment relationship plays in the economy and the lives of individuals cannot be overstated. The overriding tension of fairness versus competitiveness permeates through every aspect of the employment relationship because it is of such fundamental importance. "Labour is not a commodity" yet its very nature means it is offered in wage/work bargain; It is intrinsic to society that labour is traded as a resource or commodity in some form. It is an oversimplification to say the employee wants full protection and a fair wage whilst the employer wants to get the labour as cheaply as possible. The reality is much more complicated. Employees will often be prepared to accept higher wages in return for a decrease in their social rights protection and the more socially minded and astute employers will be fully aware of the advantages in treating a workforce well as there is a corollary productivity increase. It would seem that understanding economic perspectives aids understanding of what is best for the State because it provides a framework from which one can make value judgements about how best the State can flourish and how fairness should be balanced with competitiveness.

1.3 Statutory Regulation

These pressures leave an extremely complicated path for the government to walk if it is to find the most efficient model to promote. We have noted that due to the

[32] Collins, H – (2003) Employment Law; at page 4

inequality of bargaining power simply leaving it up to market forces has not worked satisfactorily[33]. The next question then is, has statutory regulation brought about a correct balance between fairness and competitiveness?

The neo-classic institutional economist would say very clearly that statutory regulation of any sort would not be in the interest of the employer. It will provide extra cost, which will in turn diminish competitiveness. Collins aptly sums up this view in saying:

> 'For firms to survive and prosper in modern global markets...what is needed is not mandatory labour standards, but rather deregulation of labour markets, thus permitting employers to discover the more productive use of labour power.'[34]

Those who believe regulation can actually benefit business can persuasively counter this viewpoint. The Government for example have stated that:

> 'Employers have shown that establishing decent standards is consistent with and can contribute to competitive business.'[35]

Collins also supports this viewpoint saying that the labour market needs regulation in order to achieve efficient outcomes[36]. He further states:

> 'The dominant objective [of regulation] is to improve the competitiveness of businesses so that they may survive and prosper in an increasingly global economic system.'[37]

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[33] See page 4
[34] Collins, H, Ewing, KD and McColgan, A – (2001) Labour Law: texts and Materials; at page 38
[35] Department of Trade and Industry, *Employment Relations Bill. Regulatory Impact Assessment,* Feb 1999, paragraph 15
[36] Collins, Ewing, McColgan (2001); see page 49
[37] Collins, H – (2001) Regulating the employment relation for competitiveness; at page 18 – This article provides excellent insight into the issue of regulation and competitiveness and takes the discussion much further than the scope of this thesis will allow.

This argument might seem far removed from business reality for the employer who is facing a situation where they would like to dismiss a worker but feels they cannot because of the fear of exposing themselves to financial liability. But it can be contended that because of the threat of liability, the employer will take greater care in his hiring decisions and this could be the catalyst for increased innovation and efficiency. This is exemplified in the viewpoint of Kahn-Freund[38] who saw the introduction of protection for individuals from unfair dismissal and the introduction of redundancy payments as being in the *'national interest in order and efficiency'* because it removed resistance to dismissals which were *'necessary for efficiency and labour mobility.'* Davies and Freedland take an even stronger view suggesting that:

> '[Regulation] may contribute to the efficiency of enterprises, and best contribute to the creating and maintaining of a successful social and political economy.'[39]

Statutory regulation divides opinions with critics and suitors both being convinced of the correctness of their viewpoint. The area is so contentious that we must take great care must be taken when looking at regulation and its effect because:

> 'We cannot separate sharply between legal regulation designed to enhance competitiveness by encouraging flexible employment relations and legal regulation designed to ensure fairness at work.'[40]

1.4 Unfair Dismissal – the popular claim

Having seen how important employment is both to individuals and to the economy and how the Government has tried to balance fairness with competitiveness, we can now turn our attention to how dismissal is managed and just as importantly viewed by

[38] See Lewis, R (1980); at page 214
[39] Davies, P and Freedland, M - (2000) Employees, Workers and the Autonomy of labour law; at page 270 in *'The legal regulation of the employment relation'* eds Collins, H, Davies, P and Rideout, R
[40] Hugh Collins quoted by Kilpatrick, C - (2003) 'Has new labour reconfigured employment legislation?'; at page 161

the law and the parties involved. In order to understand the lack of coherency in dismissal law it is pertinent to get a flavour of where the dissatisfaction stems from. Unfair dismissal remains the most popular statutory claim in tribunal applications, being responsible for 37%[41] of all claims in 2004. This pattern seems to have prevailed since the introduction of the statutory right in 1971 in the Industrial Relations Act. Unfair dismissal is an important barometer for society of the level of employment protection that exists, because it is at the point of dismissal where the most friction between employees and employers[42] occurs. The process for claiming unfair dismissal has brought with it a perception of unfairness because many individuals feel the Tribunals are biased in favour of the employer. The case of Mr Pays is one recent case in a vast mountain of case law which can be used to illustrate this point. It has been correctly said:

> 'In popular culture there is a widespread view that unfair dismissal legislation has become a tool of management behind a mask of procedure.'[43]

Yet employers are not happy either and still cling to the argument that unfair dismissal hurts them and is not in their interests as it becomes an extra cost and an inhibiter to change due to the retention of poor and unsatisfactory staff, which ultimately can adversely harm the productivity of the workforce.[44]

There has been much criticism by academics and laymen about unfair dismissal and its application by the judiciary. One only has to look back through the *Industrial Law Journal* to notice that as a general rule of thumb it carries at least one article relating

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[41] Employment Tribunal Service Report 2004; at page 23
[42] And therefore fairness and competitiveness
[43] Hepple, BA – (1992) The rise and fall of Unfair Dismissal; at page 80 in *Legal Intervention in Industrial Relations: Gains and Losses*. Ed Mcarthy, W
[44] Emerson, M – (1988) Regulation or deregulation of the labour markets; at page 803

to unfair dismissal every issue. There is a widespread anathema towards the unfair dismissal legislation. Yet in the 34 years since the Act's inception, the core elements of the right to not be unfairly dismissed have not changed. The evidence, both statistical and anecdotal[45], does not seem to suggest it is working and indicates it lacks credibility yet no progress is being made towards change. This leads to one of three possible conclusions. Firstly, the legislation is working as the Government intended as it does not explicitly force them to declare their preference for where the balance should fall and therefore they are reluctant to change it and expose themselves politically. Secondly, there is a coherency to the legislation and the interpretation by the judiciary that has not been fully seen due to the inadequacies of the analysis which it has been subjected too. Thirdly, the Government simply has no tenable idea as to how to overhaul the legislation.

This third conclusion would seem to be the most obvious fallacy. Yes an overhaul would be a large and difficult task, but in the past 34 years no Government has been timid when dealing with industrial relations. There has been a plethora of legislation dealing with Working Time[46], Minimum Wage[47] and Parental Rights[48] and that is just in the past 8 years. Furthermore there is no shortage of academic, judicial, employers association and trade union literature on how things could be improved[49] and so it would seem unwise to conclude the lack of action is due to lack of suggestion or creativity.

[45] See DTI SETA Survey 2003 and 1998 which are the two most comprehensive surveys to date
[46] Working Time Regulations 1998
[47] National Minimum Wage Act 1998
[48] The Maternity and Parental Leave Regulations 1999
[49] Which would have surely provoked a consultation document

Advocates of unfair dismissal would dismiss the second conclusion, that there is no visible consistency in the decisions, by pointing towards the managerial prerogative as the controlling coherent rationale. They would argue that the judiciary make decisions within a statutory framework which gives respect for managerial autonomy and discretion for employer decisions which fit into a band of reasonable responses. Thus, whilst the result is not always agreeable to many, an internal logic does indeed exist. This argument also carries over into the first proposed conclusion. If the Government have given the judiciary a framework in which they can exercise discretion, meaning the regulations are not simply inflexible onerous burdens, then it would seem from the Government's point of view entirely advisable to not further expose themselves. They have, through a framework that deals with the extremes of the balance between fairness and competitiveness, left the ultimate arbitration of where the balance should fall up to the judiciary[50]. There is certainly something persuasive about this argument and it could be suggested to provide the answer as to why no serious reform has occurred in the past 34 years. The discretion given by the oft quoted managerial prerogative is the lynch pin of the unfair dismissal legislation and it would seem to *prima facie*, provide the suggested rationale for its application, thus vitiating any suggestion that there is no internal logic in the court's approach.

But is this the complete picture and if it is, why is there still much dissatisfaction? By understanding that the managerial prerogative has a role to play in the decisions of the courts and tribunals can we predict with more certainty the likely outcome of cases and make more informed reform suggestions? The answer would seem to be no. The managerial prerogative is shrouded in mystery, one could even go so far as to suggest

[50] All mention of the judiciary in this thesis unless otherwise defined should be taken to include tribunal and appellate tribunal chairmen and wingmen.

it is a *legal shibboleth*, and this results in little understanding of the processes and factors influencing the judicial decision. The vagueness of the managerial prerogative and its 'behind-closed doors' application means we cannot confidently assess the balance between managerial autonomy and individual justice. This failing results in the area of unfair dismissal law, where employer and employee clash head on, being reminiscent of an uncharted minefield.

As was noted above there has been much study of unfair dismissal and its shortcomings. This has been carried out from many angles[51] but has still not found the proverbial smoking gun to give credibility to the legislation. This thesis will seek to take a fresh approach by subjecting some of the problematic and contentious areas of unfair dismissal to a law and economic analysis in order to see if new light can be shed on the judiciary's rationale. Law and economics is, in legal terms, a fairly new analytical tool which primarily has been developed in the United States of America. It will be explained in depth below but for now it is sufficient to say it seeks to suggest that decisions are not based on justice as we traditionally understand it, but on efficiency considerations. This analysis will seek to aid and inform some of the debate surrounding unfair dismissal and provide a new avenue from which reform can be launched due to a greater understanding of the deeper lying rationale of the policy in unfair dismissal.

[51] For a justice perspective Justice in Dismissal by Collins is extremely comprehensive, and Pitt's reply is worthy of note. From an economic perspective see Ewing and Thatcher's Radical Experiment and Collin's essay of corporatism and capitalism. From a collective bargaining standpoint see Hepple's Rise and Fall of Unfair Dismissal and Clark and Lord Wedderburn in Labour Law and Industrial Relations. Davies and Freedland provide a thought provoking analysis from a public policy point of view and Dickens and Stilgoe have both produced excellent statistical analysis of the impact of Unfair Dismissal law.

The following chapters will seek to analyse these areas with reference to law and economics in order to see if it is an appropriate analytical tool.

To embark on a complete law and economics analysis of unfair dismissal is beyond the scope of this thesis, therefore it is proposed to concentrate on a few of the particularly problematic areas of incoherency, with the majority of these ultimately relying on the managerial prerogative as the justification for the approach taken. The areas chosen to be considered deal with issues prominent in academic and judicial literature and it is hoped they will also provide enough diversity to show law and economics is an appropriate analytical tool across a wide range of employment law issues.

- The remainder of this chapter will provide an overview of the history of the unfair dismissal legislation and then introduce the tool of law and economics. The case of Mr Pays will then be analysed through a law and economics lens.
- Chapter two will look at the rise of procedural fairness at the expense of substantive justice. Within this there will be an in-depth discussion about the appropriateness of 'the Band of Reasonable Responses Test' and if there is an internal logic and justification for its application from a law and economics perspective. The chapter will then turn to consider issues surrounding the growth in reliance on 'Some other Substantial Reason' in economic dismissals, which sidestep redundancy payments.
- Chapter three looks at the issues surrounding job security and remedies. It counters popular academic thought that the legislation has failed in both these areas by stating the current situation is in line with a law and economics analysis. It will then look at why the judiciary have steadfastly refused to use

the common law to rectify any purported problems with the unfair dismissal legislation and will suggest that a law and economics analysis is appropriate across the whole field of dismissal.

Consideration and discussion of these areas from a law and economics standpoint will it is hoped, bring some fresh air to what has become a stuffy debate about the way forward for unfair dismissal.

It is first fitting to put into context the history and aims of the legislation before giving a brief overview if the core elements of unfair dismissal. If we are going to be able to effectively analyse the deep rationale behind the legislation it is necessary to understand how the law came about and what was said at the time of its creation as this will provide useful insight into the ideology behind the statute.

1.5. The aims and history of Unfair Dismissal legislation

Before 1971 termination of the employment relationship was managed with reference to contract and the common law. This meant for employees employed on contracts of indefinite termination (which was the majority) that the employer could lawfully terminate for any or no reason upon giving the requisite (and often short) period of notice. Breach of contract would only avail the claimant of damages equivalent to what they would have been paid in the notice period, whatever the circumstances of the breach.[52] As Davies and Freedland point out this was viewed as understandable because the low level of protection afforded to the individual employee by the common law principles was to be redressed through the norms supplied by collective

[52] G.de N. Clark – (1969) Unfair Dismissal and reinstatement; page 532

bargaining.[53] This reliance on the collective avenue was to prove to be the catalyst for the introduction of statutory protection from unfair dismissal.

During 1964-66 there had been an average of 267 strikes a year over employment, suspension or dismissal of employees.[54] The obvious negative economic impact caused consternation in both the Government and Parliament and a speedy solution was sought. It was suggested by the Conservatives[55] in *Fair Deal at Work* that:

> 'Britain is one of the few countries where dismissals...are a frequent cause of strike action...It seems reasonable to link this with the fact that Britain is one of only seven out of sixty-two countries covered in an ILO study where dismissal procedures are not regulated by statute.'

Whilst this could be criticised as '*a pretty crude piece of comparative argument*'[56] the Donovan Commission also reached this conclusion after much greater analysis. The Donovan Commission was set up by the Labour government in 1965 to look into a solution for this problem of large-scale industrial action and to see if statutory regulation was viable.

The process of looking into other ways of providing protection from unfair dismissal had begun in 1964, when the Government announced it had accepted the International Labour Organisations Recommendation 119. The main thrust of the recommendation was that the

> 'termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking establishment or service.'

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[53] Davies and Freedland (1993); at page 25
[54] figures quoted in Hepple (1992)
[55] Who came into government the following parliamentary session
[56] Davies and Freedland (1993); page 200

The Government referred the ILO recommendation to the National Joint Advisory Council[57] ("NJAC") who were tasked with deciding how to proceed with it. Two years later they reported that whilst the common law was not sufficient to provide adequate remedies for termination of employment as detailed in ILO recommendation 119, it was advisable to seek redress through enhancement of the current voluntarist procedures. They felt regulation would undermine the development of voluntary procedures, which were advantageous because they were 'simple, inexpensive and quick.'[58]

The Donovan Commission published its report in 1968[59] and disagreed with the conclusion of the NJAC. It was heavily influenced by the ILO recommendation 119 and proposed to adopt its definition of termination, stating that an employer would have to show a dismissal was fair based on conduct or capacity otherwise it would be classified as unfair.[60] It sought to solve the problem associated with striking over dismissal by bringing in a statutory remedy because in the Commissions view '*the right to secure a speedy and impartial decision on the justification for a dismissal might have averted many of these stoppages.*'[61] This idea was the kernel which influenced the desire for the Tribunals to become the one stop shop for employment disputes and to provide:

> '[A] procedure which is easily accessible, informal, speedy and inexpensive.'[62]

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[57] Which was made up of the ministry of labour and CBI and TUC representatives.
[58] Ministry of Labour, Dismissal Procedures para 19
[59] Report of the Royal Commission on Trade Union's and Employers associations 1965-1968, Cmnd 3623
[60] ibid para 55
[61] ibid para 528
[62] ibid para 572

The Commission sought to counter the NJAC argument by saying that regulation would actually encourage employers to adopt a fair and proper procedure:

> '[I]f employers know that employees have a right to challenge dismissal in a statutory tribunal then there is clear incentive for them too see that dismissals are carried out under a proper and orderly procedure, so as to ensure both that as many cases as possible are settled satisfactorily without recourse to an outside appeal and that in those cases where appeal is made it can be shown that the dismissal was fair and justified.'[63]

The Donovan Commission in essence said that statutory intervention was needed to force improved procedures and the Labour government in their White Paper the following year accepted this view, noting that whilst voluntary procedures were desirable they were progressing too slowly[64]. The Donovan Commission report was highly influential and its recommendations formed the basis of the Industrial Relations Act 1971.

It can clearly be seen that an overriding aim of the introduction of unfair dismissal legislation was to calm the turbulent industrial waters that were prevailing at that time.

> 'The result was that the legislation was only partly influenced by considerations of employee rights: the legislation had at the very least a dual purpose of managerial efficiency and employment protection.'[65]

There was a political strategy formed by both the Conservative Governments of that era[66] which saw stability and the increase of efficiency obtainable through the

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[63] ibid para 533
[64] In the place of strife – white paper Cmnd 3888 1969; at para 103
[65] Deakin, S and Morris, G – (2001) Labour Law; at page 387
[66] 1971-1975 and 1979-1997

increase of individual rights at the expense of collective rights. This was intended to have the effect of minimising the need for a union and therefore undermining collective solidarity and a decrease in collective disputes

But as we have briefly alluded to, political advantages were not the only reason for the Donovan Commission recommending the implementation of a statute to protect against unfair dismissal. They were in broad agreement with Recommendation 119's powerful ideology. It is appropriate to quote the report at length in order to get the full force of its rhetoric:

> 'In practice there is usually no comparison between the consequences for an employer if an employee terminates the contract of employment and those which will ensue for an employee if he is dismissed. In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all. The statutory provision for redundancy goes some way to recognise what is really at stake for an employee when his job is involved, but it is no less at stake if he is being dismissed for alleged incompetence or misconduct than if he is being dismissed for redundancy. To this it is no answer that good employers will dismiss only if they have no alternative. Not all employers are good employers. Even if the employers intentions are good, is it certain his subordinates' intentions are always also good? And even when all concerned in management act in good faith, are they always necessarily right? Should their view of the case automatically prevail over the employee's?'[67]

[67] ibid para 526

This comprehensive summation of why unfair dismissal legislation was and is needed provides our departure point for looking at the reality of the legislation when it was enacted in the Industrial Relations Act.

1.5.1 The legislation

The legislation has changed very little since 1971 and is now encapsulated in the ERA 1996. Section 94(1) of the Employment Rights Act 1996 ("ERA") states:

> 'An employee has the right to not be unfairly dismissed by his employer.'

This right is however qualified by a number of things:

- An employee[68] who has the requisite one-year qualifying period has to show they have been *dismissed.* They then must bring a claim within three months of the effective date of termination.
- The employee has to demonstrate a substantial reason for the dismissal under the statutory headings of misconduct, lack of capability or Some Other Substantial Reason.

The tribunal will then determine whether the reason was reasonable in relation to Good Industrial Practice and the practice of other employers. This is more commonly known as the Band of Reasonable Responses Test..

If the dismissal is found to be unfair, the tribunals primary remedy is to order reinstatement or reengagement. If this is not practicable then the remedy is compensation.

Compensation is split into two parts, basic and compensatory. The basic award mirrors the redundancy payment award and thus is calculated by reference to the

[68] Note not a worker

individual's weekly earnings (capped at £280[69]) multiplied by years of service. This award is capped at £8400. The discretionary compensatory award has recently been increased recently due to much criticism of its derisory size,[70] It was £12000 in1999 but is now capped at £56,800

The unfair dismissal legislation has played a vital role in shaping the current industrial and economic climate and in the search to find the correct balance between individual rights and managerial efficiency. Whether this balance has been achieved is the subject of much contention, as we have seen above in the case of Mr Pays and also in the widespread criticism from many affected groups. This thesis seeks to offer a new analysis, using the doctrine of law and economics, to the approach of the judiciary to the legislation and will suggest that the balance is in fact controlled by efficiency. But before we can look at the justifications behind this conclusion it is pertinent to start with an explanation of the doctrine of law and economics and how it can be useful.

1.6 What is Law and Economics?

> 'A lawyer who has not studied economics... is very apt to become a public enemy.'[71]

This would seem quite a blasé statement; but to dismiss it straight away misses the insight it offers. Put simply, it recognises that the separate disciplines of law and economics are not poles apart and that economics can be of relevance to lawyers. It is perhaps appropriate at this stage to offer a definition of economics in order that we

[69] Figures correct as of Feb 2005
[70] Which was due to its failure to increase in line with inflation.
[71] Justice Brandeis – 'The living law' - Illinois Law Review [1916] – taken from Hirsch, W Z – (1999) Law and economics: an introductory analysis; at page 1

depart from the same point. Hirsch states that the accepted definition of the discipline of economics is:

> '[T]he study of how societies use scarce resources to produce valuable commodities and distribute them among different groups.'[72]

Law is often the instrument used to ensure that this allocation of resources is fair and structured. Whilst economics is concerned wholly with *what* decisions are made and therefore the substantive rationality[73], the law takes account of the process of *how* the decisions are made, that is procedural rationality. Whilst it will never be a totally harmonious marriage of ideas, both disciplines deal with providing order in society and can complement one another.

Adam Smith, often referred to as the 'father of economics' seemed to suggest in his seminal work *The Wealth of Nations*[74] that law and economics were intrinsically linked. Campbell suggests:

> 'Smith manifests one of the chief characteristics of an economic analysis of law, the idea that law is a means for diverting self-interested individuals towards a mutual accommodation in which clashes of interest are settled at least over all cost to the community, thus contributing to the market pursuit of maximal efficiency.'[75]

Despite this insight, the discipline of law and economics has developed only recently and can more appropriately be classed as an offshoot of modern neoclassical welfare economics[76]. Mainstream acceptance of a law and economics discipline in the United States only started to occur in the 1970's and it still continues to be a highly debated

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[72] Hirsch (1999); at page 4
[73] See further Simons point of view in Vejenevski (1980); at page 163
[74] Published in 1776
[75] In Deakin, S –(1996) Law and Economics, in *Legal Frontiers* ed Thomas; at page 67
[76] ibid; at page 68

and controversial area of study. The precise scope of law and economics continues to be elusive with several offshoot theories seeking to correct some of the inherent problems[77]. This thesis will concentrate on what is regarded as mainstream law and economics theory as this will give a much better overview of law and economics role in unfair dismissal. Due to the uncertain nature of its scope, caused in the main by its relative youth and also the general unfamiliarity in the UK with law and economics, it is wise to inform ourselves of how and why the discipline developed so that we are able to judge its appropriateness as an analytical tool from a more informed perspective.

1.6.1 A brief history of law and economics.

The first major proponent of a basic law and economics theory was Ronald Coase. In his seminal work *The Problem of Social Cost*[78] Coase radically suggested that:

> '[F]rom an economic perspective it may prove rational for parties to contract around pre-existing legal rules should those rules preclude them from maximising their resources and minimising their costs.[79]

With this suggestion came the assumption that the task of judges and juries in deciding on conflicting resources disputes is not to establish which action caused the harm and therefore impose liability but rather to establish which cost caused the activity which resulted in the harm and, from this, which party should be responsible for minimising costs.[80] This abstract theory is perhaps best understood by reference to

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[77] A discussion of this is beyond the scope of this paper: See Duxbury, Polinsky, Leff and Campbell and Picciotto for a fuller discussion.
[78] [1960] 3 Journal of Economics 1-44 (also republished in *The Firm, Market and the Law- Chicago University Press 1988)*
[79] Duxbury, N –(1991) Is there a dissenting tradition in law and economics?; page 1
[80] Ibid page 2

the problem Coase was addressing in *The problem of social cost.* Deakin aptly illustrates Coase's purpose:

> 'Coase's immediate objective was to analyse what was then a standard application of welfare economics, the imposition of a Pigovian tax on business enterprises responsible for causing uncompensated damage (such as pollution) to third parties. Pigou had argued that the state could increase social welfare by imposing a tax equivalent to the extent of the social cost of the enterprises activity. Coase shows that such intervention might not be welfare enhancing: the enterprise itself might suffer damage if it is effectively prevented from carrying out the pollution-creating activity. This assessment has to be reciprocal: the imposition of a tax would only lead to a net welfare gain if the costs of those injured by the enterprise exceeded the enterprise's costs from shutting down or relocating production.'[81]

Classical Coase theorem therefore suggests that if transaction costs are zero, then efficiency will be achieved regardless of which party is assigned the property right in a situation of conflicting issues.

Coase's work provided the foundation for the formation of law and economics as an analytical tool, however it remained very much a tool in the economist's portfolio. Coase's work was grounded in economic and theoretical nuance[82] and would seem to have been of much greater interest to economists than lawyers. It was not until Richard Posner asserted himself squarely into the debate with the publication of *Economic Analysis of Law* in 1972 that academic lawyers began to take interest.

Posner's book dealt with providing market based solutions to a wide range of issues pertaining to the law. His basic premise of a doctrine of law and economics was:

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[81] Deakin (1996); page 75

[82] Campbell, D and Picciotto, S – (1998) Exploring the interaction between law and economics: the limits of formalism; at page 255

> '[L]egal rules and institutions should be designed to facilitate economic efficiency, that they should make the greatest use of competitive markets, and in the absence of such markets, should "mimic" what competitive markets would do.'[83]

Posner sought to promote economic efficiency through the law and this efficiency is best defined as equivalent to the notion of *Pareto efficiency*[84]. It will be remembered that this means a situation where no-one can be made better off without there being detriment to the other party. Law and economics therefore under Posner's view provides a guide as to how the market should act in order to achieve efficiency.

'Guide' is the most accurate statement. The whole theory of law and economics rests upon the assumption of zero transaction costs but the reality is in industrial relations that will never happen. Hiring and firing costs money; in terms of time, initial slow productivity and severance pay for example. Its lack of realism could be seen as an inherent weakness of law and economics and one which undermines its application yet Posner has robustly defended this line of criticism:

> '[I]t's [sic] lack of realism, far from invalidating the theory, is the essential precondition of theory. A theory that sought faithfully to produce the complexity in the empirical world in its assumptions would not be a theory but a description.'[85]

This particular line of defence does not go anyway to helping us reconcile the problem zero transaction costs creates, it merely excuses it with semantics. A much

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[83] Polinsky, A M- (1974) Economic Analysis as a potentially defective product; page 1657

[84] It is worthy of note that this definition of 'efficiency' is contested – whilst the majority seem to use *Pareto* as the base, Deakin suggests Posner (particularly) had in mind the definition of *Kaldor-Hicks* efficiency. This holds that an exchange is efficient if it makes one person better off, and that person is capable of compensating the disadvantaged. Deakin's view of Posner's efficiency has not been shared by all, see Polinsky in particular, and for the purpose of this thesis we will assume *Pareto efficiency* as the correct assumption.

[85] Quoted in Deakin (1996); at page 84

more tenable solution can be found in the assumptions Posner makes about Smith's *Invisible Hand.* Posner assumes that the judiciary will be intuitively be guided by this 'invisible hand' to act in way, which whilst perhaps unwittingly, results in the consistent creation of efficient legal rules. This, it can be argued, goes some way to circumvent the zero transaction cost problem as the judiciary will be acting in a way which mimics the market (thus trying to establish the outcome as if there were no transaction costs). Posner further suggests the law (and judiciary) should enable the minimisation of transaction costs so that market solutions are more likely.[86] Davies sums up this idea cogently when she says:

> 'In the real world, transaction costs are rarely zero. Neo-classical economists draw from this the conclusion that the Government should interfere as little as possible in the labour markets.'[87]

There has however been much debate over Posner's particular brand of law and economics with Polinsky stating:

> 'The lens Posner uses to view the law provides a virtually distortion-free vision of individual behaviour and the market, a fuzzier view of collective decision making, and almost completely filters out issues of equity.'[88]

This comment and others surrounding his methodological approach[89] would seek to minimise the impact and importance of Chicagoan[90] law and economics theory. Much of the criticism relates to Posner's broad-brush strokes[91] and the lack of requisite

[86] Polinsky (1974); at page 1665
[87] Davies, A C L – (2005) Perspectives on Labour Law; at page 26
[88] Polinsky (1974); at page 1655
[89] See Campbell and Picciotto (1999); Duxbury (1991); Polinsky (1974)
[90] Named because of the Universiy where Posner and his contemporary's promulgated their theory.
[91] See in particular Campbell and Picciotto (1999) and Polinsky (1974)

empirical evidence to support his positive economic analysis[92]. This criticism seems to be succinctly stated by Campell and Piccitto:

> 'Posner makes an economic judgement (based on no evidence or analysis) and assumes the law will sort out the consequences.'[93]

Yet, it is submitted, this is not such a heinous crime as many seem to think. Posner's theory sets out precisely to do what it is criticised for. Law and economics analyses decisions from an economic point of view and sees if the law is instrumental in facilitating this economic view. Whatever the inherent weaknesses which are a result of the assumptions made, it would still seem to operate as an analytical tool to help suggest understanding, allowance merely has to be made for it not being perfect and remembering this when using it.

Polinsky sums up the paradox of Posner's law and economics approach cogently in his highly logical argument:

> 'The competitive market paradigm, which is the basis of Posner's approach, requires a number of stringent assumptions, many of which are likely to fail in the context of the real world problems which Posner analyses. These failures arise not only in the analysis of legal problems, but also in many other problems to which economic analysis is applied. However, the crucial assumptions are more likely to fail in those areas which the law plays an important role. Because Posner does not make the limitations of the paradigm sufficiently explicit, readers not fully aware of them may accept this conclusions uncritically or may extrapolate his analysis to draw conclusions unwarranted in reality...To say that *Economic Analysis of Law* is a potentially defective product is not to deny it is a valuable one. I believe it is. But even a valuable is subject to misuse if proper care instructions are not included.'[94]

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[92] See the example in Campbell and Picciotto (1999); at page 268
[93] ibid at page 268
[94] Polinsky (1974); at page 1680

Proceed with caution, but do proceed would seem to be the appropriate message in looking at and using this dynamic tool.

1.6.2 The basics of the theory

> 'The ultimate question for decision in many lawsuits is, what allocation of resources would maximize efficiency?'[95]

The relative youth of the doctrine of law and economics means it is still an area fertile for development with much still up for grabs. There continues to be much debate as to the correct interpretation of *Coase theorem*[96]and the relationship between welfare and institutional economics[97]. It would be extremely easy to become embroiled in the finer complexities of this doctrine and lose sight of the aim to bring fresh insight into unfair dismissal legislation. It is for this reason that it is pertinent to state the core elements of law and economics, which are of general academic acceptance, and seek to bring them to bear as an analytical tool.

Fundamentally, law and economics theory says decisions are made on the basis of efficiency and not justice. It infers that decision makers look at the allocation of resources and decide where they should fall not with reference to 'fairness' but with reference to what is best; and for best it is more appropriate to substitute 'efficient.' Law and economics also seeks to minimise transaction costs so that markets mimic free markets. It recognises:

> 'That the world of zero transaction costs is an unobtainable goal [but that] the theory first accepts the traditional methodology of neo-classical economics based on the assumption of

[95] Hirsch, W Z (1999); at page 7
[96] See Deakin, S and Wilkinson, F – (1999) Labour Law and Economic Theory: A reappraisal in 'Law and economics and the labour market' eds De Geest, G, Siegers, J and van den Bergh, R
[97] See Duxbury (1991)

zero transaction costs, and secondly, leads to the inescapable conclusion that the design of social institutions should be aimed at the reduction of transaction costs.'[98]

It is not unreasonable to infer that courts[99] should come under this banner of social institutions and as such, if law and economics is an applicable analysis this should be evidenced in the way they seek to allocate resources and minimise transaction costs.

1.6.3 Justice

It is important to note that by embracing a law and economics analysis our concept of justice has to change. Justice in a traditional sense means the upholding of social or moral principles. In employment law this is probably best understood by reference to individuals rights. We commonly assert justice as being done when perceived individual rights are upheld, or less accurately from a layman's perspective, when the result seems intuitively right or fair.

Law and economics does not define justice in this way, it sees justice as merely a synonym for efficiency[100]. The argument promulgated runs that if a worker is dismissed for capability, the decision of the court should be one which brings about the most efficient outcome. So if the dismissed worker is found to have been fairly dismissed and is awarded no compensation, the employer maintains and potentially improves efficiency because he has been able to rid himself of a staff member who was not up to the task and replace him with someone who is, without suffering financial penalty. This therefore leads to increased productivity due to increased

[98] Ashiagbor, D –(2000) Flexibility and adaptability in the EU employment strategy; at page 384 in Legal Regulation of the Employment Relation eds Collins, Davies and Rideout
[99] Again mention of Courts should read tribunals as well unless stated different.
[100] See Duxbury (1991); at page 178

efficiency and ultimately the creation of new jobs in the employment market, for which the sacked worker can potentially apply. Thus, justice was done because the decision was in the best interests of efficiency, which results in what is best for the economy.

The argument continues that, if the worker dismissed for capability was not really dismissed for capability but because the employer did not like him then the courts would be right in awarding compensation. This award would act as a deterrent to the employer to not act in this way again. The logic? Not the upholding of the individuals rights, but that it is inefficient to dismiss someone who is good at their job and incur the cost of lower productivity whilst the new worker gets up to speed (and of the added cost of recruitment). There is also the potential of decreased productivity if the morale of the other workers is damaged by a capricious dismissal.

This differing concept of justice can be clearly seen in the contention of Duxbury:

> 'While the economist may be able to contribute more to discussions about efficiency this does not justify or support the suppression of the ethical basis and implications of legal decisions, and one of his tasks should be to make these clear. If there is a conflict between efficiency and justice [in the traditional sense] the nature of the tradeoffs can be illuminated by economic analysis, and since the attainment of justice usually involves the use of scarce resources the economic approach can contribute to normative discussions by providing information on the cost of justice.'[101]

This comments further strengthens the case as to the apparent usefulness of a law and economics analysis. In order to avoid confusion with terminology it is proposed to adopt 'equity' as the term that refers to what we have previously referred to as

[101] Duxbury (1991); page 178

traditional justice. Throughout the analysis it would serve us well to remember the words of Hirsch:

> '[law and economics] is best equipped to deal with resource-allocation efficiency, but justice [equity] and fairness which relate to distributional issues, must also be considered. Our task would be so much easier if efficiency could be rigorously defended as the only and ultimate objective. Instead we face two all too-often opposing objectives – efficiency and equity.'[102]

Bearing this in mind the next question that has to be considered is whether law and economics is an appropriate analytical tool to use in employment law?

1.6.4 Law and economics and employment law

> 'Labour law is as natural a field for the application of economics to law as one could imagine.'[103]

These words of Posner would seem to give credence to a law and economics analysis of employment law. But this enthusiasm must be tempered by the warning he gives almost immediately that '*labor[sic] law is doctrinally complex.*'[104] Whilst it is true US labour law is very different to that in the UK, it would surely take a brave man to argue it is not complex. For example in unfair dismissal law, individuals are subject to numerous time limits and qualifying periods and can receive a variety of remedies calculated in a variety of ways and this is even without consideration of recourse to the common law or judicial review which bring a whole other set of complexities.

Posner's statement is ironic in some ways, because it is precisely the complexity of unfair dismissal which means we need to search for a new rationale in order to try and

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[102] Hirsch (1999); page 8
[103] Posner, R – (1984) Some economics of labor law; at page 988
[104] ibid page 989

understand it. A law and economics analysis will seek to provide a framework that cuts through the complexity and sets up the platform from which the decisions can be understood. This is particularly relevant because of the wide scope given to the judiciary by Parliament. One fine example can be seen in the application of the Band of Reasonable Responses Test ("BORRT") where there is very little understanding of the process which the judiciary apply. The test is so wide and decisions seemingly so inconsistent that it is extremely difficult to see which factors are of greater influence upon the judiciary when balancing fairness and competitiveness[105]. This lack of coherent rationale is why in the employment context a law and economics analysis could:

> '[B]e extremely useful. If the judge is viewed as an allocator, judgements can be examined for their consistency and incentive effects...Economics can aid in drawing out the implications and interrelationships of legal judgments...and provide a different perspective to the traditional method of analysing cases.'[106]

Before we can move onto a law and economics analysis and see the interaction between efficiency and equity, it is necessary to highlight the assumptions in the model we are using. This is in order that we might maintain our approach of caution when considering the doctrine.

1.6.5 Assumptions in a law and economics model

We have already discussed the fundamental assumption of a zero transaction cost and concluded that it does not interfere with the ultimate goal of using law and economics as an analytical tool. However we must also note in passing the tool also makes the

[105] See chapter two for coverage of this in greater depth
[106] Veljanovski (1980); at page 176

assumptions of *zero redistribution costs* and *convexity*[107]. In essence the argument surrounding zero transaction costs carries over into these two areas and can be applied[108], with the assumption of *convexity* necessary to create a competitive equilibrium; a requisite for zero transaction costs to create *Pareto efficiency.*[109]

But this does lead us to another potential problem, the assumption of the free market. Free markets can and do exist in many areas of life, but not in the employment relationship. As has been seen in the UK's industrial history the doctrine of *Collective Laissez-Faire* was essentially that of allowing a free market and this was comprehensively interfered with due to its inherent failings. From one viewpoint the statutory scheme of unfair dismissal and the resultant inequality in bargaining power,[110] further compounded by the inferior knowledge employees will often have when taking jobs means it is hard to make a case for the existence of a free market. However it is actually contended that the existence and operation of the unfair dismissal Statute remedies this problems of a lack of free market because the very aim of the statute was to equalise the bargaining power and give a situation where employee and employer came to the table with certain inalienable rights. The existing interpretation of the Statute provides the scope for the trade off of other rights but without the loss of those inalienable rights. Put simply the legislation aimed to equalise the market, so in a sense facilitating a mimicking of the free market. There is still a problem with lack of knowledge when entering the relationship, something only

[107] See Hirsch and Veljanovski for more detail.
[108] See n86
[109] See Polinsky (1974); at page 1668
[110] The statutory scheme gave rights to the individual at the expense of collective bargaining power. Whilst those individual rights protect many core rights it has also had the paradoxical effect of minimising the individual's ability to influence/bargain with the employer with regard to other rights.

partly rectified by the Statues inalienable rights, but it would not seem a sufficient problem to derail a law and economics analysis.

Another potential problem with the use of a law and economics analysis is its lack of use. There is not a plethora of evidence in the UK to show any acceptance of this doctrine by mainstream academia or more importantly the judiciary. This however does not mean that it does not exist, it may simply not have been vocalised in an evidentiary way. The doctrine of law and economics seeks to understand judgements from the basis of efficiency and it is quite conceivable that the judiciary could make very agreeable law and economics decisions without fully vocalising or comprehending the complexities of the doctrine. The doctrine exists whether people know about it or not and therefore the reasoning behind it can exist regardless of knowledge of the terminology of the doctrine. To deny its use on this basis would seem nonsensical.

1.7 Law and Economics in action

This thesis was started with reference to the case of Mr Pays. It will be remembered that he was dismissed from employment as a probation officer due to his involvement and appearance on bondage, domination and sado-masochism websites. The case was particularly perplexing because it seemed to ignore the rights of Mr Pays and simply asserted that the dismissal was fair dismissal because other employers would have acted in the same way. This does not seem wholly satisfactory or fair and as noted, gives the impression that there is no objective standard of fairness. This apparent lack of objective fairness could be suggestive of a lack of consistency as reliance on

subjective judgements offered by different people does not lend itself to certainty and consistency.

It is appropriate to therefore see if a law and economics analysis can clear up any confusion by looking at it through a different lens. When reference is made to efficiency and the allocation of resources does a clearer picture emerge? The first thing to note is that the case does not seem strikingly obvious to be susceptible to a law and economics analysis. It does not revolve around productivity, financial gain or the buying of rights and therefore one could wonder how applicable law and economics is. The simple answer is very. Law and economics should in theory be appropriate to most situations and this case is no exception. The decision to dismiss Mr Pay revolved on harm to the Probation Service ("the business"); any risk of harm means that efficiency can be affected.

This case also provides a good example of how some rights are inalienable and therefore cannot be traded or minimised in the interests of efficiency. If Mr Pays' Human Rights arguments had been held up, the tribunals would have had no option but to give him a remedy, regardless of the impact on the Probation Office[111]. So law and economics is not a plausible analysis when rights, which are so fundamental that they should never be diminished in the interests of efficiency, are involved. The Government and the principles of equity make the decision as to which those rights are and the size of their scope will naturally impact on the efficiency of business.

[111] Although it is interesting that Article 8 of the Human Rights Convention does provide for interference should it be necessary for the economic interests of the State. How wide this is, is unknown but it would seem unlikely to fall under the margin of appreciation.

As we noted, the tribunals decided that Mr Pays could not claim protection under the umbrella of Human Rights due to the public nature of his activities. This meant the tribunals judgement was purely with reference to whether the decision to dismiss was one another reasonable employer could have made[112]. The tribunal held that the dismissal was fair because of the pressing social need on the employers[113]but there is little explanation as to how they came to justify this need over the plausible pressing social need for individual freedom outside of work. This is where a law and economics analysis is potentially useful. It is clear from the case that the employers and the tribunal recognised that the role of the Probation Service and the maintenance of its integrity as vital. In the words of the EAT:

> 'The modern probation service is a law enforcement agency at the heart of the criminal justice system. It aims to see that offenders receive proper punishment for their offending by the way they are supervised in the community. It works for the effective rehabilitation so they are less likely to offend in the future. Its objectives include Home Office priorities which were to challenge offenders in their behaviour, to enforce community sentences rigorously and to reduce the risk of harm from dangerous offenders. Its responsibilities include the delivery of effective programmes for supervising offenders safely in the community and upholding the interests of victims of crime.'[114]

We can therefore see that damage to the employers' integrity is commensurate with damage to its efficiency. If the public lose faith in the service[115] then it would not be able to do its job effectively. It would seem then that it is better to maintain public faith in the probation service, due to the service it provides to society, than to alleviate hardship for Mr Pays. The tribunal can be viewed as taking account of the allocation

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[112] Section 98(4) ERA 1996
[113] See above n5
[114] ibid paragraph 14
[115] Which was a very real worry of the probation service – see paragraph 22

of resources and judging where it is most efficient for them to fall. In this case, Mr Pays becomes the victim of the employers' greater need for efficiency through maintenance of its integrity and the positive results it produces.

Coached in these terms, the decision seems more logical and it is submitted not as inequitable as when one first reads the decision. There seems to be an internal logic in the way the decision is made and it gives an element of certainty. If we applied a law and economics analysis to the facts of the case before a decision was made, the predicted 'right' or appropriate outcome would match what in reality occurred. It is entirely plausible to counter this conclusion by saying there is no mention of efficiency and furthermore the decision obviously rested on the actions of a reasonable employer. But to advance this argument would seem to discount seeing the bigger picture. Yes, the transcript tells us that the decision revolved on the actions of a reasonable employer, but which reasonable employer will not act in the interests of maintaining their efficiency? Furthermore, as has already been tirelessly stated, what is the underlying rationale for reliance on the 'reasonable employer' if it is not one of allowing freedom for efficiency. A law and economics analysis not only fits in this case, it provides a coherent and consistent framework to understand the decision which can then be utilised in other cases to inform all parties of the logic of the tribunals.

Having understood what law and economics is and how it has developed we have seen first hand how useful it can be in bringing fresh air to a case which seemed incoherent and unfair. We can now turn to see whether law and economics is appropriate when considering some of the problems, which have prevailed in

employment law for some time. Is law and economics the way to actually understand what has been regarded as an incoherent inconsistent minefield?

Chapter two – Disciplinary and Economic dismissals : A hidden control?

There are many criticisms surrounding the unfair dismissal legislation. In order for us to apply a law and economics analysis in an attempt to find a rationale for the judicial approach we must first be familiar with some of these problems. Only by being fully informed will we be able to judge the appropriateness and value of a law and economics analysis.

However before we can even reach the point of understanding the problems associated with unfair dismissal it is necessary to provide an overview of how the legislation works and what it covers. This means we will briefly cover the three types of dismissal covered under the legislation, noting Automatically Unfair Dismissal before turning to a discussion on how the case law has influenced the interpretation of the statute. This is an area vital for understanding if we are to see how law and economics controls the judiciary's decision-making rationale.

Looking firstly in the context of disciplinary dismissals we will consider the enduring criticism of a lack of substantive fairness. This area is of great importance due to the role played in it by BORRT. We will give a detailed biography of BORRT before looking at the suggested rationale for its operation and concluding that law and economics provides a much more consistent rationale. From this understanding of the rationale behind BORRT it will be shown how efficiency is paramount in dismissal and that the lack of substantive fairness is as a result of facilitating efficiency.

The thesis will then turn to chart the rise in procedural fairness which has occurred in a manner inversely proportional to substantive fairness. After contextualising its rise

the chapter will then see how BORRT has spread into procedural fairness and law and economics is in fact the controlling rationale.

The remainder of the chapter will concentrate on economic dismissals. Whilst passing comment on redundancy and how the legislation is interpreted it will focus on the growing problem of the use of 'Some other Substantial Reason' (hereinafter "SOSR") to avoid redundancy payment at all. It will be shown that SOSR is in fact a vehicle used by an efficiency rationale.

2.1 Three types of dismissal

Unfair dismissal covers in essence, three differing types of dismissal. These can be categorised as:

- Automatically unfair dismissals[1]("AUD")
- Disciplinary dismissals
- Economic dismissals

The legislation has designated certain rights as inalienable and as a result any dismissal which conflicts with them will come under the umbrella of the AUD category. AUD covers a number of specific rights laid down in the legislation which Collins helpfully summarises in his creation of three categories.

> '**Protection of Social Rights:** for example dismissals in connection with pregnancy, maternity leave and paternity leave; dismissals in connection with trade union membership and activities; dismissals for refusals to work under conditions of serious and imminent danger; dismissals for taking protected industrial action; dismissal for making protected disclosure.

[1] Collins refers to these as public right dismissals – see generally Justice in Dismissal (1992)

Protection of Worker Representatives in performing their functions: for example, health and safety representatives; representatives for the purpose of information and consultation with respect to transfers of undertakings and collective redundancies; representatives in European Works Councils.

Victimisation for asserting a statutory right enforceable in an employment tribunal: for example, dismissals in bringing claim for minimum wage and working tax credits; or for bringing a claim with respect to discrimination against part-time workers.'[2]

Dismissals for the reasons covered above result in the dismissal being classified as automatically unfair. The legislation also ignores the need for a qualifying period[3], circumvents the rules about upper age limits[4] and can result in higher levels of compensation with the potential for removal of the cap on the compensatory award.[5]

The existence and operation of AUD is in reality fairly non contentious. The rationale behind their existence fits with modern democratic principles of inalienable rights and as such there is a consistency and coherency to their application by the courts. There is little scope or need for a law and economics analysis of these provisions because the current state of the law is satisfactory[6] and seems credible[7]. It is therefore appropriate to concentrate the remainder of this chapter on the much more contentious areas of disciplinary and economic dismissals.

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[2] Collins, H – (2004) Nine proposals for the reform of the law of Unfair Dismissal; at page 75
[3] See section 108(3) of the ERA 1996
[4] Section 109(2)ERA 1996
[5] See sections 124 (1A) and 120 of the ERA 1996. It is also worthy of note that a finding of AUD means the employee can seek interim relief and therefore a continuation of his contract of employment If employer fails to co-operate the compensation can reflect this– sections 128 -132
[6] In Collins' review of change in unfair dismissal he does not fault the scope of AUD but the remedial scheme, a criticism which would seem to apply across the board of the legislation.
[7] Efficiency has no place here because these rights have been designated inalienable by Parliament.

2.2 The Statute and the rise of case law

It remains a simple, if often forgotten, truth that unfair dismissal is statute based. Primacy must be given to the wording of the statute not the principles illuminated in the case law. The reality in unfair dismissal often seems to be in stark contrast with this. The statute in most contexts affords the discretion to the tribunals and this has had the effect of greater consideration being given to other interpretations of the statute and not the 'plain meaning of the Statute itself.' This can result in:

> 'The [employment] tribunals bent down under the weight of the law books or, what is worse, asleep under them.'[8]

There has been much discussion about the role of case law in unfair dismissal with the courts and tribunals periodically engaging in the somewhat ironic exercise of castigating the amount of judge-made law and interpretation pertaining to unfair dismissal, whilst continuing to advance a multiplicity of opinions as to the correct interpretation of the legislation.

> 'This is a tribunal which, rightly in our view, preferred to drink at the pure waters of the section rather than allow itself to be diverted into the channels created by judicial decision... in other cases in different circumstances.'[9]

This, to the uninformed or perhaps naive reader, would suggest that by relying on the plain meaning of the statute the application of the law should be more coherent and as a result more consistent. Munday summarises this viewpoint excellently when he says:

> 'One strongly suspects that some people's assumption is that, in general, Parliament has created a species of layman's law which can be safely administered in tribunals whose

[8] Per Lord Denning MR – Walls Meat Co Ltd v Khan [1978] IRLR 499; at page 501
[9] Per Mr Waite P- Siggs & Chapman Ltd v Knight [1984] IRLR 83; at page 85

procedure is informal and whose application of legal rules is free, discretionary and, basically, unfettered by precedent.' [10]

But he disturbs this assumption by maintaining

'[It] is mistaken for it is founded upon the misapprehension about the nature of language.'[11]

It is pertinent at this point to turn to the statute in order to get a flavour of the language and see whether resort to the plain words of the Statute would solve problems of certainty.

The unfair dismissal legislation is contained in the Employment Rights Act 1996 and is primarily located between sections 94 and 181. The kernel of the right revolves around section 98. As we noted in chapter one, in order to initiate a claim for unfair dismissal the claimant must clear a number of hurdles. The claimant must be: an employee, have been dismissed and have the requisite one-year qualifying period.

Once these hurdles are cleared, section 98 is engaged and the burden of proof passes on to the employer, who has to show two things.

1. The reason for the dismissal. If there is more than one reason the employer must clarify the principal reason.
2. That this reason justified dismissal because it fell within one of the enumerated categories of prima facie fair dismissals. Namely that the reason was
    a) related to the capability or qualifications of the employee for performing his work,
    b) related to the conduct of the employee,
    c) that the employee was redundant,

[10] Munday, R – (1981) Tribunal Lore: Legalism and the Industrial Tribunals; at page 149
[11] ibid

d) that the employee could not continue to work in that position without contravention of a legislative provision,

e) Some other substantial reason of a kind such as to justify the dismissal.

If the employer can navigate through these requirements and put forward a justified reason for dismissal, the lynch pin of the legislation, section 98(4), becomes live.

> 'Where the employer has fulfilled the requirements of subsection 1[justified reason], the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) **the employer acted reasonably or unreasonably** in treating it as a sufficient reason for dismissing the employee and
>
> b) shall be determined in accordance with equity and the substantial merits of the case.'[12]

This synopsis of this whole process can be best found in a three-stage test.[13]

1) The reason for dismissal
2) Prima facie fair grounds
3) Fairness

It must be noted that whilst the plain meaning of the statue gives us some framework as to the processes dismissal hearings should go through, it does not aid the quest for consistency and coherency. The statute does not define what it means by 'reasonable' or from which viewpoint this should be assessed. Nor does it enlighten us as to the correct balance which should be struck between an employers reasonableness and

[12] Section 98(4) ERA 1996
[13] This test is common throughout academic literature on unfair dismissal – see Smith and Wood – (2004) Industrial Law; at page 564 for just one example.

equity and the substantial merits of the case. This conclusion would seem to be in line with Munday's; the language requires interpretation in order to give it practical meaning and cannot realistically be taken at plain value as it provides no certainty

This leaves an impasse. The plain meaning of the statute cannot satisfy the desire for consistency and coherency without interpretation, yet the vast swathes of cases and the myriad of differing decisions have only served to further compound the apparent lack of coherency. As was noted in chapter one, there does not seem to be an agreed rationale as to how the legislation should be interpreted apart from with reference to balancing respect for the managerial prerogative with fairness. But as we have already alluded to, this seems insufficient because it cannot satisfactorily stand up to scrutiny as the managerial prerogative cannot be defined or give a certain framework. It is proposed to look at some of the problems caused by the interpretation and approaches the tribunals have taken and see if a law and economic analysis can shed much needed light and as such:

> 'Provide a framework with which to analyse and prepare dismissal cases. The interpretation given to the statutory language by tribunals and judiciary can in many ways be as important as the design of the statute. The proposition that judges do not make law but only apply it must be looked at in the context of the discretion allowed for judicial interpretation by the particular enactment and the uses to which that discretion is put by the particular judges. In the case of unfair dismissal legislation the statutory language allows for varying interpretations.'[14]

2.3 Lack of substantive justice in disciplinary dismissals

[14] Boothman, F and Denham, D – (1981) Industrial Tribunals: Is there an ideological background?; at page 7

One of the most enduring criticisms about the unfair dismissal legislation is that it is biased in favour of the employer and as a result the employee is the victim of injustice. With reference to the statutory language above, it does not seem prima facie to indicate bias. The statute asks the tribunal to decide whether the employer's reason for dismissal was reasonable or unreasonable taking into consideration the business circumstances and the equitable merits of the case. It is a creative argument that makes a case for bias from the plain meaning of the words. So if this bias does indeed exist; that is there is a lack of substantive justice for employees, where has it come from?

In the early days of the statute there was much debate as to the correct approach the tribunals should take to the question of reasonableness. Should it be objective or subjective? The majority of early cases on what is now section 98(4) saw the tribunals taking advantage of their tripartite formulation and acting as an industrial jury[15]. This resulted in them:

> 'reviewing the employers conduct from their standpoint [as an objective industrial jury] and deciding, in light of standard industrial practice, whether on the facts they would have dismissed.'[16]

This approach would seem to indicate the tribunals were taking an interventionist stance. Interpreting 'reasonable' from an objective perspective of 'good industrial practice' meant the legislation had teeth in order to deliver justice for individual employees but it also meant that there was interference with managerial autonomy.

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[15] See the Court of Appeal decision in *Bessenden Properties Ltd v Corness* [1974] IRLR 338 for a fine example of this.
[16] Smith and Wood (2003); at page 571

This 'objective' approach did not sit well with many, particularly when cases revolved around an employers belief of a set of facts at the time of dismissal, which would make the decision seem reasonable to him[17]. During the period 1976-78 it seems Mr Justice Phillips in his role on the High Court and then as President of the newly created EAT, took it upon himself to readdress the balance from a wholly objective interpretation of section 98(4). Thus, in *Trust House Forte Leisure v Aquilar* Phillips J said:

> '....when the management is confronted with a decision to dismiss an employee in particular there may well be cases reasonable management might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.'[18]

And then in the same year in *Grundy (Teddington) v G F Willis* he said quite unequivocally:

> 'I suspect very much that they applied the wrong test and unconsciously, perhaps, fell into the error of deciding not whether the employers had acted reasonably in treating it as sufficient reason for dismissing the employee, but whether, had they been the employers, they would have made the same selection. **That, of course, is not their function**.'[19] (emphasis added)

The approach of Mr Justice Phillips seems best summed up in the oft quoted case of *Watling & Co Ltd v Richardson.*

> 'It has to be recognised that there are circumstances where more than one course of action may be reasonable... In such cases...If an industrial tribunal equates its view of what itself would have done with what a reasonable employer would have done, it may mean that an

[17] See the case of *Alidair Ltd v Taylor* [1978] IRLR 482 CA for comments by Lord Denning that the test in section 98(4) is subjective – 'it must be remembered that [section 98] contemplated a subjective test. The tribunal have to consider the employer's reason and the employer's state of mind. If the company honestly believed on reasonable grounds that this pilot was lacking in proper capability to fly aircraft on behalf of the company, that was good and sufficient reason for the company to terminate the employment there and then.'

[18] [1976] IRLR 251; at page 254

[19] [1976] IRLR 118; at page 119

> employer will be found to have dismissed an employee unfairly although in the circumstances many perfectly good and fair employers would have done as that employer did.' [20]

The correct interpretation and application continued to remain elusive, with different tribunals taking differing views.[21] The ideal solution seemed to be some sort of balance between an objective industrial jury and substantive view of the employer, however as can be appreciated achieving a consistent application of such an approach was unlikely.

2.3.1 The band of reasonable responses test

It is not entirely clear where the test commonly known as the 'band of reasonable responses' ("BORRT") first originated. Something similar to it is hinted at in *Watling* but it was Lord Denning in the Court of Appeal case of *British Leyland UK v Swift*[22] who defined the test in order to provide guidance as to how a tribunal should interpret section 98.[23] *Swift* was a conduct case and involved the dismissal of an employee because the employer believed he had stolen from the company. Lord Denning defined the correct test in applying section 98(4) as:

> 'Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a **band of reasonableness**, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonable keep him on. Both views may be quite reasonable.

[20] [1978] IRLR 255; at page 258
[21] Contrast *Vickers v Smith* [1977] IRLR 11 with *Wells v Derwent Plastics* [1978] ICR 424
[22] [1981] IRLR 91
[23] It is worthy of note that it was Lord Denning who also made his feelings very clear on the subjective nature of section 98 in *Alidair Ltd v Taylor* [1978] IRLR 482 CA. See *n*16

If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.'[24] (emphasis added)

Mr Justice Browne-Wilkinson converted this view of a 'band of reasonableness' into a workable test in *Iceland Frozen Foods Ltd v Jones*[25]. This has influenced all unfair dismissal cases since and has purported to provide the framework within which the tribunals can act as an industrial jury. Due to its fundamental importance, it is appropriate to set the test out in full, as it appeared in *Iceland*:

'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the questions posed by [s. 98(4) ERA 1996] is as follows:

1. The starting point should always be the words of [s.98(4)] themselves;
2. in applying the section an industrial tribunal must consider the reasonableness of the employers conduct, not simply whether they, (the members of the industrial tribunal) consider the dismissal to be fair;
3. in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
4. in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
5. the function of the industrial tribunal, as an industrial jury, is to determine whether in particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.'[26]

[24] ibid paragraph 11
[25] [1982] IRLR 439
[26] ibid paragraph 24

And so BORRT was born because it offered the benefit of:

> 'actions of the employer are measured against the objective standard of a hypothetical body of reasonable employers who may well respond to circumstances in different, though equally reasonable, ways. It avoids the subjectivity of a standard set by reference to the actions of the particular employer, as well as a potential for subjectivity arising if tribunal panels were to substitute their own decisions for those of the particular employer.'[27]

Put simply, BORRT was developed to assist tribunals in focusing on objectivity in a difficult area of their practices[28] and has seen much judicial support in the EAT and the Court of Appeal.[29]

However the application of BORRT has been controversial and many commentators[30] have argued its use results in a decrease in intervention by the tribunals; resulting in a decrease in substantive justice for dismissed employees. Collins notes that:

> 'The idea of a range of reasonable conduct broadens the scope for legitimate disciplinary action by denying implicitly that a fixed standard of reasonableness should be applied.'[31]

Before we get into what has been said and the specific criticisms of the test it is perhaps wise to familiarise ourselves with the operation of the test and establish its boundaries. The phrase 'boundaries' is important because the BORRT does not set standards; it merely defines the boundaries of reasonableness, as determined by the

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[27] Davies, J – (2003) A cuckoo in the nest? A 'Range of Reasonable Responses', Justification and the Disability Act 1995; at page 172

[28] See Freer – (1998) The range of reasonable responses test: From guidelines to statute; at page 36; and Daves, J (2003); at page 174

[29] *Neale v Hereford and Worcester County Council* [1986]IRLR 168 and the more recent combined case of *Post Office v Foley; HSBC v Madden* [2000] IRLR 827 are the two most obvious examples.

[30] See Collins – 9 reforms for Unfair Dismissal; Justice in Dismissal; Freer – The range of reasonable responses test; Hepple – The rise and fall f unfair dismissal; Smith and Wood - Industrial law; Deakin and Morris - Labour law.

[31] Collins (1992); at page 38

tribunal's interpretation of conventional industrial practice.[32] It must also be noted that worryingly:

> 'Because this fairness standard is an interpretation of practice, not just a description of conventional standards, it therefore becomes susceptible to an interpretation itself.'[33]

This potential problem was noted by the EAT in the surprising recent decision of *Haddon v Van Den Bergh Foods.*[34]We will look a this decision in-depth below, but what is relevant is the viewpoint of President Morrison J:

> 'the band has become a band or group of employers, with an extreme end. There is a danger of Tribunals testing the fairness of the dismissal by reference to the extreme.'[35]

Confusion surrounding whether 'reasonableness' is to be interpreted in a public law sense has further compounded this problem of BORRT becoming 'standard reflecting' rather than standard setting. It will be remembered that in the classic Court of Appeal decision in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[36]unreasonableness was defined as a decision so irrational no reasonable person would make it. In essence *Wednesbury Unreasonableness* is akin to perversity. How 'reasonableness' is interpreted is therefore of great consequence in the application of BORRT. If the tribunals apply a *'Wednesbury Unreasonable'* test then there will be negative repercussions for employees. The employee would have to prove that the employers decision to dismiss was so unreasonable, no other employer would have ever done it. It can be seen that this is a very high bar for an employee to clear. The debate whether BORRT amounts to a perversity test continues to rage. Certainly there is much evidence in the language of the tribunals to suggest a

[32] See Freer (1998); at page 342 and Collins (1992); at page 78
[33] Collins (1992); at page 78
[34] [1999] IRLR 672
[35] ibid at paragraph 26
[36] [1947] 2 All ER 680

perversity test is being applied[37]. This viewpoint was expressed by Mr Justice Morrison in *Haddon*:

> 'The mantra "the band of reasonable responses" is not helpful because it has led tribunals into applying what amounts to a perversity test, which, as is clear from *Iceland* was not its purpose.'[38]

This statement indicates the crux of the problem; BORRT according to its creation in *Iceland* is not a perversity test[39], yet its application has often looked like it is[40]. One case will suffice to illustrate the seeming injustice a wide interpretation of BORRT can propitiate.

In the case of *Saunders v Scottish National Camps Association Ltd*[41] the appellant was dismissed because he was a homosexual. He was employed as a handyman at a children's camp and his job did not require him to be in contact with children. However upon investigation of a homosexual incident in a nearby town he was dismissed because:

> 'At a camp accommodating large numbers of school children and teenagers it is totally unsuitable to employ any persons with such tendencies.'[42]

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[37] See Vickers Ltd v Smith [1977] IRLR 11 for an early example – although this case has been widely discussed it has never been expressly disapproved. Also see the decision of Judge Clark in *London Borough of Harrow v Cunningham* [1996] IRLR 256 who held that in order to fall outside the range of reasonable responses the decision of an employer must be 'irrational'.

[38] Ibid paragraph 26

[39] This has been confirmed in the Court of Appeal case of *Foley v Post Office; HSBC v Madden* and after thoughtful consideration in *Beedell v West Ferry Printers* [2000] IRLR 650 which has a very thorough discussion of BORRT.

[40] It could be suggested that the idea of reasonableness being akin to perversity comes from the role Lord Denning has had in the creation of BORRT. In *British Leyland v Swift* he suggested a band of responses for the reasonable employer and in the public law case *Secretary of State for Education v Tameside MBC*, he spoke of reasonableness in the same terms of *Wednesbury* and irrationality.

[41] [1980] IRLR 174

[42] ibid page 174

Mr Saunders claimed unfair dismissal but failed at both tribunal and EAT level. The EAT held:

> 'The tribunal were entitled to find a considerable proportion of employers would take the view that the employment of a homosexual should be restricted, particularly when required to work in proximity and contact with children. Whether that view is scientifically sound may be open to question...Some employers faced with the problem in the present case might have decided not to dismiss; others, like the respondent, would have felt that in the interests of the young persons for whom they were responsible to parents it was the only safe course. Neither could be said to have acted unreasonably. The present case was one where the area of decision is indeterminate and, ***provided the employer has approached the matter fairly and properly, and has directed himself properly, he cannot be faulted for doing what, in his judgement, is just and proper***.'[43] (emphasis added)

In essence the EAT said, some employers would do it so therefore it must be reasonable. The EAT pins its colours to the mast of procedure at the expense of any consideration of justice for Mr Saunders. BORRT has the effect of legitimising what seems to be an unfair dismissal by reflecting the standard of other employers not of justice.

Before we turn to a consideration of BORRT from a law and economics point of view it is submitted it would be helpful to get a flavour of the academic criticism surrounding BORRT. This will inform our analytical approach and it is hoped, provide contrast between a law and economics analysis and a 'fairness/justice' analysis.

[43] ibid at 174

2.3.2 BORRT: What the papers say

> 'It is a gloss on statute.'[44]

This unequivocal statement aptly sums up much of the academic criticism surrounding the use of BORRT. Collins fleshes out this criticism by stating that the use of BORRT has an effect of a two-fold shift from the statutory formulation. The first shift involves the insertion of the word 'range', thereby broadening the scope of legitimate disciplinary action. The second shift away involves a focus on the 'unreasonableness' of the employer's decision rather than its reasonableness.[45] Collins says as a result:

> 'the effect of the courts' and tribunals' double reformulation of the statutory test is to create a presumption of fairness and an excuse for non-intervention.'[46]

When one compares this test with the plain words of the statute the changes although subtle are of great effect. This effect is further compounded by the fact the judiciary in taking this interpretation seem to attach little weight to the other part of the statutory test that refers in broad terms to 'equity and substantial merits of the case.'[47]

The use of BORRT makes it very hard for an employee to advocate that their dismissal was unfair because:

> 'The tribunal will not make its own decision about the question whether the dismissal was merited for fear of the problem of juridification[48]. **It simply endorses the practice of**

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[44] Freer (1998); at page 343
[45] Collins (1992); at page 38-39
[46] Ibid at page 39
[47] See Collins (2004); at page 36
[48] A term of which definition is notoriously hard to come by – in essence juridifcation means 'lawification' or put another way, the process of legal rules/procedures taking over and minimising judicial flexibility and discretion. See Jon Clark's article *The Juridification of Industrial Relations: A review article* for a detailed introduction.

management in all but the most unreasonable and irrational instances of abuse of managerial disciplinary power.'[49] (emphasis added)

This reluctance to interfere has the further impact of endorsing harsh disciplinary practices which stop short of being 'perverse' but nevertheless do not seem equitable. Included in this is the situation where an employer may promulgate a disciplinary code of some kind, which warns employees that dismissal will follow a breach A tribunal is likely to find that a dismissal in conformity with the disciplinary code is fair, without making any assessment of whether the code was fair in the first place.[50]

As can be seen, BORRT seems to have had the effect of skewing the balance of substantive justice in favour of the employer. To prove the employers action was so unreasonable that no other employer[51] would have taken it, is not an easy task and one at which many prima facie equitable claims may fall.

Critics of BORRT argue that its use legitimises the managerial prerogative. This would certainly seem to be evidenced in the application of BORRT. But this acknowledgement does not help us understand the rationale behind decisions or how BORRT is to be construed. To reiterate a point made earlier, the managerial prerogative provides a face for the decision but no substantive rationale.

In an effort to diffuse unhappiness with BORRT and in particular its application of perversity, the EAT[52] recently tried to suggest the rationale for BORRT actually was analogous to the 'Bolam test.' It will be remembered that this test comes from the

[49] Collins (1992); at page 39
[50] See Collins (2004); at page 37
[51] Because the tribunals implicitly assume other employers are inherently reasonable
[52] *Beedell v West Ferry Printers* [2000] IRLR 650; at paragraph 77

medical negligence branch of law and deals with standards of reasonableness. In brief the test says:

> 'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.'[53]

The analogy to Bolam is certainly helpful in giving some guidance as to how the test is to be interpreted by and implemented by the tribunals, especially with reference to the question of perversity. Yet it does no more than point us towards the managerial prerogative when trying to understand the deeper rationale and for reasons already stated, this does not help us find a framework in which the decisions can be considered coherent and consistent.

The dissatisfaction with BORRT was recently evidenced in the EAT[54]. Mr Justice Morrison in his last case as President of the EAT seemingly decided it was time to take issue with the injustice BORRT was capable of propitiating. Mr Haddon was dismissed for misconduct for supposedly refusing to co-operate with management. He had been employed with the company for 15 years and therefore was the recipient of a good service award with a buffet supper being provided by the employers. Mr Haddon was scheduled to being working a shift on the day of the presentation but was allowed to leave early in order to change and collect his wife. He was told however that he would have to return to work after the ceremony. Another manager however contradicted this, saying it was unusual for anyone to be required to return to work after such a ceremony because alcohol was provided. The employers had a stated policy of not providing alcohol at functions where employees were returning to work.

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[53] Bolam v Friern Hospital Management Committee [1957] 2 All ER 118; per McNair J at page 122
[54] Haddon v Van Den Bergh Foods [1999] IRLR 672

Upon his arrival at the presentation Mr Haddon was offered alcohol and it was at this point he decided to not return to work. The gathering was not concluded until 20:30, leaving only one and a half hours of his shift remaining and so Mr Haddon did not return to work. Mr Haddon was subsequently dismissed for failing to carry out a proper and reasonable instruction which, according to the company's disciplinary procedure, was an offence normally regarded as gross misconduct for which an employee may be dismissed without prior warning.

Mr Haddon brought a claim for unfair dismissal. The claim was rejected; the employment tribunal reasoning in applying the range of reasonable responses test that:

> 'although many employers would have not dismissed the employee in these circumstances, it could not be said that no reasonable employer would have done so. The inescapable conclusion therefore was that the decision was fair.'[55]

Mr Haddon appealed to the EAT, who overturned the tribunal decision and held that the dismissal was unfair. This is not surprising when one reads the facts of the case, however the manner in which Morrisson J sought to justify the decision was extremely radical. Instead of holding that the decision of the tribunal was 'perverse' and therefore sending it back to a differently constituted tribunal, which would have seemed a viable option, he decided to tackle BORRT head on. Some of his comments have been referred to above; essentially Morrison J tried to say that BORRT was not and should not be a perversity test and that more prominence should be given to the 'equity and substantial merits of the case, which would allow a change of focus from purely an employer's perspective. He furthermore dismissed the notion that a 'band'

[55] ibid at page 252

actually existed in reality; the only thing to be considered was whether the employer had acted reasonably or not and this was a question of fact for the tribunal to decide bearing in mind their role as an industrial jury.[56]

One cannot fault the desire to provide justice for Mr Haddon. The decision to dismiss bearing in mind the irony that the company had just been throwing him a good service award party seems utterly illogical. Yet the reasoning of Morrisson J is disappointing. Whilst the argument against BORRT has been waiting to be made, one cannot but help feel Mr Justice Morrison's attempt comes up short. Despite this weakness, some tribunals who thought the shackles of BORRT had been loosened, if not entirely released quickly seized upon this decision. A case in the Scottish Court of Session[57] quickly followed, supporting the Morrison stance, however again the forcefulness of the argument was disappointing.

This led to a short period of even greater uncertainty. Not only was the application of BORRT capable of rendering inconsistent results, now there was great confusion over whether and how it should be applied, if at all. The Court of Appeal quickly stepped in and expedited two cases before itself.

In *Post Office v Foley; HSBC v Madden*[58] the Court of Appeal did not mince their words. Both cases involved employers distrusting the conduct of their employees but not being able to prove it. The court held that BORRT as set out in *Iceland* was correct, that the tribunals job was to not simply decide whether they considered the dismissal fair but to always determine the decision in line with the band of reasonable

[56] ibid page 672
[57] Wilson v Ethicon [2000] IRLR 4
[58] [2000] IRLR 827

responses which a reasonable employer might have adopted. Furthermore they held that despite the criticisms surrounding the BORRT only Parliament or the House of Lords could interfere with the interpretation which has persisted since *Iceland.*[59]

The decision in the Court of Appeal had the effect of curtailing the rebellion against BORRT, which had been gathering momentum. It restored the familiarity of the presence of BORRT but did nothing to aid our understanding of its rationale. The confusion surrounding the correct rationale in the application of BORRT persists throughout the decision and is perhaps best summed up by this incomprehensible reference to the approach the tribunal should take in deciding whether an employer has behaved reasonably:

> ' Although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not.'[60]

With clear explanations like this resounding in the ears of the tribunals it is no wonder tribunals resort to applying a test which is deferential to the employer, interference only coming when a decision is obviously perverse. A tribunal chairman who wants to progress through the ranks of the judicial system will not want to be seen as getting it wrong, so by applying a perversity test they know they are on safe ground due to the existence of definable boundaries.

Fundamentally, BORRT is here to stay until the House of Lords or Parliament get involved. It is strange that this question of the correct application of BORRT, despite

[59] Ibid paragraph 11
[60] Ibid paragraph 53

its immense significance in unfair dismissal cases, has not reached the House of Lords yet. Even if a case did reach the House of Lords, in reality the House is unlikely to take a much different view than the one which has been expounded by the Court of Appeal. This serves to heighten the need to provide an analytical framework within which BORRT can be understood, as it is a problem that is unlikely to go away.

2.4 Law and economics: BORRT is a tool?

From our whistle-stop tour of the situation surrounding BORRT it would seem a logical conclusion to draw that it has failed in delivering an appropriate balance between certainty and flexibility. Certainty can only be achieved seemingly through the application of a perversity test, but this comes at the expense of flexibility and looking at the merits of the case *ex post facto.* This situation is highly objectionable to many because it seems to allow an employer the freedom to make untrammelled decisions with little regard to the 'substantial merits and equity' of the case. Yet still confusion abounds because the courts have repeatedly said BORRT is not a perversity test,[61] leaving us with little understanding of whether an appropriate balance between certainty and flexibility has been struck or whether any rationalised framework exists at all.

Does BORRT seem so confused and objectionable when viewed through the lens of law and economic theory? The case of *Saunders* is a prime example of the injustice BORRT can propitiate. One cannot read the case without feeling a certain amount of sympathy for him. Some might argue that it is a case which is not appropriate for analysis because the advent of greater human rights protection and the

[61] *Iceland v Jones; Post Office v Foley; HSBC v Madden; Beedell v West Ferry Printers*

implementation of improved anti-discrimination laws would suggest a case like *Saunders* would be differently decided now. This argument however falls down when confronted with the recent post Human Rights Act cases of *Pays v Lancashire Probation Service*[62] and *X v Y*,[63] which delivered very similar verdicts as the EAT in *Saunders.*

Applying a law and economics analysis to *Saunders* suggests there is a rationale behind the approach of BORRT and that it does deliver a just result, but only when we skew justice to equate with efficiency. It will be remembered from the facts of the case that Mr Saunders worked for a national holiday camp organisation, which catered primarily for school and youth trips. Mr Saunders sexuality came to light after an incident in a nearby town, thus indicating that it was in the public domain. As a result there was potential for injury to the employer's reputation. The employer held a perception[64] that having a homosexual in the same environment of children could put them at risk and obviously any incident would tar the camps with a negative public perception and in some ways even the simple knowledge that a homosexual worked at the camp could have negative repercussions. This would potentially have the result of decreasing business, as parents would not feel safe sending their children to the camps[65]. The logical conclusion of this thought process is that a decrease in business will lead to job losses, which will be bad for the local economies where these camps are located. The State will ultimately become responsible for welfare support and trying to encourage job growth in other industry sectors to cater for the loss of employment.

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[62] [2004] IRLR 129 – see chapter one for a thorough consideration of this case
[63] [2003] IRLR 561
[64] and from the transcript of the case it would seem to be a commonly held perception
[65] See paragraph 8

This whole scenario could however be avoided if the tribunal allocated resources in favour of the employer; i.e. rather than burdening the employer with the inability to dismiss or a prohibitive cost of dismissal which could lead to further burdens as outlined above, they could put the burden of the dismissal on the individual. Thus freeing up the employers' resources. This response, as we are aware, was the one the tribunal chose to take. If one views the dismissal as one where the effect on the individual was far less severe than the effect on the employer had no dismissal occurred, there is a chilling logic behind the decision. It was more efficient to dismiss Mr Saunders before damage was done to the reputation (and therefore the efficiency) of the business than to not dismiss him and run the risk of harm.

Therefore by allowing the use of BORRT the tribunal could point towards other employers acting in the same way, in order to legitimise this theory of efficiency and effective resource allocation. BORRT gives the judiciary the scope to effect an efficiency solution without *prima facie* seeming to go against the principals of equity. So we could view the approach taken by the EAT in *Saunders* not simply as 'was it a decision a reasonable employer would have taken' but 'was it a decision necessary for the continued efficiency of the business'. When we construe BORRT in this way, there seems to be a much more definable rationale.

Another case in which the application of BORRT seemed to propitiate injustice is that of *St John of God (care services) v Brooks*[66]. In order to effectively analyse it is pertinent to briefly review the facts of the case. The claimants were members of the

[66] [1992] IRLR 546

nursing staff at a hospital run by the appellant company, a wholly owned subsidiary of a registered charity. The hospital was funded in part by the NHS. When this funding was considerably reduced, the company took various steps to make savings and increase revenue from other sources. Eventually however, it was decided that the only alternative to closure was to employ the staff on less beneficial terms of employment. The employers sent out new contracts which reduced holidays, abolished overtime rates and replaced a generous sick pay scheme with the much lower statutory scheme. Employees were told they had a reasonable period of time to decide whether to accept the terms but if they did not they would be dismissed. 140 out of the 170 staff accepted the new terms. Mr Brooks and three others were dismissed for refusing to agree to the new terms and brought a claim of unfair dismissal.

The EAT held that the dismissals were fair. In applying BORRT they said it had to be applied in the context of the business reorganisation[67]. Therefore the offer of new terms by the employer was not unfair as it was in line with what a reasonable employer would do in a similar situation. The EAT acknowledged that:

> 'The situation may well be one in which the employer's legitimate interests and the employees equally legitimate interests are irreconcilable.'[68]

In this situation, how and why do the employer's interests come out on top? To say they do because other employers act in that way also, with no consideration as to equity and balance, is surely not a convincing argument because it is entirely circular. The rationale behind BORRT producing an outcome which is in the employer favour has to be something deeper.

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[67] See paragraph 14
[68] Ibid

In giving the judgement of the appeal tribunal, Mr Justice Knox immediately makes reference to the fact that:

> 'the company recognised they were harsh terms but claimed they were necessary if the hospital was not to close with a large number of redundancies as a result of cuts in its NHS financing.'[69]

This detail, it is submitted, is vitally important. We can understand the decision through the lens of law and economics because of this threat of large redundancies. It all comes down to allocation of resources and ensuring the most efficient outcome. It can plainly be seen that the continued operation of the hospital is more desirable than mass redundancy and the loss of a valuable community service. The only way to effect this outcome was to find that the decision to dismiss the employees who had not accepted the new terms was fair. By finding the dismissals fair it meant the hospital could stay open and run efficiently, thus keeping many people in employment as opposed to being a burden on the welfare state. This solution was pareto-efficent as it kept the employment levels in the local theatre at equilibrium, rather than leading to increased unemployment as the labour market was flooded with specialist nursing staff. To put the burden of dismissal on the hospital would have been highly inefficient. Again, when we view the decision of the case in light of this analysis there seems to be a clear logic behind it and we can see indications of BORRT being a vehicle used to implement this efficiency rationale. BORRT perhaps appears to become a little less vague and offensive once we start to understand it is controlled by an efficiency rationale. This efficiency rationale is even more evident in the case of *N C Watling & Co v Richardson*[70]. We must first make the caveat that this case was

[69] Ibid paragraph 1
[70] [1978] IRLR 255

decided before BORRT was defined in *Iceland*, however it has been noted above[71] that Mr Justice Phillips did advance a test very similar to BORRT in this case and the interpretation given to 'reasonableness' is sufficiently similar to allow conclusions to be drawn.

Briefly the facts: Mr Richardson was employed as an electrical contractor. He worked at two different sites but was made redundant when the work at one of the sites came to an end. Mr Richardson claimed that his dismissal was unfair; pointing out the employers had engaged two additional electricians the week before his redundancy for work on the other site Mr Richardson had worked on. Furthermore one of them had worked only half a day before falling ill but had still been retained in preference over himself.

The Tribunal and EAT found the dismissal unfair. In applying a reasonable employer test the EAT held:

> 'it was not reasonable to dismiss an electrician who had been employed for a substantial period of time in preference to an electrician who had only been employed for a little over a week and who had only worked half a day.'[72]

This decision might seem quite surprising bearing in mind the deference the judiciary have shown to employers. It highlights the lack of inconsistency BORRT can promulgate because the scope of a BORRT type test is so wide there would have been no certainty on the part of Mr Richardson that the tribunals would agree with him, indeed many would have thought it unlikely the tribunal would interfere with hiring

[71] n20
[72] ibid paragraph 14

decisions. Can this decision, to effectively interfere with the managerial prerogative, be reconciled with the two cases and subsequent analysis detailed above?

Efficiency is paramount. There seems to be no sense in dismissing employees whilst at the same time hiring new ones unless it is for efficiency gain. The cost of this process and the potential loss of productivity whilst the new workers adjust would seem to make no economic sense. There had been no complaints about Mr Richardson's work or productivity[73] so there is no substance in an argument that it was in the employers efficiency interests to replace Mr Richardson. The cumulative effect of this information is to suggest that the decision to dismiss was an inefficient one. It would cause hardship to Mr Richardson whilst providing no tangible benefit to the employers. Therefore there was no benefit in allowing the dismissal to be fair; the tribunal would not want to encourage other employers to make similar decisions because it would be bad for efficiency and productivity in the economy. As such the law and economics analysis provides an understandable rationale where before there was uncertainty.

These three cases provide a small snapshot into the differing applications of the BORRT and are by no means exhaustive. Yet they evidence a general trend that coherency behind the decisions can be seen with resort to a law and economics analysis. Whether that analysis indicates a desirable outcome is not the point, it indicates a consistent outcome. The plausibility of a law and economics theory is further evidenced if we look at the difference between the Statue and the practical

[73] ibid paragraph 9

application of BORRT. It will be remembered that section 98(4) says the issue of whether the employer behaved reasonable or unreasonably:

> 'shall be determined in accordance with equity and the substantial merits of the case.'

Yet mention of this in the cases is extremely rare. In *Saunders* there is not one single mention of equity or substantial merits, the same is true in *St John of God* and *Watling*. Obviously an empirical study of all unfair dismissal cases would provide hard and fast data for whether this assertion is true but the author's personal impression from extensive research of unfair dismissal cases suggests that the mention of equity is the exception not the rule. To put it bluntly, this particular requirement seems to have been airbrushed from the Statute.

This is intriguing because potentially giving greater prominence to consideration of the substantial merits and equity in a case could well provide the counter-balance to the employer-orientated test that BORRT seems to promulgate. Yet, this is a course most of the judiciary have chosen not to take. It is suggested that the justification for this is best explained with reference to law and economics. In chapter one we discussed how efficiency had replaced equity as the requisite standard of fairness in law and economics. If we follow this theory through it brings us to the conclusion that reference to the merits and equity of a case is in reality reference to the best way to achieve efficiency. Equity and efficiency cannot lie together so efficiency has in effect replaced equity in the test in s. 98(4).

We have seen how law and economics can provide a consistent rationale for the operation of BORRT, giving it definable parameters; this has the great advantage of improving confidence in its operation the outcome would seem more and with

efficiency as the controlling factor it does not seem so objectionable and biased. But how does this understanding of BORRT fit into the problem of lack of substantive justice?

2.5 Law and economics and substantive justice

We started off this whole discussion about substantive justice by blaming BORRT for its demise. In light of the law and economics analysis is this still fair? To some extent the answer is in the affirmative, BORRT is the vehicle which has undermined the process of traditional substantive justice. But law and economics seems to have been the controlling factor, pulling the strings in order to manipulate the 'charmed circle of BORRT'[74]into facilitating efficiency. The question that naturally follows is how does law and economics gain creating a decline in the role of substantive justice?

'Employment-at-will' is a doctrine which still prevails in the United States and to some extent also in the UK common law.[75] It is the neo-classical economists preferred method of employment relationship in the free market because they argue it is the most effective and efficient. Employment-at-will is the natural anathema to substantive justice; it is the classic paradigm of competitiveness versus fairness. Therefore for the ideas behind employment-at-will to take hold in the regulatory setting, the major thing to be compromised would have to be substantive justice. Procedural fairness can live harmoniously with employment-at-will because there is no incursion into one another's core territory; the process of implementing a dismissal

[74] Collins (1992); at page 2

[75] Obviously the unfair dismissal statute has provided a new avenue of redress but for those falling outside the qualifying conditions, their employment (with the exception of the automatically unfair dismissals) is no better than at-will.

is not the same as the process of making the actual decision. But the same cannot be said for substantive justice.

In Beck's thoughtful essay on *The law and economics of dismissal regulation*[76]he helpfully sets out the arguments why efficiency (employment-at-will) is to be preferred to equity (substantive justice)[77]. Firstly, knowledge that the employer can dismiss at will is said to decease the chances that a worker will not put forth the expected levels of performance:

> 'Any alteration of this contract format through a restriction of dismissals, may lead to a less efficient employment relationship, which may impose substantial costs on the economy as a whole, as output in existing firms is lowered and/or few workers are hired.'[78]

Secondly, the ability of an employer to decide on discharges without restriction is essential to the organisational efficiency of the firm:

> 'Court policing of dismissals erodes managerial property rights and, in the long run, reduces incentives for the creation of new firms.'[79]

Essentially the argument propounded says that a requirement of substantive justice in employment relationships leads to inefficiency and potential decline. This argument however is not attractive to many who feel employees should not be simply commodities and factors in production. One moderate line of thought has been to highlight the inequality in bargaining position between employer and employee and then go onto say that the employment-at-will doctrine should only be used when the

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[76] Beck, M – (1999) The law and economics of dismissal regulation: A comparative analysis of US and UK systems in '*Law and Economics and the Labour Market* eds De Geest, G, Siegers, J and van den Bergh, R

[77] See pages 106,107 and 108

[78] ibid

[79] ibid; at page 107

employers interest in dismissing workers does not extend beyond economic rationality.[80] The similarities between this approach and the EAT's approach in *Watling* are very clear. There was no economic benefit to the dismissal therefore it was not efficient to dismiss. This approach

> '[that] regulation is often necessary on grounds related to economic efficiency, as opposed to the social justice considerations which are most often adduced'[81]

is indicative of acceptance that regulation can be used to facilitate efficiency in a way that the free market was unable due to the presence of external factors. Minimising substantive justice gives scope for efficiency considerations to be implemented. So whilst the role of substantive justice is minimised by law and economics it does not necessarily mean justice is not done; it just has to be construed and understand in a different way, with different values.

2.5.1 No evidence for law and economics

But is the theory of law and economics the only one which can be put forward? Of course whenever there is a part of law which is contentious or difficult to understand there will be numerous different theories as to the correct interpretation. In unfair dismissal these range from the judiciary not understanding the needs of workers because of their societal background[82] to the unfettered discretion of the managerial prerogative.

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[80] ibid; at page 108

[81] Deakin and Wilkinson (1999); at page 38

[82] Collins makes this point in (1982) *Capitalist Discipline and Corporatist Law*; at page 80 – it must however be said that there only seems to be any real substance in this claim when dealing with the rights of trade union's. The fact that tribunal have wingmen who have industrial experience would seem to defeat this theory on a general basis.

Critics of the plausibility of a law and economics analysis would suggest that there is little supporting language in the cases. This is indeed true and whilst some references are made to economic climate and rationale this is the exception, not the rule. There is much greater reference made to the managerial prerogative and the 'reasonable employer'. It is here we would like to suggest that some of the strongest evidence for a law and economics theory can actually be found. The managerial prerogative serves to give employers the scope and discretion to make decisions they think are best for their company. It is submitted it would take a pretty unreasonable employer who would exercise decisions under the managerial prerogative which provided no efficiency benefit. Surely no 'reasonable employer' will want to act in a way which will have a negative impact on its productivity or efficiency. The counter to this is; not all employers are like that, some act in a capricious and arbitrary way not out of a desire to increase efficiency. Whilst this is true, reference must be made back to *Watling* where the tribunal stepped in and said that the dismissal was unfair in precisely those circumstances. Reference to the managerial prerogative and 'reasonable employer' gives the judiciary the requisite scope to interfere in the interests of efficiency. By not making this role/scope public it is not subjected to any criteria or definable tests making it more flexible and capable of ensuring the results the judiciary want to promulgate. It would seem entirely plausible to suggest that the focus on substantive fairness has been minimised in the interests of efficiency. The judiciary's pattern of interference does not fit well with the simple theory that they will let business do what they want, as *Watling* perfectly shows. Does this efficiency justification, which we have seen through the law and economics analysis, follow through into the other big area of disciplinary dismissals, procedural fairness?

2.6 The rise of procedural fairness

> '[Section 98(4)] directs the tribunal to focus on the conduct of the employer and not on whether the employee in fact suffered any injustice.'[83]

This statement in the House of Lords is indicative of the approach the judiciary have taken towards the balance between procedural and substantive justice. By focusing on the conduct of the employer, not on any injustice suffered by the individual, the court is implicitly promoting procedure over substance. The stance the judiciary have taken on the amount of attention that should be paid to procedural fairness has altered significantly over the Statutes history, with the pendulum swinging wildly from one end of the spectrum to another. There seems to have been an inversely proportional relationship between procedural and substantive fairness. As the standard of procedural fairness has risen the judiciary seem to have made that the hurdle to clear in order to prove the fairness of the dismissal. We have already alluded to the airbrushing of 'equity and the substantial merits of the case' from the statute and this is part of the problem associated with a rise in proceduralism. By making the test about the employer and his conduct, the need for substantive justice can be circumvented because the tribunals and courts are still implementing fairness standards; the problem being they relate to fairness of the process not the substance.

From an equity perspective it may seem that this rise in procedural justice is seemingly advantageous. The rise in procedural fairness has been given a statutory boost with the Employment Rights Act 2002 inserting into the ERA 1996, section 98A. The effect of this section is to prescribe certain minimal procedural requirements which an employer must satisfy, before a dismissal can be found fair. Failure to

[83] *W Devis & Sons Ltd v Atkin* [1977] IRLR 314; per Viscount Dilhorne at 317

adhere to these requirements results in a finding of automatically unfair dismissal and also incurs additional financial penalties.

Collins helpfully suggests three distinct chronological periods[84] over which we can see the tribunal and courts differing approaches to procedural fairness. In light of section 98A it is necessary to add a fourth period, however the precise nature of the approach to this section is still not fully known and therefore only suggestions can be offered.

The first period covering 1971 to 1977 he calls *Symbolic Affirmation*[85]. In this period the judiciary took a very strong stance on the necessity of procedural fairness, maintaining that unfair procedure alone could render a dismissal unfair[86]. This approach was affirmed in the House of Lords in *Devis & Sons v Atkins*[87]where the Law Lords held that despite the employees disobedience the dismissal was unfair because the employers had not warned that dismissal may result.

However, the picture is not quite as rosy and pro-employee as might be perceived from this summary. In *Devis* the House of Lords also affirmed another principle which was prevalent in the lower courts at the time; that despite a finding of unfair dismissal there could be an award of zero compensation because no injustice was done to the employee due to his conduct still meriting dismissal. Collins aptly sums up the situation as thus:

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[84] Collins (1992); pages 111-120
[85] ibid at page 112
[86] See *Earl v Slater & Wheeler (Airlyne) Ltd [1972] ICR 508* – employee returned after a period of sick leave and was dismissed due to inadequacies in his work. Whilst this incompetence would have been sufficient reason for dismissal the fact that the employee was given no opportunity to explain made it unfair.
[87] [1977] AC 931

> 'One suspects that the emphasis upon procedures was a way of avoiding the more difficult substantive questions of unfairness...which were less easy for the courts to resolve. By determining that a dismissal had been unfair on the ground of a bad procedure, the courts could avoid direct second-guessing of management's substantive disciplinary decisions with a consequent reduction of threat to the managerial prerogative. Yet despite the importance attached to procedures, the courts were not willing to allow pursuit of this policy and strategy to undermine to undermine the corrective justice basis of the law of unfair dismissal. A way to reconcile these competing considerations was discovered in following a finding of unfairness based upon a defect in procedure by a denial of a compensatory award in cases where an employee was at fault.[88]

This approach shows the standard of procedural fairness was high, but the impact on employer behaviour was very minimal. Employers could act in capricious way and still not be punished apart from a potential tarnishing of their reputation, which many would see as an expendable cost. Collins maintains that use of this device achieved the aim of compelling employers to tighten up on procedures without undermining their perception of the ultimate corrective justice aim of the legislation[89], however it is suggested this is not entirely correct. The device in many senses had the impact of a paper tiger because of the minimal punitive sanctions an employer faced.

Between 1977 and 1986 we had a period which Collins defines as *Procedure as Substance*. The change in the judiciary's approach was caused by the introduction of the basic award in unfair dismissal. The Employment Protection Act 1975 introduced via sections 73-75 a basic award as well as a compensatory award. In essence this was to rectify the problem of an employee receiving no financial settlement even when the dismissal had been found to be unfair. The basic award could not be reduced below a

[88] Collins (1992); at page 113
[89] ibid see page 114

minimum of two weeks pay and it was the Labour Government's intention that the judiciary should only exercise discretion over the compensatory award not the basic.[90]

This legislation sent alarm bell through the judiciary and was commented on in *Devis*, with the Law Lords noting *obita dicta* that they would not be able to promulgate a result like *Devis* in the future because of it and that surely Parliament had not intended this result; that an employee should receive compensation where his serious misconduct was discovered between the date of dismissal and the determination by the tribunal.[91]

The route of symbolic affirmation was no longer fully available to the judiciary in their minds, because a finding of unfair dismissal for flawed procedure meant that there was compensation to be paid, regardless of the employees behaviour. This did not sit well with the judiciary because it seemed to frustrate the application of corrective justice. The response of the EAT is traditionally acknowledged to have been started in *British Labour Pump v Bryne*[92]which was approved by the Court of Appeal in *Wass Ltd v Binns.*[93]Mr Justice Slynn in *British Labour Pump* ventured a general test for when bad procedure should not lead to a finding of unfairness:

> 'It seems to us that the right approach is to ask two questions. In the first place, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the information which that inquiry would have produced? Secondly, have the employers shown – the burden is on them –that in light of the

[90] ibid see page 115
[91] See in particular Lord Diplock's comments that section 73-75 of the EPA was capable of converting unfair dismissal compensation provisions into a veritable rogue's charter, for the tribunal would be bound to award to a fraudulent employee, because he had successfully concealed his fraud, a basic compensation which might well amount to a substantial sum – at paragraph 5
[92] [1979] IRLR 94
[93] [1982] IRLR 283

information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?[94]

This question quickly developed into a Court of Appeal affirmed test of:

'A dismissal would not be unfair for improper procedure, if the employer could show on balance of probabilities that such a failure would not have affected the reasonableness of the decision to dismiss.'[95]

This approach had the overall implication of:

'where an employer had good substantive reasons for dismissals, then procedural steps may be ignored with impunity, quite the opposite message to that conveyed by the courts in the early years. In effect procedural considerations were treated as a subsidiary element of substance rather than enjoying independent weight as necessary elements of fairness.'[96]

So although more consideration was being given to substance this did not mean that the employees were benefiting from an increase in substantive justice. Procedural failure could be ignored if there was substance to the claim that dismissal would have occurred anyway. Yet the converse was not true; a fair procedure could not be turned into an unfair dismissal just because the decision did not seem correct or fair, the decision still had to be so unreasonable no reasonable employer would have taken it[97].

This approach was not greeted with much happiness as it headed in the 1980's. Mr Justice Browne-Wilkinson became President of the EAT and quickly set about suggesting a return to increased procedural fairness. In *Silifant v Powell Duffryn Timber* he maintained that the *British Labour Pump principle* was

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[94] ibid at paragraph 17
[95] Using the words of Collins (1992); page 116 – but commonly accepted throughout the system – see *Silifant v Powell Duffryn Timber* [1983] IRLR 91
[96] Collins (1992); page 117
[97] See the section above on substantive justice and the role of BORRT

'wrong in principle, undesirable and inconsistent with [section 98(4)] as construed by *Devis.*'[98]

Yet he said the decision by the Court of Appeal in *Wass* bound them to apply *British Labour Pump.* The turning point and loosening of the shackles came in two House of Lords cases in 1985and 1987

The revival of procedural standards[99] was the third stage and occurred in part because of changes to the legislation. The Employment Act 1980 empowered courts to reduce the basic award[100] to nil in light of any conduct of the employee prior to the dismissal. This in essence returned the legislation back to its original form and more importantly *'removed the spectre foreseen in Devis of an employee winning a substantial basic award even though he had secretly been guilty of grave misconduct.'*[101] This change was perhaps influential in the House of Lords feeling it could start to re-assert the need for procedural fairness; the loophole that could propitiate grave injustice had been removed.

The first signs of a change in the attitude of the House of Lords in seen in *West Midlands Co-op Society v Tipton*[102] where they upheld a tribunal decision that the flawed procedure was capable of rendering the dismissal unfair. This was to some extent the start on the journey back to the ratio of *Devis* but it was not until two years later that the position became much clearer.

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[98] At paragraph 30
[99] Collins (1992); at page 117
[100] And removed the minimum basic award of two weeks pay
[101] Collins (1992); at page 117
[102] [1985] IRLR 116

The case of *Polkey v AE Dayton Services Limited*[103] was crucial because it

> 'restored the importance of procedural standards in the law of unfair dismissal. It recognised that a dismissal may be unreasonable under what is now section 98(4) because the employer failed to follow a fair procedure prior to making the dismissal, even though the employer had good grounds for the dismissal such as the need to make redundancies.'[104]

The decision effectively overruled *British Labour Pump* and has had the effect of taking away 'the balance of probabilities test'.

However this was not a straight return to the strictness of procedural fairness that had been evident in the early 1970's. The House of Lords made it very clear that procedural standards should not be regarded as mandatory and in replacing the 'probabilities test' introduced 'reasonableness'. This introduction has had a massive impact on the way procedural fairness is implemented and interpreted because wherever 'reasonableness' is, BORRT is sure to follow.

Polkey leaves us with a landscape that gives hope to both the employer and employee. On the one hand Lord Bridge summarise the requirement of fairness as:

> 'in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes

[103] [1987] IRLR 503
[104] Collins, H – (1990) Procedural fairness after Polkey; at page 39

such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.'[105]

This seemingly stringent test is to be balanced by Lord Mackay's assertion in the same case:

'If the employer could reasonably have concluded in the light of the circumstances known to him at the time of the dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code [ACAS Code of Practice]. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair.'[106]

The case is the epitome of balance; 'Relaxation of procedural requirements is permissible where the employer reasonably concludes that further inquiry would be futile,'[107] or in the words of Justice Browne-Wilkinson in *Silifant* which was approved by Lord Mackay in *Polkey*:

'there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could take the view that whatever explanation the employee advanced it would make no difference.'[108]

The balancing factor is the 'reasonableness' of the employer because it gave the judiciary the scope to manoeuvre. In essence this left the law at a halfway house between *symbolic affirmation* and *procedure as substance* with BORRT being introduced as the crucial and controlling factor in the standard of procedural fairness. This has had massive implications into how procedural fairness has been construed and we will look at the results below. But before this, we must consider the final and

[105] At paragraph 28
[106] At paragraph 5
[107] Collins, (1992); at page 119
[108] ibid at paragraph 31

very new chapter in the construction of procedural fairness. Once again the change is as a result of legislative action.

The Employment Act 2002 inserted section 98A into the ERA 1996. The background of the instrument was the desire by the Government to reduce applications to tribunals. By inserting minimum procedural requirements it was hoped that recourse to internal procedures would increase the rate of resolution before submitting claims to tribunals.[109] The effect of section 98A is to 'fix minimum procedural standards'[110] and can be presented in the simple format of a three-step procedure:

1. A written warning of dismissal
2. A hearing which allows both parties to explain their cases
3. An appeal – if practicable this should involve more senior management

The reality of these requirements is 'a little more elaborate than the three step political presentation'[111] but ultimately they set a basic floor of rights which one would assume constitutes procedural fairness. They are not especially onerous in their burden on an employer and envisage that many companies would have more superior disciplinary procedures than this as part of their standard procedure. This fact is potentially very important as Smith and Wood point out the new legislation leaves the door open for a return to the *British Labour Pump* principle:

> 'The new section 98A will contain a major advantage for such an employer. It will state that, in relation to any part of a procedure that is more advanced than the standard [section 98A] procedure, if an employer fails to follow any part of that part [i.e. his own superior procedure]

[109] This belief came from the 1998 Survey of Employment Tribunal Applications – Employment Relations Research Services No 13, DTI, 2002
[110] Schedule 2 paragraph 1
[111] Collins (2004); at page 45

the dismissal will still not be unfair if the employer shows that he would have decided to dismiss the employee if he had followed the procedure.'[112]

On the face of it section 98A seems to be a very proactive way of making sure minimum procedural fairness occurs. Failure to follow this procedure will mean the dismissal is automatically unfair with additional compensation being awarded. However, whilst it has the effect of pushing employers towards a basic level of procedure it has the countervailing effect of creating disincentives to employers with superior protection to actually instigate those. It could be argued it has the effect of bringing everyone's claim down to the lowest common denominator and therefore we will see a uniform standard of procedural fairness but at a lower level than was in existence in the early 1970's. It must be noted that this section did not come into effect until October 2004 and at present there has been little judicial comment as to its interpretation. The fears about a return to *British Labour* Pump could be misplaced. What is perhaps likely is for the judiciary to take the new requirements and reinforce its view of a reasonable employer by reference to them, thus incorporating them as a requisite of BORRT and worryingly thus subjecting them to a reasonableness interpretation themselves rather than leaving them as an objective standard.

2.6.1 Procedural fairness and the influence of BORRT

It is to the relationship between BORRT and procedural fairness we must now turn. We have seen above how 'reasonableness' has become infused into the test for procedural fairness especially in deciding the stringency of the procedure to be followed. But this is not the only way BORRT has become entwined with the requirements of procedural fairness. As we have already discussed above a decision to

[112] Smith and Wood (2003); at page 542

dismiss for belief in an employees misconduct is essentially a substantive one. However, there is a very important procedural step which has to be cleared before an employer can legitimately dismiss. This step, of 'reasonable investigation', has effectively replaced any notion of substantive justice in situations involving misconduct. If the employer can show the investigation was 'reasonable', then to interfere with the subsequent dismissal decision would be an incursion into the managerial prerogative that the judiciary are unwilling to make.

This 'reasonable investigation' has, as can probably be easily deduced, recently become subsumed by BORRT.

The starting point for this journey of legislative interpretation is the EAT in 1978. *British Home Stores v Burchill*[113] involved an employee dismissed because the employer suspected she had been stealing from the company by falsifying sales records. They laid down a test, which has subsequently received widespread approval in the Court of Appeal[114], which was to aid interpretation of fairness in section 98(4). The test is in essence:

> in determining the fairness or otherwise of the dismissal of an employee who is suspected or believed to be guilty of misconduct, an employment tribunal has to decide whether the employer had a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements:
>
> 1. The fact of that belief must be established
> 2. It must be shown that the employer had reasonable grounds for that belief.

[113] [1978] IRLR 379
[114] See *Foley v Post Office; HSBC v Madden* [2000] IRLR 827

3. At the stage at which the employer formed that belief on those grounds, it must have carried out as much investigation into the matter as was ***reasonable*** in all the circumstances of the case.'[115]

How this 'reasonable' was to be interpreted was the subject of much discussion and in the recent case of *Sainsbury's Supermarkets v Hitt*[116]the Court of Appeal emphasised that:

> 'The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.'[117]

The impact of this statement cannot be underestimated. Essentially it says in conduct cases, *all of the employers behaviour* is to be judged with reference to BORRT.[118]The result is that the judiciary have inserted their own discretionary vehicle throughout the whole of the legislation.

This leaves us with a confused picture surrounding procedural fairness. The courts have acknowledged the importance of procedural fairness and said it will be rare for an employer to show a dismissal was fair if the procedure was unfair[119], however this statement now has to come with the caveat that 'reasonableness' as judged by BORRT is applicable. Once again the situation is anything but clear; how can certainty exist when the failure to follow procedural fairness requirements become only one factor in deciding if the dismissal is unfair, yet the judiciary do not define

[115] See *Burchill*; paragraph 2
[116] [2003] IRLR 23
[117] ibid paragraph 30
[118] It will be remembered from the discussion above how much scope BORRT gives to employers and the judiciary and how it seems skewed against the interests of the employee
[119] And the introduction of section 98A buttresses this view

the other factors and the weight given to each one of them. The whole situation is one where it seems that the judiciary have the scope to enforce procedural fairness when it suits them. In order to attempt to find a coherent framework for the application of the rules surrounding procedural fairness we must again turn to law and economics.

2.7 law and economics: the facilitator

Collins, in an effort to prescribe a model which best fits the judiciary's approach, helpfully notes:

> 'The reluctance of the tribunals to adopt the strict rules of natural justice demanded by respect for the dignity of individuals is revealed in many of their decisions...This unwillingness to implement the principles of natural justice for disciplinary dismissals seems to be grounded in efficiency considerations.'[120]

Collins concludes that a model of procedural fairness based on the concepts of efficient managerial decisions best accords with tribunal practice.[121] So does a law and economics analysis support this conclusion?

> 'The reasonable employer is the efficient employer, the one who adopts procedures conducive to manpower management. It is this subtle combination of the costs and benefits of dismissal procedures which best accounts for the diversity and flexibility of the courts' and tribunals' standards of procedural fairness.[122]

'The reasonable employer is the efficient employer'; the corollary of this is the standard of procedural fairness is proportional to efficiency. It is necessary to unpack a statement of this magnitude in order to see if it is indeed applicable to the judiciary's approach to procedural fairness.

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[120] Collins (1992); at pages 120-121 – He also goes on to note that the model of democratic participation also does not shed much light on the practice of the tribunals.
[121] ibid page 123
[122] ibid

Efficiency can be achieved through procedural fairness in two ways. By having a recognised procedure[123], employers can know what is expected of them and jump through the requisite hoops. It also means they can cost out dismissals[124], because there will be certainty as to the total costs that will be awarded. This will lead to greater efficiency in the operations of the employer when enacting a dismissal. Secondly, the requirement of procedure has the effect of making sure employers do not dismiss without thought. This has the effect of making sure decisions to dismiss are for efficiency gains; the freedom to 'hire and fire' is not necessarily good for economic stability or an employer's productive efficiency. By concentrating an employer's mind through procedure the judiciary can ensure efficiency is promoted.

Yet some procedural requirements can be an onerous burden on employers and in some ways become like regulations,[125] which as established before, are not always conducive to efficiency. It is here that BORRT's value really shines. The effect of the discretion BORRT gives the judiciary is to minimise the impact of the regulations when it would be against the principles of efficiency to enforce the procedure. This discretion is clearly evidenced in the decision of the EAT in *Rowe v Rentals*[126]:

> 'It is very important that internal appeals procedures run by commercial companies should not be cramped by legal requirements imposing impossible burdens on companies in the conduct of their personal affairs.'[127]

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[123] Which is the important element in the judgement of whether dismissal is fair or not (i.e. giving greater weight to procedural fairness as opposed to substantive fairness)
[124] There is a cynical argument that says, if an employer can know how much Court will award they can calculate whether it is worth following the procedure or whether to not follow any procedure thereby not incurring costs but just paying increased compensation.
[125] This is especially true in light of section 98A
[126] [1982] IRLR 177
[127] ibid

This logic can be evidenced in the change in the judiciary's approach from *symbolic affirmation* to *procedure as substance*. The introduction of a mandatory award for failure of following procedure, despite good substantive reasons, led to the standard of procedure being minimised so as not to unnecessarily burden the employer. The situation of the law post-*Polkey* and post-*Hitt* means that the standard is variable, being controlled by the most efficient outcome. This can be seen in the case of *Whitbread v Hall*[128]. Mr Hall was the manger of a very successful hotel for the employer but was dismissed for gross misconduct due to stock control problems. The Court of Appeal held his dismissal to be unfair. They held that although his misconduct was sufficient to warrant dismissal under BORRT the procedure of the disciplinary process was so flawed it rendered the dismissal unfair. On the face of it this finding of unfair dismissal would seem to go against the argument we have propounded above, but once we dig into the language of the transcript the decision does indeed support the efficiency argument.

There were two crucial factors in the case; firstly, Mr Hall was very good at his job and had won the prestigious *Evening Standard Pub of the Year Award* and numerous awards from his employers. Secondly, the working relationship between Mr Hall and his immediate manager was poor.[129] The decision to dismiss came from her and she admitted in evidence that she did not consider any other course of action.[130]

These two details are vital in understanding the efficiency argument which explains the case. The court held:

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[128] [2001] IRLR 275
[129] The employment tribunal diplomatically states they did not see eye to eye; at paragraph 3
[130] At paragraph 6

> '[the] Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers.'[131]

It is not efficient to get rid of an employee who is good for your company simply because of a personal disagreement. This is in effect what the court was saying. Whilst Mr Hall's conduct was prima facie worthy of dismissal, because of his ability he should have been given a chance to explain himself so that the employer could make a measured decision with full knowledge of the situation. Unless there is a clear tangible efficient benefit in dismissal the tribunals do not seem willing to allow procedure to be circumvented. If as a result of following the procedure the employer still decides to dismiss, the tribunals are much more likely to accept the decision because they view an employer who has followed a procedure as having acted in a reasonable way, which is also highly indicative of them acting in an efficient way.

BORRT acts as the front for efficiency based decisions once again: This is in part because 'reasonableness' is less offensive than efficiency to those who see procedural fairness as a right, furthermore by presenting 'reasonableness' and hiding efficiency it means there is flexibility to its application and variable standard, which if defined would possibly become victim to interpretation or challenge.

It is hoped that we have shown that by viewing BORRT through the eyes of law and economics there is indeed a chilling logic and rationale to its application. To many it will still seem a gloss on statue and a tool which delivers injustice and in some ways

[131] At paragraph 19

this is indeed true[132]. However what it is not, it is submitted, is a principle with no definable rationale or purpose. Its function is very clear – to provide the vehicle through which the judiciary have the discretion to apply efficiency concepts which are the most suitable for the economic stability and welfare of the UK. Understanding this concept gives us the potential to develop a framework which can deliver certainty and coherency. The decline in substantive justice and rise in procedural justice it is suggested is as a result of the judiciary realising that they can have more control and impact over facilitating efficiency in the procedural setting as opposed to the substantive setting. Whilst it could be said this mirrors respect for the managerial prerogative this argument would fail to satisfactorily explain the cases where the judiciary have interfered, both in procedural and substantive settings. A law and economics analysis can however explain theses cases by recourse to efficiency; decisions are made to give the most efficient outcome, which can require judicial intervention.[133] Therefore BORRT when understood as a vehicle for efficiency does not seem quite such an unruly beast as it marauds through the whole of the unfair dismissal legislation.

In short we have seen that BORRT has become the single most important tool in disciplinary dismissals. The broad interpretation and prominence given to it by the judiciary has meant it is highly influential. This is not by chance; it is the perfect vehicle for applying a law and economics rationale. It provides the flexibility to allow decisions made on the basis of efficiency. It does not get tied down in precedent or rules or parameters but is guided solely by efficiency. This means that a rationale and certainty does exist, one just has to be looking in the right place. BORRT also

[132] It probably continues to depend on where your allegiance lies – the workers or the employers
[133] *Watling* and *Hall* both provide appropriate and familiar examples

provides a valuable mask for this efficiency rationale; one which many find offensive and insulates the judiciary from criticism because on the face of it the judiciary appears to be applying an ambiguous Statute.

It must however be noted that this thesis does not intend to offer any opinion as to whether a law and economics rationale is a good thing and to be promoted. It is a very complex discussion to decide where the balance between efficiency at the expense of equity should be drawn and the author seeks to make no comment on this. It is the author's aim for the sake of clarity and space to only discuss the appropriateness of law and economics as an analytical tool and what can be observed from this analysis[134]. This thesis seeks to suggest a concept not analyse it.

2.8 Economic dismissal and the use of 'Some other Substantial Reason'

> 'It is important that nothing should be done to impair the ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency.[135]

It is with this ringing endorsement for efficiency that we turn to consider economic dismissal. Economic dismissals have traditionally not been contentious as the legislation seemed clear and a redundancy payment was given to redundant employees. However in recent years the judiciary have taken a very flexible approach particularly with reference to the use of SOSR. This has had the effect of causing

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[134] For more in depth discussion of law and economics in society see Duxbury (1991) Is there a dissenting tradition in law and economics; Polinksky (1974) Posner's Economics analysis of law; Campbell and Picciotto (1998) Exploring the interaction between law and economics; Posner (1984) Some economics of labour law; Deakin, S (1996) Law and economics in '*Legal frontiers*' ed Philip Thomas; Ewing, KD (1990) Economics and labour law in Britain: Thatcher's radical experiment; Hirsch (1999) Law and economics, An Introductory analysis and Estreicher, S (1985) Unjust dismissal laws: Some cautionary notes

[135] Lord Denning in *Lesney Products' Co Ltd v Nolan* [1977] ICR 235 (CA)

much criticism over the judicial approach to economic dismissals and an increase in uncertainty. This section will suggest that this increased flexibility can be traced to a desire to effect efficiency. It will show that there is an efficiency rationale which has perhaps not been acknowledged before and that SOSR is used in very much the same way as BORRT, to facilitate the efficiency flexibility. Firstly however it is important to note the debate surrounding redundancy and how the judiciary has interpreted the Statute, in order to see the lengths they have gone to obtain efficiency in redundancy.

The primary area for consideration and activity in economic dismissals is redundancy. It will be remembered that protection from economic dismissal in the form of a redundancy payment was instigated in1965[136] and it has become incorporated into the current unfair dismissal statute: The core sections relating to redundancy are to be found in Sections 105, 109 and 139 of the ERA 1996. The first thing we need to note is that redundancy is a potentially fair reason for dismissal under section 98(2). An employee will be classed as redundant if the employer can fulfil the requirements of the statute in section 139. This section has been subjected to much debate[137] on its appropriate interpretation despite its seemingly plain words. This confusion seems to have been settled by the comparatively recent judgment in the House of Lords of *Murray v Foyle Meats*[138] which authoritatively approved the test laid down in the EAT in the case of *Safeway Stores v Burrell.*[139] In *Burrell* the EAT concluded after much discussion that section 139 required a three stage process:

1. was the employee dismissed? If so,

[136] Redundancy Payments Act 1965 - This was 6 years before unfair dismissal became a much more generally protected right.
[137] See generally Smith and Wood (2003) at page 625; Barnard – (2000) Redundant approaches to redundancy; Deakin and Morris (2001); page 502; The transcript of *Safeway Stores v Burrell* [1997] IRLR 200 also provides a thorough analysis of the history of the changing tests.
[138] [1999] IRLR 562
[139] [1997] IRLR 200

2. had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were they expected to diminish? If so,
3. was the dismissal of the employee caused wholly or mainly by the state of affairs indicated at stage 2?[140]

In giving the leading judgement in the House of Lords in *Murray,* Lord Irvine said:

> 'This conclusion [that it was a situation of redundancy and not unfair dismissal] is in accordance with the analysis of the statutory provisions by Judge Peter Clark in *Safeway Stores v Burrell* and I need say no more than that I entirely agree with his admirable clear reasoning and conclusions.'[141]

Lord Irvine approved a very pro-employer test when it comes to deciding whether a redundancy situation exists or not. He said the tribunals must ask themselves two 'simple'[142] questions of fact:

> 'The first is whether one or another of various states of economic affairs exists....The second question is whether the dismissal is attributable wholly or mainly, to that state of affairs. This is a question of causation.'[143]

This test has been described as:

> 'The Lord Chancellor[as he was then] adopts a broad, practical approach but in doing so effectively air-brushes the words 'work of a particular kind' from the face of the statute: The statute does not say "there is a redundancy whenever a dismissal is attributable to a diminution

[140] ibid at page 200
[141] At paragraph 6
[142] Lord Irvine has caused much amusement amongst academics and students with his nonchalant dismissal of section 139 being 'simplicity itself'
[143] At paragraph 6

in the employer's requirements for employees", but that is the effect of the Lord Chancellor's approach.'[144]

The result of the decision and it could be argued creativity in 'airbrushing work of a particular kind out' is that employers have a large amount of flexibility when it comes to redundancy situations[145]. This is not surprising as the judiciary have consistently held the view, as illuminated in *Nolan* above, that nothing should interfere with employers right to re-organise in the interests of efficiency:

> 'It is settled...that an employer is entitled to reorganise his business so as to improve its efficiency and, in doing so, to propose to his staff a change in terms and conditions of their employment; and to dispense with their services if they do not agree. Such a change does not automatically give the staff a right to redundancy payments. It only does so if the change in the terms and conditions is due to a redundancy situation.'[146]

This deference and hands-off approach towards redundancy is, it is submitted, not very controversial. Part of this reasoning is the fact that when an employee is made redundant he does at least receive something as recognition for his service; there is an element of financial stability given by the redundancy payment. There is sound law and economics theory behind the application of a redundancy payment and the judiciary's approach to make it easy to classify dismissals as redundancy can potentially be seen as attributable to that.

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[144] Barnard (2000); at page 38

[145] There is also a line of thought which suggests *Murray* clears the way for a practice known as 'bumping employees' – this is because employees who are bumped will be able to claim redundancy but not unfair dismissal – the cost of redundancy being much lower – see Smith and Wood (2003) at page 630 for more in-depth discussion.

[146] *Johnson v Nottinghamshire Combined Police Authority* [1974] 1 All ER 1082; at 1084

When the redundancy payment was introduced Otto Kahn-Freund very insightfully commented that it was:

> '[A] method of strengthening management control by breaking down resistance to dismissals which were necessary for efficiency and labour mobility, one of the most urgent needs of our economy.'[147]

Proponents of law and economics theory suggest that redundancy payments facilitate the change that is necessary for economic efficiency to occur because it compensates those who 'make sacrifices in the interests of economic expansion.'[148] It must be noted that not everyone accepts this view and there is some suggestion that the presence of redundancy payments (and their relative low cost) actually encourages 'excessive layoffs.'[149] It would however still seem more beneficial to a company (and the national economy) to make some workers redundant than to allow the company to go bust because it could not afford its wage bill. If this were to happen, the allocation of resources would fall squarely on the shoulders of the government; in the eyes of law and economics this is a comparatively worse result than making some workers redundant because it is inefficient resource allocation.

The presence of a redundancy payment in economic dismissals also has a positive effect on employers in exercising their mind properly before taking the decision to make employees redundant. In a very similar way to that found in procedural fairness, the cost of redundancy forces an employer to weigh up the options and make the most efficient decision. This should in theory mean that decisions to dismiss are made out of economic necessity and not for arbitrary or capricious reasons. Economic

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[147] In Lewis (1979); at page 214
[148] See Beck (1999); at page 99
[149] Ibid

dismissals can be understood clearly from an efficiency perspective and it seems that the Statute has been interpreted in this way. A law and economics analysis is therefore appropriate and many would argue obvious.

2.8.1 Some other substantial reason (SOSR) and its use as a law and economics vehicle

Of much greater controversy and confusion is the application and scope of 'Some Other Substantial Reason' ("SOSR"). Section 98 as has already been established is the lynch pin of the unfair dismissal legislation and covers situations where dismissals may be fair. As well as indicating categories of reasons which are capable of rendering a dismissal is fair, it also includes scope that the reason for dismissal may be:

> '[S]ome other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'[150]

If an employee puts forward SOSR as the principal reason for dismissal then it again is subject to section 98(4) and the test of fairness as perpetrated by BORRT. The main use of SOSR in the tribunals has been in the area relating to changing business needs and reorganisation, where its presence and use has had the effect of 'greatly expanding the scope of legitimate economic reasons.'[151] The presence of SOSR is evocative, with some calling its use potentially *'Chimerical'*[152] while others have used just as powerful rhetoric to point towards its necessity:

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[150] Section 98 (1(b)) ERA 1996
[151] Deakin and Morris (2001); at page 475
[152] Bowers and Clark – (1981) unfair dismissal and managerial prerogative: A study of "other substantial reason"; at page 34

> 'To achieve a sensible balance, the employer must somehow be allowed to make changes necessary for the efficiency (and in the extreme case the survival) of the enterprise.[153]

SOSR when used in an economic dismissals context *prima facie* seems to have the effect of circumventing redundancy as the reason for dismissal, thus releasing the employer from the liability of a redundancy payment and leaving the employee with nothing. But is this a correct reading of SOSR and what restrictions have the judiciary put on its use through their interpretation? To answer this question, we first have to look at how SOSR developed.

It has existed in its present form from the very beginning of the statute's history and surprisingly despite the effect it has of subverting some of the intentions of ILO Recommendation 119 it does not seem to have been discussed in Parliament.[154] This means we have very little idea how wide Parliament intended SOSR to be construed and the plain meaning of the statue does not offer much guidance. The scope of SOSR was considered by the National Industrial Relations Court (NIRC)[155] in the early case of *RS Components v R E Irwin*[156] and the interpretation offered has prevailed throughout the tribunals and courts since.

The appellate hearing in *Irwin* was because the tribunal had proceeded on the basis that a reason for dismissal is not capable of being SOSR unless it is a reason *ejusdem generis* (of the same kind or nature) with the reasons specified as potentially fair

[153] Smith and Wood (2003); at page 599
[154] See Bowers and Clark (1981); at page 34
[155] The forerunner to the EAT
[156] [1973] IRLR 239

reasons for dismissal in section 98(2). Brightman J in the NIRC held in unequivocal terms that:

> 'A reason for dismissal falling within the terms 'some other substantial reason' in [s.98(1(b))] does not have to be a reason *ejusdem generis* as the reasons specified in [s.98(2)]. For whilst Parliament may well have intended to set out in [s.98(2)] the common reasons for a dismissal, they can hardly have hoped to produce an exhaustive catalogue of all the circumstances in which a company would be justified in terminating the services of an employee. In some situations, such as the need to restrict use of knowledge etc, it would be unfortunate if an employer were unable to meet the situation without infringing or risking infringing rights conferred by the [ERA 1996].'[157]

This very wide interpretation arguably has to be constrained within the umbrella of fairness because the NIRC seemed to qualify its comments by saying:

> 'We do not quarrel with the Tribunals proposition that the words 'substantial reason of a kind such as to justify...dismissal ought not as a matter of good industrial relations and common fairness to be construed too widely against an employee'...The words must be construed according to the ordinary canons of construction and consistently with the manifest intention of the Act.'[158]

Yet this statement is ambiguous and unhelpful. We have already noted that Parliament made no mention of how SOSR was to be interpreted or what its aim was. To interpret its scope in line with the rest of the Act presents a unique set of problems. Depending from which viewpoint you look the aims of the Act can be 'fairness' or just as plausibly 'increased efficiency in the workforce.'[159]These are obviously in stark contrast with one another and the interpretation of SOSR would naturally differ; if the aim was fairness then SOSR would be interpreted very narrowly with reasons

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[157] ibid page 239
[158] ibid page 239
[159] See chapter 1 n64

being *ejusdem generis* with s.98(2) and therefore SOSR would act as a 'safety valve, allowing a potentially fair dismissal in situations closely analogous to those listed.'[160] If however the aim is efficiency then it would seem logical to construe SOSR widely in order to give employers maximum flexibility and avoid statutory liabilities when dismissing for economic reasons. As such common fairness would only come into play where decisions by the employer were perverse or not in the interests of efficiency:

> 'The principal concern of the NIRC in *Irwin* was apparently to preserve free of legal control the power of the employer to initiate changes beneficial to the development of industry without incurring the costs of unfair dismissal or of redundancy compensation.'[161]

This would seem to evidence which way the NIRC thought SOSR should be construed and this widening of the scope of SOSR has seemingly pervaded throughout the past 33 years with Bowers and Clarke bemoaning the very wide scope of SOSR and saying that as result:

> 'In very few reported cases have employers not reached the threshold of substantiality.'[162]

The academic criticism surrounding SOSR is concentrated on saying the scope is too wide and as a result it is being implemented in a way which is against the legislative aims. Bowers and Clark recognise that an element of flexibility is needed but say the threshold is too low[163] whilst Collins states:

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[160] Deakin and Morris (2001); page 475
[161] Ibid
[162] Bowers and Clark (1981); page 35
[163] (1981) At page 37 – they also suggest that some tribunals have taken to viewing SOSR through wednesbury unreasonableness spectacles and as such often the scope given to it will only be interfered with if it seems perverse.

> 'The employer has an easy ride to justify the dismissal under the rubric of other substantial reason as soon as the employer appeals to business considerations, for the court will not in general look behind the business reasons and assess their merits.'[164]

This reticence by the judiciary to look behind SOSR has been acknowledged in the Court of Appeal, where they said:

> 'It was not open to the court to investigate the commercial and economic reasons which prompted the closure. It may be that the court should have this power, **but it does not have it at present.'**[165]

It would seem therefore that SOSR has been given a wide scope, which is very much in the employers favour. However, like many other parts of the unfair dismissal legislation it does not have a definable controlling criteria as evidenced by Lord Denning's statement in *Hollister v NFU,* where he said SOSR can be used when there is:

> 'Sound and good business reason for the reorganisation'[166]

What 'sound and good business reasons' are is not illuminated and would seem to remain as elusive as defining reasonableness in BORRT. This great width is worrying because of the effect SOSR has had in expanding the area of economic dismissals. Now, economic dismissals that are not for redundancy[167] will not necessarily be unfair but be justified by SOSR thus avoiding any liability. The limits of SOSR and its operation can however be understood if we view law and economics as the controlling mechanism.

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[164] Collins (1992); at page 66
[165] *James W Cook & Co v Tipper* [1990] IRLR 386
[166] *Hollister v National Farmers Union* [1979] IRLR 238; paragraph 12.
[167] Which has been narrowly defined by the case law

It would seem in the environment of business re-organisation and economic dismissal efficiency is controlled by flexibility and necessity. We can see from the cases that the increased scope given to SOSR by the judiciary generally occurs when one of these functions is at stake. This is recognised by Bowers and Clark:

> 'A review of the 'reorganisation' case law shows the EAT and Court of Appeal appearing to accept as valid employers' claims that to compete efficiently in a free market they must be allowed latitude to trim their workforce and make 'efficient' their work methods without being hampered by laws protecting their workers.'[168]

There is no better summation of this point than in *O'Hare and Rutherford v Rotaprint,*[169] where Kilner Brown J says:

> 'The problem here is whether or not the employer can avoid the implication of payment for redundancy where he has over-manned his work force to cope with work which never materialised. Common sense would indicate that he should...It would be disastrous to the national economy if employers were to be inhibit from taking justifiable risks in planning increased production, and taking on increased labour, with high hopes of fuller employment, by the thought that they may be saddled with claims for redundancy payments if they have to cut down on the workforce because their hopes have not been fulfilled.'[170]

In this case, the tribunal took the view there was a necessity to avoid the redundancy payments in order to keep the business efficient. This wide reading of SOSR can be seen to cause great injustice to dismissed employees who lose their job through no fault of their own and still receive no compensation. But this view must be tempered by the bigger picture, that a failure to allocate resources in the most efficient way will cost society more in the long term.

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[168] Bowers and Clark (1981); page 39
[169] [1980] IRLR 47
[170] ibid paragraph 11

Again, if we turn to the familiar case of *St John of God Healthcare and Brooks* we can see the judiciary upholding SOSR as another potentially fair reason for dismissal because the employer needed the flexibility to be able to dictate new employment terms. If the tribunal had indicated *Brooks* was in fact redundant, the employer could have been facing 170 redundancy payment claims and would have then had to incur the cost of hiring new staff on top of that. This is obviously not efficient and would have probably caused the closure of the business. As a result, by circumventing the Redundancy Payment and holding that the dismissals could also be fair for SOSR the tribunal were allocating resources in favour of the employer because he had the greater need for flexibility and thus the employer could carry on employing the majority, which is the most efficient outcome for the employer and the State.

One more case, which we have briefly touched upon, will suffice to illustrate the point that SOSR once seen as controlled by law and economics, has a logical rationale. In *Hollister v National Farmers Union*[171] Mr Hollister was dismissed for refusing to accept a new contract of employment, which was designed to bring him and other employees into line with the rest of the Country. This reorganisation was as a result of submissions by the Cornish Mutual (for whom Mr Hollister worked) to the effect that they were disadvantaged compared to others in the UK because they could not offer life or fire assurance. The reorganisation meant that there would be increased remuneration for the employees but also less advantageous pension arrangements. Mr Hollister refused to accept the new terms and as a result was dismissed. He claimed unfair dismissal. The Court of Appeal restored the industrial tribunals view that the dismissal was fair for SOSR.

[171] [1979] IRLR 238

The words of Lord Denning are particularly illuminating:

> 'It was recognised by the Court in *Ellis v Brighton Co-operative Society* [1976] IRLR 419 that "where there has been a properly consulted-upon reorganisation which, if it is not done, is going to bring the whole business to a standstill, a failure to go along with the new arrangements may well constitute 'some other substantial reason.'" Certainly, I think, everyone would agree with that. But in the present case Mr Justice Arnold expanded it a little so as not to limit it to where it came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation. I must say I see no reason to differ from Mr Justice Arnold's view on that. It must depend in all circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement. It seems to me that that [sic] paragraph may well be satisfied [s.98], and indeed was satisfied, in this case, having regard to the commercial necessity of rearrangements being made and the termination of the relationship with the Cornish Mutual, and the setting up of a new relationship via the NFU Mutual Insurance Ltd. On that rearrangement being made, it was absolutely essential for new contracts to be made with the existing group secretaries: and the only way to deal with it was to terminate the agreements and offer reasonable new ones. It seems to me that that [sic] would be, and was, a substantial reason of a kind sufficient to justify dismissal.'[172]

We can clearly see that SOSR was justified in the mind of Lord Denning because of the necessity to make efficient change; it was for 'sound good business reason' and as such the employer should not be penalised with financial liability. To not have this result would be bad for the economy because dismissal for economic reason would potentially cripple business leading to reluctance to dismiss, which could ultimately lead to greater job loss and more cost to the State.

[172] ibid paragraph 12

The evidence points towards SOSR being another law and economics vehicle. If we see the promotion of efficiency as the rationale behind SOSR, then we can see a logical rationale which provides certainty and definable boundaries. SOSR can be interpreted as widely or narrowly as necessary in order to bring about an efficient result, whether that be in the employers favour (as it often is) or not. It would seem therefore that once again law and economics provides a tenable solution to the problem of coherence with regard to SOSR which also fits in the context of a new efficiency understanding of unfair dismissal as a whole.

Prondzynski who quotes the unreported case of *Feltham v Co-op Insurance Society*[173] aptly supports this conclusion:

> 'It is established law that the employer is entitled, subject to the requirements of reasonableness, to run his business in the way he thinks right and that Parliament has protected the rights of business to reorganise the business.'[174]

SOSR gives freedom in reorganisation, which in theory results in efficiency. When we place SOSR into the control of law and economics it does not appear so 'chimerical' in its uncertainty of application, although it must be acknowledged that its very presence is of concern to many interested in equity. Prondzynski continues:

> 'It is indeed possible to argue that 'fair' grounds for dismissal under the ERA 1996 amount to **a charter of employer rights**, particularly in light of their interpretation by the courts. But these provisions would be less unpredictable in their effect if they formed part of a more coherent and deliberate statutory framework to set out the **employer interests which should receive protection in the public interest.**'[175] (emphasis added)

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[173] 29 July 1998

[174] Prondzynski, F – (2003) Labour Law as a business facilitator; at page 109 in *'Legal Regulation of Employment Relation'* Eds Collins, Davies and Rideout

[175] Ibid page 109

It is precisely this function, of giving a framework that illuminates the rights in the public interest, which a law and economics analysis has sought to fulfil. The drive for efficiency in the judiciary is perhaps best summed up by Phillips J, whose comments would seem to resonate with that of law and economic theory:

> 'It is important that the operation of legislation in relation to unfair dismissal should not impede employers unreasonably in the efficient management of their business, **which must be in the interests of all**'[176]

In summary, it is suggested that the judicial use of BORRT and SOSR and the subsequent rise in procedural fairness at the expense of substantive fairness is in order to facilitate efficiency, which is in the interests of all. Law and economics brings coherence and provides an underlying rationale.

[176] *Cook v Linnel* [1977] IRLR 132

Chapter 3 – Failing to give the right remedy?

The level of job security an employee has will determine the remedy they receive. However such simplicity has not been seen in the operation of the unfair dismissal legislation, the foggy haze of confusion surrounding the determination of the appropriate remedy and the correct level of job security seems to be permanent. There seems little understanding or acceptance as to why the judiciary have taken the stance that they have and how they actually interpret the statute. This lack of clarity is not satisfactory when one considers that the judicial determinations have a massive impact on individuals and employers. This chapter will look individually at job security and remedies before turning to consider why the judiciary have steadfastly resisted the increased use of wrongful dismissal, which does not suffer from the same confusion as to its rationale. Looking firstly as job security, we will consider what the legislation envisaged as 'job security' before suggesting job security is in fact far more complex than is commonly understood. We will look at some different suggestions for how job security should be interpreted before developing an existing theory of tri-partite differential distinction to show that law and economics suggests efficiency is in fact the controlling factor for the judiciary's differential and seemingly confused approach.

The second part of this chapter will concentrate on the remedies available. After detailing what the legislation provides for, we will then turn to discuss the difference between the ideology and the reality. We will discuss these reasons in depth and bring together a common thread that links them. This thread is efficiency and it will be seen

that efficiency casts new light on the judiciary's approach and brings with it illumination of a consistent coherent rationale.

The final area of this chapter will concentrate on the potential in using the common law action of wrongful dismissal as a claim. This area is pertinent because with so many problems surrounding the unfair dismissal legislation, a natural conclusion would be to seek to use the common law as a different avenue for claims. The judiciary have steadfastly resisted attempts to do this and have in fact gone further and minimised its impact. It will be shown that the explanation for this can be found in law and economics and that ultimately we will see that a law and economics rationale pervades through the judicial mindset in their approach to dismissal.

Unfair dismissal legislation has received sustained criticisms in some quarters because the critics believe the remedies available are too weak and are responsible for:

> 'significantly detracted from the aim of improving job security.'[1]

Job security and remedies would seem therefore to be causally and proportionally linked. The importance the legislation or judiciary place on one will have a direct impact on the other; an increased desire by the judiciary to give employees greater job security would likely see an increase in the potency of the remedies. Similarly a decrease in the scope of remedies will suggest job security is not a priority. However the contention and unhappiness surrounding their roles in unfair dismissal remain distinct. It is for this reason that we will approach them as two separate areas, whilst remembering that they are indeed linked. This separatist approach will enable us to

[1] Collins, H – (1992b) The meaning of Job Security; at page 228

look at the subtle differences in the logic of the judiciary when applying a law and economics theory.

3.1 Job Security

The overriding criticism surrounding unfair dismissal is that it has failed to provide meaningful job security. This popular perception is built upon the foundations of what a job means to people, especially when thinking of a jobs semantic definition. White acknowledges this:

> 'While a job is an abstraction, it is customary for a worker to refer to 'my job', or for an employer to talk of 'giving jobs'. It seems but a short step to objectify the concept of a job as a form of property, as a tangible possession. A worker can come to treat his job as a valuable possession: apart from the income it yields, it can provide personal satisfaction, enhanced personality, and a source of companionship through shared work experience... When a worker loses his job – an allusion, yet again, to a possession - he can said to have been deprived of his property.'[2]

It is easy to see how a perception of job security, which is equivalent to a property right, can grow from the language society uses. This perception is fuelled by the importance of a job to many people. The introduction of the unfair dismissal legislation served to buttress this understanding as it seemed to advance:

> 'the promise of job security, the right to work, even a property right.'[3]

Viewed in these terms, any dismissal must be an invasion of job security, and as such would be unlawful as there is a promise of job security.[4] Yet within 3 years of the legislation coming into effect, the legislation was criticised as it seemed it had:

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[2] White, P J (1984); at page 98
[3] Hepple (1992);at page 96
[4] See Collins (1992b); at page 229-231

'advanced the cause of employee job security hardly at all.'[5]

This criticism could be levelled at the legislation 30 years later just as easily, so where has it broken down. Was job security an initial aim? What sort of job security did Parliament have in mind? Has the judiciary frustrated the intentions of Parliament with a differing interpretation of job security?

Collins suggests that whilst job security was not the only aim of the unfair dismissal legislation[6] it was still a repeated aim:

> 'The principal rhetoric in support of the legislation, and the repeated justification for it, emphasise the view that one of its principal motives and intended effects included the improvement of job security. In its boldest from, this rhetoric claimed that the legislation granted workers property rights in their jobs.'[7]

But it does not appear that Collins is wholly correct in this confident assertion. When recourse is made back to the aims[8], it does not seem to indicate any intention to create a stringent job security protection[9].

The first thing we can deal with is that the Act had no intention of creating a property right in the job for employees. White stresses that:

> 'Ministers in Parliament did not cite the rationale of property rights, either in 1971 when the unfair dismissal legislation was introduced, or in 1975 when ostensibly substantial amendments were enacted. In other words, the connection between law and property rights

[5] Williams, K – (1975) Unfair dismissal and job security; at page 292
[6] See chapter one for a full discussion of the aims of the legislation
[7] Collins (1992b); at page 227
[8] Looking at what was said by Parliament and the highly influential Donovan Commission
[9] For an overview of what has been said see Davies and Freedland (1993) at pages 197-205 and Hepple (1992) at pages 80-83

has been made by people outside Parliament: Motives have been imputed to politicians rather than uttered by them.'[10]

Deakin and Morris put it even more strongly when talking about property rights in jobs:

'to claim that the provisions of the statute amount to an improvement in employment security is akin to arguing that legislating for insurance cover for a proportion of road users would be about safety.'[11]

We can buttress the suggestion that Parliament never intended to create stringent job security with reference to the inadequacies of the remedies. We will look at in much greater depth below the problems surrounding remedies but for now its suffices to say that the broad brush stroke is one of the remedies not being of sufficient punitive strength on the employer and as a result the legislation pertaining to job security having the appearance of a paper tiger. If Parliament had a serious intent to implement stringent job security then it would be expected they would enforce this with the creation of appropriate remedies. As we will see below when we consider remedies this has not occurred and it would seem a conclusion can be drawn that, as quoted at the beginning of this chapter, the inadequacy of the remedies does not aid the quest for an inferring an intention of stringent job security.

But if there was no intention to create property rights in the jobs for employees or put another way stringent job security protection, what did the legislation envisage giving the employee? Because without any protection at all the legislation would be nothing

[10] White (1984); at page 103
[11] Deakin and Morris (2001); at page 388

more than the proverbial chocolate fireguard. This is not an easy question to answer because 'job security' can have a multiplicity of meanings.

> 'The notion of 'job security', for example, can be taken to imply that a worker is protected in the *particular job* which he or she holds; this in turn presupposes the existence of quite rigid job classifications and, from a regulatory perspective, the placing of limits on the employer's right to change those classifications at will. At the opposite extreme, 'employment security' in its widest sense could be taken to refer to the availability of employment opportunities in a given economy; if this is the goal, economic and regulatory policy should be concerned to maximise the chances of employees finding a job and being able to move between jobs throughout their career, rather than being protected in relation to a given job which they might hold at any one time. **Dismissal legislation does not fit neatly in either of these definitions.**[12] (emphasis added)

White suggests that job security is best understood as not giving property rights except in the narrowest of senses because the 'statutory right seems to constitute only a title to a meagre amount of compensation income not a title to the control, recovery or disposal of a valuable asset which yielded that income'[13]. The viewpoint of Neo-classical economists would suggest the concept of job security is one which should be construed to facilitate high levels of employment in the economy, that is that the employment relationships should be *pareto-efficient*[14]. Through this myriad of potential differences as to the correct construction and conception of the notion of job security the simplest and most insightful definition would seem to be that found in Deakin and Morris, where it is suggested that the level of protection Parliament had in mind and the level the judiciary should uphold is:

> 'Security **only** from ungrounded or arbitrary job termination'[15] (emphasis added)

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[12] ibid at page 383
[13] ibid at page 104
[14] See Collins, (1992b); at page 228
[15] Deakin and Morris (2001); at page 385

This definition still falls some way short of providing a definitive answer as to the level of job security intended or indeed the rationale behind this approach. It is perhaps the dissatisfaction with this definition that prompted Collins to come up with his 'taxonomy of job security in dismissals theory'[16] He suggests that the concept of job security is actually best understood by reference to a taxonomy of dismissals. He distinguishes three classes:

- Economic (redundancy)
- Public (this is better understood by reference to Automatically Unfair Dismissal)
- Disciplinary (this includes misconduct and incompetence)

He then goes on to state that the legislation protects job security against these three types of invasion by dismissal but offers different levels of protection against each.[17] He says economic dismissals provide very little job security and the judiciary's interpretation of the law scarcely makes any attempt to prevent or deter dismissal. The existence of redundancy pay is in order to minimise the social cost and reduce resistance to necessary change. There is no benefit to the economy of forcing employers to retain staff if there is a decrease in demand for labour as that could easily cause the business to become insolvent, leaving a greater number of dismissals and the government to internalise the cost. This minimal level of protection is ' a side effect not a goal of the legislation.'[18]

[16] See 'The Meaning of Job Security' for a brief overview or 'Justice in Dismissal' for much greater depth
[17] Collins (1992b); at page 232
[18] ibid at page 233

Collins suggests that Public dismissals are best understood as a response to the subversion of civil rights not simply protecting job ownership. Whilst the effect of the aim can be to keep individuals in their jobs, *'the fundamental aim consists in the protection of these civil rights against threats from whatever quarter.'*[19] So this much higher level of protection is designed to stop employers acting in a discriminatory way and can be attributed to the value society places on equality not job security.

Disciplinary dismissals present a more complicated situation. Here the principles of fairness and competitiveness clash head on. The first thing to be noted is a re-affirmation that job tenure is not an aim in itself. This can be seen from the fact that the legislation envisages fair disciplinary dismissal and as such buttresses the contention that 'property rights' were never an intention of the legislation.

Collins baldly suggests that the measure of job security can be best understood not with reference to the relief of poverty but the respect for dignity and employee autonomy:

> 'The conception of job security in disciplinary dismissals is neither some partial protection of ownership of jobs nor some inefficient and ineffective relief of poverty, but rather one which recognises that a measured society which seeks through its political and economic institutions to realise in a practical way the value of respect for the dignity of individuals and to establish the conditions necessary for the enjoyment of autonomy.'[20]

Collins tripartite idea seeks to give a framework of understanding as to the scope and rationale of job security. The allowance it makes for a variable construing of job security is on the whole helpful in aiding our understanding of the rationale of the

[19] ibid at page 234
[20] ibid at page 237

approach of Parliament and the judiciary, but it does not seem to provide a full answer because with regard to disciplinary dismissals the framework relies heavily on autonomy and respect for dignity.

We have, however, seen a number of cases in chapters' one and two that would seem to vitiate this theory of respect for dignity and autonomy. Mr Saunders[21] certainly did not seem to receive much respect for his dignity yet was found to have been fairly dismissed. In a similar vain, Mr Pays[22] also suffered detriment despite receiving no respect for dignity or his autonomy. Bearing these cases in mind, the framework and rationale suggested by Collins does not seem entirely satisfactory.

The position which is left is one whereby no one is quite sure what job security actually means. Is it analogous to a proprietary right[23] or is it best understood as merely freedom from arbitrary managerial power? Does that understanding have to be interpreted in light of which type of dismissal situation is occurring? As can be seen, the issues surrounding job security are anything but plain and as a result there is much criticism as to the approach taken by the judiciary. It is necessary to provide some form of consistency to job security so that reform can be better informed and as an important corollary, remedies can become more effective in facilitating the appropriate definition of job security. Therefore it is appropriate to turn to the theory of law and economics to see if it can provide any coherency.

3.2 Law and economics provides 'security'

Job security is the antithesis of efficiency. This is starkly stated by Ewing:

[21] *Saunders v Scottish National Camps*; See chapter two n42
[22] *Pays v Lancashire Probation Service*; See chapter one n4
[23] See White (1984); at page 101

> 'The careful pursuit of statutory guaranteed protection against disadvantage for every individual circumstance can thus yield for many people, the severest disadvantage of all – the lack of a job.'[24]

Collins in unpacking this notes:

> 'The benefits to the community as a whole would be severely impeded if each worker could insist upon retention of his or her job, regardless of competence or effort. As well as harming productive efficiency, ownership of jobs would create friction in the labour market, by preventing reductions in the workforce to meet the declining demand and by discouraging workers from finding a new job...By granting a worker the right to remain in possession of a particular job, regardless of whether useful work remains to be done, a property right in a job would block necessary adjustments to market conditions in the productive activities of a community.'[25]

This argument, that a property right reduces resistance to change and harms efficiency, is premised on the free market doctrine of *employment-at will*[26]. This doctrine has at its very heart the concept that a free market will promulgate efficiency. As a result the doctrine suggests there should be no restriction on the employer to 'hire and fire' as he sees fit, because the result will always be in the interests of efficiency. This idea is based on the misguided assumption which Epstein, in a very robust defence of employment-at-will, helpfully illuminates[27]. He states that employment-at-will mirrors freedom of contract and as such will be efficient because the free market creation of contracts will always be efficient. As a result of this he equates freedom of contract to fairness to the employee; they have the right to choose to enter into employment and the right to leave at any point. Thus, through essentially

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[24] Ewing, KD (1990); at page 634
[25] Collins (1992); at page 11
[26] For a more detailed explanation of employment-at-will see chapter 2.5
[27] Epstein, R – (1984) In defence of contract at will

a rehashing of the *Invisible Hand* argument, Epstein concludes that employment-at-will can be equated with fairness.

For reasons already outlined in chapter one, this proposition is not as convincing once one considers the inequality of bargaining power in the contract of employment and whether there really is freedom of contract. However it does raise a very interesting question. If job security is the anathema of efficiency and as such employment-at-will is the only way to obtain efficiency how can we reconcile the situation we have whereby the legislation is clear that employment-at-will is unlawful? Put another way, we have established that the level of job security under the legislation is akin to 'security only from ungrounded or arbitrary job termination' yet this falls short of employment-at-will which is dismissal for 'any reason or no reason at all'. Does this defeat our ability to construct a law and economics framework in which to analyse job security?

Arbitrary dismissal can be extremely bad for efficiency as it can lead to a decrease in productivity whilst the dismissed individual is replaced and the new employee trained. It can also lead to a decrease in morale again negatively impacting on the productivity of the firm. Of course, those in favour of employment-at-will[28] argue that fear of damage to an employers reputation will stop them from acting wrongly:

> 'The employers interest in maintaining a reputation for fair treatment of employees, may also deter invasion of the employee's freedom and integrity. Obviously, an employer who becomes known for unduly compromising the individuality of his employees may find it difficult to hire and keep them.'[29]

[28] See Posner, R – (1984) Some economics of Labor Law; Epstein (1984)
[29] Blades, L E – (1967) Employment at will vs. Individual freedom: On limiting the abusive exercise of employer power; at page 1412

This argument may at first sight seem logical but it must be remembered it is very rare that the employment relationship is at equilibrium or that there is a job surplus. Blades point this out:

> 'Especially during times of abundant labour supply, an employer may think it unnecessary to be concerned about his reputation in this respect; and even if he is concerned, he may be able to exert his influence to silence those employees who are affected, and thereby ensure that his coercion will never become known. The interest in maintaining favourable reputation cannot be regarded as a very substantial deterrent to the employer who is tempted to bend his employees to his will.'[30]

This indicates that perhaps employment-at-will will not always provide an acceptable level of self-regulation and as such cannot claim to be wholly efficient. Raday's detailed study of the cost of dismissal[31] illuminates yet another problem employment-at-will has with regard to fitting into a law and economics theory. He notes that:

> 'A no-fault at-will contract avoids ... monitoring and enforcement costs but may add significant social costs caused by opportunistic behaviour.'[32]

Law and economics deals with the efficiency of allocating resources and there is considerable weight to the argument that allowing a fully unrestricted dismissal at-will actually constitutes inefficiency in the allocation of resources; by allowing the employer to avoid any cost associated with dismissal it means the State becomes solely responsible for any social costs which may arise. This inefficiency could be compounded as there is no duty on the employer to exercise his mind as to the appropriateness of the dismissal. The can result in the State supporting dismissed

[30] ibid at page 1413
[31] Raday, F – (1989) Costs of Dismissal: An analysis in community justice and efficiency
[32] ibid at page 197

individuals whilst the employer experiences no increased efficiency gain, thus giving overall a net loss to the national economy.

It would seem therefore that a completely unrestricted employment-at-will approach may not always be in the best interests of efficiency or the economy when considering dismissal and as such not a wholly satisfactory explanation for the judiciary's approach. The precise scope of job security therefore seems to have to fall somewhere between stringent proprietary job security and employment-at-will because both extremes provide efficiency problems.

It is at this point helpful to turn back to the framework suggested above. It will be remembered that Collins suggested a tripartite differential approach to job security. The sticking point we identified was that disciplinary dismissals were to be justified on grounds of respect for dignity and autonomy. Collins however hints at some other controlling mechanism surrounding disciplinary dismissals when as a defence to the claim that all disciplinary dismissals vitiate any respect for dignity, he states they are:

> '[N]ot grounded in disrespect for the individual himself, but in a legitimate concern to promote the **general welfare achieved by efficient production.**'[33] (emphasis added)

Here we find implicit acknowledgement that efficiency is the root of decisions on the scope of job security. Once this is acknowledged the rationale behind a variable job security becomes much clearer. Obviously in economic dismissals there is no efficiency gain in enforcing stringent job security, it merely leads to greater job loss over time. It is much more efficient to reduce resistance to change and help the

[33] Collins (1992); at page 336

displaced workforce find other jobs, which decreases the burden on the State. This was the stated policy behind the Redundancy Payments Act 1965[34] that the compensation helped reduce resistance to change and created a more flexible workforce[35]. Therefore by giving compensation and with that a low level of job security, there is the most efficient allocation of resources. With public rights dismissals, efficiency is displaced by fundamental rights and as a result more stringent job security is enacted. This does not interfere with a law and economics analysis because it is a situation where law and economics is not appropriate (as the result of democratic decision) and as such has no influence.

The rationale behind disciplinary dismissals also becomes clearer. By only giving job security against 'arbitrary or ungrounded termination' the legislation provides an incentive for employers to exercise their minds and follow correct procedure before dismissing, without prohibitively burdening them. This aids efficiency because it pushes employers to not dismiss without just cause. Essentially it leaves the position that if it is in the interests of efficiency to dismiss an employee then this is acceptable, as long as the employer can show they have exercised their mind properly in reaching the decision:

> 'From a purely economic perspective, it is unclear why rational employers would ever fire workers for anything but good cause.'[36]

By applying a law and economics analysis to job security we can avoid Collins complicated reasoning behind the tripartite distinction and merely view the differing

[34] Which was subsumed into the unfair dismissal legislation.
[35] See Collins (1992); at page 165
[36] Harvard Note (no cited author) – (1989) Employer Opportunism and the need for a just cause standard; at page 517

levels of job security as being controlled by efficiency. This means we can see variable job security as controlled by the boundaries of efficiency, giving it certainty in its operation. Law and economics provides the rationale and balance the judiciary and the legislation have used when deciding the correct scope to apply. From a law and economics perspective we can see why such a low level of job security is enacted, because stringent or proprietary job security clashes with the principles of efficiency.

Hepple aptly sums up why law and economics is so influential in the determination of job security when he says:

> 'There is little point in developing this particular human rights guarantee [universal job security] in the employment relationship unless there are also macro-economic policies directed towards the growth of employment and welfare.'[37]

Efficiency seems to be the best lens through which to view the law surrounding job security. It provides a rationale for why there is a differential and flexible level and gives a point of reference that can guide the judiciary. Job security is very much dependent on what is in the interests of efficiency.

3.3 Problems with remedies

As we noted above, job security and remedies are very closely linked. They complement each other and the strength of the remedy is indicative of how much importance is given to job security[38]. We have seen from the discussion above that job security is a complex area and is best understood from a law and economics perspective but is the same true for remedies? Before we can answer this it is

[37] Hepple (1992); at page 96

[38] See Lewis, P – (1981) An analysis of why legislation has failed to provide employment protection for unfairly dismissed employees at page 316 for a good introduction to relationship between job security and remedies.

necessary to take stock of what remedies exist, how they have been implemented and why there is much disappointment in their strength. Only after we have grasped the situation and looked at the potential reasons why compensation has become the only real remedy, will we be in a position to look at law and economics and see if this provides the real rationale.

There has been much discussion as to the appropriateness of the remedies the legislation propounds and the interpretation the judiciary have taken in enacting these.[39] The Statute unequivocally states that the primary remedy should be an order for reinstatement:

> 'The tribunal shall **first** consider whether to make an order for reinstatement'[40] (emphasis added)

The prominence given to reinstatement is backed up by the judiciary with the acknowledgement in the Court of Appeal:

> 'Parliament has indicated that the preferred remedies for unfair dismissal are reinstatement, re-engagement and monetary compensation **in that order**.'[41](emphasis added)

However, in 2004 according to the figures published by the Employment Tribunals Service the percentage of orders for reinstatement was a mere 0.25%[42], a significant drop from the hardly impressive 6% that it was in 1973. This is to be compared with compensation being ordered in 65% of the cases. There would seem a significant

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[39] See Lewis (1981); Haugh, B and Spowart-Taylor, A – (1996) Liability, Compensation and Justice in Unfair Dismissal; Collins (1992); Dickens, Hart, Jones and Weekes – (1981) Re-employment of Unfairly Dismissed Workers: The lost remedy for just a flavour of the discussion

[40] Section 116 ERA 1996

[41] per Lord Donaldson in *O'Laire v Jackal International* [1990] IRLR 70 CA; at paragraph 3

[42] Figures calculated from Report of Employment Tribunals Service 2004 – 11 cases out of 4363 which were upheld

problem with the legislation if its primary remedy is used so shockingly little. The Labour government in *Fairness at Work* implicitly acknowledged the problem expressing hope that:

> 'the voluntary arbitration alternative provided by ACAS will create a change of culture so that individuals who have been dismissed are more likely to get their jobs back.'[43]

The statistics do not seem to match with what the legislation and judiciary say, so it is imperative to discover where the problem with reinstatement originates. This is in order for us to bring a level of coherency to the legislation surrounding remedies, which at present says one thing yet does another. Before we delve into suggestions as to why there is such a low incidence of reinstatement it is wise to spend a brief time defining the different remedies and what the statute says about their application.

3.3.1 Distinctions and definitions

The legislation provides for three different remedies, which as noted above are reinstatement, re-engagement and monetary compensation. Whilst reinstatement and re-engagement are often subsumed in the genus term 're-employment' it would be a mistaken conclusion to draw that they are the same. Sir John Donaldson noted a clear distinction very early on in the legislations history when he said:

> 'reinstatement is retroactive in effect. It involves a revocation of the dismissal and payment of wages for the intervening period. Re-engagement leaves the dismissal unaffected and an intervening period of unemployment...'[44]

In order to further support the distinctions, we will look at each remedy from its statutory perspective and what it is intended to achieve.

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[43] At paragraph 3(4) – Cm 3968 1998)
[44] *Morris v Gestetner Ltd* [1973] 1 W.L.R 1378; at page 1382

Reinstatement – Section 114 of the ERA 1996 deals with this remedy and states:

> '(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.'

In effect the employee is to be put back in to the job they occupied, restored to the benefits they enjoyed and compensated for any loss in the interim. We must note that it is up to the dismissed employee to decide whether they want to seek this remedy and section 116 ERA 1996 says that the tribunal should take into account when considering reinstatement:

> '(a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal whether it would be just to order his reinstatement.'

We will consider below how the judiciary have interpreted 'practicable', but for now it suffices to observe that the remedy of reinstatement seems strong and would seem to have a very positive punitive effect on employers.

Re-engagement – According to Section 116 (2) ERA 1996, this remedy is only triggered when the judiciary have decided against ordering reinstatement. Re-engagement is a noticeably weaker remedy than reinstatement because it only provides for a return to:

> 'employment comparable to that from which was dismissed or other suitable employment'[45]

[45] Section 115 (1) ERA 1996

The big difference between the two remedies is that under re-engagement the individual does not have to be compensated for loss suffered in the interim. The judiciary do however still have a duty to consider the suitability of re-engagement in light of the same criteria as for reinstatement and as such:

> 'If it orders re-engagement, [it shall] do so on terms which are, so far as reasonably practicable, as favourable as an order for reinstatement.'[46]

Both these remedies present quite an onerous burden on the dismissing employer and whilst have different effects can be termed together under the genus heading of re-employment because they both involve, to a differing severity, an imposition of the courts will over the managerial prerogative in terms of the number of employees that should be employed. Both these remedies are distinct from that of compensation because they involve direct interference with the employment relationship as opposed to merely compensating for loss. This is potentially very significant as will be unpacked below.

Monetary Compensation – Despite being the third choice remedy it is the most popular. Compensation is split by the legislation into two categories, basic and compensatory. 'The basic award is meant to reflect the loss of accrued continuity of employment following the dismissal: on finding new employment, the employee will have to begin again to acquire the continuity needed for the purposes of entitlement to a statutory redundancy payment.'[47] The basic award is calculated in precisely the same way as a statutory redundancy payment, so that it is a function of the employee's age, length of service and normal weekly pay at the time of dismissal. The

[46] Section 116 (4)
[47] Deakin and Morris (2001); at page 493

maximum weekly earnings are capped at £280 and the total basic award is capped at £8400. The compensatory award is payable under section123 of the ERA 1996 and is:

> 'such amount as the tribunal considers just and equitable in all the circumstances having regard to loss sustained by the complainant on consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

This amount is now capped at £56,800. The size of the compensatory and basic award has been the source of much discussion over the years. In 1999 the compensatory award was an extremely derisory £12000, but this has been remedied by linking the increase in amount to the retail price index, in order that it would take into account the increased cost of living and reflect a much more equitable award.[48] This is much more in line with the apparent intention of the legislation for the compensatory award to reflect two years pay at average earnings.[49] The situation surrounding the calculation of the basic and compensatory award is extremely complicated with the legislation allowing for a number of reductions relating to employee behaviour. However these do not affect the central premise that compensation is a much more quantifiable remedy from the perspective of an employer, because he can enter a dismissal situation fully aware of the maximum liability he is exposing himself to.

It is quite clear that there is an obvious disparity between the wording of the statute and the reality of the remedies promulgated by the judiciary. This leaves a confused and potentially uncertain picture because the law purports to say one thing yet does another.

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[48] See Collins (2004); at page 67

[49] Hence in 1971 the compensatory award was two years pay or £4,160 which ever was the lesser – the latter being two years average pay – see Davies and Freedland (1993); at page 209

The question which now demands out attention is what potential reasons are offered to explain the low incidence of re-employment?

3.3.2 Reasons why re-employment rarely ordered

Breakdown of trust and confidence – A crucial facet of the employment relationship is that neither party acts in anyway to undermine the trust and confidence in the relationship. Lord Nicholls defined the implied term of trust and confidence as:

> '[The parties] would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'[50]

It is not hard to see that a dismissal which is unfair (i.e. without reasonable and proper cause) is likely to cause some damage to the relationship. If this is indeed the case, then in the words of Lord Johnston in the EAT:

> '[it was] difficult to see how the essential bond of trust and confidence that must exist between an employer and an employee, inevitably broken by such investigations and allegations **can be satisfactorily repaired by re-engagement**.'[51] (emphasis added)

This can be true from the perspective of both parties involved. In the case above the issue was that the employer, despite dismissing the employee unfairly due to not following procedure, still believed in the employee's guilt. Because the employer still had a genuine belief of guilt it was held to not be practical to order re-engagement. This approach has raised fears that:

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[50] *Malik v BCCI* [1997] IRLR 462 (HL); at paragraph 8
[51] *Wood Group Heavy Industrial Turbines v Crossan* [1998] IRLR 680

> 'the implied duty of trust and confidence, which has proved so helpful to employees trying to establish constructive dismissal, should be used to minimise the possibility of orders for re-employment being made.'[52]

From the employee perspective, they may decide that 'the way they had been treated destroyed any desire or willingness to work for the employer'[53]again or in the words of Collins:

> 'The employee may reasonably doubt whether his or her former expectations of betterment through the internal labour market will be realised if he or she is compulsorily reinstated contrary to the wishes of management.'[54]

Put another way, they may fear they will be victimised and as such compensation seems a much more attractive option.

The individual has a new job – Because there is a time lag between dismissal and a tribunal hearing, it likely in some situations that the dismissed employee will have found another job. This eventuality is often forced by the economic circumstances of the dismissed employee and also the statutory duty to mitigate loss.[55]

Impractical to hire – This is often because the job disappeared with the dismissal or somebody else is now employed in that job so there is no vacancy. This would mean re-employment was not practicable.

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[52] Lewis, D – (1999) Re-employment as a remedy for unfair dismissal: How can the culture be changed?; at page 183
[53] Dickens et al (1981); at page 165
[54] Collins (1992); at page 222
[55] See Lewis, P (1981)

Toothless enforcement mechanism – The employer will not incur contempt of court proceedings for refusing to implement a statutory order for re-employment. This was acknowledged by the Lord Donaldson in the Court of Appeal case *O'laire v Jackson International*[56] where he said:

> 'A reinstatement order under s.69 is wholly unenforceable. If such an order is not complied with, whether wholly or in part, the complainant's only remedy is to apply to the Industrial Tribunal under [s.117] for an award of compensation.'[57]

This would seem to indicate that failure to re-employ will only incur further financial penalty and if the employer is determined not to take the employee back there is little the judiciary can do about it. In some ways this sums up the 'paper tiger' nature of remedies in one fell swoop. An employer could well be reluctant to receive back an employee because as well as the breakdown in trust and confidence, the returning employee will act as a constant reminder of the weakness of the employer. It would highlight the fallibility of the employer and possibly undermine other decisions they make which affect the workforce, therefore they can resist and effectively buy their way out, as the cost is quantifiable.

However, it must be noted that the additional award can be quite significant. It envisages two situations; firstly where the employee is taken back but on terms less advantageous than ordered by the court, the court can order an additional award with regard to the complainant's loss. 'A more highly-paid employee might therefore receive substantial compensation under this head'[58]because the statutory cap may be exceeded to the extent necessary to enable the award to fully reflect the claimants

[56] [1990] IRLR 70
[57] At page 70
[58] Deakin and Morris (2001); at page 491

loss.[59] The second situation is where the employer fails to comply at all. If this occurs then under section 117 of the ERA 1996 the court will award in addition to the basic and compensatory award a further additional award to reflect the employers failure to comply with the re-employment order. This award is to be the equivalent of twenty-six to fifty-two weeks pay and is intended to reflect the amount specified as payable in the re-employment order, once again the statutory cap is capable of being exceeded. Hence it can be seen that whilst the order for re-employment is unenforceable and in many regards toothless, the expense of additional compensation acts as an incentive to comply with the order.

Time taken to get to the tribunal – Despite the aim of the employment tribunal being to bring 'quick and easy access to justice' it is obvious that it will not be instantaneous. This 'time lag' can have a huge effect on the remedy sought by the employee. Over the time, they may realise that the trust and confidence has broken down, or their financial position may alter and they need a lump sum of compensation. Tied up in this is also the possibility of finding another job which would then make re-employment pointless. Lewis[60] sees time as a big factor for the low incidence of re-employment. Using figures he collected through his own survey he shows the disparity between the remedy sought by the individual at the point of launching a claim for unfair dismissal and then the remedy sought when the case comes before the tribunal. In his figures from 1977 it seems that 71.5% of dismissed applicants wanted re-employment at the initial claim stage. This had dropped to 21% by the time the case reached the tribunal. This is highly influential in suggesting that

[59] Section 124 ERA 1996

[60] See Lewis, P (1981) - Again these figures are obviously old but they are the most up-to-date figures the author has found. Since the legislation has changed very little there seems no reason why these patterns and explanations do not remain accurate.

the time between dismissal and hearing affects the remedy sought and that many of the reasons propounded above as plausible suggestions are buttressed by the time factor.

Poor legal advice – Dickens et al suggests one further factor as to why the remedy for re-employment is used so little, that of poor legal advice and guidance. Their report[61] suggests anecdotal evidence that dismissed employees may not really know the differences between the remedies and as such fear not getting anything, thus compensation seems the safest option. The report buttress this point by comparing applications for reinstatement from union and non-union members, drawing the conclusion that many more unions member ask for reinstatement, hence there is a disparity in advice. Whilst there may be truth in this it is important to not give it too much weight because such a crude comparative argument fails to take into account unionised and non-unionised employment sectors and the differences there.

It can be seen that there are many plausible reasons as to why re-employment has not been the primary remedy used in unfair dismissal, but in order to see if law and economics is a controlling factor it is first necessary to establish who is responsible for the current state of affairs; Parliament or the judiciary?

3.4 Who's to blame? The judiciary or Parliament

In essence there is no clear-cut answer to this question because both groups can seek to blame each other. Parliament can point to the legislation and say it has created a right to re-employment and has buttressed this with punitive damages as an incentive

[61] Dickens et al (1981)

to comply; therefore the failure of the instigation of the remedy must lie with the judiciary.

The judiciary can reply with the argument that the legislation is 'wholly unenforceable' and as such they are left holding the baby with an unworkable statutory remedy. Lewis attributes the blame to Parliament, saying that 'practicable' needs much more careful framing if the remedy is to become strong.[62]

However, when one looks closely at how the judiciary have approached the remedy of re-employment it would seem the judiciary have been extremely pro-active in weakening the effect of the legislation themselves. Section 116 of the ERA 1996, as we have already noted provides three factors which the tribunal have a duty to take into account when considering re-employment. The most influential and source of much judicial discussion is s.116(1)(b), which provides that the tribunal will take into account whether:

> 'it is **practicable** for the employer to comply with an order for reinstatement' (emphasis added)

What 'practicable' actually means has been the root of much contention. Mr Justice Wood gave a good summary of how the judiciary have approached 'practicable' in *Rao v Civil Aviation Authority*:

> '[the word practicable] is not 'possible'; it is not 'capable'. It is not always wise to seek to define rules for different factual situations, but factors which have influenced decisions in the past are: the fact that the factory atmosphere is poisoned ... the fact that the employee has displayed her distrust and lack of confidence in her employers and would not be a satisfactory

[62] Lewis, P – (1982) Interpretation of 'practicable' and 'just' in relation to 're-employment' in unfair dismissal cases; at page 397

> employee on reinstatement ... a change in policy which reinstatement would undermine... insufficient employment for the employee ... and possibly where parties are in close relationships at work...'[63]

This understanding of 'practicable' is an extremely narrow construing of the plain meaning of the word:

> '**Practicable** – able to be put into practice, able to be effected, accomplished or done; feasible'[64]

Lewis makes this point when he observes:

> 'The courts and the EAT have narrowed what is 'practicable' very considerably and pay too much attention to the employers arguments. They should be less passive and not assume the parties have made informed judgements.'[65]

But the intentional narrowing of the judiciary's remit is perhaps best illuminated by the Court of Appeal decision in the case of *Port of London Authority v Payne.*[66]The facts of the case are complicated but it suffices to say 17 workers were selected for redundancy because of their Trade Union activity, this was held to be unfair and an order for re-engagement was made. The employer failed to comply with the orders and appealed against the decision to order re-engagement. The Court of Appeal tellingly said:

> 'The test is practicability not possibility. The industrial tribunal, though it should carefully scrutinise the reasons advanced by an employer, should give due weight to the commercial judgement of the management... the standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer

[63] [1992] IRLR 203; at page 207
[64] The new shorter Oxford English dictionary; at page 2317
[65] Lewis, P (198); at page 388
[66] [1994] IRLR 9 (CA)

> does not have to show that reinstatement or re-engagement was *impossible*. It is a matter of what is practicable in the circumstances of the employers business at the relevant time.'[67]

This approach of the court looks strikingly similar to a 'reasonable employer' test, which we are aware, gives an incredible amount of flexibility to the judiciary and often results in deference to the managerial prerogative. This suggestion is supported by research carried out in 1985 which concluded that:

> '...the [employment] tribunals pay a lot of attention to the employers' views regarding the acceptability and practicability of re-employment and rarely award the remedy in the face of employer opposition. This is partly because of a view that re-employment which has to be imposed will not work.[68]

This approach of the judiciary suggests they construe 'practicability' narrowly in order to give them as much scope and flexibility as possible. It is reminiscent of the approach they take to SOSR[69], namely that if they can show good reason the court should accept that. It is therefore clear that the judiciary are responsible to some extent for the lack of re-employment ordered, however what is not as clear is whether this is because of the weakness of the enforcing mechanism or because of a judicial dislike of the remedy of re-employment. This leaves us in a position whereby we can see the potential reasons why re-employment is so rare, but are still lacking an underlying rationale. It is still a very mixed bag with lots of differing ideas. Before we turn and look at a law and economics rationale for the lack or re-employment and seek to provide a framework from which we can understand the judiciary's narrow approach it is pertinent to turn to compensation, the most popular remedy, and see

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[67] ibid paragraph 57
[68] Dickens, Hart, Jones and Weekes – (1985) Dismissed: A study of unfair dismissal and the industrial tribunal system
[69] See Dickens et al (1981); at page 169

whether it is in fact a satisfactory remedy. This is advisable because if compensation is a much better remedy prima facie, all discussion surrounding understanding re-employment and the judiciary's attitude can be summed up in accepting compensation is more desirable for the employee and hence the most equitable settlement is in this form.

3.5 Is compensation a desirable remedy?

The law surrounding the compensatory award has led to the creation of:

> 'principles formulated almost exclusively with respect to the financial loss of the claimant, ignoring for the most part any other dimensions of justice and equity in the case...this interpretation being such as to frustrate any conceivable aim of the legislation.'[70]

In essence the sustained criticism is, compensation does not deliver justice because it only looks at direct financial loss. This rather narrow concept of compensation was first formulated in the influential early case of *Norton Tool Co Ltd v Tewson*[71] and has been a fixture ever since. Sir John Donaldson said in the case:

> '... First, the object is to compensate, and compensate fully ... Secondly, the amount to be awarded is that which is just and equitable in all the circumstances, having regard to the loss sustained by the complainant. 'Loss' in the context of [s.123] does not include injury to pride or feelings. In its natural meaning the word is not to be so construed, and that this meaning is intended seems to us to be clear from elaboration contained in [s.123(2)]...'[72]

It can clearly be seen that whilst appearing to have regard to what is just and equitable, the judiciary have intentionally narrowed the remit of compensation by construing the statute to remove any reference to loss outside of the very narrow

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[70] Collins, H – (1991) The just and equitable compensatory award; at page 201
[71] [1972] ICR 501
[72] ibid

concept of financial loss. This can be seen even more clearly in the speech of Sir John Donaldson the following year:

> '[T]he purpose of assessing compensation is not to express disapproval of industrial relations policy. **It is to compensate for financial loss.**'[73] (emphasis added)

The effect of the judicial approach is to deprive the tribunal of the capacity to reflect in its award the fault of the employer. This is in sharp contrast to their approach in assessing the compensation when the employee has acted in a way which has in part contributed to his dismissal. The judiciary are only too willing to reduce the compensation when there is contributory fault,[74] and this serves to buttress the argument that the judiciary have intentionally acted in a more favourable way towards employers. The situation which has been maintained throughout the legislations history has been defined very astutely by Collins as the:

> 'Court promulgating ...a set of cool, economic rules for totting up financial loss suitable for a discipline of accountancy. The criterion of loss to the complainant became the sole dimension of justice, rather than merely one to which the tribunal should have had regard.'[75]

There was an attack on this approach in *Johnson v Unisys*[76]but this was short lived as the Law Lords in *Dunnachie*[77] quickly distinguished this attack and said the remarks made by Lord Hoffman were in fact obiter in any case.[78]

It would seem compensation therefore has the effect of delivering very watered down corrective justice and no deterrent justice. This, when the remedies of reinstatement

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[73] *Clarkson International Tools v Short* [1973] IRLR 90; at paragraph 15
[74] See Collins (2004) at page 68 for a good overview and reform suggestion
[75] Collins (1991); at page 203
[76] [2001] IRLR 279 (HL)
[77] *Dunnachie v Kingston-upon-Hull City Council* [2004] IRLR 727
[78] For greater consideration of what was said in these cases please see the appendix

and re-engagement are also being denied wholesale, indicates that the situation regarding remedies is not ideal and that the dismissed individuals are getting very much the short end of the stick.

How has this situation been allowed to develop? It would seem that there are only two plausible explanations which can be advanced to explain the judiciary's approach. Either the statute leaves them powerless or the judiciary do not want to interfere with the managerial prerogative and therefore are reluctant to order re-employment, choosing instead to construe compensation narrowly.

It is the opinion of the author that the first explanation has no real justification. The legislation has enough flexibility built into it for them to be creative with. They have shown a certain creative flair in other areas of the legislation, for example in avoiding the award of any compensation when the dismissal has been unfair procedurally but fair substantively and therefore finding the dismissal in fact fair.[79] Furthermore if the judiciary were really unhappy with the way the statute tied their hands they would be letting Parliament know, either in sustained *obiter* criticism or forcing Parliament to act through a series of creative judgements. The fact that neither of these can be evidenced would indicate that the judiciary do not feel powerless. In fact, they have been extremely creative in their interpretation of the legislation surrounding remedies. We have already noted their approach to defining 'practicable' and how they have lowered the test in favour of the employer and this is again evidenced in their approach to compensation, Collins insightfully noting:

> 'The [judiciary's] style of interpretation has been one which reversed the statutory formula. It elevated the sub-principle of causation of loss to the main principle, and then relegated the

[79] *British Labour Pump v Bryne* is a fine example

general standard of just and equitable compensation to the status of a minor limitation on the application of the principles of causation of economic loss.'[80]

So is it simple a case of respect for the managerial prerogative which has influenced the courts approach towards re-employment and compensation. Whilst this may seem a plausible solution, it raises the questions which been considered of what rationale does managerial prerogative stand for? How can it be defined and understood? It has been suggested that to simple stop at managerial prerogative as the explanation is to simplistic, there is a deeper more complex rationale underwriting the whole of the judiciary's approach to remedies. Law and economics provides us with this framework, although it is not as immediately obvious and remains well hidden behind the much more familiar concept of freedom of contract.

In order to understand this we need to firstly look at why law and economics suggests re-employment is not a desirable remedy before turning to see how compensation is more appropriate.

3.6 Law and economics and re-employment

A justification for the reluctance to enforce re-employment can be seen from the efficiency perspective provided by law and economics. It can be seen below that the reasons suggested at the beginning of this section as to why re-employment was rarely ordered when it was sought, are all rooted in efficiency[81].

[80] Collins (1991); at page 202

[81] Obviously the finding of a new job, time and poor legal advice do not explicitly find their root in efficiency but these are decisions taken by the individuals as to why they do not want re-employment and therefore are not evidential as to a framework which seeks to understand the judicial position. The toothless enforcement mechanism is to some extent the result of the judiciary's own creativity to fulfil their purpose of ensuring efficiency.

Breakdown of trust and confidence – this will naturally led to a disruption of efficiency. If the employer does not trust the employee there is potential he will not feel able to fully utilise them, as he may want to keep them on tasks from which they can be monitored. Equally, an employee who has lost faith in the employer is not going to work as hard as someone who has not, thus leading to a decrease in productivity.

Reputation of managers – Re-employment significantly undermines the managerial prerogative[82] and as such will lead to diminution of the managers authority. This will naturally impact negatively on the efficiency of the firm because as well as the employer being saddled with a worker he dismissed, the rest of the workforce will potentially feel they can take liberties with the employer, who is likely to be wary of exercising his authority to readily[83].

Impractical for hiring/new person in the job – It would be inefficient to restructure the organisation in order to find space for the dismissed employee, as well as creating cost whilst restructuring it would also hamper the productivity in the short term and even potentially in the long term. There could also be a situation whereby the individual was so out of touch with the latest developments in their field that they would not be able to effectively do the job. .

All of these reasons would seem to indicate that re-employment is bad for efficiency, because it is not an efficient allocation of resources. To have someone who has been removed from the employment nexus foisted back on the employer three to six

[82] As noted by Dickens et al (1981); at page 167
[83] This was particularly noted in *Port of London v Payne*

months later is not good for the efficiency of the firm, especially if on top of this you also have the financial cost of putting the employee back in the position as if they had never been dismissed. The whole process can become a cost of which the employer cannot quantify or know because they will be unsure how productivity and efficiency, both of the returning employee and the other workers, will be affected. This unknown cost in itself can be a burden to inefficiency; this is evidenced in situations where employers upon being told the total cost of failure to comply with the reinstatement order have essentially got their chequebooks out there and then.

> 'In one instance where a tribunal told an employer in advance that the cost of not complying with the order would be £138, it was promptly accepted as a bargain.'[84]

So if re-employment is perceived as a bar to efficiency, there seems a chilling logic to the judiciary not wanting to award it, unless the circumstances seem that the re-employment would not harm efficiency. This could occur in a number of circumstances where there is no breakdown of trust and confidence and both parties are amenable to this. However, the likelihood of this it must be said is rare. It is unlikely an employer who dismissed an employee will be happy to accept him back just because a tribunal held the dismissal was fair. Therefore if re-employment is not the favoured remedy because of the damage to efficiency it could do, does compensation satisfy efficiency considerations?

3.6.1 Compensation: The law and economics answer

Collins notes that:

> 'A substantial financial penalty strikes at the employer where it hurts most, the balance sheet, and may force a review of abusive disciplinary practices ... It seems clear that the aim in the

[84] Williams and Lewis – (1981) The aftermath of reinstatement and re-engagement, Dept of Employment Research Paper No 23 London; at page 37

> law of improving the working environment are likely to be promoted more effectively by substantial compensation than a remedy of reinstatement.'[85]

As we have discussed at length, the legislation had the aim of improving disciplinary procedures which in turn would effect greater efficiency in the workplace and the employment relationship as a whole. The natural conclusion is therefore that the judiciary are much more likely to order remedies which fulfil this aim. Compensation also has the advantage of being a completely quantifiable cost, in the main because of the statutory caps on the basic and compensatory awards. As has been noted:

> 'The upper limit ensures that employers always have the resources to remove the employee's right not to be unfairly dismissed on payment of compensation...it can always be financially practicable to dismiss.'[86]

This is much more efficient than re-employment because the employer can budget and calculate whether the dismissal is worth the increased efficiency, in essence he can carry out a cost-benefit analysis prior to the dismissal and therefore make an informed judgment with all the costs known. The award of compensation also avoids the inefficiency in the workplace which, as discussed above, might occur if re-employment was ordered.[87] Compensation also has one further law and economics benefit which comes from the efficient allocation of resources.

It has been noted in studies[88] that a quarter of those re-employed stay less than six months, with the average only managing a year. This creates a burden on the State

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[85] Collins (1992); at page 218
[86] Collins (2004); at page 67
[87] See the reasons above in 3.6
[88] See Williams and Lewis (1981) – it is acknowledged that this is not particularly up to date but the DTI commissioned surveys in 1998 and 2003 did not consider this question and the author has not been able to locate any other more up to date statistics.

because when they leave[89] the employer does not have to contribute towards the social cost of their unemployment, which he would have done if it compensation was the primary remedy. Compensation therefore ensures a more efficient allocation of resources by not placing the burden unnecessarily on the State and instead placing it on the employer, but as we have noted not to such an extent which is necessarily prohibitive.

Law and economics would seem to point towards compensation as the best and most efficient remedy; a viewpoint that was shared by the Donovan Commission[90] who acknowledged that compensation should always be the primary remedy. This naturally leads us onto the question, if compensation is the preferred remedy from a law and economics perspective why have the judiciary construed it in such a narrow way and only compensated for direct financial loss?

The answer is seen in the cogent logic of Collins:

> 'An enhanced measure of compensation would redress these faults [that of reflecting all the employees losses not simply their economic ones]. It would supply the necessary incentive for compliance and provide full compensation for the employee. But it may be objected that heavy financial penalties for dismissal would deter employers from making even justified or fair dismissals, because the standard is too vague to provide a reliable guide for employers to use in a practical way.'[91]

Hence leaving a stagnant economy that will not grow, employers will be saddled with inefficient workers who they are unwilling or unable to get rid of because of the financial liability they will expose themselves too. This situation is the antithesis of a

[89] Either out of choice or a fair dismissal
[90] See Davies and Freedland (1993); at page 209
[91] Collins, Ewing, McColgan (2001); at page 586

law and economics approach, the setting of compensation at a manageable level means it can be avoided. High compensation also could act as a disincentive to the employer instigating internal fair procedure policies because they may take the view that the increased cost in implementing procedure is not worth it with the standard being so vague. Hence they will dismiss without recourse to procedure, because if they are going to be liable for a large amount there is not point in wasting extra money on a procedure that might make no difference to the outcome. This argument draws some support from the principle that the compensation reflects loss not industrial relations practice. This situation would also be disastrous from a law and economics point of view. The point of the procedure is to encourage the employer to exercise his mind so he does not dismiss where it would be inefficient to do so. To remove the incentive to fair procedure would be to remove one of the central efficiency aims in the judiciary's promotion of procedural fairness.

A low level of compensation seems to be an acceptable law and economics solution as it ensures an efficient allocation of resources. The employer is responsible for some of the social cost if he fails to follow procedure or re-organises for the purposes of increased efficiency. However he is not burdened against his will with remedies that hinder efficiency and he can calculate the total cost of a dismissal[92], meaning he can apply an efficiency cost/benefit analysis when considering dismissal.

Law and economics provides a framework from which we can understand why there is a push towards compensation from the judiciary, but it must be remembered it is a very narrowly construed compensatory award. Re-employment hurts efficiency,

[92] Which could not be done if a) the statutory caps did not exist and b) compensation included non-financial loss

whereas compensation provides incentives to only dismiss when proper procedure has been followed and hence facilitates efficiency.

The validity of a law and economics analysis is confirmed when one considers reform in the area. There has been suggestion that the solution to the low incidence of re-employment is for the dismissed employee to remain in the job until the tribunal hearing[93], thus avoiding:

> 'The dangers of the job disappearing, or the employee needing to look for another job, and more importantly it might prevent the employment relationship deteriorating further.'[94]

This reforming suggestion is an anathema to a law and economics approach. To keep the employee in the job after a dispute, until the tribunal makes a decision, is incredibly inefficient. If the employer is justified he will have been burdened with extra expense for an unnecessary period of time, which could have catastrophic implications if there was widespread dismissal for economic reasons. Furthermore, if the employer feels justified in dismissal, it is likely that trust and confidence will have already broken down; therefore it could still be inefficient if the tribunal orders re-employment. This reform also does nothing to counter the efficiency problems created by damaging the reputation of the employer (the workforce will still know the employer tried to dismiss the employee) or the interference with the managerial prerogative. The failure of this suggested reform to counter any of the efficiency problems associated with re-employment is indicative of why it has not been taken on as a serous reform idea.

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[93] See Lewis, P (1981) and Dickens et al (1981)
[94] Lewis, P (1981) at page 324

The current situation, whilst seeming weighted against the employee and not what the statute says, is the most efficient solution for the general welfare of the economy. When viewed under a law and economics framework, we can understand why compensation is the favoured remedy as it fulfils the efficiency considerations of the judiciary in order to promote economic growth and long-term stability. This analysis also fits cogently with the situation regarding job security, whereby the importance given to job security is flexible and controlled by efficiency.

Law and economics provides a controlling rationale for both the differential job security and the emphasis on compensation. Efficiency ties a number of explanations tighter under one generic heading and gives everyone a framework from which to assess the decisions against. This can only aid consistency and help understanding so that reforming suggestions can be more strategically targeted.

Having seen that law and economics provides a controlling rationale for unfair dismissal legislation in a number of situations where uncertainty existed it is now pertinent to turn and consider whether this approach of the judiciary towards efficiency is also prevalent in wrongful dismissal. There has been a sustained line of thought in recent years suggesting that wrongful dismissal should be used to remedy the perceived weaknesses in unfair dismissal, specifically those which we have discussed in depth in this thesis. But this has not happened and the judiciary have shown no enthusiasm for reversing this. When this resistance to utilise the common law is analysed from a law and economics perspective it becomes clear that the judiciary have intentionally kept wrongful dismissal minimised and subservient to unfair dismissal because of efficiency considerations. During consideration of this

rationale it is hoped it will become clearer to the reader that a law and economics approach pervades through the judicial approach to dismissal as a whole and as such is a valid and necessary tool in understanding the judicial rationale.

3.7 Wrongful dismissal in context

It is first appropriate to briefly contextualise wrongful dismissal with regard to unfair dismissal. As has been noted in chapter one, unfair dismissal replaced wrongful dismissal as the primary remedy for dismissal in 1971. This situation came about because of the weakness of wrongful dismissal due to its reliance on the contractual principles:

> 'The individual employment relationship itself was under the system of *collective laissez-faire*, to be regulated by social rather than legal institutions. The common law conceptualised the relationship between employee and employer as a contractual one, **but the fictitious equality which the common law assumed as the basis of this contract meant that the contract did not regulate, but rather articulated, the inevitable subordination of the employee to the employer.**'[95] (emphasis added)

Under wrongful dismissal a dismissed employee can only claim damages which are the equivalent to the loss of salary during their contractual notice period. This seemingly harsh approach, which Carty describes as *'limited notice obligations and nothing more'*,[96] is rooted in contract. Since in most cases the employee is not entitled to remain in employment for longer than the minimum period of notice contained in their contract, to pay damages that are greater than this vitiates the contract and would have far reaching implications into other areas of labour law which are regulated by

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[95] Davies and Freedland (1993); at page 24

[96] Carty, H – (1989) Dismissed employees: The search for a more effective range of remedies; at page 449

the contract of employment. This narrowness is further compounded when one takes into account that:

> 'as a result of express agreement or by way of an implied term, the employer will almost invariably possess the right at common law to terminate the contract simply by giving notice, without needing to have a good reason, or any reason, for doing so.'[97]

This strict adherence by the judiciary to contractual principles also rules out the *'order [for] specific performance of any contract for personal services'*[98] as is summed up aptly by the words of Lord Justice Fry:

> 'I should be very unwillingly 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.'[99]

This narrow and restrictive approach to dismissal appears to have been maintained despite the advent of the statutory protection[100]. It can be cogently suggested that the court has intentionally construed the common law remedy very narrowly, using respect for contractual principles as their rationale[101]. But more than that, the judiciary do not want the common law to fulfil or vitiate the role of unfair dismissal.

> 'The statutory provision sends a clear signal that its intent is to introduce a form of statutory regulation to supplant the contractual position and that therefore the contents of the

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[97] Deakin and Morris; at page 392
[98] G de N Clark – (1969) unfair dismissal and reinstatement; at page 532
[99] [1890] 45 Ch.D. 430; at page 438
[100] There is a suggestion by Ewing and Grubb – (1981) The emergence of a new labour injunction - that more and more people are seeking to use the common law in order to remedy the weaknesses in the statutory scheme (mainly stemming from procedural fairness considerations) and that therefore wrongful dismissal is entering a renaissance. It is suggested with respect that their suggestion is more based on hope than reality, the courts have repeatedly emphasised that the common law will only provide a very narrow remedy with regard to unfair dismissal – see Anderman (2000) The interpretation of protective employment statutes and contracts of employment; Pitt (1989) Dismissal at Common law: The relevance in Britain of American developments; Carty (1989) Dismissed employees: The search for a more effective range of remedies.
[101] This is indeed true in general, although the judiciary have used a considerable amount of creativity when it is seemingly in the employers interest. This is best exemplified in the common law doctrine of frustration and its use by employers to avoid liability for dismissal. For more see Collins (2004); at page 21 and Collins, Ewing and McColgan (2001); at page 535

> employment contract are not to be allowed to undermine or derogate from the statutory provisions. Like the 'free standing' provisions, the plain intent of such legislation is to impose a mandatory public policy of protection, such as a reasonableness standard or a preservation of contractual terms standard, to replace whatever arrangement has been made between the parties. The statutory standard is meant to be independent of the will of the parties to the contract of employment because Parliament has rejected the private values of contract law such as autonomy, formal equality and freedom of contract preferring to substitute a public standard.'[102]

In *Johnson*[103] the House of Lords seriously considered the role of the common law but Lord Hoffman ultimately concluded in consideration of how unfair dismissal and wrongful dismissal worked together, that:

> 'Judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. **The courts may proceed in harmony with Parliament but there should be no discord.**'[104] (emphasis added)

This decision by the Law Lords would seem to have removed any hope that the common law claim may become a viable alternative to unfair dismissal, Collins unequivocally stating that:

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[102] Anderman, S – (2000) The interpretation of protective employment statutes and contracts of employment; at page 225,226
[103] See appendix for a full consideration of this case
[104] [2001] IRLR 279 (HL); at paragraph 37

> 'Any hopes that the common law of wrongful dismissal might be adjusted to reflect modern perceptions of how employees should be treated fairly and with dignity must be thrown before the bonfire of innocent carcasses.'[105]

Whilst this is perhaps a little flamboyant, it does convey a sense of the frustration many feel with the reluctance of the judiciary to use the common law in a meaningful way, especially when the statute is perceived as employer-friendly. The decision in *Johnson* made certain that wrongful dismissal would be subordinate to unfair dismissal and that the common law would provide no 'second bite of the cherry' or indeed a remedy which would supplant unfair dismissal when the legislation was capable of providing recourse to a claim.

3.7.1 The law and economics justification for no overlap

The judiciary do not want wrongful dismissal to overlap into unfair dismissal for very good reasons.

Wrongful dismissal contains a much greater element of unpredictability than unfair dismissal. The unfair dismissal statute denotes how the balance between fairness and competitiveness should be drawn and provides guidance as to what standard the employer should be held to. The common law has no such framework and only has recourse to the contract of employment. To interpret this contract in any way but restrictively could lead to widespread confusion and uncertainty; the anathema of law. This potential unpredictability is clearly illustrated in the consideration of damages. Unfair dismissal has a cap and it is now established recovery is for direct financial loss, personal injury being excluded. Wrongful dismissal on the other hand, whilst

[105] Collins, H – (2001) Claim for Unfair Dismissal; at page 305

only compensating for financial loss in the notice period is susceptible for claims relating to injury before the dismissal and furthermore, confusion continues as to the correctness of the decision in *Johnson*, leading to a tenable sense of uncertainty. A narrow interpretation of the common law gives scope for increased width in the application of the statute, which brings with it a much greater element of predictability, particularly with reference to cost.

An even more sustainable justification for keeping wrongful dismissal at bay is seen when we consider the increased procedural stringency which wrongful dismissal propagates. As Pitt notes:

> 'The common law may be more expensive and procedurally complex than unfair dismissal claims.'[106]

The reason for this greater procedural burden is the application of natural justice principles. We have already noted above[107] the way in which the judiciary have interpreted procedural fairness under the statute. Essentially they have ignored natural justice principles in favour of 'reasonable procedural standards' and this approach finds its rationale in efficiency:

> 'The unwillingness to implement the principles of natural justice for disciplinary dismissals [so under the statute] seems to be grounded in efficiency considerations.'[108]

Claims under the common law are however susceptible to the principles of natural justice, which were summed up famously as:

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[106] Pitt, G – (1989) Dismissal at Common law: The relevance in Britain of American developments; at page 41
[107] Chapter two
[108] Collins (1992); at page 121

> 'it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[109]

Since the House of Lord's decision in *Ridge v Baldwin*[110] the judiciary have applied natural justice principles to wrongful dismissal cases. There has been much discussion about the applicability of natural justice and the role of public law in dismissals[111] but it would seem relatively safe to surmise the position which prevails as:

> 'The courts **have not been** prepared to hold that a breach of natural justice can be overlooked if the decision is in substance fair, whereas industrial tribunals have been readier to accept the argument that procedural irregularity can be ignored if a dismissal is substantively fair.'[112] (emphasis added)

This position obviously needs to take into account the new s98A of the ERA 1996, which as discussed above[113], lays down a basic procedure which if not adhered to will result in an automatic finding of unfair dismissal, yet as noted the requirements of this basic standard falls well short of a natural justice standard. Natural justice under the common law is a more stringent burden than procedural fairness under the statute and as a result is not as good for efficiency. We have already alluded to the fact that the judiciary in unfair dismissal minimised procedural fairness in the interests of efficiency and as a corollary of this we can see that natural justice, as a much more onerous burden, fetters the managerial prerogative substantially negatively impacting

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[109] per Lord Heward *R v Sussex Justices, ex parte McCarthy*[1924] 1 KB 256; at 259
[110] [1964] AC 40
[111] See generally Fredman and Lee – (1987) Natural Justice for employees: The unacceptable face of proceduralism; Woolf, Sir Harry (1986)– Public Law – Private Law; Davies and Freedland – (1997) The impact of Public Law on Labour Law 1972-1997; Sedley, Sir Stephen – (1994) Public Law and Contractual employment; Laws, Sir John – (1997) Public Law and employment law: Abuse of power - Public Law; Walsh, B - (1989) Judicial Review of dismissal from employment
[112] Stokes, M – (1985) Public law remedies for dismissal; at page 121
[113] Chapter 2.6

on efficiency. This point is well made by Ewing and Grubb in their sustained argument for increased justice via the common law:

> 'It remains to be seen [in terms of the increase of using natural justice], whether the common law will follow its logical course, or whether the judges will conveniently take a wrong turning. It would, however, be manifestly unacceptable for the Court of Appeal to shelter behind the floodgates argument; the need for efficiency in the administration of the judicial system; and the availability of unfair dismissal as a justification for impatiently stamping on those developments. **Yet although efficiency is desirable, so is justice [equity], something clearly not being provided by the statutory regime.**'[114]

There is a clear distinction drawn between efficiency and equity, with the acknowledgement that the statute fails to deliver equity because of its focus towards efficiency. Thus, a rise in the use of the common law would result in potentially greater procedural justice but at the expense of efficiency. It would seem therefore that if the judiciary's mindset is towards efficiency then a law and economics analysis would evidence an attempt to minimise the role of anything which could hinder this; in the present situation this would be evidenced in the reduction of the scope of the common law because of its attitude to natural justice. This is of course what is seen. We can see that by keeping the wrongful dismissal remedy unattractive the judiciary can maintain unfair dismissal as the predominant avenue of claim, which as we have argued above is utilised in a way to favour efficiency for the economy.

The third way in which law and economics suggests the rationale behind the judicial attitude of keeping wrongful dismissal as unfair dismissal's poor relation, is found in the effective allocation of resources argument.

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[114] Ewing and Grubb (1987); at page 163

Law and economics suggests that effective allocation of resources is the way to achieve efficiency and therefore when deciding what decision to make, the most effective allocation of resources should always be considered. The unfair dismissal statute has always intended disputes to be resolved in the tribunals because they have been recognised from day one as being cheap, easily accessible and specialised in nature. The ordinary common law court bears none of theses qualities and, as Sir John Donaldson personally bears testament too, is subsequently disadvantaged[115]:

> 'When I first read the Industrial Relations Bill containing the constitution of the NIRC[now the EAT], I was astonished to find that this was the situation which was proposed [that of non-legally qualified members having equal votes as the legally-qualified chairmen]. I thought it must be a mistake. In fairness to the members of the NIRC and of the EAT who were or are not legally qualified, I should like to make clear that after I began sitting with lay members to hear unfair dismissal and redundancy appeals I very soon found out that my initial reaction had been wholly mistaken. The field of industrial relations has its own very specialised 'know-how' and this is something which, initially at least, is more familiar to Members of Parliament than to judges. Parliament, in legislating in the field of industrial relations, does so against the background of that 'know-how' and the words which it uses have to be interpreted in the light of that background. Upon more than one occasion I found that the industrial relations expertise of the lay members of the NIRC cast an entirely new light upon what must have been the intention of Parliament. **At the end of my term as President of that Court, my regret was not that it was a mixed court of judges and industrial members, but that there was a right of appeal to the Court of Appeal which did not have similar advantages**, albeit perhaps with the industrial members being in the minority.'[116] (emphasis added)

[115] It is noted that in this context he was talking about the role of wingmen in the Court Appeal when considering an appeal from the EAT and therefore he is not directly talking about the common law. However the argument still holds up as it illustrates the inadequacies of the court when not operating in a tripartite wingmen format.

[116] *Martin v MBS Fastenings* [1983] IRLR 198; at paragraph 6

Clearly it can be seen that the judiciary had awareness that the tribunal system was the more appropriate for dealing with industrial relations problems[117], and as such it would seem an inefficient allocation of resources to encourage a remedy which is inferior. This line of argument can be buttressed when one considers other practical considerations. The English court system is already extremely busy; a further increase in case load could clog the system up. This could have negative implication as:

> 'Delays might prompt employees to take industrial action with a consequent disruption of enterprise rather than await the lengthy procedures of courts to run their course'[118]

This increase in volume, as well as leading to potentially industrial disruption which is by itself bad for the economy, will also lead to increased cost for the State in maintaining the court system. It could also lead to increased cost for individuals and employers in terms of legal fees as unlike the tribunal system, legal representation will be much more important[119]. When considered in this way, pushing people towards bringing claims under the unfair dismissal legislation is much more efficient in resource use than the common law and it seems entirely logical and agreeable. The statute system has been set up to provide a quick avenue for remedy at a relatively cheap cost and with an understanding of 'industrial justice', as opposed to the common law which has over worked courts and no specialism. It makes no sense in terms of efficiency to work the civil courts harder whilst letting the tribunals go to fallow. It is not efficient for the State or the individual.

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[117] See also Collins, H – (1981) Unfair Dismissal: Judicial Review of tribunal decisions in cases of unfair dismissal; at page 256 – 'Parliament established industrial tribunals as bodies with special expertise in the field of employment, and these 'industrial juries' must be presumed to have a better grasp of the realities of industrial relations than the ordinary courts.

[118] ibid

[119] There is again a further issue in that legal aid becomes a factor when we consider the common law. This is obviously a very scarce resource and it would seem inefficient to allow people access to it, when another scheme provides access to justice without need for any legal representation at all due to its 'informality'.

When we consider these three justifications together it can be seen that a narrowing of wrongful dismissal by the judiciary results in:

- The restriction of a more expensive remedy, which as is evidenced by history spectacularly failed and resulted in massive economic instability in the UK and the introduction of the unfair dismissal legislation.
- An increased scope for unfair dismissal, which encourages greater certainty[120] and a resultant ability to quantify the cost of dismissal.

As has already been seen through this article, the unfair dismissal legislation has been interpreted in a way which favours efficiency and therefore by the courts interpreting wrongful dismissal in a restrictive way they are able to control the exercise of efficiency in dismissal law by keeping unfair dismissal as the main remedy. In many senses it is a case of 'better the devil you know', than the potentially unruly beast you do not.

It would seem therefore that the confusion surrounding why wrongful dismissal is such a narrow remedy and is treated as the subsidiary to unfair dismissal is cleared up when one considers law and economics as the analytical tool and the pursuit of efficiency as the overall goal.

[120] See Sir John Waite – (1986) Lawyers and Laymen as Judges in Industry; at page 40

Conclusion

'Employment law requires a balancing of interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human right, the point at which this balance should be struck is a matter for democratic decision.'[1]

Through the course of this thesis it has been the contention that the balance is struck in favour of economic interests because of the benefits this brings to society on a macro scale. The balance is maintained by efficiency. It is true that the legislation which has brought about this state of affairs is as a result of democratic decision and has been the subject of much Parliamentary debate, yet the real force behind the move towards economic interests has come from judicial interpretation. They have exploited the ambiguity in the Statute and in some situations as we have seen, completely airbrushed other parts of it away[2] in order to maintain a rationale of efficiency. This rationale has become apparent as a result of applying a law and economics analysis and goes some way to explaining how and why the judiciary have chosen to make the decisions they have despite the seeming unfairness it produces to some employees and in some cases employers.

The law and economics theory provides an extremely consistent and coherent framework, something which has been lacking in the common understanding of the unfair dismissal legislation and ties up the main themes under one banner extremely successfully.

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[1] Per Lord Hoffman – Johnson v Unisys Ltd [2001] IRLR 279; at para 37

[2] See chapter 2 and economic redundancy and the use of SOSR and chapter 3 and the rise of compensation

The question which seems most pertinent to address is, do the judiciary have an awareness that they are using law and economics theory in their decision making? There is no clear cut answer. The reason for this ambivalence is that the language in the cases sometimes evidences awareness and sometimes does not and to further complicate matters some cases hint at acknowledgement of law and economics, yet do not expressly say so.

For example, one cannot read the judgement in *O'hare and Rutherford v Rotaprint*[3] and not be convinced of a judicial acceptance of law and economics theory. The whole tenor of the judgement can be summed up in the following statement:

> 'it would be disastrous to the national economy if employers were to be inhibited from taking justifiable risks in planning increased production, and taking on increased labour, with high hopes of fuller employment, by the thought they may be saddles with claims for redundancy payments if they have to cut down on the wok force because their hopes have not been fulfilled.'[4]

As can be seen, this is in harmony with a law and economics theory; economic stability through long term efficiency. A similar judicial attitude is expressed by Lord Denning in both *Chapman v Goonvean China Clay*[5] and *Lesney Products v Nolan,*[6] where he states:

> 'It is very desirable, in the interests of efficiency, that employers should be able to propose changes in terms of a man's employment for reasons such as these: so as to get rid of

[3] [1980] IRLR EAT 47
[4] ibid para 9
[5] [1973] ICR 310
[6] [1977] IRLR 77 – see chapter two for more on this case

> restrictive practices: or to induce higher output by pieceworker: or to cease to provide free transport at excessive cost'[7]

> 'An employee is entitled to reorganise his business so as to improve its efficiency.'[8]

Mr Abernethy[9] found to his cost that efficiency is a factor in the minds of the judiciary when his claim of unfair dismissal failed. The Court of Appeal held that 'an employee's inflexibility and lack of adaptability come under the definition of capability and that the employee's unwillingness to work other than from head office 'related to his capability.''[10] The judge's attitude was very reminiscent of law and economics as seen in the way they showed contempt for the lack of flexibility on behalf of the employee:

> 'The Industrial Relations Act [now ERA 1996]is not intended to protect the unambitious from dismissal.'[11]

In many ways this phrase is symptomatic of the judiciary's attitude; the legislation will be interpreted to aid efficiency not hinder it. When these cases are considered[12] it would seem to buttress the suggestion that the judiciary are aware of law and economics and are intentionally applying its principles. However these cases are but a small sample of a very large number of decisions on unfair dismissal and so we cannot confidently draw that conclusion immediately.

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[7] Chapman; ibid
[8] Lesney Products; ibid
[9] Abernethy v Mott, Hay and Anderson [1974] IRLR 213
[10] ibid; at page 213
[11] ibid; at page 213
[12] For other comments on efficiency see R S Components v R E Irwin [1973] IRLR 239; Safeway Stores v Burrell[1997] IRLR 200; N C Watling v Richardson [1978] IRLR 255

In one of the most recent seminal cases[13], the Court of Appeal gave a thorough and detailed judgement as to the correct interpretation of the band of reasonable responses test; what is notable is the complete absence of any mention of efficiency or economic considerations. Does this blow the contention that the judiciary have knowledge out of the water? It would seem premature to draw this conclusion, yes it is true that this case and others evidence little acknowledgement of efficiency considerations. But what they often do is acknowledge the role of other factors which are causally linked to efficiency. For example in *Madden* the court noted the dismissal was justified by the employer's belief in guilt and the subsequent destruction of trust and confidence in the relationship. The rationale behind this is no trust and confidence means impaired efficiency as the jobs the employee can do are significantly reduced[14]. So efficiency considerations are really pulling the strings, it is simply that break down of trust and confidence is the expressed logic. Just because the courts do not explicitly acknowledge efficiency does not mean it is not hiding in the shadows. This in many ways sums up the situation regarding the applicability of law and economics to dismissal law. Efficiency considerations are there and can be evidenced, it is just often necessary to be pointed in the right direction as they are not always immediately apparent. This has been seen throughout this thesis with reference to cases like *Pays v Lancashire Probation Service*[15], *Saunders v Scottish National Camps*[16]and *Haddon v van den Bergh foods*[17].

It is often necessary to look hard because at a first glance it would seem that managerial prerogative, BORRT, SOSR or freedom of contract are the suggested

[13] Post Office v Foley; HSBC v Madden [2000] IRLR 827 – see chapter two for details
[14] See chapter three
[15] See chapter one
[16] chapter two
[17] chapter two

rationale and justification behind the judiciary's decision and mindset. But as we have contended through this work all these rationales are fundamentally masks or vehicles of law and economics. BORRT gives the discretion to the judiciary to propagate efficiency without ever having to justify why. Similarly SOSR has been developed by the judiciary to interfere with the statute when it is in the interests of efficiency and freedom of contract finds its roots in law and economics and the supposed efficiency the free market brings. The managerial prerogative exists precisely because a manger's prerogative is to act in a way which serves the purpose of his business the best; that of optimum efficiency and therefore greater profitability. Managerial prerogative is merely a mask which hides law and economics considerations and it is only through reference to law and economics lenses that we can clearly see the whole picture and establish a consistent framework.

The managerial prerogative is presented as the face of law and economics and the justification behind the judiciary's decisions primarily, it is suggested, because it is more politically acceptable. It is not an attractive proposition to think of individual's rights being traded for the good of the economy, which is the essence of law and economics. No Government wants to be seen as particularly pro-individual or pro-employer, they do not want to alienate either side and want to encourage a balance between fairness and competitiveness so that the economy might flourish and employment might be at equilibrium. The managerial prerogative in conjunction with one of the vehicles is sufficiently mysterious enough to insulate the Government from any association of trading rights or actively seeking efficiency over equity. The judiciary also benefit from this mysterious formulation because it gives them much

greater scope to use their discretion to act in a way which facilitates efficiency without being bound by inflexible principles and precedents.

Drawing this together and accepting that law and economics is the controlling factor and rationale behind the judiciary and government's approach to dismissal means we have a much more certain framework from which reform can be suggested. As a result of this analysis it would seem that any reform will need to take account of law and economics principles as the courts are not willing to give them up and have steadfastly ignored any reform suggestions which do not fit in with law and economics theory. This is perhaps best evidenced in the way that there has been a massive shift towards the use of arbitration[18] whilst a complete silence and diffidence to any reform over the weakness of the remedy of reinstatement.

Arbitration is rooted in law and economics principles; at its foundation is negotiation which mirrors in many ways the free market as two parties bargain for a solution acceptable to both. Whereas suggestions for reform in reinstatement, as noted in chapter three, have not even remotely been considered as serious reforms.[19] It is suggested that we can understand this by reference to its complete disregard for law and economic principles. If, as suggested, employees who are dismissed stay in their jobs until the case comes before the tribunal the impact on the economy could be potentially catastrophic. There would be little incentive for employers to take on new staff or fire any staff due to the costs and potential risks and as such the economy

[18] See for more on this Clark, J – (1999) Adversarial and Investigative approaches to the arbitral resolution of dismissal disputes. A comparison of South Africa and the UK; Edwards, P – (1998) Anticipating new roles for third parties

[19] The Courts have not mentioned them and there has been no white paper mention, which considering the comprehensive nature of *Fairness at Work* (1998) would surely have been expected had they had any serious and workable potential.

would stagnate, with no new job creation and no increased efficiency. When viewed through law and economic principles it seems clear why the judiciary have embraced arbitration but shunned improved re-employment.

Law and economics seems to provide coherence to unfair dismissal. It does not solve any of the problems over the potential unfairness of BORRT or the lack of substantive justice applied under the statute. It does not solve the problem of the lack of re-employment or for that matter the derisory compensation. It also does not reconcile unfair dismissal and wrongful dismissal into two harmonious doctrines. What it does do however is help us understand why we have the current situation that we do. It informs us of what aims and influences are prevalent in the judiciary's mind and from this we can have a much fuller knowledge of how and why the dismissal legislation operates in the way that it does. This can only serve to help reform suggestions become practical and workable and to bring increased certainty through a reference framework.

The role of law and economics has a long way to travel before it accepted as a mainstream doctrine in the United Kingdom. However, when applying it to unfair dismissal law it brings fresh insight, certainty and coherency and it is hoped will continue to aid the discussion over the correct role and interpretation of unfair dismissal.

Appendix

1.1 Corrective Justice and Deterrent Justice: What does the compensation provide?

If we construe constructive justice in its narrowest form then we can see that the judiciary's approach to compensation fits this form; corrective justice seeks to remedy the quantifiable loss sustained and financial loss will always be the main part of any dismissal, thus corrective justice occurs. This idea of a narrow corrective justice is also evidenced when reference is made to the duty on dismissed employees to act in order to mitigate their loss, as the compensatory award reflects this and will decrease if the individual finds another job straight away.[1]

Lord Hoffman suggested in the fairly recent case of *Johnston v Unisys*[2]that the approach the National Industrial Relations Court[3] took in the early days, of only compensating for financial loss, was:

> 'too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or family life.'[4]

This statement was highly influential coming from the House of Lords and it seemed that perhaps corrective justice might now to be construed to encompass all problems caused by the dismissal, not simply the direct financial ones. This however has not

[1] s.123(4) ERA 1996
[2] [2001] IRLR 279 (HL)
[3] Now the EAT
[4] ibid paragraph 55

proved to be the case, with two subsequent House of Lords cases[5] noting the confused reasoning of the Law Lords in *Johnson* and saying that the legislation does not allow for recovery of non-economic loss. The main rebuttal came in *Dunnachie* where it was held that Lord Hoffman's remarks were *obiter*[6] and therefore were not binding in effect. Lord Steyn gave the leading judgement and turning to the wording of the statute, he took the view that the word 'loss' in s.123 must be given its ordinary meaning, which in his opinion was only economic loss[7]. He was persuaded in part by the fact that up until *Johnson* there had been no real dissent from this position and there was only one academic criticism[8], which Lord Steyn did not find convincing.[9] The result of *Dunnachie* is to leave the law surrounding the position of compensation and its formulation, in precisely the same situation as it has been since 1972; the House of Lords in *Dunnachie* maintaining that it was Parliaments intent to only compensate for financial loss.[10]

Deterrent justice it would seem has never been an aim of the judiciary; we can state this so baldly precisely because of what was said in *Norton Tools* and *Clarkson,* namely that 'compensation was not intended to express any disapproval of an employers industrial relations policy'. Deterrent justice is in essence one of punitive damages which are intended to change an employers approach, but if no disapproval is intoned then:

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[5] Dunnachie v Kingston-upon-Hull City Council [2004] IRLR 727; Eastwood and another v Magnox Electric; McCabe v Cornwall County Council and others [2004] IRLR 733

[6] Lord Steyn makes mention that Lord Hoffman's language was not the language a Law Lord would use if he was seeking to overturn an established principle- at paragraph 12 – Lord Hoffman who was also involved in the case agrees entirely with the speech of Lord Steyn, which is indicative that compensation for economic loss is the only tenable position according to the law lords.

[7] See paragraphs 17-22

[8] Collins (1991)

[9] ibid paragraph 27 – Sedley LJ had taken a position similar to that of Collins in this case when it was before the Court of Appeal saying the current position 'leaves the governing concept – compensation which is just and equitable – without a role' (paragraph 24)

[10] See paragraph 21

> 'The compensatory award possesses an autonomy and neutral character which may not sufficiently serve broader purposes of deterrence and industrial order.'[11]

Collins argues that deterrent justice was the concept intended by Parliament when it included the reference to employer fault in principle of calculating compensation[12], this would seem to have some credibility because one of the aims of the legislation was to encourage employers to reform their internal procedures. However, the approach of the judiciary and the presence of the statutory cap on unfair dismissal awards would seem to undermine this rationale and therefore we cannot see any evidence for deterrent justice being an influential concept in the construction of the compensatory award.

2.1 Contractual principles in wrongful dismissal

Before the advent of the unfair dismissal legislation the employment relationship was treated as a contract and as such was controlled by contractual principles. Therefore, in the common law the Courts were very reluctant to 'order specific performance of any contract for personal services'.[13] This approach is clearly seen in the words of Lord Justice Fry:

> 'I should be very unwillingly 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.'[14]

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[11] Hough and Spowart-Taylor (1996); at page 309
[12] Section 123 of ERA 1996
[13] G de N Clark (1969); at page 532
[14] [1890] 45 Ch.D. 430; at page 438

Whilst this case occurred before the turn of the 20th Century, it remained indicative of the courts approach[15] up until the unfair dismissal legislation was created, bringing with it a statutory right for, what is in essence specific performance of an employment contract. However, despite this introduction there was still much judicial wariness of imposing the specific performance of a contract against the will of an employer. This was recognised by the Donovan Commission and was responsible for the move away from re-employment as a remedy, Kahn-Freund a member of the Commission noted afterwards:

> 'A contract of employment can not be specifically enforced against either side because equity does nothing in vain and also because an order for specific performance against the worker would savour of compulsory labour, and the rule of mutuality demands that if no such order can be made against the employee it cannot be made against the employer either.'[16]

Dickens calls the reluctance of the judiciary to order re-employment 'a hangover from the traditional approach'[17] and goes onto insightfully say:

> 'The ghost of the common law still haunts judicial thinking about unfair dismissal and yet the basis on which the traditional refusal to order specific performance rests is a shaky one in respect of an employment contract. The personal nature of the contract and the equality of position as between the two parties which the common law presumes are clearly at odds with the real nature of a contract of employment and the realities of the employment relationship.'[18]

Whilst there is certainly more than a kernel of truth in this, the important part from our perspective is the recognition that specific performance of contract is not something the judiciary are comfortable with.

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[15] See Carty (1989); at page 450
[16] Kahn-Freund, O – (1974) Uses and misuses of comparative law
[17] Dickens et al (1981); at page 170
[18] Ibid

2.2 Johnson and the role of the common law

Much ink has been spilt over *Johnson* with most academics finding some part of the confused judgement to take issue or agree with. But before we get to what was said, it is pertinent to give a brief overview of the facts and issues surrounding the case. Mr Johnson was summarily dismissed for some alleged irregularity, he complained to an employment tribunal of unfair dismissal and the tribunal upheld his claim. They found that the company had not followed their own disciplinary procedure; he was awarded the maximum compensation, reduced by 25% on the grounds of his contributory fault. His total award was just under £11,700. Two years later he commenced an action against the company in the county court for damages at common law, claiming breach of contract or negligence. He claimed his dismissal was in breach of various implied terms of his contract of employment, including the implied term of trust and confidence. He claimed that the manner of his dismissal caused him to suffer a mental breakdown, leading to periods in a mental hospital and as a result he would not be able to find another job. As such he claimed damages of £400,000 to compensate for his loss of earnings.

The potential pitfall with Mr Johnson's claim was that the Courts have until recently, steadfastly resisted from opening up the common law to attack for damages under any head of liability other than direct financial loss for the period of notice and this can clearly be seen in the classic case of *Addis v Gramaphone Co Ltd*[19]. In that instance, the judiciary in their desire to compensate for the actual loss of Mr Addis only allowed him to recover damages for the salary for his six month notice period and reasonable commission for this period. They refused to compensate him for the

[19] [1909] AC 488

humiliating manner of the dismissal or the problems he may have in finding future work as a result. This approach persisted[20] until the recent case of *Malik v BCCI*[21] indicated that there was a chink in the refusal to award anything but direct quantifiable financial loss. The case involved a claim by ex-employees of the bank whose reputations had been tarnished due to their relationship with the bank whilst the bank had been behaving fraudulently. The employees claimed damages for injury to reputation and future loss of earnings[22] and the House of Lords sidestepped *Addis* to award them. They reasoned that the compensation was for the breach by BCCI of trust and confidence and that this was now of principle importance in employment law, whereas it had not been in existence in *Addis* therefore the case could be distinguished. Whilst this may be evidence of the judiciary being pro-employee and exercising a considerable amount of enterprise in order to deliver justice, it also created a huge amount of confusion, as it seemed to open up an entirely new channel for obtaining substantial damages. The first thing that perhaps needs to be said when looking at the judgement is that *Johnson* is the 'paradigm hard case'[23]. There was a great deal of sympathy amongst the judiciary for Mr Johnson and the inadequacy of the damages under unfair dismissal and whilst they ruled by majority 4:1 against Mr Johnson, one can detect in their language that they in some ways felt their hands were

[20] Gunton v Richmond-upon-Thames London Borough Council [1980] ICR 755 – The case also continues to use the language of master and servant, perhaps indicative that the judiciary mindset has not really changed.
[21] [1997] IRLR 462 HL
[22] They were unable to bring a case under the statute because they had not been dismissed, however the damages they sought were far in excess of the statutory cap so it is unlikely they would have had recourse to this even if they could – it is worth noting that when the case was finally brought it failed for lack of causation.
[23] Barmes, L – (2004) The continuing conceptual crisis in the common law of the contract of employment; at page 444

tied[24]. The principal reason given for striking out this common law claim was that it would conflict with the statutory claim for unfair dismissal:

> 'A common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals not the ordinary courts of law'[25]

Barmes however finds this justification for keeping the common law narrow unconvincing. She quotes Lord Hoffman[26] and adds thought provoking comment:

> ''For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.' In taking this step Lord Hoffman and the other judges in the majority entered the fraught territory of divining parliamentary intention from legislative intention over time. It is not premature, however, to observe that working out what Parliament intended for related aspects of employment regulation from anyone legislative intervention is notoriously problematic. The extraordinary difficulty of discerning any over-arching plan or meaning behind even the simplest measure is one of the main reasons is such a fertile field of scholarship. The prolixity of Parliament, the number of actors who exert an influence on the law and the frequency of significant unintended effects, all mean it is not uncommon for the policy objectives underpinning even the same set of laws to shift and alter over time, sometimes with dizzying speed, while simultaneously being internally contradictory.[27]

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[24] It is for this reason perhaps that the judgement appears confused and has seemingly left the door open to challenge, particularly with regard to recovery of non-economic loss. See chapter 3 for more.
[25] ibid at para 2
[26] At para 58
[27] Barmes (2004); at page 445

Whilst there is certainly an element of truth in this statement, it is based on the rationale that the judiciary should not interfere when it might be against Parliaments intention. However, if we go deeper than this and suggest that the judiciary by not interfering can perpetuate efficiency, it becomes less of an issue actually 'divining the intent of Parliament' because the judiciary are focused on the goal of efficiency. This suggestion will, it is hoped, become more evident below.

We can sum up the ratio of the case in Lord Hoffman's words:

> '*[T]he action for wrongful dismissal could ... yield no more than the salary which should have been paid during the contractual notice.*'[28]

2.3 Advantages and disadvantages of Wrongful Dismissal

The question that most obviously springs to mind, bearing in mind the narrowness of wrongful dismissal, is why would anyone want to claim wrongful dismissal and not unfair dismissal?

One of the major advantages of bringing an action through the common law is that it circumvents the qualifying conditions which the statute imposes[29]. If the dismissed employee does not have the requisite qualifying period for example, they have no recourse to statute but they do have the ability to bring a claim under the head of wrongful dismissal providing they have a contract of employment. Equally, if the employee is on a fixed term contract, they can bring a claim in the common law for the full amount outstanding on the contract. This can certainly be advantageous

[28] ibid at paragraph 41
[29] See chapter 1 for a synopsis of these conditions

financially as the award may be larger than the full capped amount under the statutory scheme. This benefit also applies to employees who are on a high salary or long contractual notice period. Another potential advantage of the common law, which may influence dismissed employees, is the greater importance given to procedural rights[30]. It will be recalled that the judiciary have subverted the demands of procedural fairness under the dismissal to include the band of reasonable responses test, which has led to efficiency being a major consideration in the correct standard of fairness to be applied. In the common law there is no flexibility; the standard is natural justice. Lord Wilberforce[31], when considering the applicability of natural justice principles in a common law action,[32] asked:

> 'How could any responsible body of men reach a fair decision without hearing him [the dismissed employee]?'[33]

Lord Wilberforce refused to assume as inevitable that there are relationships in which all the requirements of the observance of the rules of natural justice are excluded.[34] Bearing this in mind, a dismissed employer may feel he is more likely to succeed in his claim if the court judges the dismissal against a background of natural justice and not the judicially created procedural fairness that pervades through the statutory scheme.

We established above that as a result of *Johnson,* under the common law the employee can only receive damages for direct financial loss which is quantifiable under the contract of employment. As was noted, this significantly reduced the scope

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[30] See Carty (1989); at page 452-454
[31] *Malloch v Aberdeen Corporation* [1971] 2 All E.R 1278
[32] This case occurred before the unfair dismissal legislation had come into effect – but still evidences the procedural burden upon employers in wrongful dismissal cases
[33] ibid at page 1295
[34] Carty (1989); at page 454

of wrongful dismissal and put the focus firmly on using the statute to remedy dismissal. However another recent House of Lords case has slightly muddied the water again and given some fresh hope to the role of the common law.

In the joined cases of *Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others*[35]the Law Lords held 'in cases where psychiatric injury is alleged to have been caused by acts of the employer committed prior to, and separately from the act of dismissal itself, a cause of action will exist at common law for damages in respect of breaches of the implied terms of mutual trust and confidence or to take reasonable care for employee's safety, and/or negligence.'[36] The House reasoned that:

> 'If before his dismissal an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by the subsequent dismissal and the statutory rights flowing therefrom [sic]. By definition, in law such a cause of actions exists independently of the dismissal. The majority decision of the House of Lords in *Johnson v Unisys Ltd* established a line of demarcation between events leading up to the dismissal, in respect of which the implied term of trust and confidence applies and a claim at common law may be made, and the dismissal itself, actual or constructive, to which implied contractual obligation to act fairly does not apply and an employee's remedy for unfair dismissal is that provided by the Employment Rights Act.'[37]

The House distinguished injury caused before the dismissal in order to try and get round *Johnson*, employing some judicial creativity when holding:

> 'Ordinarily, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed, it

[35] [2004] IRLR 733
[36] See Case note in IRLB 745; at page 12
[37] ibid at page 733

> arises by reason of his dismissal and the resultant claim for loss falls squarely within the exclusion area defined by *Johnson v Unisys Ltd.* Exceptionally, however, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. **Financial loss flowing from suspension is one instance. Another instance is when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment.**'[38] (emphasis added)

The jump from financial loss for suspension to psychiatric illness is one which cannot be easily made, but in order to do justice for the claimants it was one the House were willing to take. It is clear from the language in the case that the court were very unhappy at the way *Johnson* had restricted their ability to act. This is because it can be read from *Johnson* that they decided to only compensate for direct financial loss in part because they felt the statutory scheme was capable of providing appropriate remedy for injury. This was subsequently held to not be the case in *Dunnachie*[39] and as such it would seem that the effect of *Johnson* is to completely remove compensation for injury from either of the two remedies. The Law Lords in *Eastwood* thought this was unacceptable and as well as saying that *Johnson* should be re-visited they sought to offer a new way to obtain a remedy, hence this pre-dismissal injury distinction. It is worthy of note however, that the judges agreed with the *Johnson* approach with regard to the common law being subsidiary to the statute and not impinging on its territory.[40] The decision to award a remedy in *Eastwood* has come with strings attached, as noted by the judges themselves:

> 'The existence of a boundary line also means that an employer may be better off dismissing an employee than suspending him since a claim for unfair dismissal would be subject to a statutory cap, but a common law claim for compensation would not. Likewise, the decision in

[38] ibid
[39] See chapter 3
[40] See page 734

> *Johnson* means that an employee who is psychologically vulnerable is owed no duty of care in respect of his dismissal but may be owed a duty of care in respect of suspension'[41]

The outworking of this decision could well be to see an even smaller role for the common law if employers decide to dismiss early and take the quantifiable cost of unfair dismissal, something that is obviously a factor.

Of course, wrongful dismissal also has several disadvantages compared to unfair dismissal. As has been commented, if no injury occurs prior to the dismissal the dismissed employee will only be able to recover his salary for his contractual notice period[42]. Further to this, there is no ability to get specific performance, i.e. no chance for re-employment unlike under an unfair dismissal remedy. Wrongful dismissal also does not give the claimant access to specialised tribunals, which have layman with experience of industrial justice. For a start as Collins points out:

> 'The simple characterisation of employment as a contract fails to grasp the nature of the social relations involved.'[43]

If the judge hearing the case has no experience in industry, there is a greater likelihood that they will not be able to fully grasp the complexities of the relations involved[44]. This was acknowledged astutely by May LJ:

> 'Employment disputes not infrequently have political or ideological overtones, or raise what are often referred to as 'matters of principle'; **these are generally best considered not by the divisional court but by an industrial tribunal to the members of which, both lay and**

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[41] ibid
[42] Which it is unlikely he will have had any bargaining power over
[43] Collins, H – (1986) Market Power, Bureaucratic Power, and the Contract of Employment; at page 3
[44] See Clarke and Weddderburn – (1983) Modern Labour Law: Problems, Functions, and Policies at page 166-167 in Labour Law and Industrial Relations: Building on Kahn-Freund eds Clark, Lewis and Lord Wedderbun; for a great comment on the judiciary and the fact that they are the product of class and therefore unable to identify with industrial relations.

> **legally qualified, such overtones or matters of principle are common currency.'**[45]
>
> (emphasis added)

This viewpoint is also shared by members of the judiciary who have been involved with the tribunals, Sir John Waite remarking:

> 'It would be impossible to do full justice in an appellate court, even to the most refined questions of employment law, without the wisdom, humour and experience introduced by the lay mind.'[46]

Whilst this enthusiasm must be tempered by the knowledge that these judges are not wholly objective due to their roles on the EAT, it does illustrate some of the rhetoric which suggests industrial justice may not be something the judiciary are automatically familiar with, which could inhibit justice being done in a claim brought under the common law.

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[45] *R v East Berkshire Health Authority ex parte Walsh* [1984] IRLR 278; at paragraph 38 (CA)
[46]Waite (2986); at page 32 – see also the article by the now Lord Browne-Wilkinson – (1982) The role of the EAT; at page 76

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