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# Plant Closings and the Duty to Consult Under Britain's Employment Protection Act of 1975: Lessons for the United States

## I. INTRODUCTION

Employee dismissals which result from the shutdown of an industrial plant precipitate societal problems.<sup>1</sup> Industrialized nations have adopted several different approaches to resolve these problems. Unlike other modern industrial nations, the United States takes a passive approach which allows employers alone to decide if, when, and how to shut down plants.<sup>2</sup> Those who are most affected by the shutdown, the employees, frequently have no input in the shutdown decision. Great Britain, on the other hand, takes a more active approach by requiring employers to consult their employees before dismissing them and by giving employees significant rights upon dismissal.

A comparison of the British and U.S. approaches to the problems of plant shutdowns demonstrates the relative passivity of the United States. Since the United States and Great Britain have similar legal systems, an analysis of the British legal response to the problems of plant shutdowns provides an opportunity to evaluate the impact of that response were it to be applied in the United States. This Comment presents such an analysis. It examines the British approach and suggests whether it would be feasible for use in the United States.

After first considering the scope of the problems which result from the shutdown of an industrial plant, this Comment outlines the U.S. law relating to such shutdowns. The author then discusses the underlying similarities and differences between U.S. and British labor relations law, with emphasis on Britain's labor history and concept of the right to work. This Comment focuses on Great Britain's Employment Protection Act of 1975<sup>3</sup> and considers both the substantive and the procedural rights which the Act grants to employees upon dismissal.

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1. For a discussion of the social and economic problems which accompany plant shutdowns, see generally B. AARON & K. WEDDERBURN, *INDUSTRIAL CONFLICT* (1972); G. ABRAHAM, *TRADE UNIONS AND THE LAW* (1968); K. WEDDERBURN, *CASES AND MATERIALS ON LABOR LAW* (1967); F. BARTOSIC, *LABOR RELATIONS LAW IN THE PRIVATE SECTOR* (1977); Lubin, *Unions Try New Kinds of Resistance As Anger Over Plant Closing Grows*, *Wall St. J.*, Jan. 27, 1982, at 29, col. 4 [hereinafter cited as *Unions Try Resistance*].

2. Compare *Textiles Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (complete shutdown without bargaining is not an unfair labor practice under the National Labor Relations Act) with National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976) (employer and employee must bargain "with respect to wages, hours and other terms and conditions of employment . . .").

3. Employment Protection Act, 1975, ch. 71.

The author concludes that the substantive rights granted by the 1975 Act place an excessive burden on the market economy<sup>4</sup> and, therefore, are not a feasible alternative or addition to current U.S. law. However, the procedural guarantees of the Act, which require consultation between employers and employees, do provide a plausible model for reform of current United States law.

## II. THE PROBLEM OF PLANT SHUTDOWNS — DISMISSALS FOR REDUNDANCY

In many industrialized market economies, a plant shutdown<sup>5</sup> generates problems for the plant's owners, workers and community.<sup>6</sup> A shutdown is often caused by industry-wide weaknesses, competition from lower priced imports, obsolete production methods, or other factors beyond the control of the plant's owners and managers.<sup>7</sup> The dismissed employees suffer from loss of jobs and income.<sup>8</sup> Society loses the goods which the plant would have produced and bears the burden of supporting the unemployed persons.<sup>9</sup> Theoretically, the owner's

4. The term "market economy" is used here in a broad sense to include all economic systems which rely in whole or in part on the factors of supply and demand for the allocation of goods and resources. See P. SAMUELSON, *ECONOMICS* (10th ed. 1976) [hereafter cited as SAMUELSON].

5. The author uses the term "plant shutdown" to encompass both whole-scale and partial closings. A shutdown may result in the dismissal of all company employees or of only a few employees in one department.

In this Comment, "shutdown," refers to the dismissal of employees whose employment is no longer economically desirable. Even when a company increases output by switching its production method to a more capital-intensive technique, the definition of shutdown, as used in this Comment, includes circumstances where any employees are dismissed.

This definition corresponds most closely with the British term, "redundancy," which a British statute defines as a situation where a worker's employment is no longer required by his employer because of adverse economic conditions. Redundancy Payments Act, 1965, ch. 12, § 1(2); *C.f.* Delanair Ltd. v. Mead, 1976 Indus. Cas. R. 552 (the correct test of whether the dismissal was for redundancy was whether it was the result of a decision that less employees were needed). The Redundancy Payments Act of 1965 states that a dismissal of an employee is by reason of redundancy if that dismissal is wholly or mainly attributable to the following circumstances: (1) the employer has ended the business for which the employee is employed; (2) the employer has ceased or intends to cease that business in the location of the employment; (3) the requirements of the particular kind of work for which the employee was employed are no longer necessary; (4) work of the particular kind for which the employee was employed is no longer carried out at the level it had been in the place of employment; and (5) a situation in which none of the above four circumstances exist, but in which they would exist if the entire industry was viewed as the employee's employer. Redundancy Payments Act, 1965, ch. 12, § 1(2). Additionally, that Act declares that an otherwise unexplained dismissal will be presumed to have been due to redundancy. *Id.* at § 9(2)(b); *Hindle v. Percival Boats Ltd.* [1969] 1 W.L.R. 174. The presumption does not apply to a claim of unfair dismissal. Trade Unions Labour Relations Act, 1974, ch. 52, § 1(1), sched. 1, para. 17; *Midland Foot Comfort Centre Ltd. v. Richmond* [1973] 2 All E. R. 294.

6. Sease, *Shutting Down: Closing of a Steel Mill Hits Workers in U.S. With Little Warning*, Wall St. J., Sept. 23, 1980, at 1, col. 6 [hereinafter cited as *Shutting Down: U.S.*]; Morgenthaler, *Shutting Down: When the British Close Mills, the Government Gives an Array of Help*, Wall St. J., Sept. 24, 1980, at 1, col. 6 [hereinafter cited as *Shutting Down: British*].

7. *Shutting Down: U.S.*, *supra* note 6; *Shutting Down: British*, *supra* note 6.

8. *Shutting Down: U.S.*, *supra* note 6; *Shutting Down: British* *supra* note 6.

9. *Shutting Down: U.S.*, *supra* note 6; *Shutting Down: British* *supra* note 6.

loss is one of the risks of investing his capital in the plant, with potential profits providing the incentive for this risk. Investors demand, and receive, a higher rate of return for high-risk endeavors than for low-risk endeavors.<sup>10</sup> Thus, plant shutdowns do not justifiably produce major concern for owner relief.

A similar theory might justify worker losses in a plant shutdown. Since the market economy will allocate resources most efficiently when the forces of supply and demand are left unimpeded,<sup>11</sup> factors outside the market should not influence the employer's decision to dismiss an employee.<sup>12</sup> Likewise, the availability of shutdown benefits should not influence a worker's decision to take or to refuse different employment. The denial of relief to workers, when their employment by one plant or industry terminates, encourages those workers to find employment where they are needed.<sup>13</sup> However, this proposition fails to take account of a worker's specialization and geographic location. A worker who is highly trained in skills no longer in demand, or who lives in an economically depressed area, faces either unemployment or underemployment.<sup>14</sup> Thus, without the aid of outside intervention, the worker can suffer substantial loss.<sup>15</sup>

#### A. *The Response of the United States to the Problem of Plant Shutdowns*

Recently, several state legislatures in the United States have considered legislation which addresses the problems arising from plant shutdowns.<sup>16</sup> However, no state has in fact enacted such a law. Concern that any significant protection or benefits given to employees will infringe on management's prerogative to shut-down makes many legislators reluctant to enact state laws in this area.<sup>17</sup> They

10. K. LEWELLEN, *THE COST OF CAPITAL* (1969); G. WESTON & B. BRIGHAM, *MANAGERIAL FINANCE* 223-27 (4th ed. 1972).

11. *E.g.*, M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

12. *Id.*

13. *Id.*

14. *E.g.*, SAMUELSON, *supra* note 4, at 582-85.

15. See generally Bowers, *Handling Redundancies: The Unanswered Questions*, 124 SOL. J. 369 (1980); Arup, *Job Security or Income Support*, 7 FED. L. REV. 145-68 (1976); Szakats, *Comparative Law and Job Security*, 3 OTAGA L. REV. 137-52 (1974) (New Zealand); Lowry, Bartlett & Heinsz, *Legal Intervention in Industrial Relations in the U.S. and Great Britain—A Comparative Analysis*, 63 MARQ. L. REV. 1 (1979).

16. N.Y. Times, Mar. 15, 1980, reprinted in 126 CONG. REC. E1494 (daily ed. Mar. 25, 1980). Maine did have a law intended to regulate plant closings. See ME. REV. STAT. ANN. tit. 26, § 625 (1981) (repealed 1975). The Maine statute required the employer of more than 100 persons to give notice to employees before closing or moving more than 150 miles. *Id.* paras. 2-3. It also required the employer to give each employee with five or more years seniority a severance payment equal to one week's pay for each year of seniority. Presumably because of its adverse effect on the state's economy, the law was repealed. 1975 Me. Laws 512, §§ 1, 2. Legislation with goals similar to this Maine statute has been introduced in New York, Ohio, Pennsylvania, Rhode Island, Illinois, Indiana, Michigan, and Massachusetts.

17. One report stated that the mere introduction of a bill regulating closing had "a dampening effect" on Michigan's economy. Philadelphia Enquirer, Mar. 6, 1980, reprinted in 126 CONG. REC. E1140

fear that any such infringement will discourage a company from locating within their state.<sup>18</sup> Thus, any significant solution to the problem must be enacted by the federal government.<sup>19</sup>

In 1979, congressmen from industrial states, with support from the United Automobile Workers, introduced legislation in Congress.<sup>20</sup> This legislation would have made plant closings restrictively expensive for its owner.<sup>21</sup> The Carter administration, concerned that the law would have an adverse impact on its efforts to improve the economy's productivity, opposed the legislation.<sup>22</sup> Private sector management also opposed the legislation, arguing that it would permit an unwarranted governmental intrusion into a matter best left to collective bargaining and to the problem-solving mechanics of the market.<sup>23</sup> Thus, the U.S. government has given only minimal direct attention to the problems resulting from plant shutdowns.

To date, the most significant source of law regarding the shutdown is the National Labor Relations Act (NLRA).<sup>24</sup> A company has a legal responsibility to its employees only when the NLRA imposes the duty to bargain.<sup>25</sup> The NLRA

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(daily ed. Mar. 10, 1980). The president of the Michigan Manufacturers Association, Mr. John Thodis stated: "The only way you're going to cope with [the effect of disincentive] is in federal legislation. I think it's got to affect the country as a whole." *Id.*; see N.Y. Times, Mar. 15, 1980, reprinted in 126 CONG. REC. E1494 (daily ed. Mar. 25, 1980).

18. Philadelphia Enquirer, Mar. 6, 1980, reprinted in 126 CONG. REC. E1140 (daily ed. Mar. 10, 1980).

19. See *id.* However, any large scale, inter-jurisdictional solution requires satisfying powerful competing interests. For a discussion of attempts at such a solution in the European Economic Community, see generally Comment, *Multinational Regulation of MNE Labor Relations*, 4 B.C. INT'L & COMP. L. REV. 409 (1981).

20. H.R. 5040, 96th Cong., 1st Sess., 126 CONG. REC. H6994 (1979) (introduced by Rep. William D. Ford, Mich.). The legislation would have required business concerns which undertook a change of operations to give at least one year's notice to the Secretary of Labor, and to affected labor organizations, employees and local governments. *Id.*

21. The legislation would have required business concerns to provide assistance to employees who suffer an employment loss caused by changes in operations. The legislation also would have authorized the Secretary of Labor to provide assistance to such business concerns and to such affected employees and local governments. *Id.*

22. *Shutting Down: U.S.*, *supra* note 6, at 20, col. 2.

23. *Id.*

24. 29 U.S.C. §§ 151-169 (1935) (amended 1947, 1951, 1958, 1959, 1974, 1981). The National Labor Relations Act (NLRA) created a substantive body of labor relations law and established an administrative agency, the National Labor Relations Board (NLRB), which is responsible for interpreting and applying the substantive law.

25. Section 8(d) of the National Labor Relations Act, establishes the duty to bargain in good faith. The employer and the employee's representative must "meet at reasonable times and confer in good faith . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." *Id.* at § 158(d). Compare *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026 (6th Cir. 1970) (refusals of parent and subsidiary to bargain over decision to close subsidiary and dismantle its machinery did not constitute an unfair labor practice; i.e. there is no duty to bargain) and *NLRB v. Acme Indus. Prod., Inc.*, 439 F.2d 40 (6th Cir. 1971) (there is no duty to bargain over a decision to relocate part of manufacturing operation to another plant) with *Weltronic Co. v. NLRB*, 419 F.2d 1120

requires bargaining "with respect to wages, hours, and other terms and conditions of employment."<sup>26</sup> The courts have interpreted the phrase "terms and conditions of employment" to include partial shutdown under certain circumstances.<sup>27</sup> In the instance of a partial shutdown, the National Labor Relations Board (NLRB)<sup>28</sup> has the authority to order the employer to bargain only when the purpose and effect of the employer's conduct is to "chill" unionism among the remaining employees.<sup>29</sup> However, the employer owes no duty to bargain if it chooses to shut down the entire business.<sup>30</sup> Similarly, in cases where the employer contemplates a shutdown which will remove that employer from a distinct phase of its business, the NLRA does not require bargaining with the union.<sup>31</sup>

The distinction between instances in which the duty to bargain does and does not arise is "quite fine, indeed one might say barely perceptible."<sup>32</sup> Confusion on the issue results from the conflicting concerns of the National Labor Relations Act and of the employees involved. In the event of a proposed shutdown, affected workers are interested in keeping their jobs and in receiving fair treatment from their employer if dismissal is necessary.<sup>33</sup> The NLRA, however, is primarily concerned with the maintenance of industrial peace.<sup>34</sup> The NLRA does not provide a viable method for handling the problems resulting from a shutdown because Congress did not intend it to solve them.<sup>35</sup>

(6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1969) (under a collective bargaining agreement providing that functions of management include the right to determine the location of plants, the union did not relinquish the right to bargain about the decision to remove work from a unit where such removal had a significant impact on wages; thus, duty to bargain existed). *See generally* R. GORMAN, *LABOR LAW* 399-495 (1976) [hereinafter cited as GORMAN].

26. GORMAN, *supra* note 25, at 399-495; *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

27. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964). *See generally* GORMAN, *supra* note 25, at 496-531.

28. *See* note 24 *supra*.

29. *Cf.*, *Textiles Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (complete shutdown without prior bargaining would not be an unfair labor practice under § 8(a)(3) of the NLRA).

30. *Id.*

31. *Summit Tooling Co.*, 195 N.L.R.B. 479 (1972). *See also* *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

32. GORMAN, *supra* note 25, at 519.

33. *Shutting Down: U.S.*, *supra* note 6 (examining distress of steel workers affected by United States Steel plant in Lordstown, Ohio); *see Unions Try Resistance*, *supra* note 1.

34. "The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining." *International Harvester Co.*, 138 N.L.R.B. 923, 926 (1963), *enforced sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964).

35. The fact that the judicial decisions are difficult to reconcile reflects the conflict between the goals of NLRB and the concerns of the affected workers. With regard to shutdowns and the duty to bargain, "[t]he [National Labor Relations] Board's decisions appear inconsistent with one another, in spite of its attempt to articulate relevant distinctions. The same is true of the decisions of the court of appeals. . . ." GORMAN, *supra* note 25, at 514.

B. *Underlying Similarities Between U.S. and British Industrial and Labor Relations Law*

In 1975, Great Britain adopted legislation which codifies methods for dealing with shutdowns.<sup>36</sup> Parliament primarily designed this legislation, as Congress designed the NLRA, to improve industrial relations.<sup>37</sup> This "social contract" legislation<sup>38</sup> may be viewed as the British equivalent to the U.S. National Labor Relations Act.<sup>39</sup> While the two Acts differ significantly in approach, their basic goals and policies are the same. The findings and policies of the National Labor Relations Act are:

to mitigate and eliminate [instances of industrial relations unrest as it interferes with the free flow of commerce] by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>40</sup>

Similarly, the purpose of Britain's Employment Protection Act of 1975, as expressed in that Act is "to establish machinery for promoting the improvement of industrial relations; to amend the law relating to workers' rights and otherwise amend the law relating to workers, employers, trade unions and employers' associations."<sup>41</sup>

Both the British and U.S. Acts adopt fundamental principles of the common law of contracts. Under these principles, notions of justice and equity do not require the legal system to maintain the fairness of the deal reached by the parties; rather the concept of free enterprise requires the legal system to maintain the fairness of the dealings between the parties.<sup>42</sup> The differences between the two Acts are attributable, first, to the differing views that the two societies

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36. Employment Protection Act, 1975, ch. 71. The Act received the Royal Assent on November 12, 1975.

37. See note 41 and accompanying text *infra*.

38. The term "social contract" represents the general status of the individual employee in his employment position and signifies the relationship between the government and labor organizations. For purposes of this Comment, the term "social contract" refers to the promises and protections given to workers, either as individuals or as members of trade unions, by the government, in the context of the employment relationship. See Mitchell, *The Employment Protection Act 1975 and the Extension of Industrial Democracy in Britain—Lessons for Australia*, 6 *AUSTL. BUS. L. REV.* 105 (1978) [hereinafter cited as Mitchell].

39. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976). See note 24 and accompanying text *supra*.

40. National Labor Relations Act § 1, 29 U.S.C. § 151 (1976).

41. Employment Protection Act, 1975, ch. 71, Preliminary Note.

42. 13 S. WILLISTON, *CONTRACTS* §§ 1601-1602; Williston, *Freedom of Contract*, 6 *CORNELL L. Q.* 365, 366 (1921).

possess with regard to the social responsibility of employers and the rights of employees<sup>43</sup> and, second, to each country's history of labor relations.<sup>44</sup>

### C. *Underlying Differences Between U.S. and British Industrial and Labor Relations Law*

#### 1. Britain's Labor History

The Labour Party took control of the British Government, following a general election in 1974, on a platform of industrial relations reform.<sup>45</sup> A full five years prior to that election, the Donovan Commission had completed an expansive study of labor-management relations and had reported several existing problems.<sup>46</sup> Those problems still troubled the British economy in 1974, demon-

43. Compare *Shutting Down: U.S.*, *supra* note 6 with *Shutting Down: British*, *supra* note 6 (for a comparison of shutdowns in the United States and Great Britain).

44. The Labor history of both Great Britain and the United States has been the subject of extended works. The scope of this Comment, however, does not permit an extensive review. For a basic review of the events leading to the passage of the Employment Protection Act of 1975 in Great Britain, see generally R. MCCARTHY & C. ELLIS, *MANAGEMENT BY AGREEMENT* (1973); Lewis, *The Historical Development of Labor Law*, 14 BRIT. J. OF INDUS. REL. 1 (1976). On U.S. labor history, see generally A. COX, *LAW AND THE NATIONAL LABOR POLICY* (1960); R. WELLINGTON, *LABOR AND THE LEGAL PROCESS* (1968); D. BOK & C. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY*; J. GREGORY, *LABOR AND THE LAW* (2d. rev. ed. 1958).

45. See Bartlett & Lowry, *Collective Agreements in the United States and Britain: Status and Consequences*, 1979 UTAH L. REV. 469, 484 [hereinafter cited as Bartlett & Lowry].

46. THE ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYER'S ASSOCIATIONS [DONOVAN REPORT], Cmd. 3, No. 3623 (1968) [hereinafter cited as the DONOVAN REPORT]. The Donovan Commission was the fifth Royal Commission, since 1867, established to study British industrial relations. Unlike its predecessors, the range and scope of the Donovan Commission's inquiry was broad and was conducted in contemplation of a full-scale legislative revision of the entire industrial relations system. *Id.* at 1-10. The Donovan Commission reported that it received evidence from unions, employers and the government, as well as from interested organizations, experts and members of the general public. *Id.* at 319-23.

In substance, the DONOVAN REPORT, *supra*, concluded that in Britain, formal, collective agreements between union and employer take place at the national level and are not binding on either the individual employee or the employer on the local level. *Id.* at 12. The bargaining that takes place at the local, factory-wide level makes use of the formal, industry-wide agreements merely as a starting point for local additions. *Id.* at 36. National trade union organizations are unable to exert strong control over local unions. *Id.* at 12, 94-121. A lack of strong central authority provides at least a partial explanation as to why Britain is frequently plagued by unofficial, "wildcat" strikes. See IN PLACE OF STRIFE, CMD. 3, No. 3888, at 15 (1969).

In response to an unstable state of affairs, the Donovan Commission envisaged reform through the introduction of formal, factory-wide agreements and the confinement of industry-wide agreements to such areas as they might effectively cover. DONOVAN REPORT, *supra* at 261-63.

The Donovan Commission recommended significantly less progressive changes than those it originally envisaged. The main point of its report was that the essentially "voluntarist" character of British labor relations should remain unchanged. According to the Commission, general reform of the system of practices and procedures was a necessary prerequisite for successful reform in the statutory treatment of union-management agreements. *Id.* at 261-77; see Bartlett & Lowry, *supra* note 45, at 480, 482; Mitchell, *supra* note 38, at 108, 111.



strating that the Conservative Party's efforts<sup>47</sup> to improve labor relations had been largely unsuccessful.<sup>48</sup>

The Labour Party planned to implement its program to reform labor relations law, or social contract,<sup>49</sup> in three stages.<sup>50</sup> The goal of the first stage was to eliminate the preference that the Conservative government had created toward legally enforceable collective agreements.<sup>51</sup> The Labour Party attained this goal by repealing the Industrial Relations Act of 1971<sup>52</sup> and simultaneously enacting the Trade Union and Labour Relations Act of 1974.<sup>53</sup> In the second stage of labor reform, the Labour Party sought to extend the rights of individuals and trade unions in the field of labor relations and to make third party intervention in labor disputes more accessible.<sup>54</sup> The government achieved this goal by enacting the Employment Protection Act of 1975.<sup>55</sup> In the third stage, which was never implemented, the Labour Party contemplated providing legal underpinning and encouragement to increased worker participation in management decisions.<sup>56</sup> Thus, Parliament enacted the Employment Protection Act as part of

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47. In 1971, in response to continuing industrial instability, the British Conservative Party enacted the Industrial Relations Act which established a preference for legally enforceable collective agreements. "Every collective agreement which . . . does not contain a provision which (however expressed) states that the agreement or part of it is not intended to be legally enforceable, shall be conclusively presumed to be intended by the parties to it to be a legally enforceable contract." Industrial Relations Act, 1971, ch. 72, § 34(1) (repealed 1974).

48. Employers and unions generally choose to avoid the control of the Industrial Relations Act, 1971, by including non-enforceability clauses in collective bargaining agreements. J. COOPER & J. BARTLETT, *INDUSTRIAL RELATIONS: A STUDY IN CONFLICT* (1976). Moreover, the Industrial Relations Act, 1971, was inconsistent with the recommendations of the Donovan Commission, *see* note 46 *supra* and was opposed by the Trade Union Congress. *See* A. MCCARTHY & J. ELLIS, *MANAGEMENT BY AGREEMENT* 22-55 (1973). The problems caused by the Industrial Relations Act, 1971, prompted Professor Wedderburn, noted scholar and editor of the *Modern Law Review*, to term it "[t]he government's industrial Vietnam." *The Observer* (London), Apr. 1, 1973, at 12, col. 3.

49. *See* note 38 *supra*.

50. Mitchell, *supra* note 38, at 109.

51. *Id.* at 109-10.

52. Industrial Relations Act, 1971, ch. 72, § 34 (repealed 1974).

53. Trade Union and Labour Relations Act, 1974, ch. 52. This Act retained some provisions of its predecessor (Industrial Relations Act, 1971, ch. 72), but replaced § 34 with § 18 which provides in pertinent part: "(1) A collective agreement . . . shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—(a) is in writing, and (b) contains a provision which (however expressed) states that the parties intended that the agreement shall be a legally enforceable contract." Trade Union and Labour Relations Act, 1974, ch. 52, § 18. Of course, the individual employer-employee contract may incorporate collectively bargained terms. *National Coal Bd. v. Galley*, [1958] 1 W.L.R. 16. Furthermore, courts may hold that when the individual employment contract is silent on a point that is covered by a term of the collective agreement, incorporation should be implied. *Maclea v. Essex Line*, 133 Lloyd's List L.R. 254. The law is well established that when the terms of an individual contract are inconsistent with those of a collective agreement, the former governs. K. WEDDERBURN, *THE WORKER AND THE LAW* 189 (2nd ed. 1971).

54. Mitchell, *supra* note 38, at 109-10.

55. Employment Protection Act, 1975, ch. 71 (1975).

56. Mitchell, *supra* note 38, at 109. The government did begin the process of enacting this third stage

a program of wide-reaching, labor-minded reform.<sup>57</sup> That reform, broad as it was, provided an environment conducive to the implementation of a solution to the problem of plant shutdowns.<sup>58</sup>

## 2. The British Right to Work

Differences in American and British views concerning an employer's social responsibility and an employee's rights are the most significant factors causing variations between American and British laws governing industrial relations and plant shutdowns.<sup>59</sup> A brief consideration of the British right to work offers insight into plant shutdown legislation affecting that right.

In Britain, public sentiment encompasses the notion that a man has the right to work, and that, "if [he wants] to work and put in [his] time, then society would look after [him]."<sup>60</sup> British courts have recognized this notion and have acted to protect it.<sup>61</sup> One court reasoned that "[a] man's right to work is just as important, if not more important, to him than his rights of property. The courts . . . must intervene to protect the right to work."<sup>62</sup>

A recent case, *Bosworth v. Angus Jowett & Co. Ltd.*,<sup>63</sup> demonstrates the extent of the right to work. In *Bosworth*, the petitioner-employee successfully argued that the right to work imposes a duty upon the employer which extends beyond the obligations not to dismiss an employee without reasonable cause and to continue paying the employee the agreed upon wage.<sup>64</sup> The Industrial Tribunal<sup>65</sup> held

by publishing a Command Paper. INDUSTRIAL DEMOCRACY, CMD. 3, NO. 7231 (1978). The government intended that employees and their representatives should participate in making corporate decisions which affect them. *Id.* Legislation was to provide basic statutory rights for employees and unions, varying with the size of the employer; but details of participation would be left to the individual companies. *Id.*

57. See Mitchell, *supra* note 38, at 109; Bartlett & Lowry, *supra* note 45, at 480-83.

58. See Mitchell, *supra* note 38, at 109-11; Bartlett & Lowry, *supra* note 45, at 480-85.

59. See § II.B *supra*. A review and analysis of both nations' views on these factors has been the subject of numerous works and is beyond the scope of this Comment. For a discussion of British views, see generally J. PARKER, *SOCIOLOGY OF INDUSTRY* (1976); K. WEDDERBURN, *THE WORKER AND THE LAW* (2nd ed. 1971); J. GRUNFELD, *TRADE UNIONS AND THE INDIVIDUAL IN ENGLISH LAW* (1960). For a discussion of American views, see generally A. COX, *LAW AND THE NATIONAL LABOR POLICY* (1960).

60. *Shutting Down: British*, *supra* note 6, at 1, col. 1 (statement of Jimmy Wright, steelworker and Mayor of Corby, England).

61. Napier, *Judicial Attitudes Toward the Employment Relationship*, 6 *INDUS. L. J.* 1 (1972) (discussion of recent case law).

62. *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (action brought by employee against union on grounds of unreasonable expulsion from closed shop). See Kahn, *Recognition and Protection of a Worker's Right to Work*, 119 *SOL. J.* 125-26, 145-46 (1975).

63. [1977] *Industrial Relations Law Reports* [I.R.L.R.] 374. The case and its implications on the right to work are examined and discussed in McMullen, *A Right to Work in the Contract of Employment*, 128 *NEW L. J.* 848 (1978) [hereinafter cited as McMullen].

64. *Bosworth*, [1977] I.R.L.R. at 376.

65. Industrial tribunals were established under the Industrial Tribunals Regulations, 1965 *STAT.*

that an employment contract<sup>66</sup> gives rise to a duty of the employer to provide work for the employee.<sup>67</sup> Members of Parliament have followed the trend of the British judiciary in recognizing the importance of a person's right to work.<sup>68</sup> Modern British legislation tends to treat an employee's right to his job as analogous to a property interest.<sup>69</sup>

A plant shutdown challenges the concept of an individual's right to work. Despite a philosophy deeply rooted in society supporting the right to work, the market economy determines if and when that right may be exercised.<sup>70</sup> No right to work will save an employee's job when factors such as inflation, recession, technological obsolescence, and competition from other countries dictate that an employee must be dismissed. As one commentator noted, "It is difficult to see a right to work with any full practical significance in an economy where full employment has ceased to be the norm."<sup>71</sup>

The Labour Party's efforts to implement its social contract theory occurred at a time when the right to work was sorely in need of protection.<sup>72</sup> Though Britain's legal system respected that right, Britain's economy did not. The sag-

INST. No. 1101. These and other subsequently enacted regulations (*see, e.g.*, Industrial Tribunal Labour Relations Regulations, 1974 STAT. INST. No. 1386) grant these judicial bodies jurisdiction over labor relations disputes.

66. Under the Contracts of Employment Act, 1972, ch. 53, § 4, an employer must, within 13 weeks after the commencement of employment, give each employee a written contract stating the particulars of each party's obligations to the other. *See Note, Some Effects of the Contracts of Employment Act 1972*, 6 INDUS. L. J. 133 (1977).

67. A criticism of this holding is that it extends the right to work without discussion of precedent to the contrary. In particular, the tribunal ignored the oft-cited dictum of Judge Asquith in *Collier v. Sunday Referee Publishing Co. Ltd.*, [1940] 2 K.B. 647. "[P]rovided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out." *Id.* at 650.

68. Mitchell, *supra* note 38, at 105-09. *See, e.g.*, the statement of Mr. Douglas Henderson (Aberdeenshire, East), made during debate concerning a situation where "an amorphous group" could dismiss an employee without notice: "These are the sorts of things that concern people . . . . People feel threatened by such conditions." 891 PARL. DEB., H.C. (5th ser.) 89 (1975) (debate after the first reading of the Employment Protection Bill, April 28, 1975, which was later passed as the Employment Protection Act, 1975, ch. 71). (The Employment Protection Act, 1975, did not become an Act until it was passed. During the debates, Parliament referred to the legislation as the Employment Protection Bill. Employment Protection Bill, 1975, First Reading 889 PARL. DEB., H.C. (5th ser.) 257 (1975)).

69. *See, e.g.*, Redundancy Payments Act, 1965, ch. 62; Contracts of Employment Act, 1972, ch. 53. Mitchell, *supra* note 38, at 107.

70. McMullen, *supra* note 63, at 849-50.

71. *Id.* at 850.

72. In the first major parliamentary debate over the Employment Protection Bill, Members of Parliament noted that the government had just introduced financial support amounting to £2.8 billion (£1 = approx. \$2.20) for British Leyland, England's largest automotive company. British Leyland Act, 1975 ch. 43. The Act authorized the Secretary of State to acquire shares in British Leyland Motor Corporation in an effort to strengthen the company's troubled financial status. *Id.* In that same debate, the members noted that the British Steel Corporation had threatened to layoff 50% of its work force, a move that would directly affect 20,000 employees and their families. 891 PARL. DEB., H.C. (5th ser.) 137 (1975).

ging economy made the possibility of dismissal due to plant shutdown a real and imminent threat to the security of many workers.<sup>73</sup>

In 1975, prior to the passage of the Employment Protection Act, Parliament believed that instability in industrial relations would persist if workers continued to see their right to work threatened by imminent dismissals.<sup>74</sup> Parliament also believed that regardless of the progress it made in improving labor relations procedure, apprehension of violations of the right to work would continue to cause worker unrest.<sup>75</sup> Thus, Parliament concluded that if any legislation were to achieve maximum industrial relations stability, it would have to protect the right to work against the effects of plant shutdowns.<sup>76</sup>

In drafting the Employment Protection Act, the Labour Government attempted to protect the right to work by two methods. The first method, the "fixed" rights method, is encompassed in Part II<sup>77</sup> of the Act, entitled "Rights of Employees." The second method, the procedural rights method, is included in Part IV,<sup>78</sup> entitled "Procedures for Handling Redundancies." The remaining sections of the Act, Parts I,<sup>79</sup> III,<sup>80</sup> and V,<sup>81</sup> specifically address the mechanics of settling industrial and labor relations disputes.<sup>82</sup> These sections protect the

73. See notes 68-70 and accompanying text, *supra*.

74. Several members of Parliament suggested that one of Parliament's goals in passing the Employment Protection Act, 1975, was the removal of the worker's fear of an unannounced dismissal. See, e.g., 891 PARL. DEB., H.C. (5th ser.) 139 (1975). One member, Mr. I. Clemitson, commented, "Insecurity must be replaced by a legal framework for healthy and constructive conflict." *Id.* He continued, "Insecurity is one of the major unwritten, unrecorded causes of industrial dispute." *Id.*

75. See *id.* at 137-39.

76. *Id.*

77. Employment Protection Act, 1975, ch. 71, §§ 22-88.

78. *Id.* §§ 99-107.

79. *Id.* §§ 1-21.

80. *Id.* §§ 89-98.

81. *Id.* §§ 108-129.

82. Parts I, III, and V comprise the bulk of the Act. Part I, entitled "Machinery for promoting the improvements of industrial relations," establishes an Advisory, Conciliation and Arbitration Service, provides for the recognition of trade unions, and mandates the employer to disclose certain information to the trade union for the purposes of collective bargaining. Employment Protection Act, 1975, ch. 71, §§ 1-21. Part III, entitled "Regulation of terms and conditions of employment," clarifies the intended interaction of the Advisory, Conciliation and Arbitration Service and previously existing agencies. Employment Protection Act, 1975, ch. 71, §§ 89-98. Finally, Part V, entitled "Miscellaneous and supplementary provisions," specifies, *inter alia*, procedures for and limits of application of the Act. Employment Protection Act, 1975, ch. 71 §§ 108-129.

These particular parts of the Employment Protection Act demonstrate a partial retreat from the "voluntarist" nature of previous industrial relations practice. See note 46 and accompanying text, *supra*. The statutory establishment of an arbitration service manifests an emerging attitude which favors arbitration over litigation as a means of settling labor disputes. Interestingly, lawmakers in the United States have encouraged the use of this approach since the Supreme Court's decisions in the *Steelworker's Trilogy* (United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)). *But see* Bartlett & Lowry, *supra* note 45, at 485-88, where the authors suggest that British use of the arbitration process has been minimal, and will remain so until collective agreements become legally enforceable. An important aim of the Employment Protection Act and of the implementation of the social contract is the attempt to provide a legal climate that is more conducive to collective

individual's right to work by exposing employer transgressions of this right.<sup>83</sup>

### III. EMPLOYMENT PROTECTION ACT PART II — RIGHTS OF EMPLOYEES

Part II of the Employment Protection Act<sup>84</sup> provides employees with specific substantive rights which vest in the employee notwithstanding external factors such as the employer's financial situation, the condition of the local or national economy, or the degree to which the employee is willing to accept sacrifice such as reduced wages or increased hours.<sup>85</sup> While these rights do not solely address the problem of shutdowns, they do benefit the employee who is subject to dismissal.<sup>86</sup> This Part provides employees with the following rights: a guaranteed week's pay;<sup>87</sup> remuneration in the event of suspension for medical reasons;<sup>88</sup> maternity pay and maternity leave upon pregnancy;<sup>89</sup> the choice of whether to join a trade union without fear of retaliation from either the union or the employer;<sup>90</sup> time off from work to perform trade union work,<sup>91</sup> or public duties,<sup>92</sup> or to look for new employment in the event of an impending layoff;<sup>93</sup> increased priority of payment of wages, pensions, and benefits if the employer becomes insolvent;<sup>94</sup> a written statement, upon request, stating reasons for dismissal;<sup>95</sup> increased protection from unfair dismissal<sup>96</sup> and broad remedies in such event;<sup>97</sup> an itemized pay statement;<sup>98</sup> and normal working hours for a

bargaining. *See id.* Still, commentators agree that British industrial relations will not stabilize until the system of collective bargaining practices and procedures undergoes general reform, particularly with regard to its dual national-local character. Bartlett & Lowry, *supra* note 45, at 486-88; *See* DONOVAN REPORT, *supra* note 46, at 261-77.

83. Freedland, *The Employment Protection Act 1975 — Individual Aspects*, 39 MOD. L. REV. 561 (1976) [hereinafter cited as Freedland]. This article and its companion piece, Wedderburn, *The Employment Protection Act 1975 — Collective Aspects*, 39 MOD. L. REV. 169 (1976) [hereinafter cited as Wedderburn], examine the Act in terms of the benefits it bestows upon unions, and in terms of benefits it provides individuals.

84. Employment Protection Act, 1975, ch. 71, §§ 22-88.

85. *See id.*

86. *See* notes 87-106 and accompanying text *infra*.

87. Employment Protection Act, 1975, ch. 71, §§ 22-28.

88. *Id.* §§ 29-33.

89. *Id.* §§ 34-51.

90. *Id.* §§ 52-56.

91. *Id.* §§ 57-60.

92. *Id.*

93. *Id.* § 61.

94. *Id.* §§ 63-69.

95. *Id.* § 70.

96. *Id.* §§ 71-80. These sections of the Act broadened the scope of, and codified the prior law regarding unfair dismissal. *See* Williams, *Job Security and Unfair Dismissal*, 38 MOD. L. REV. 292 (1975) [hereinafter cited as Williams].

97. *Id.* §§ 71-80. When acting on a complaint of unfair dismissal, an industrial tribunal has the remedial power to grant reinstatement, re-engagement and compensation, if necessary. *Id.* Re-engagement involves placement of the employee in a new, though similar, position. The new position may be with the dismissing employer or with an affiliate. Reinstatement, on the other hand, refers to

normal week's pay.<sup>99</sup> The Act also provides procedures to enforce these rights,<sup>100</sup> including an appeals process.<sup>101</sup>

While the Labour Government responded to concerns broader than plant shutdowns when it drafted Part II,<sup>102</sup> the provisions therein do affect the shutdown situation.<sup>103</sup> For example, in the case of an employer's insolvency, employees who are dismissed under such circumstances benefit significantly from the provisions which increase the priority of claims for wages, benefits and pensions over other creditors.<sup>104</sup>

The guaranteed payment provisions<sup>105</sup> aid employees who are subject to short-term layoff. These sections provide that should an employer fail to give work to an employee on a day when the employee would normally be required to work, that employee, nonetheless, is entitled to a "guarantee payment."<sup>106</sup>

The sections requiring employers to give time off to employees in certain situations demonstrate how adverse economic conditions pressured the Act's draftsmen into compromise. These sections give employees time off to conduct trade union duties.<sup>107</sup> The Parliament reasoned that this rule would promote the stability of both trade unions and industrial relations.<sup>108</sup> Whatever the merit of that rationale, it is wholly irreconcilable with another provision which gives employees, who are about to be made redundant, time off from work to search for new employment or to make arrangements for training for future employment.<sup>109</sup> The time off for job search rule is designed to lessen the adverse impact of plant shutdowns.<sup>110</sup> While each rule, taken separately, is justifiable, as noted

placement of the employee in the same position from which he was dismissed. The two concepts are developed further in Williams, *supra* note 96.

98. Employment Protection Act, 1975, ch. 71, §§ 81-84.

99. *Id.* §§ 85-86.

100. *Id.* §§ 22-88.

101. *Id.* §§ 87-88.

102. The employee rights provisions form part of a network of minimum employment guarantees which were originally enacted in the 1960's. Contracts of Employment Act, 1963, ch. 49; Redundancy Payments Act, 1965, ch. 62; *see* Mitchell, *supra* note 38, at 110.

103. The provisions of the Act relating to maternity rights (§§ 34-51) are the result of quite different policy considerations than those underlying the remainder of the Employment Protection Act; specifically, these new maternity rights are part of a broad effort in Britain to increase women's rights in the workplace. *See generally* Equal Pay Act, 1970, ch. 41; Sex Discrimination Act, 1975, ch. 65.

104. Employment Protection Act, 1975, ch. 71, § 63. If the employer is unable to meet the employees' claims, the Secretary of State may make payments to the employees in the amount of the outstanding debt. *Id.* Such payments are made from the Redundancy Fund, *id.*, which is maintained by the Secretary of State. Redundancy Payments Act, 1964, ch. 62, § 2. Payments to the Fund are made by employers according to the requirements of the Redundancy Payments Act, 1965, ch. 62.

105. Employment Protection Act, 1975, ch. 71, §§ 22-28.

106. *Id.* § 22.

107. *Id.* §§ 57-59.

108. *See* PARL. DEB., H.C., Standing Committee F, Employment Protection Bill, May 27, 1975, at 925-927 (statements of Mr. Edward Brown, Mr. Albert Booth and Mr. James Prior).

109. Employment Protection Act, 1975, ch. 71, § 61.

110. *See* PARL. DEB., H.C., Standing Committee F, Employment Protection Bill, May 27, 1975, at 1019-20 (statement of Mr. Albert Booth).

above, the two rules work in opposite directions. Only the most socially responsible employer would be content with a rule which forces him to subsidize his employees' search for new positions, especially at a time when he is cutting back his operations. The time off for job search rule<sup>111</sup> coerces the prudent employer to postpone notifying employees of the impending lay-offs for as long as possible. The postponement, in turn, antagonizes the employer-union relationship which the sections granting time off for trade union duties<sup>112</sup> seek to promote.

The most striking aspect of the rights and protections provided for in Part II of the Employment Protection Act is that the rights are fixed. The parties may not change these rights through bargaining, either collectively or individually.<sup>113</sup> The rigidity of the rights gives rise to two consequences. First, the provisions are unresponsive to the differing factual circumstances in which they arise,<sup>114</sup> and, second, they are expensive. For example, the cost of the guaranteed payment provisions, alone, was expected to be four times that of all other provisions in the entire Act, annually.<sup>115</sup> Opponents of these costly fixed rights and protections argue that they cause overmanning of aging, inefficient industries and plants and that they exist at a time when the British economy is too weak to support them.<sup>116</sup> The fixed provisions of Part II are prohibitively expensive to

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111. Employment Protection Act 1975, ch. 71, § 61.

112. *Id.* §§ 57-59.

113. *See id.* §§ 22-88.

114. *See id.*

115. 891 PARL. DEB., H.C. (5th ser.) 34 (1975). Mr. Albert Booth, Minister of State, Department of Employment, estimated that had the Act been in force in 1974, the expense to employers would have been between £100,000,000 and £120,000,000 (£1 = approx. \$2.20), or approximately ten pence per week per employee of which eight pence would have gone toward guarantee payments (one pence = approx. \$.22). Additionally, in the industries where layoffs frequently occur, comprehensive guarantee payments plans often exist and thus, the total cost of guarantee payments borne by employers might be even higher. *Id.*

116. The overmanning effect of the provisions and the poor timing of the Employment Protection Bill were two of the three primary arguments on which the Opposition to the Bill based its objections. 891 PARL. DEB., H.C. (5th ser.) 48-103 (1975). The third argument characterized the Bill as biased too much in favor of trade unions. The Opposition alleged that the Bill gave unions too much power at the expense of both employees as individuals, and employers. *Id.* Corby-Hall, *The Employment Protection Act 1975 — Implications of the ACAS, Rights to Employees, Changes in Terms, New Redundancy Procedures, the Employment Appeals Tribunal*, 120 SOL. J. 56-57, 73-75, 90-91 (1976) (concluding that unions were "dictating" the government's policy).

The Employment Protection Act provides trade unions with more power than they were granted under prior law. Wedderburn, *supra* note 83. Some increase in the control by national unions over their members would seem to be a necessary prerequisite to industrial peace, given the state of affairs in the years before the Act. *See* note 46 *supra*. National unions need more control over their locals if collective agreements are to have greater significance and, especially, if the problem of wildcat strikes is to be cured. IN PLACE OF STRIFE, CMD. 3, No. 3888, at 15 (1969).

Still, the major flaw in the over-bias line of objection is that the Opposition focused on political overtones of the Act and failed to address its probable effect. Freedland, *supra* note 83, at 561. Thus, one should not be surprised that much of the over-bias line of objection was presented in a rather trite manner, without a logical basis. For example, Mr. James Prior, quoting John Elliot of the Financial Times, stated that the Bill is "a bonanza for the unions with hardly one measure which pleases any employer." 891

employers and, therefore, inhibit the transfer of workers from "dying" industries and firms to more productive, growing ones.<sup>117</sup> Consequently, aging, inefficient industries remain overmanned while growing industries, in demand of workers, are undermanned.<sup>118</sup> Proponents of this overmanning theory argue that "[f]ull employment is protected and maintained by good commercial and industrial management, stimulated by the profit motive and backed by rising levels of investment."<sup>119</sup> While this argument has faults,<sup>120</sup> it is valid to the extent that requiring employers to pay employees who would otherwise be laid off, will cause overmanning, since those employees, by definition, are not necessary for the employer's desired level of production.<sup>121</sup>

Oponents also criticized the timing of the Part II fixed provisions.<sup>122</sup> Given the existing thirty percent inflation rate and high unemployment<sup>123</sup> in Great Britain, the provisions were too costly to England's economy. Regardless of the merits of worker benefits, such as maternity benefits and guaranteed weekly payments, legislators should not introduce such provisions in a troubled economy.<sup>124</sup> Members of Parliament were aware of the merit of the bad timing argument when the Bill was debated.<sup>125</sup> The Labour Government was willing, nonetheless, to proceed with this second stage of the social contract and to save only the third stage, that of increased worker participation, for a more favorable economic climate.

#### IV. EMPLOYMENT PROTECTION ACT PART IV — REDUNDANCY PROCEDURES

In contrast to the fixed and costly provisions of Part II, the solution to the problem of plant shutdowns implemented in Part IV<sup>126</sup> of the Employment

PARL. DEB., H.C. (5th ser.) 49 (1975). He then sarcastically suggested renaming the Bill the "Trade Union Benefits (No. 2) Bill." *Id.* at 50. Mr. Prior concluded that the Bill would cause industrial power to shift from both employers and Parliament to the trade unions. *Id.*

117. 891 PARL. DEB., H.C. (5th ser.) 65 (1975) (statement of Mr. James Prior). Pursuing a similar theme, Mr. Egmond Bulmer suggested that the Bill would take some dynamic from the economy by increasing the power of trade unions whose operating thesis has traditionally been maintenance of the status quo. *Id.* at 80.

118. *Id.* at 65-80.

119. *Id.* at 74 (statement of Mr. Phillip Holland).

120. The argument fails to take proper account of skill specialization and geographic location of workers. See SAMUELSON, *supra* note 4, at 582-85. British economists have long been aware of the existence of the groundwork for a sophisticated critique of the economic theory underlying the argument. See P. SRAFFA, PRODUCTION OF COMMODITIES BY MEANS OF COMMODITIES (1960); see also J. ROBINSON & J. EATWELL, ECONOMICS (1976).

121. See, e.g., 891 PARL. DEB., H.C. (5th ser.) 48-103 (1975), for the responses to the proponent's argument.

122. Mr. James Prior presented the Opposition's argument. 891 PARL. DEB., H.C. (5th ser.) 51-52 (1975).

123. See *id.* at 62 (statement of Mr. Robert Smith).

124. See *id.* at 51-52 (statement of Mr. James Prior).

125. Mr. J.M. Craigen, for example, expressed the fear that unless the economic climate improved, the Bill's objectives would "fall flat on their face." *Id.* at 93.

126. Employment Protection Act, 1975, ch. 71, §§ 99-107 (Procedure for Handling Redundancies).



Protection Act provides a feasible method of protecting employees, without imposing excessive costs on employers. Part IV requires an employer who proposes to dismiss an employee for redundancy<sup>127</sup> to consult<sup>128</sup> at the earliest opportunity,<sup>129</sup> with representatives of a trade union recognized by the employer.<sup>130</sup>

#### A. *The Purpose of the Procedures*

Part IV of the Employment Protection Act grants procedural rights to employees. These rights more closely resemble the duty to bargain under the National Labor Relations Act than the substantive fixed rights of Part II of the Employment Protection Act. Part IV encourages communication between labor and management, as does the NLRA.<sup>131</sup>

When presenting the Employment Protection Bill to Parliament, Mr. Albert Booth, the Minister of State of the Department of Employment, articulated the principle of Part IV:

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127. Redundancy has the same meaning under the Employment Protection Act, 1975, as it has under the Redundancy Payments Act, 1965. See note 5 *supra*.

128. For a discussion of the duty to consult, see § IV.B *infra*.

129. See Employment Protection Act, 1975, ch. 71, § 99.

130. *Id.* Certain types of employers (e.g., the government and certain seamen) are excluded from these provisions of the Act. *Id.* at § 119.

The union must be "independent" of the employer. *Id.* at § 99(1). This requirement is not overly restrictive; the Act grants independent status to unions which had been set up by the employer. See, e.g., *Blue Circle Staff Ass'n v. Certification Officer*, [1977] 1 W.L.R. 239. The Act established a Certification Office, to be responsible for granting certificates of independence to qualifying unions upon their application. Employment Protection Act, 1975, ch. 71, §§ 6-9; see *United Kingdom Ass'n of Professional Eng'rs v. ACAS*, [1979] 1 W.L.R. 570 (C.A.).

The employer must also recognize the union. Employment Protection Act, 1975, ch. 71, § 91(1). The Act defines recognition as "the recognition of the union by an employer to any extent, for the purpose of collective bargaining." *Id.* at § 11(2). The law on the issue of whether a union has been recognized is not settled, though apparently the issue is one of law and fact. *Joshua Wilson & Bros. v. Union of Shop Distrib. and Allied Workers*, [1978] 3 All E.R. 4. Recognition requires an express or implied agreement; mutual assent by employer and union is necessary. *Id.* Mere discussion between the employer and the union about wages is insufficient to satisfy the requirement unless the discussion is aimed at reaching an agreement. *National Union of Gold, Silver & Allied Trades v. Albury Bros.*, [1979] Indus. Cas. R. 84. See *National Union of Tailors and Garment Workers v. Charles Ingram & Co.*, [1978] 1 All E.R. 1271; *Joshua Wilson*, [1978] 3 All E.R. 4.

Among the most objectionable aspects of the redundancy procedures is that there must be a recognized union for affected employees to receive their benefits. If there is an appropriate union, all affected employees, whether union members or not, receive the benefits of the provision. Thus, whether a worker is entitled to his statutory rights seems to hinge on whether he or any of his co-workers are members of a union. The proponents of the Bill justified this result by stating that it was more favorable to the employer than a requirement which would force him to consult individually with every person who claimed to represent an employee or a group of employees. *PARL. DEB., H.C., Standing Committee F, Employment Protection Bill, July 13, 1975, at 1393-94* (statement of Mr. Albert Booth).

131. See 29 U.S.C. § 151.

The Bill is proposing to change our law from legal support for management by managerial prerogative to legal support for management by consultation. It requires management to inform, consult and in some cases to negotiate. It does not create a legal obligation to agree, nor does it prescribe the outcome of those consultations and negotiations.<sup>132</sup>

Parliament did not intend that the requirement of consultations and negotiations would guarantee identical benefits to each laid-off employee; nor did Parliament intend to strip management of the right to make the final decision on whether it is economically necessary to shut down.<sup>133</sup> Rather, Parliament intended to encourage the employer, together with the union, first, to examine alternative ways of dealing with the exigencies causing the impending shutdown and, second, if a shutdown were necessary, to examine alternative ways of implementing the consequential dismissals.<sup>134</sup> Obligatory consultation is intended to foster the discussion and consideration of all alternatives.<sup>135</sup> Implementing the prescribed Procedures ensures "that the problems of redundancy are explored in advance and dealt with in a sensible and humane way."<sup>136</sup>

In comparison to other provisions of the Bill, the provisions of Part IV drew only minimal objections.<sup>137</sup> However, some Members of Parliament expressed doubt about the efficacy of the provisions.<sup>138</sup> Because the market economy is the ultimate determining factor on the issue of plant shutdowns, some proponents of the Bill believed a better industrial and economic climate was necessary if the Bill was to meet its objectives regarding the "vexed problem of redundancy."<sup>139</sup> One Member of Parliament suggested that Parliament's efforts would be better expended in other directions: "One can consult a man as much as one likes when telling him that he will be redundant, but at the end of the day he gets his [dismissal slip]. Bringing new jobs to . . . the United Kingdom is vital."<sup>140</sup>

The challenges to the Procedures' efficacy are based on a misconception of the Procedures' intended effect. The purpose of the Procedures for Handling Redundancies provided in the Employment Protection Act are to ensure that: (1) in the event of an apparent forthcoming partial or complete shutdown, the employer explores alternatives to that shutdown before deciding that it is indeed necessary<sup>141</sup> and (2) given that a shutdown is necessary, the employer imple-

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132. 891 PARL. DEB., H.C. (5th ser.) 36 (1975).

133. *See id.*

134. *See id.*

135. *See id.*

136. *Id.* at 43.

137. *See* note 116 *supra*.

138. *E.g.*, 891 PARL. DEB., H.C. (5th ser.) 89-93 (1975) (statement of Mr. Douglas Henderson).

139. 891 PARL. DEB., H.C. (5th ser.) 93 (1975) (statement of Mr. J.M. Craigen).

140. *Id.* at 94.

141. Employment Protection Act, 1975, ch. 71, § 99 (1975).

ments that shutdown in a way which minimizes the conflict between the affected workers and himself.<sup>142</sup> Challenges to the Procedures' efficacy failed to recognize that the Procedures, by design, do not prevent the occurrence of dismissals which have been dictated as necessary by the economy.<sup>143</sup> Rather, the procedures assure that the employer, under the statutory obligation, consults with trade union representatives on the issue of any shutdown.<sup>144</sup> Thus, the Procedures have not failed to achieve their intended effect merely because dismissals, which were economically necessary, have occurred. The Act achieves its primary objective when the parties meet for consultations.<sup>145</sup>

### B. *The Duty to Consult — Obligatory Consultation*

Consultation must begin at "the earliest possible opportunity" after the employer decides to shut down all or part of his operation.<sup>146</sup> More specifically, when a shutdown plan involves the dismissal of over 100 employees at one establishment within a ninety day period, consultation must begin at least ninety days before the first dismissals.<sup>147</sup> Similarly, when the plan involves dismissal of between 10 and 100 employees within a thirty day period, consultation must begin at least thirty days before the first dismissal.<sup>148</sup>

The employer commences consultation.<sup>149</sup> He must disclose to trade union representatives, in writing, information regarding his proposed dismissals.<sup>150</sup> This notice must either be delivered or be sent by post to the union's main office or to the address given to the employer by the union.<sup>151</sup> The specifics to be given to the trade union by the employer are listed in Section 99(5). This Section provides that employer shall disclose:

- (a) the reasons for his proposals;<sup>152</sup>

142. 891 PARL. DEB., H.C. (5th ser.) 88-93 (1975).

143. *See, e.g., id.* at 35-36 (statement of Mr. Albert Booth).

144. Employment Protection Act, 1975, ch. 71, § 99.

145. *See* 891 PARL. DEB., H.C. (5th ser.) 42-43 (1975) (statement of Mr. Albert Booth).

146. Employment Protection Act, 1975, ch. 71, § 99(3) (1975).

147. *Id.* § 99(3)(a).

148. *Id.* § 99(3)(b). Originally, the Act required consultation to begin at least 60 days before a dismissal of this size. The requirement was only recently lowered to 30 days. Variation Order, 1979 STAT. INST. No. 958.

149. The burden to commence consultation properly lies with the employer, since it is he who initially makes the decision to consider dismissing employees.

150. Employment Protection Act, 1975, ch. 71, § 99(5).

151. *Id.* § 99(6).

152. In the Act's original text, clause (a) of this section read: "[the reasons] why any employees have become redundant." PARL. DEB., H.C., Standing Committee F, Employment Protection Bill, July 15, 1975, at 1399-1400. The Standing Committee adopted an amendment to change this clause to its present form. The purpose of the change was to make clear that consultations should take place when redundancy plans are in the proposal stage and to emphasize that the employer should enter into consultation with an attitude that the dismissals may be avoidable. *Id.*

- (b) the number and descriptions of employees whom it is proposing to dismiss as redundant;<sup>153</sup>
- (c) the total number of employees of any such description employed by the employer at the establishment in question;
- (d) the proposed method of selecting the employees who may be dismissed; and
- (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.<sup>154</sup>

After the employer has provided this information as the starting point, the parties begin consultation.<sup>155</sup>

The Act is less specific in setting forth the dimensions of consultation than in outlining procedures for its commencement. Consultation is more comprehensive and probative than mere notification.<sup>156</sup> Section 99 explicitly requires active discussion between the employer and the trade union representatives.<sup>157</sup> Subsection 7 of Section 99 provides that "[i]n the course of the consultation required by this Section the employee shall — (a) consider any representations made by the trade union representatives; and (b) reply to those representations and, if he rejects any of those representations, state his reasons."<sup>158</sup>

This subsection does not create a duty identical to that of good faith bargaining required under the National Labor Relations Act.<sup>159</sup> Here, the burden is clearly upon the trade union to come forward with "representations."<sup>160</sup> The subsection, therefore, provides that unless the union can offer a more acceptable alternative, the employer may implement his initial proposal.<sup>161</sup> The Employment Protection Act gives the role of deciding whether a given proposal is

153. This subsection does not require the employer to name individual employees in the hope of avoiding, or at least minimizing, employee defections. However, it seems logical that, in many instances, particularly in small establishments, the mere description of the job class to be eliminated is sufficient for workers to know specifically which employees stand to lose their jobs.

154. Employment Protection Act, 1975, ch. 71, § 99(5).

155. *Id.* § 99.

156. *Rollo v. Minister of Town and Country Planning*, [1948] 1 All E.R. 13 (C.A.); *Agricultural, Horticultural and Forestry Indus. Training Bd. v. Aylesbury Mushrooms, Ltd.*, [1972] 1 W.L.R. 190. For a discussion of these cases, see notes 173-89 *infra*.

157. Employment Protection Act, 1975, ch. 72, § 99(7).

158. *Id.*

159. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976), provides that the employer and union must "meet . . . and confer in good faith . . ." *Id.* Certain sections of the Employment Protection Act, have imposed such a duty. See *Mitchell*, *supra* note 38, at 115. Section 15(2) provides that, with respect to the issue of union recognition, the employer must take "such action by way of or with a view to carry on negotiations as might reasonably be expected to be taken by an employer ready and willing to carry on such negotiations . . ." Employment Protection Act 1975, ch. 71, § 15(2).

160. See Employment Protection Act, 1975, ch. 71, § 99(7).

161. See *id.* § 99.

more acceptable to either the principal parties or the Advisory, Conciliation and Arbitration Service, which is established in Part I of the Act.<sup>162</sup> The words of Section 99 make the distribution of the burdens of consultation rigid: the burden of initially suggesting a method of handling a potential shutdown situation lies with the employer,<sup>163</sup> the burden of suggesting alternatives lies with the union,<sup>164</sup> and the responsibility of considering and either accepting or stating reasons for rejecting those alternatives lies with the employer.<sup>165</sup>

Whether the employer has duly consulted according to the requirements of Section 99 is a potentially litigious issue. Yet, both employers and trade unions have apparently been content with each other's conduct once the consultation has begun.<sup>166</sup> The lack of complaints by the parties on the issue of satisfactory consultation indicates either that they find Section 99 to be clear in its requirements or that they ignore these requirements completely. Employers frequently try to place themselves outside of the Section,<sup>167</sup> thereby suggesting that the former alternative is the logical explanation. Cooperative planning, as a matter of course, by employers and unions before any possibility of dismissals<sup>168</sup> does minimize conflicts in the event of dismissals.<sup>169</sup> The enactment of the Employ-

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162. Employment Protection Act, 1975, ch. 71, §§ 2-6.

163. *Id.* § 99(5)(e).

164. *Id.* § 99(7)(a).

165. *Id.* § 99(7)(b).

166. The author was unable to find a single reported case in which after an employer and a union had commenced consultation, one of the parties then resorted to litigation on the specific issue of whether the other party had consulted according to the Act's requirements. *But see* *Electrical & Eng'g Staff Ass'n v. Ashwell Scott Ltd.*, [1976] I.R.L.R. 319. In *Ashwell*, the employer informed the union that it intended to reduce its staff in 60 days. *Id.* at 320. Then, 16 days later, the employer served dismissal notice, effective immediately, on eleven employees. *Id.* Agreeing with the union, the industrial tribunal held that the employer had failed to consult the union or disclose information specified by § 99 of the Employment Protection Act. *Id.* at 320-22. *See also* *Clyde Pipeworks Ltd. v. Foster*, [1978] I.R.L.R. 313 (in selecting employees to be dismissed, the employer satisfied the requirements of consultation by doing so in accordance with a method which had been approved by the union).

167. *See, e.g.*, *Clarks of Hove, Ltd. v. Baker's Union*, [1978] 1 W.L.R. 1207 (C.A.) (for a discussion of this case, *see* note 196 and accompanying text *infra*); *National Union of Gold, Silver & Allied Trades v. Albury Bros.*, 1979 Indus. Cas. R. 84; *National Union of Tailors and Garment Workers v. Charles Ingram & Co.*, [1978] 1 All E.R. 1271; *Joshua Wilson & Bros. Ltd. v. Union of Shop Distributive and Allied Workers*, [1978] 3 All E.R. 4.

168. If the employer and union are under a binding collective agreement which establishes either (1) arrangements for providing alternative employment for any employees dismissed as redundant or, (2) arrangements for handling redundancies, then, upon request of union and employer, the Secretary of State may make an order adapting, modifying or excluding the provisions of Part IV of the Employment Protection Act from (future) application to the parties. Employment Protection Act, 1975, ch. 71, § 107(1). However, the Secretary may not so order unless (1) the terms of the collective agreement are at least as beneficial to the employee as are those of Part IV, and (2) the agreement provides for employee access to arbitration or adjudication in the event of complaint. *Id.* § 107(2).

169. *See* Hall, *Handling Redundancies: A Guide*, 126 *NEW L.J.* 919 (1976) [hereinafter cited as Hall]. Mr. Hall recommends that employers define such a policy with the union. Paying strict attention to § 99, he outlines the proper step-by-step method of carrying out dismissals for employers to follow.

ment Protection Act and the requirement of obligatory consultation provide the employer with added incentive to define an overall policy for dealing with dismissals.<sup>170</sup>

Though the requirements of Section 99 consultation have not been refined by judicial construction, the concept of consultation is not new to Parliament. One can infer Parliament's intended scope of consultation by considering the judicial construction of the duty to consult in situations prior to the enactment of the Employment Protection Act. British statutes, predating the Employment Protection Act of 1975, have required consultation by various parties.<sup>171</sup> The issue of whether a party has properly discharged its duty to consult arose in situations prior to the drafting of the Employment Protection Act.<sup>172</sup> In 1948, the Court of Appeals, in *Rollo v. Minister of Town and Country Planning*,<sup>173</sup> held that, in consultation, one side must supply sufficient information to enable the other side to offer advice, and must provide sufficient opportunity to offer that advice.<sup>174</sup> In that case, the Minister had notified the other party of his plan of action, but had not allowed time for response by the other party before implementing that plan. The court ruled that the Minister had not properly consulted, as required by the Town and Country Planning Act.<sup>175</sup>

The court in *Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms, Ltd.* reaffirmed the holding of *Rollo*.<sup>176</sup> There, the court set out the essence of consultation: the communication of a genuine invitation, extended with a receptive mind, to give advice.<sup>177</sup> In *Aylesbury Mushrooms*, the Industrial Training Act<sup>178</sup> required the Minister of Labour to establish an Industrial Training Board.<sup>179</sup> That Act also required the Minister of Labour to consult with every organization within the provisions of the Act before establishing the Industrial Training Board.<sup>180</sup> The Minister attempted to consult with the Mushroom Growers Association by mail. However, the Association never received the letter sent by the Minister. The court, after referring to the Shorter Oxford English Dictionary, determined that to consult means "to ask advice of,

170. *Id.*

171. *E.g.*, New Towns Act, 1946, 9 & 10 Geo., ch. 68, § 1(1). Industrial Training Act, 1964, ch. 16, § 1(4).

172. *E.g.*, *Rollo v. Minister of Town and Country Planning*, [1948] 1 All E.R. 13 (C.A.); *Re Union of Whippingham and East Cove Benefices v. Church Comm'rs for England*, [1954] A.C. 245; *Agricultural, Horticultural and Forestry Indus. Training Bd. v. Aylesbury Mushrooms, Ltd.*, [1972] 1 W.L.R. 190.

173. [1948] 1 All E.R. 13 (C.A.)

174. *Id.* at 16; *Accord* *Re Union of Whippingham and East Cove Benefices v. Church Comm'rs for England*, [1954] A.C. 245 (consultation between pastoral committee and parochial church council).

175. [1948] 1 All E.R. at 17.

176. [1972] 1 W.L.R. 190.

177. *Id.* at 193.

178. Industrial Training Act, 1964, ch. 16.

179. For the establishment of Industrial Training Boards, see Industrial Training Act, 1964, ch. 16.

180. *Id.* § 1(4).

seek counsel from; to have recourse to for instruction or professional advice."<sup>181</sup> The court found that the Minister's efforts, though made in good faith, were insufficient to amount to consultation.<sup>182</sup>

*Aylesbury Mushrooms* also addressed the issue of vicarious consultation, i.e., whether consultation of a parent-body constitutes consultation of its constituent parts.<sup>183</sup> In *Aylesbury*, the Minister of Labour had consulted with the National Farmers Union in accordance with the requirement of the Industrial Training Act. The Mushroom Growers Association was a member of the Farmers Union. The facts indicated, however, that the Mushroom Growers had no notice of consultations between the Minister and the Farmers Union.<sup>184</sup> The Minister argued that the court should rule that consultation with the parent Farmers Union satisfied the requirement of consultation with the constituent Mushroom Growers.<sup>185</sup> The court agreed with the Minister insofar as that, generally, consultation with the parent satisfies the requirement of consultation with the constituent. However, the court refused to apply that general rule to the facts before it because in this case the Minister had actually tried, but failed, to consult directly with the constituent Mushroom Growers.<sup>186</sup> The court stated: "Prima facie, consultation with the parent body undoubtedly constitutes consultation with its constituent parts, but I think this general rule is subject to an exception where, as here, the Minister has also attempted and intended direct consultation with a branch."<sup>187</sup>

Construing consultation with a parent as vicarious consultation with a constituent is sound statutory construction. Otherwise, groups and individuals who are unhappy with the results might besiege the employer with demands for further consultation after he has consulted with a national or even with a local union.<sup>188</sup> But, the court in *Aylesbury Mushrooms* seems to have carved a strange exception to the general rule. By basing the exception on the initiating party's action, the court gave that party the right to put itself within the exception and, therefore,

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181. [1972] 1 W.L.R. at 193.

182. *Id.* at 194.

183. *Id.*

184. *Id.* at 192.

185. *Id.* at 194.

186. *Id.*

187. *Id.*

188. The national-local union relationship which exists in Britain (*see* DONOVAN REPORT, *supra* note 46, at 12, 94-121) does give merit to the argument that the employer should specifically consult the local union. Because the national union is frequently unable to impose the terms of any collective agreement on the local union, the utility to the employer of consulting the national union to the exclusion of the local union may be insignificant. If the local union is dissatisfied with the result of the employer's consultation with the national union, it might refuse to obey its terms. Historically, national unions have had little control over local unions in such circumstances. *See* IN PLACE OF STRIFE, CMD. 3, No. 3888, at 15 (1969).

to consult or not consult a constituent body as it desires. A better approach to an exception to the general rule of vicarious consultation would require that the constituent body be sufficiently disassociated from the parent so that it had no notice, and that it could not have reasonably been expected to have had notice of the consultations with the parent. Such an exception would prevent the initiating party from deliberately keeping undesirable parties out of the consultation proceedings. At the same time, the rule would protect the initiating party from being forced to consult with multiple parties representing the same interests.<sup>189</sup>

In summary, the duty to consult requires employers and unions to meaningfully discuss alternative methods of carrying out employee dismissals well in advance of their actual occurrence. In choosing among alternatives, the parties have the flexibility to adopt a method which is well suited to their particular circumstances. An escape clause, which permits employers confronted with "special circumstances" to dispense with the usual obligatory consultation, provides further flexibility.<sup>190</sup>

### C. *The Escape Clause*

When special circumstances exist which prevent the employer from fulfilling the usual requirements of the duty to consult, an escape clause, Section 99(8),<sup>191</sup> excuses the employer from these requirements. The employer has the burden of proving that special circumstances existed which rendered usual compliance with the duty to consult not reasonably practicable. The employer must also prove that he took all steps toward compliance as were reasonable under those circumstances.<sup>192</sup>

Parliament did not intend to allow the employer to easily avoid his statutory obligation.<sup>193</sup> Rather, it contemplated a situation that is truly extraordinary. An example would be:

the employer who suddenly, at three weeks notice, has a major contract cancellation on his hands and as soon as he gets it calls in the union representatives and others concerned and says, "This has

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189. Again, the existing national-local union relationship raises doubts as to whether the national union and the local union are, in fact, representing the same interests. See DONOVAN REPORT, *supra* note 46, at 261-77.

190. Employment Protection Act, 1975, ch. 71, § 99(8).

191. Section 99(8) provides: "If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with any of the requirements of subsections (3), (5), or (7) above, the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances." *Id.*

192. *Id.* § 101(8); *Clarks of Hove Ltd. v. Baker's Union*, [1978] 1 W.L.R. 1207 (C.A.).

193. *Clarks of Hove*, [1978] 1 W.L.R. 1207 (C.A.).



happened to me, and I have to tell you that I am going to propose a major layoff."<sup>194</sup>

The draftsmen of the Employment Protection Act rejected specific mention of possible special circumstances, fearing that to do so would cause those circumstances to become "less and less special" as employers tried to fit their own case to meet them.<sup>195</sup>

The Court of Appeals in *Clarks of Hove, Ltd. v. Baker's Union*<sup>196</sup> enumerated the three criteria which must exist before the employer can invoke the escape clause: (1) the existence of special circumstances, (2) that those special circumstances made compliance with the usual requirements of Section 99 consultation not reasonably practicable, and (3) the employer took all steps toward compliance as were reasonably practicable in the circumstances.<sup>197</sup> The court indicated that insolvency may be a sufficient "special circumstance" to place the employer outside the usual consultation requirements if the cause of the insolvency is itself extraordinary.<sup>198</sup> Also, insolvency caused by "sudden disaster," whether physical or financial, would be a special circumstance, whereas the gradual financial rundown of the company would not.<sup>199</sup> The range of special circumstances which permit the employer to evade the obligation should be narrow. Since the usual Section 99 duty is only to consult, the union cannot force the employer to accept onerous terms regardless of his bargaining position.<sup>200</sup> The third requirement enumerated in *Clarks of Hove*,<sup>201</sup> that the employer take all steps toward compliance as are reasonably practicable, ensures that the employer, in every situation, will meet the obligatory consultation objectives to the greatest degree possible.<sup>202</sup>

In summary, Section 99 requires employers to take the enumerated steps of consultation in the usual shutdown situation. Only in limited instances, when special circumstances exist which render compliance impracticable, is the employer excused from his duty. Even then, he must comply to the extent practicable. When the employer neither complies with the usual requirements of consul-

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194. PARL. DEB., H.C., Standing Committee F, Employment Protection Bill, July 15, 1975, at 1418 (statement of Mr. Albert Booth).

195. *Id.* at 1417. The Standing Committee rejected an amendment that would have inserted "including but not confined to the economic and financial circumstances affecting the employer's establishment" after "special circumstances." *Id.* at 1424-25.

196. [1978] 1 W.L.R. 1207 (C.A.).

197. *Id.* at 1212.

198. *Id.*

199. *Id.*

200. See Employment Protection Act, 1975, ch. 71, § 99; 891 PARL. DEB., H.C. (5th ser.) 36 (1975). See also text accompanying notes 132-33 *supra*.

201. [1978] 1 W.L.R. 1207.

202. *Id.* at 1210.

tation nor takes all steps toward compliance in the event of special circumstances, the grieved union may seek remedies under the Act.<sup>203</sup>

#### D. Remedies

Operation of Section 101 of the Employment Protection Act enforces the duty to consult.<sup>204</sup> This Section provides that a trade union "may present a complaint to an industrial tribunal on the ground that an employer has dismissed as redundant or is preparing to dismiss as redundant one or more employees and has not complied with any of the requirements of Section 99."<sup>205</sup> The tribunal, upon finding that the employer has not properly consulted with an appropriate trade union, nor brought himself within the escape clause, must make a "declaration" of that finding.<sup>206</sup> This Section also empowers the tribunal to make a "protective award" in terms of days of remuneration to be paid by the employer to the affected employees.<sup>207</sup> For example, an award of 28 days means the employer must pay each employee covered by the award an amount equal to that employee's average earnings over 28 days. Every employee of the class covered by the protective award is entitled to be paid, whether or not the employee is a member of the union which brought the complaint.<sup>208</sup> The employer may reduce any employee's award by the amount of any wages or payment for breach of the employment contract paid by him to the employee.<sup>209</sup> The employer may also offer re-engagement<sup>210</sup> to an employee in lieu of the protective award.<sup>211</sup> The employee who unreasonably refuses the re-engagement offer loses his entitlement to the protective award.<sup>212</sup>

203. Employment Protection Act, 1975, ch. 71, § 101(1).

204. *Id.*

205. *Id.*

206. Employment Protection Act, 1975, ch. 71, § 101(3). "Where the tribunal finds a complaint under subsection (1) above well-founded it *shall* make a declaration to that effect and *may* also make a protective award . . . ." *Id.* (emphasis added).

207. *Id.* § 101(4).

208. *Id.* § 102(1).

209. *Id.* § 102(3).

210. For an explanation of the term re-engagement, see note 97 *supra*.

211. Employment Protection Act, 1975, ch. 71, § 102(6).

212. Employment Protection Act, 1975, ch. 71, § 102(7). The preference for re-engagement (and also reinstatement) over monetary compensation is common under British labor law. See Williams, *supra* note 96; See also Employment Protection Act, 1975, ch. 71, § 71 (industrial tribunal is empowered to order re-engagement or reinstatement as a remedy for unfair dismissal); cf. Fuller v. Stephanie Bowman (Sales) Ltd., [1977] I.R.L.R. 87 (the industrial tribunal held that the complainant had unreasonably refused an offer of employment in the employer's new premises, and was, therefore, not entitled to the unemployment benefits to which she would have been entitled had she been dismissed and not offered re-engagement). The tribunal in Fuller ruled that whether a dismissed employee has acted reasonably in rejecting an offer of re-engagement or reinstatement is a question of fact and personal factors must be taken into account. *Id.* In Fuller, the complainant's sole basis for refusing re-engagement was that the workplace was located over a sex shop. *Id.* The tribunal noted that the

If the employer defaults in paying remuneration to an employee under the protective award, that employee may present a complaint to an industrial tribunal.<sup>213</sup> If that employee can establish that he is a member of a protected class and that he has not been paid remuneration by his employer, the industrial tribunal must order the employer to pay the amount due.<sup>214</sup>

The protective award can be quite large from the standpoint of an employer who faces a complaint covering hundreds of employees. The industrial tribunal, with its authority to declare an employer's action a wrong-doing, can place a significant financial burden on him. In the tribunal's exercise of that authority, "it is plain that the making of the declaration is mandatory but the making of the protective award is discretionary."<sup>215</sup> Surprisingly, the Employment Protection Act does not provide any explicit guidelines for the exercise of the tribunal's discretion in granting such awards. Of some assistance on this question is Section 101(5), which states that the protective award should be "just and equitable" with respect to the employer's violation and should not exceed the number of days by which consultation should precede proposed dismissals.<sup>216</sup>

The Employment Protection Act does not clearly indicate whether the protective award is penal or compensatory in nature. Whether the protective award is penal or compensatory is a significant issue. If the award is penal, the amount of loss suffered by each employee is inapposite to the determination of the size or length of award: Similarly, if the award is compensatory, the employer's conduct is irrelevant to the determination.

On the one hand, the tribunal's power to consider the seriousness of the employer's violation of his duty to consult supports the conclusion that the award is penal in nature.<sup>217</sup> On the other hand, the Employment Protection Act links

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workplace did not form part of the sex shop, that no prostitutes used other floors, and that the applicant, at age 53, was unlikely to be mistaken for a prostitute, and therefore mere dislike of the sex shop was not sufficient to make her refusal reasonable. *Id.* at 88-89.

213. Employment Protection Act, 1975, ch. 71, § 103(1). An industrial tribunal is effectually a court of record with subject matter jurisdiction limited to labor relations disputes. *See* *Corner v. Buckinghamshire County Council*, 1978 Indus. Cas. R. 836. *See also* note 65 *supra*.

214. *Id.* § 103(3).

215. *Talke Fashions Ltd. v. Amalgamated Soc'y of Textile Workers and Kindred Trades*, [1978] 1 W.L.R. 558, 560; *see also* *GKN Ltd. v. Eng'rs Ass'n*, [1980] I.R.L.R. 8.

216. Employment Protection Act, 1975, ch. 71, § 101(5). This subsection provides:

The protected period under an award under subsection (4) shall be a period beginning with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, of such length as the tribunal shall determine to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 99 above, not exceeding—

(a) in a case falling within section 99(3)(a) above, 90 days;

(b) in a case falling within section 99(3)(b) above, 30 days; or

(c) in any other case, 28 days.

*Id.* (The figure in clause 101(5)(b) was changed from 60 days to 30 days by Variation Order, 1979 STAT. INST. No. 958).

217. *Talke Fashions*, [1978] 1 W.L.R. at 558-59.

the period of the protective award with the required period of notice and consultation. This interrelation gives credence to the conclusion that the award is compensatory in nature, as the Act intends the award to go to the employee who has not received the benefits to be derived from consultation.<sup>218</sup>

The Employment Appeals Tribunal<sup>219</sup> has adopted the view that these awards are compensatory.<sup>220</sup> It has rejected the view that the award is penal as being "wholly inconsistent" with the spirit of the Trade Unions Labor Relations Act of 1974.<sup>221</sup> The seriousness of the employer's default does remain a factor for the tribunal's consideration of an increase in the period of the award. However, the tribunal should consider this factor not in isolation, but in relation to the consequences of the default to the employees.<sup>222</sup> The mere fact that the employer's default is serious does not mean that the tribunal will award the maximum protective award.<sup>223</sup>

Construing the protective award as compensatory, rather than penal, is more consistent with the overall aims of obligatory consultation. The ultimate purpose of consultation is to ensure that the parties take the most sensible approach in addressing the particular problems causing the proposed dismissals. Unless the employees can demonstrate some loss, a tribunal should assume that the employer's approach was, in fact, the most sensible one from the employee's perspective.<sup>224</sup> If the employees suffered no loss when the employer implemented his own plan without consultation, then it seems that consultation would have been of no benefit to the employees.<sup>225</sup> As the employer took that

218. *Id.*

219. The Employment Appeals Tribunal is an appellate body established by the Employment Protection Act, 1975, ch. 71, § 87. It has jurisdiction to hear appeals from decisions of industrial tribunals. *Id.* § 88.

220. *Talke Fashions*, [1978] 1 W.L.R. at 558-59.

221. *Id.* The Employment Appeals Tribunal considered dispositive the fact that the Trade Unions Labor Relations Act, 1974, ch. 52, had displayed a strong aversion to punishing trade unions for violations of the law which arose out of the collective bargaining relationship.

222. *Talke Fashions*, [1978] 1 W.L.R. at 558; see *Spillers-French (Holdings) Ltd. v. Union of Shop, Distributive and Allied Workers*, [1980] 1 All E.R. 231. In *Spillers-French*, the industrial tribunal held that it had jurisdiction to make a protective award even though the employees had not suffered any loss of wages by the employer's default because the shops involved had been sold and business had continued without interruption. *Id.* at 232. The employer appealed the tribunal's holding, arguing first that the protective award was solely compensatory and, second, that even if there was liability, it had been discharged by the "new" employer in his payment of wages. *Id.* at 233. The Employment Appeals Tribunal rejected both arguments and dismissed the appeal. *Id.* at 235.

223. *Talke Fashions*, [1978] 1 W.L.R. at 560; *Spillers-French*, [1980] 1 All E.R., at 233.

224. Tribunals should construe "loss" broadly, beyond the loss of wages. When enacting the Employment Protection Bill, members of Parliament were operating under the assumption that the loss of security that follows an employer's unilateral actions may be just as real as the loss of a week's pay, and might cause even more instability in the employee-employer relationship. See, e.g., the statement of Mr. I. Clementson that, "insecurity is one of the major unwritten, unrecorded causes of industrial disputes." 891 PARL. DEB., H.C. (5th ser.) 137 (1975).

225. See *Barley v. Amej Roadstone Corp.* (No. 2), [1978] I.C.R. 190. In *Barley*, an employer dismissed

approach unilaterally, it must have been sensible from his standpoint also. However, the argument that the most sensible approach to the problem could be discovered during consultation and might not be formulated after the fact has much force. During consultation, the parties might together develop an approach which neither party, acting alone, would have formulated. If the employer intentionally avoids consultation, the union could argue that the protective award should take account of the fact that the employer's action foreclosed the possibility of such an approach. Therefore, under this argument, the tribunal should order a protective award in an amount greater than the demonstrable loss. However, the enumerated mechanics of obligatory consultation weakens the argument because those mechanics specify that the union always has the burden of coming forward with alternative approaches.<sup>226</sup> If the union is unable to present an alternative to the industrial tribunal, it probably would not have been able to present one to the employer. Consultation would not have yielded employees any benefits; therefore, the employer's avoidance of consultation caused no loss to employees.

The size of the protective award should be within the discretion of the judicial body which hears the employee's complaint of employer default. In exercising that discretion, the body should give great consideration to the employee's loss caused by the employer's default. It should recognize the possibility that the employees may have suffered a loss which they are unable to demonstrate. Therefore, the body should presume that where the employer totally avoids consultation through his default, the employees have suffered a loss equal to lost wages for a period at least as long as the required notice period. In order to avoid the award, the employer would then have to prove that consultation would not have yielded a more sensible method of dealing with the impending dismissals than that which he unilaterally adopted. In all cases, the hearing body, in determining the size of the award, should recognize the primary aim of the redundancy procedures — to encourage consultation in the shutdown situation, and their underlying rationale — that decisions made through such consultation should embody the concerns of both employer and employee, and that, therefore, these decisions are sensible from society's standpoint.

## V. CONCLUSION

In order to demonstrate the passivity of U.S. labor law on plant shutdowns and to present an alternative to that law, this Comment has examined the provisions of Great Britain's Employment Protection Act of 1975 which pertain to the prob-

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a number of employees on the ground of redundancy but failed to consult the relevant union. *Id.* at 191. The industrial tribunal had found the dismissals were unfair, but awarded the aggrieved employees compensation for the notice period only because, it reasoned, the dismissals had been inevitable. *Id.* On appeal brought by the employees, the Employment Appeals Tribunal affirmed the decision below, reasoning that it was highly unlikely that consultation would have led to the avoidance of any of the dismissals. *Id.* at 193-94.

226. Employment Protection Act, 1975, ch. 71, § 99(5). See § IV.B *supra*.

lem of plant shutdowns. The Employment Protection Act provides the employee with more benefits and greater employment security than is afforded under current U.S. law. Britain's relatively liberal legislative response to the problem is essentially a consequence of two factors. First, Parliament enacted its legislation as part of wide-reaching, labor-minded reform, which provided an atmosphere conducive to such a response. Second, British social values encompass the notion that an individual has a right to work and that the courts and the legislature must intervene in the workings of the market economy to protect that right.

Britain's Employment Protection Act of 1975 contains two sets of rights which affect employees subject to dismissal because of a shutdown. Fixed, substantive rights, such as a guaranteed week's payment, place a costly burden on employers and cause dying industries to be overmanned, while growth in young industries is stifled for lack of workers. In contrast, the procedural rights are not so costly to provide and do not cause overmanning.

These procedural rules set forth the steps which the employer and the union must take when confronted with an apparent impending shutdown. Part IV of the Employment Protection Act, "Procedures for Handling Redundancies," requires an employer to consult with the appropriate trade union at the earliest possible opportunity before dismissing employees for redundancy. During consultation, the employer must listen to the union's advice and suggestions and, then, if he wishes to reject that advice, he must state his reasons for doing so. The employer is under no legal obligation to agree with the union's advice or suggestions. Rather, Parliament intended obligatory consultation to ensure that management would explore all alternative methods of handling the impending shutdown well in advance of shutdown. It also intended that consultation would prevent any dismissals which were not economically necessary and that those dismissals which were necessary would be carried out by management in a manner which minimized the adverse impact on affected workers.

If legislators in the United States decide to enact a response to the problem of plant shutdowns, they should focus that response on a requirement similar to the obligatory consultation required by Great Britain's Employment Protection Act of 1975. An employer's consultation with the proper national union regarding a mass dismissal affecting several local unions should satisfy the requirements of shutdown consultation. The national union should bear the responsibility of ensuring that the local union's part of the shutdown plan is effected and the employer need not be required to consult local unions as well. To remedy instances of employer default, a judicial or quasi-judicial body (such as the National Labor Relations Board) should be empowered to hear employee complaints, and to award compensatory damages to affected employees. The duty to consult, if so imposed, would ensure that employers deal with employee dismissals caused by plant shutdowns in a sensible and humane way without undue infringement on management prerogative.

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