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THE DISMISSAL OF EMPLOYEES UNDER THE UNFAIR DISMISSAL LAW IN THE UNITED KINGDOM AND LABOR ARBITRATION PROCEEDINGS IN THE UNITED STATES: THE PARAMETERS OF REASONABLENESS AND JUST CAUSE

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INTRODUCTION

This article examines practice under British law and American labor arbitration agreements relating to the dismissal of an employee

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for misconduct or incapability. The article addresses the question of when the dismissal of an employee for misconduct or incapability is appropriate. The discussion focuses upon three major concerns in the law on unfair dismissal: (1) a comparison of the British requirement of "reasonableness" in dismissal cases with the American arbitration requirement that there be a "just cause" for dismissal; (2) a comparison of the procedures followed and factors used to evaluate the appropriateness of an employer's decision to discipline and to discharge; and (3) a comparison of the authority afforded British tribunals[1] and American arbitrators to modify an employer's decision to discharge.

After examining these issues in some detail, this article recommends that the United States adopt a comprehensive statute permitting all employees, in a procedurally fair and uniform manner, to challenge the propriety of their dismissals. In formulating such a statute, legislators in the United States should critically evaluate the experiences of the British under their unfair dismissal statute. In Great Britain, the adherence to an objective standard of reasonableness and, generally, a greater concern with the substantive fairness of a discharge, would rectify many of the inadequacies now associated with the operation of the unfair dismissal statute.

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1. Industrial tribunals, under the Employment Protection (Consolidation) Act, 1978, provide a first-tier review of the fairness of an employer's decision to discipline. *See* Employment Protection (Consolidation) Act, 1978, ch. 44, § 67 [hereinafter cited as EPCA]. Pursuant to regulations issued by the Secretary of State for Employment, an industrial tribunal consists of three persons, a legal chairperson and two laypersons. Both management and labor submit nominations of the laypersons who sit on an industrial tribunal, and there will be a layperson representative from both sides at the hearings, except in exceptional cases. *See* EPCA, 1978, ch. 44, § 128. The members of the tribunals, of course, have an expertise in industrial relations. Parliament apparently presumed that a familiarity with problems in labor relations would be more likely to satisfy the parties and would provide "a more competent body to review the employer's discretion." Elias, *Fairness in Unfair Dismissal: Trends and Tensions,* 10 INDUS. L.J. 201, 202 (1981). For a discussion of the origins of the English tribunal system, see C. GRUNFELD, THE LAW OF REDUNDANCY 258-63 (1971); and ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968, REPORT, CMB, 3623 (1968) [hereinafter cited as DONOVAN REPORT].

The Employment Appeal Tribunal [hereinafter referred to as EAT] has jurisdiction to review questions of law "arising from any decision of, or arising in any proceeding before, an industrial tribunal." EPCA, 1978, ch. 44, § 136(1). The EAT consists of a High Court judge and laypersons with "special knowledge or experience in industrial relations, either as representatives of employers or as representatives of workers." EPCA, 1978, ch. 44, § 135(3). The role of the EAT in unfair dismissal cases is largely a function of the willingness of the EAT to intervene insofar as "fairness is most accurately described as a mixed question of law and fact." Elias, *supra* at 203.

I

HISTORICAL BACKGROUND

A. THE DEVELOPMENT OF THE BRITISH STATUTORY LAW REGULATING UNFAIR DISMISSALS

The British legislators formulated their unfair dismissal legislation against the background of the industrial strife of the 1960's. The large number of employee lay-offs occurring in Great Britain during the early 1960's led to the passage of the Redundancy Payment Act (RPA) in 1965.[2] The RPA attempted to attenuate the industrial conflict associated with those massive lay-offs by giving a discharged employee a lump-sum payment as compensation for the loss of his job. Industrial strife in Great Britain continued despite the RPA, however, with some 2,196 unofficial strikes reported between 1964 and 1966.[3] Parliament established the Royal Commission on Trade Unions and Employers' Associations to discern the causes of this pronounced increase in industrial strife, including the causes of the dramatic increase in the number of unofficial strikes.[4] The Commission, commenting on the increase in the number of strikes, noted that a "right to secure a speedy and impartial decision on the justification for a dismissal might have averted many of these [work] stoppages."[5] The Commission also recommended the enactment of nationwide legislation providing employees with protection from unjust dismissals.[6] Such legislation, the Commission concluded, should avoid the harshness that is characteristic of the common law of wrongful dismissal, while providing better protection for employees and promoting "the 'rule of law' in what was increasingly seen to

2. The EPCA incorporated the redundancy provisions of the 1965 Act. *See* EPCA, 1978, ch. 44, § 81. Under the 1978 Act, redundancy exists when an employee loses work because the employer has completely closed down his business, a particular aspect thereof, or when work of a particular kind is no longer necessary to the production process. Perhaps the most common example of redundancy occurs when new machinery replaces a worker in the production process. For a discussion of the British law on redundancy, see C. GRUNFELD, *supra* note 1.

3. *See* DONOVAN REPORT, *supra* note 1, at 101. *See also* Collins, *Capitalist Discipline and Corporationist Law—Part I,* 11 INDUS. L.J. 78, 87 (1982).

4. *See* DONOVAN REPORT, *supra* note 1, at 101.

5. *Id.* at 143.

6. *Id.* at 146. The Commission members carefully weighed the comparative advantages and disadvantages of legislative action. They concluded that legislative action would provide employers with an incentive "to see that dismissals are carried out under a proper and orderly procedure." *Id.* at 143. Most importantly, the Commission members observed that legislative action had "the immediate advantage of making possible an immediate raising of standards to a much more satisfactory level." *Id.* Finally, the Commission noted that legislation would provide employees with a broader range of remedies and would provide protection for employees in industries where voluntary methods of resolving industrial dispute currently are ineffective (in smaller businesses and in poorly organized industries, for example). *Id.* at 145-46.

be an embattled field where the law had an inadequate presence."[7]

In response to the recommendations of the Commission, the Industrial Relations Act, 1971, included provisions regulating unfair dismissal. The Trade Union Labor Relations Act, 1974, repealed many of the provisions of the 1971 Act, but retained the provisions relating to unfair dismissal. The Employment Protection (Consolidation) Act, 1978, (EPCA) currently embodies the 1974 provisions relating to unfair dismissal.[8] Section 67 of the EPCA provides that any employee protected by the Act may present a complaint to an industrial tribunal within three months of his termination date. At a hearing on the complaint, the tribunal will inquire into the "fairness" of the dismissal. A determination of "fairness" involves two inquiries. First, the employer must establish a valid reason for the dismissal. The statute expressly recognizes as valid the following reasons for dismissal: redundancy;[9] the inability of an employee to perform his work; the conduct of an employee; when continued employment would violate some other statutory enactment; and when "some other substantial reason" exists for the dismissal.[10] Second, if the employer provides a valid reason for dismissal, the tribunal then must determine, without placing the burden of proof on either party, whether the employer acted "reasonably or unreasonably" by discharging the employee. If the tribunal finds the discharge to be unfair, it must then consider whether reinstatement, re-engagement, or compensation is the proper remedy for the dismissal.[11] The

7. *See* P. DAVIES & M. FREEDLAND, LABOUR LAW: TEXT AND MATERIALS 346-48 (1979). Prior to the enactment of the unjust dismissal legislation in 1971, an employer was required to provide his employee only with notice of the termination of the employment relationship, i.e., the employer was not required to provide a reason for the termination. An employer's failure to provide an employee with adequate notice meant that the employee had been *wrongfully dismissed*. The employment contract could define the parameters of "adequate notice," so long as it was not less than the statutory minimum of one week after four weeks of employment, and, thereafter, one week for every completed year of employment, up to a maximum notice period of 12 weeks. Employees who had been wrongfully dismissed could seek compensation for their losses. Although the cause of action for wrongful dismissal survives the enactment of the unfair dismissal legislation, this legislation renders superfluous the former cause of action in the vast majority of cases. *See* DONOVAN REPORT, *supra* note 1, at 141. Because of the *de facto* limitations on compensation in unfair dismissal cases, however, an action for wrongful dismissal remains an attractive alternative for higher paid employees.

8. *See* EPCA, 1978, ch. 44, §§ 54-80. *See also* Employment Act, 1980, ch. 42, §§ 6-10; and Employment Act, 1982, ch. 46, § 2-9.

9. *See supra* note 2.

10. *See* EPCA, 1978, ch. 44, § 57. The phrase for "some other substantial reason" is interpreted very broadly, and is not construed *ejusdem generis* with the other reasons for dismissal. *See* R.S. Components v. Irwin, [1973] Indus. C. Rep. 535. *See generally* Bowers and Clarke, *Unfair Dismissal and Managerial Prerogative: A Study of "Other Substantial Reason,"* 10 INDUS. L.J. 34 (1981).

11. *See* EPCA, 1978, ch. 44, §§ 57 & 68. Reinstatement places an employee in the position he would be in if he had never been dismissed. Consequently, the reinstated

existence of a statute recognizing the right of an employee to insist upon a valid reason for discharge, and the concomitant remedies that are available if the tribunal finds that the discharge was unfair, represent clear advances over the common law of wrongful dismissal.[12]

B. The Foundations and Evolving Structure of Unjust Dismissal Law in the United States

The employment-at-will doctrine, a product of formalistic contract doctrines and *laissez faire* economic theory,[13] traditionally has been an important structural feature of the employment relationship in the United States. The doctrine provides that, absent specific contractual limitations, an employer is free to "discharge an employee

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employee, upon reinstatement, would receive the benefit of any pay increase that he would have received had he remained in employment. The *re-engaged* employee, on the other hand, is given employment comparable to that from which he was discharged with his former employer, an associated employer, or some other employer. More importantly, under the re-engagement remedy, the tribunals determine the terms of employment, and these terms need *not* include the restoration of privileges lost because of the unjust dismissal. *See id.* § 69. *See also infra* notes 161-78 and accompanying text.

12. The remedies aspect of the legislation, however, from the point of view of an employee, has been disappointing. The remedies that would put the unjustly discharged employee back to work or provide substantial compensation admittedly *appear* to represent an advancement in employee security. Industrial tribunals, however, rarely utilize the re-employment remedies, and the median compensation award in 1981 was only £963. *See infra* notes 161-78 an accompanying text.

Although generally recognized as an advancement in the industrial relations area, there have been several recent modifications to laws in the unjust dismissal area. In 1980, for example, Parliament modified the applicability of the unjust dismissal law to small businesses. Following the enactment of the 1971 Act, the representatives of small business alleged that the right to claim unfair dismissal presented yet another obstacle to the operation of an efficient and competitive business. The 1980 Act, enacted by the Conservative Government, responded to these objections by requiring that employees working for an employer with no more than 20 employees must have two years of service before possessing the right to claim unjust dismissal. Employment Act, 1980, ch. 42, § 8. For a discussion of another modification of the unjust dismissal law in the 1980 Act, see *infra* notes 82-92 and accompanying text concerning the so-called neutral burden of proof.

13. The *laissez faire* ideology provided that employers had a "fundamental right" to discharge employees as they pleased. *See* Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 343 (1974). Formalistic contract doctrines, such as mutuality of obligation, the statute of frauds and consideration all provided convenient analytical avenues through which courts and commentators could legitimize the employment-at-will doctrine. *Id.* at 342. Despite the doubtful support and historical justification for the rule, the employer's "unrestrained freedom to discharge was transmuted into a constitutional right." *See* Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute,* 62 VA. L. REV. 481, 485 (1976). In Adair v. United States, 208 U.S. 161 (1908), the Supreme Court held unconstitutional a federal statute which prohibited the discharge of a railroad employee because of union membership. Although the Court abandoned the constitutional rulings of this case in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the "common law rule stubbornly survives." Summers, *supra* at 486.

for a good cause, a bad cause, or no cause at all."[14]

Several developments in the law on unfair dismissal in the United States, however, challenge the continued vitality of the employment-at-will doctrine. First, many federal and state statutes prohibit employers from dismissing employees for certain specified reasons, such as race, color, sex, age, or national origin.[15] Second, the judiciary has been active in limiting the discretion of an employer in dismissal cases. Some state courts, for example, entertaining actions brought by employees alleging that their employer breached a contract by dismissing them, utilize implied covenants of good faith and fair dealing in order to limit the operation of the employment-at-will doctrine.[16] Other courts find employers liable in tort for violating public policy when they discharge employees without a valid cause.[17] Finally, under most grievance arbitration procedures in the United States, an employer cannot dismiss an employee

14. Note, *supra* note 13, at 335. The doctrine became widely accepted following the publication of Horace Gray Wood's treatise on employment relations. *See* H. WOOD, MASTER AND SERVANT 277-81 (2d ed. 1886). *See also* Note, *supra* note 13, at 340-43.

15. The federal acts that protect employees from dismissal for these specified reasons include: National Labor Relation Act, 29 U.S.C. § 158(a)(3) (1976) (union activity protected); Employment Discrimination Act, 42 U.S.C. § 2000(e)(2) (1976) (race, sex, national origin, religion); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1976) (age); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1976) (filing complaint with or otherwise causing the Occupational Safety and Health Commission to investigate or institute proceedings against an employer); and Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (garnishment of wages). For a survey of state laws protecting employees from unfair dismissals, see Summers, *supra* note 13, at 495.

16. *See, e.g.,* Monge v. Beebe Rubber Company, 114 N.H. 130, 316 A.2d 549 (1974), where the New Hampshire Supreme Court held that an employer breaches an employment contract if the motivation for the dismissal is bad faith, malice, retaliation, or is not in the best interests of the economic system or for the public good. 316 A.2d at 551. The New Hampshire Supreme Court has recently retreated from *Monge,* however, holding it applicable only "to a situation where the employee was discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." Howard v. Dorr Woolen Company, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980). The Massachusetts Supreme Court adopted the *Monge* test in Fortune v. The National Cash Register Company, 373 Mass. 96, 105-06, 364 N.E.2d 1251, 1257-58 (1977), where it held that the dismissal of a salesman prior to the payment of his commissions constituted a breach of the covenant of good faith and fair dealing.

17. For example, in Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27-28 (1959), the employer dismissed an employee for refusing to commit perjury. The court held that the employee's complaint alleged sufficient facts to overcome a lower court dismissal for failure to state a cause of action in that dismissing an employee because of his refusal to violate the law imposed civil liability on the employer for any damages caused to the employee by the dismissal. Other cases include: Tameny v. Atlantic Richfield Company, 27 Cal. Rep. 3d 167, 610 P.2d 1330 (1980) (dismissal for refusing to participate in an illegal price fixing scheme); Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (D.C.N.Y. 1980) (dismissal so as to deprive employee of accrued pension rights); and Nees v. Hocks, 272 Ore. 210, 536 P.2d 512 (1975) (dismissal for serving on a jury against an employer's wishes).

unless there is "just cause" for the dismissal. This, of course, is a direct challenge to the employment-at-will doctrine insofar as an employer must adhere to the provisions of a collective bargaining agreement concerning the terms and conditions of a bargaining unit member's employment. Most collective bargaining agreements assure that a dismissal is for "just cause only" by providing a multi-step grievance resolution system that culminates in binding arbitration between the parties.[18]

These developments in the law on unjust dismissal in the United States mitigate some of the harsh consequences associated with the employment-at-will doctrine. The law, however, remains inadequate because of its non-systematic nature. For example, non-unionized private-sector employees remain subject to arbitrary dismissals under the employment-at-will doctrine if they fall outside the protective shield of the aforementioned statutory and judge-made protections.[19] This situation creates a disparity between the substantive rights of employees protected by collective bargaining agreements and those employees who are not so protected. Additionally, even among employees that are protected by collective bargaining agreements, the nature and scope of the protection need not be uniform. Arbitration procedures are a product of the specific collective bargaining agreement between the employer and the union, and, naturally, the procedures and protections vary with the agreement. Furthermore, arbitrators are not bound by the decisions of other arbitrators on issues relating to the interpretation of similar

18. The purpose of a multi-stage grievance procedure is to settle as many grievances as possible in an informal manner. In the typical grievance procedure, the first step involves oral communication with the employee's immediate supervisor. If unsuccessful at this level, the grievant may file a written grievance with the shop steward, who then meets with a lower-level managerial employee to seek a resolution of the grievance. If the parties are again unsuccessful, discussion of the grievances may continue at two or three more stages, each involving higher-level union and management officials. Finally, if voluntary resolution of the grievance is impossible, the parties may submit the grievance to an arbitrator. *See* F. ELKOURI & E.A. ELKOURI, HOW ARBITRATION WORKS 120-23 (3d ed. 1973). Express clauses in the contract also may dictate the other specifics of the arbitration process such as burden of proof, evidentiary standards, and the authority of an arbitrator to modify penalties. *Id.* at 181.

19. One commentator, for example, argues that one-half of all discharges in the non-unionized private sector would be overturned by arbitration if those dicharges were subject to grievance arbitration. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1, 10 (1979). Peck supports his argument with references to statistics which show that one-half of all discharges brought to arbitration by union representatives result in the overturning of management's decision to discipline. *Id.* For a discussion of public employees and job security, see Weisberger, *Job Security and Public Employees,* INSTITUTE OF PUBLIC EMPLOYMENT, MONOGRAPH No. 2 (1973) (as revised in No. 6 (1976), published by New York State School of Industrial and Labor Relations, Cornell University.) Public employees are given limited constitutional protection against unjust dismissals by the courts, and also negotiate for job security through the collective bargaining process.

contractual provisions.[20] This interpretational freedom provides a potential for further disparities in the substantive rights among employees working under collective bargaining agreements.

Comprehensive legislation would correct many of the debilitating disparities in substantive rights that currently exist among employees in the United States. Legislators, lawyers, and academic commentators, when formulating such legislation, would be well advised to consult the recent experience of the British under their unfair dismissal law.[21]

C. The Legal Consequences of the Different Origins of the British and American Law on Unfair Dismissal

Many of the differences between the British and the American law on unfair dismissal are a function of the different sources of the law. In Great Britain, the Industrial Relations Act, 1971, introduced statutory provisions regulating unfair dismissal, including the right of an employee "not to be unfairly dismissed."[22] As mentioned above, however, employees in the United States do not have such comprehensive legislative protections. Instead, the United States relies upon a patchwork of federal and state statutes, judge-made rules, and collective bargaining agreements to protect employees from an unjustified dismissal. These measures, however, afford only limited protection. The statutory provisions, for example, regulate dismissals only for certain unlawful reasons.[23] Additionally, although collective bargaining agreements typically provide an employee with comprehensive protection against dismissal without cause, these agreements cover fewer than twenty-five percent of all

20. Although it is literally correct to say that arbitration awards have no *stare decisis* effect, in practice, many arbitrators will consider the relevant decisions of other arbitrators in similar cases when reaching their decision. This should come as no surprise, for one might expect that rational persons will render similar judgments in similar cases. On the other hand, because one arbitrator's decisions are not binding on other arbitrators, little effort is made to distinguish cases that, at first glance, seem quite similar. *See* F. Elkouri & E.A. Elkouri, *supra* note 18, at 365-68.

21. *See* Collins, *supra* note 3, at 88-92. Many commentators have called for statutory reform in this area. *See, e.g.,* Blades, *Employment-At-Will v. Individual Freedom: On Limiting The Abusive Exercise of Employer Power,* 67 Colum. L. Rev. 1404 (1967); Blumrosen, *Stanger v. More: All Workers Are Entitled To Just Cause Protection Under Title VII*, 2 Indus. Rel. L.J. 519 (1978); Peck, *supra* note 17; and Summers, *supra* note 13.

One of the authors of this article recently has proposed a federal statute, modeled on the British experience, for protection against unjust dismissal in the United States. *See* Mordsley, *Lessons from the British Experience,* 20 Indus. L. Rel. Rep. 24 (1982).

22. Industrial Relations Act, 1971, ch. 72, § 8.

23. *See supra* note 15.

employees in the United States.[24] Consequently, the first major difference between the British law on unfair dismissal and American labor arbitration relates to coverage—some ninety-nine percent of British employees enjoy protection from unfair dismissal, while less than forty percent of American employees may challenge their dismissal either through arbitration or tenure procedures.[25]

Furthermore, the British law, precisely because of its statutory nature, represents a form of social legislation, providing each individual employee with a right that cannot be waived by the terms of the employment agreement.[26] In the United States, on the other hand, the parameters of an employee's right to submit dismissal cases to arbitration typically remains a function of the consensual agreement between an employer and an employee's representative, i.e., the focus is on the employer-union relationship. The rights of an employee, then, are not guaranteed insofar as they are subject to negotiation by the employee's representatives.

Finally, the British law on unfair dismissal utilizes a more structured appeals procedure than the appeals procedures that are characteristic of American labor arbitration. In Great Britain, an employee alleging unfair dismissal must file a complaint with an industrial tribunal within three months of his dismissal. The decision of an indi-

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24. *See* Weisberger, *supra* note 19.

25. It is also of some importance to note that a 1975 survey indicated that 79% of all collective bargaining agreements contain "cause" or "just cause" for discharge provisions. *See* Summers, *supra* note 13, at 499 n.104. Additionally, in 1980, 20.8% of the American workforce belonged to a union. This represents a decline from 22.3% in 1978. *See* 1981 LABOR RELATIONS YEARBOOK 253 (BNA 1982).

The remaining 80% of the private-sector workforce in the United States, therefore, has no unfair dismissal protection, other than the patchwork of federal statutes and judge-made rules mentioned above. For a discussion and proposal of possible federal legislation providing such protection to both unionized and non-unionized employees, see Summers, *supra* note 13; and Mordsley, *supra* note 21.

This article does not attempt to explore other related areas of employee discharge and discipline, including the protection enjoyed by public sector employees, and voluntary programs established by private-sector employers to protect against unjust dismissal. Of approximately 15 million public-sector employees, for example, more than 50% are protected by tenure agreements or other civil service procedural devices. *See* Peck, *supra* note 19, at 8-9. Additionally, some larger employers have introduced voluntary grievance and arbitration procedures. *See* Littrell, *Grievance Procedure and Arbitration in a Nonunion Environment: The Northrop Experience,* 34 PROCEEDINGS OF THE ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 35 (1980) (describing the grievance procedures adopted by Northrop Aircraft, Inc.).

26. "(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer.

(2) This section applies to every employment except in so far as its application is excluded by or under any provision of this part. . . ."

EPCA, 1978, ch. 44, § 54. *See also id.* at § 140 which generally prohibits the contracting out of the right to claim unjust dismissal. An employer and union, however, may contract for and operate their own unfair dismissal procedure with the approval of the Secretary of State for Employment. *Id.* at § 65.

vidual tribunal, as to matters of law, may be appealed to the Employment Appeals Tribunal (EAT). If the ruling of the EAT fails to satisfy the complaining employee, leave may be taken to appeal the decision to the Court of Appeal and the House of Lords.[27] In the United States, the collective bargaining agreement usually provides a method for selecting an arbitrator and outlines the grievance procedures to be followed. These procedures vary according to the requirements of the agreement. Further, in the United States, court review of an arbitrator's decision remains the exception rather than the rule, and the agreement ordinarily will narrowly circumscribe the right of judicial review.[28]

This brief examination of the background and structure of the British and American law on unfair dismissal reveals several of the broad differences that currently exist between the two systems. This article now addresses, in greater detail, the similarities and differences in the central concepts and standards used to determine the appropriateness of a discharge.

II

A COMPARISON OF THE METHODOLOGIES USED TO DETERMINE THE APPROPRIATENESS OF A DISCHARGE

A. TOWARDS A DEFINITION OF THE CENTRAL CONCEPTS: "REASONABLENESS" AND "JUST CAUSE"

The dismissal of an employee in Great Britain is appropriate only if it is "reasonable"; a dismissal under the arbitration system in the United States is appropriate only if it is with "just cause." These words by themselves are of little guidance to either an industrial tribunal or an arbitrator. Various British and American tribunal, court and arbitration decisions, however, have further defined, and thereby concretized, the meaning of these terms.

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27. *Id.* at §§ 67 & 136.

28. The parties to an arbitration agreement select the arbitrator or arbitrators in various ways. Some collective bargaining agreements contain designations of a "permanent arbitrator" (i.e., for the life of the collective agreement), or a tripartite board of arbitrators. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18. Tripartite arbitration panels generally include an impartial chairman selected upon agreement by the parties, and two members, one selected by management and the other by labor. *Id.*

Parties also may select arbitrators on a "temporary" basis (i.e., for the particular grievance), and many contracts provide for the selection of an arbitrator in accordance with the rules of the American Arbitration Association. *See* M. TROTTA, ARBITRATION OF LABOR—MANAGEMENT DISPUTES 37 (1974).

1. The British Law on Unfair Dismissal: The Reasonableness Requirement

Section 57 of the EPCA, as modified by the Employment Act, 1980, provides that once an employer establishes a reason for discharge:

> the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.[29]

Commentators have noted that this statutory test appears to focus upon the sufficiency of the employer's reason for dismissing the employee in view of the circumstances that the employer knew or reasonably should have known at the time of discharge.[30] Similarly, British courts interpret the reasonableness requirement as involving consideration of only that employee conduct and those circumstances that were known to the employer at the time of dismissal.[31] In *W. Devis & Sons Ltd. v. Atkins*,[32] for example, an employer dismissed an employee for insubordination. The employer offered the employee a severance pay of six weeks' salary if the employee would waive the otherwise applicable notice of termination requirement. The employer also offered the employee a £6,000 *ex gratia* payment. Before the employee accepted these offers, however, the employer discovered that the employee had engaged in dishonest trade practices prior to his termination. The employer then withdrew the settlement offers and notified the employee that he was summarily dismissed on the basis of the subsequently discovered dishonest conduct. The House of Lords upheld the finding of an unfair dismissal. The Law Lords ruled that the lower court properly determined the reasonableness of the dismissal solely on the basis of the evidence available to the employer at the time of the dismissal. The Law Lords insisted that this evidence, and not whether the employee deserved to be discharged because of the subsequently discovered misconduct, was the proper basis for a determination of the fairness of a discharge.[33]

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29. EPCA, 1978, ch. 44, § 57(3).

30. *See* S.D. ANDERMAN, UNFAIR DISMISSALS AND THE LAW 41 (1973); and Elias, *supra* note 1, at 204.

31. *See infra* notes 32-39 and accompanying text.

32. [1977] Indus. Rel. L. Rep. 314.

33. *See also Earl v. Slater & Wheeler (Airlyne) Ltd.* where the test was viewed as "whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee and it has to be answered with reference to the circumstances known to the employer at the moment of dismissal." [1973] All E.R. 145, 150.

This interpretation of the unfair dismissal legislation appears to benefit the discharged employee insofar as any subsequently discovered misconduct cannot be considered by a tribunal when adjudging the fairness of a dismissal. A tribunal will consider this misconduct, however, in determining the compensation that is owed to the unjustly dismissed employee. The unfair dismissal legislation provides that "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances."[34] In *Atkins*, for example, the House of Lords interpreted the predecessor of this section of the 1978 Act as allowing "nil compensation" where the employee successfully concealed grave misconduct.[35] Although it may seem inconsistent to have an unfair dismissal and yet award no remedy to the employee, a careful consideration of the underlying policies of the unjust dismissal law supports the rule of the *Atkins* case. By requiring that the validity of a dismissal be judged only on information known to the employer at the time of discharge, the *Atkins* rule encourages employers to make a reasonable investigation and to base any dismissal on an adequate factual foundation. When determining whether reinstatement, reengagement, or compensation is the appropriate remedy for an unfair dismissal, however, the law should be less concerned with the facts known to an employer at the time of dismissal, and more concerned that an employee receives his "just desserts." An industrial tribunal should consider all relevant information when making the latter determination, including information not available to an employer at the time of discharge. The *Atkins* rule promotes both of these policies in unfair dismissal cases. Under the *Atkins* rule, a finding of unfair dismissal penalizes the employer for improperly discharging an employee without an adequate factual basis, while the award of nominal or nil compensation penalizes the employee who engaged in serious misconduct.[36]

In *Atkins,* the court limited its holding to what it found was the correct statutory interpretation of the 1971 Act, and not what it considered the proper approach regarding subsequently discovered employee misconduct. Indeed, under the common law of wrongful discharge, an employer could utilize information discovered after the dismissal in order to justify the validity of his action. *See* Boston Deep Sea and Ice Company v. Ansell, 39 Ch.D. 339, 352 (1888).

34. EPCA, 1978, ch. 44, § 74(1).

35. In point of fact, the court awarded the employee in *Atkins* two weeks pay as a "basic award." Between 1975 and 1980 an employee would receive this minimum compensation whenever there was an unfair dismissal, without regard to the merits of his claim. This minimum award was later referred to as the " 'rogues' charter." It was repealed by the Employment Act, 1980.

36. The only qualification to this affirmation of the *Atkins* rule is that an employer may be insufficiently penalized for his error, and, thereby, may be insufficiently "encouraged" to improve his ways after a finding of unfair dismissal.

Commentators on the British law have identified further the components of the "reasonableness" requirement in dismissal cases. Anderman, for example, posits three distinct components of reasonableness: (1) the factual basis supporting the employer's decision; (2) the procedural adequacy of the dismissal process; and (3) the proportionality of the penalty imposed to the offense.[37] Davies and Freedland argue that the question involves a balancing of "substantive justice" and "procedural justice."[38] Elias also recognizes that the concept of "fairness" necessitates an inquiry into both the "substantive factual adequacy" of a dismissal decision and the "procedural protections" provided in the dismissal process.[39] In simple terms, then, to satisfy the test of reasonableness a dismissal must be both substantively fair and procedurally fair.

An exception to the rule that an employer must base a discharge on facts known at the time of the discharge recently developed in The Board of Governors, The National Heart and Chest Hospitals v. Nambiar, [1981] Indus. Rel. L. Rep. 196. In *Nambiar,* the employee challenged his discharge through the company's internal appeals procedures. He introduced evidence at the appeals hearings that the medication he was taking for his diabetes caused the actions that led to his dismissal. The internal appeal failed, and the employee brought a complaint before an industrial tribunal. The industrial tribunal found the dismissal unfair because the internal appeals tribunal failed to admit the medical evidence introduced by the employee. The EAT reversed, holding that for purposess of unfair dismissal proceedings, the discharge was not final until all internal appeals ended. The EAT ruled that the evidence disclosed at the internal appeals herein, could be considered by the tribunal.

In considering the effect of this decision on the *Atkins* rule, it is important to know the nature of the employer's decision prior to the internal appeal. Has there been a mere suspension pending the appeal, and is it on full pay? If so, using information obtained at the appeal cannot be objectionable. Indeed, the process is more of a fact-finding investigation than an appeal. The use of this evidence is not appropriate if the appeal is against a final decision to dismiss which already has been made by an employer. By permitting the use of the appeal to strengthen an employer's reasons for dismissal, the appeal stage is effectively lost. The tribunal, however, did not make this distinction, as the employer had decided to dismiss prior to the internal appeal. The EAT justified its decision by noting that the employer was not substituting a new reason for the dismissal, and, therefore, it was perfectly permissible to take into account information that clarifies the reason relied upon.

Nambiar is somewhat different from other cases in that the evidence adduced was of assistance to the employee. There will, of course, be cases where the additional evidence will assist an employer. In practice, it is impossible to say that the internal appeal body will ignore evidence that was presented at the appeal but was not known to the employer at the time of the original dismissal. It must remain the case, however, that an employer cannot change the reason for dismissal as a result of the internal appeal hearing. *Nambiar,* therefore, does not put into question the status of *Atkins,* but only qualifies *Atkins* to the extent that it allows an employer to consider information received after the decision to dismiss has been made but that is relevant to the reason proffered at the time of dismissal.

37. *See* S.D. ANDERMAN, *supra* note 30, at 41-42.

38. *See* P. DAVIES & M. FREEDLAND, *supra* note 7, at 354-71, particularly at 365-66.

39. *See* Elias, *supra* note 1, at 210-11.

2. *Grievance Arbitration in the United States: The Requirements of "Just Cause"*

The test of the appropriateness of discharge under American grievance arbitration is similar to the test applied under the British law. Although articulated in terms of "just cause," arbitrators in the United States also concentrate on the factual adequacy of the discharge, the procedural protections afforded the employee, and the relationship between the penalty imposed and the nature of the offense committed. As one arbitrator stated:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires 'sufficient cause' as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge.[40]

Another arbitrator developed a list of seven factors to consider in discharge cases, once again, with the intention of assuring the procedural and substantive fairness of a dismissal. The following questions exemplify these factors: (1) did the employee have knowledge that his conduct would be subject to discipline, including possible discharge?; (2) was the rule he violated reasonably related to the safe, efficient and orderly operation of the business of the company?; (3) did the company make a reasonable effort, before disciplining the employee, to discover whether he in fact did violate the rule?; (4) was the investigation made by the employer fair and objective?; (5) did the investigation produce substantial evidence that the employee was guilty of the offense with which he was charged?; (6) was the decision non-discriminatory?; and (7) was the degree of discipline given him reasonably related to the seriousness of the proven offense?[41]

The investigation into whether "just cause" existed for a discharge is confined to the reasons articulated by an employer at the time of the discharge. As in Great Britain, then, evidence of misconduct that was not known to the employer at the time of discharge will not justify a discharge. In *National Screw & Manufacturing Co.*,[42] for example, the employer fired an employee for absenteeism. At the arbitration hearing, however, the employer sought to introduce evidence showing that, after the discharge, the employee had

40. Riley Stoker Corp., 7 L.A. 764, 767 (1947).

41. *See* W. BAER, DISCIPLINE AND DISCHARGE UNDER THE LABOR AGREEMENT 29 (1972), wherein Mr. Baer refers to a list of criteria developed by the well-known arbitrator, Carroll B. Daughterty.

42. 33 L.A. 735 (1961).

been convicted of a statutory rape that had occurred prior to the discharge. The arbitrator refused to consider the evidence:

> At most, the subsequent conviction and particularly the admission of guilt at the trial, could be considered as corroborative evidence bearing upon the company's initial appraisal of the employee's conduct. It cannot, however, serve to retroactively provide justification for discipline in the absence of the existence of "just cause" prior to the discharge.[43]

The definitions of "just cause" and "reasonableness," therefore, are strikingly similar. Both concepts compel an employer: (1) to provide an adequate factual basis for the dismissal; (2) to maintain the procedural integrity of the dismissal process; and (3) to ensure an equitable balance between the offense and the penalty. Furthermore, both British tribunals and American arbitrators insist that employers justify their decision to dismiss on the basis of evidence that is available to them at the time of discharge. Unlike the British unfair dismissal law with its statutory definition of fairness,[44] however, there is no clear consensus among arbitrators as to what constitutes a "fair" dismissal. Where a contract is silent on the issue of disciplinary procedures, for example, some arbitrators will impute a "just cause" requirement, but other arbitrators claim that management, under these circumstances, has the authority to discharge at will.[45] Additionally, arbitrators have different views concerning what constitutes "just cause." One arbitrator stated: "What constitutes just cause is a matter that must be based on the individual merits of the case."[46] Past practice, the history of negotiations between the parties, and the relative skill of the advocates for both sides also will influence the meaning assigned to "just cause" in a particular case.[47] Finally, although arbitrators sometimes will look to the decisions of their colleagues for guidance, they often will disregard rulings in similar cases, preferring to apply their own brand of industrial justice within the parameters of the collective bargaining agreement.[48] Thus, although there is a great deal of similarity in the definitions of "just cause" and "reasonableness," the case-specific nature of arbitration in the United States provides the potential for a divergence of opinion amongst arbitrators concerning what constitutes "just cause" in discharge cases.[49]

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43. *Id.* at 740.

44. EPCA, 1978, ch. 44, § 57.

45. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 611.

46. Power Equipment Co., 2 L.A. 558, 560 (1945), as cited in W. BAER, *supra* note 41, at 27.

47. W. BAER, *supra* note 41, at 27.

48. *Id.*

49. One should not overstate the distinction between the United States and Great Britain concerning the meaning of "just cause" versus "fairness." Although there is a statutory definition of fairness in Great Britain, the view of one industrial tribunal

B. The Determination of Reasonableness: The British Law on Unfair Dismissal

Two basic questions emerge in both British and American discharge cases: (1) did the employer have a sufficient basis for disciplining the employee?; and, if so, (2) was discharge the appropriate penalty for the misconduct or incapability? Although Part IIA of this article noted the broad similarities in the definitions of "just cause" and "reasonableness," critical differences do exist in the focal point for determining whether *any discipline* is warranted, and, assuming that some sort of discipline is called for, whether discharge is the appropriate penalty. These differences are not merely semantic insofar as recent decisions in Great Britain reveal a trend towards deference to the judgment of an employer. The trend is in marked contrast to the *de novo* review that is characteristic of arbitration in the United States.

1. The Establishment of an Adequate Factual Basis for the Discipline and Discharge of an Employee

During the first six to seven years of the British law on unfair dismissal, industrial tribunals were viewed as "special [juries] adopting a broad approach of common sense and common fairness and eschewing all legal or other technicalities."[50] In *Bessenden Properties Ltd. v. Corness,*[51] for example, the Court of Appeal acknowledged the validity of this understanding of the role of industrial tribunals. The court noted that the question of the fairness of a discharge should be left to the tribunals, and that the tribunals should consider all relevant circumstances when making this decision. The approach endorsed by the Court of Appeal in *Corness* encouraged industrial tribunals to examine objectively the reason for the discharge, and to render an independent assessment of the reasonableness of the discharge.[52]

A series of decisions by the EAT in 1976 and 1977, however, shifted the focus of the initial inquiry that was made by the industrial tribunals. Henceforth, industrial tribunals would not objectively review the reasonableness of an employer's decision to discipline and discharge an employee, but instead would defer to the

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regarding reasonable behavior may be very different from the view of another tribunal, and the relative skill of the advocates for either side may influence the decision as well. Furthermore, the decisions of a tribunal are not binding on another tribunal; only the EAT and the courts of review render decisions which establish binding precedents.

50. *See* S.D. Anderman, *supra* note 30, at 39.

51. [1974] Indus. Rel. L. Rep. 338.

52. *See also* Earl v. Slater & Wheeler (Airlyne) Ltd., [1973] 1 All E.R. 145; and St. Anne's Board Mill Co. v. Brien, [1973] Indus. Cas. R. 444.

decision of an employer if there was a reasonable basis for the decision.[53] In *Ferodo Ltd. v. Barnes*,[54] an employer dismissed an employee for vandalism of the company's toilets. The EAT held that the proper test was not whether the evidence convinced the industrial tribunal that the employee committed the misconduct, but whether the employer had reasonable grounds at the time of dismissal to conclude that the employee committed the offense. The EAT stated that a finding relating to whether or not the employee actually committed the misconduct was only one relevant factor in determining whether the employer had reasonable grounds to dismiss.[55]

Similarly, in *Vickers Ltd. v. Smith,*[56] the EAT exhibited an even more deferential attitude towards employer decisions in dismissal cases by establishing the "two views doctrine." The "two views doctrine" provides that if a reasonable employer could decide either to dismiss or retain an employee, either decision would be legally acceptable to an industrial tribunal. Under this doctrine, then, a tribunal may overrule an employer's decision to dismiss only where that decision "was so wrong, that no sensible or reasonable management could have arrived at the decision";[57] the role of the tribunal under this test is merely to determine whether the action of the employer was so arbitrary and capricious as to lack any rational support. Although a minority of arbitrators in the United States limit themselves to this "arbitrary and capricious" standard of review, it clearly is far more deferential than the *de novo* standard generally applied by arbitrators.[58]

Finally, in *Taylor v. Alidair Ltd.,*[59] the Court of Appeal, by Lord Denning, affirmed the holdings of *Barnes* and *Smith* as to the focal point for determining the reasonableness of discharge:

> In considering the case, it must be remembered that [the statute] contemplated a subjective test. The Tribunal has to consider the employer's reason and the employer's state of mind. If the company honestly believed on rea-

53. Because the statutory language regarding dismissal does not explicitly endorse either understanding of the role of industrial tribunals, the increased deference that has been afforded to the judgments of management in this area is entirely a result of judicial construction of the statutory language. *See* EPCA, 1978, ch. 44, § 57.

54. [1976] Indus. Rel. L. Rep. 302.

55. *Id.* at 303.

56. [1977] Indus. Rel. L. Rep. 11.

57. *Id.* at 12. The wide range of discretion granted to employers under the "two views" doctrine is arguably the harbinger of the "band of reasonableness" test currently used by British courts to examine the reasonableness of an employer's choice of discharge as a penalty. *See infra* notes 117-29 and accompanying text. More recent tribunals decisions have retreated, somewhat, from the extreme position announced in *Smith*. *See* Iceland Frozen Foods v. Jones, [1983] Indus. Cas. R. 17; N.C. Watling Co. v. Richardson, [1978] Indus. Cas. R. 1049.

58. *See infra* notes 131-36 and accompanying text.

59. [1978] Indus. Rel. L. Rep. 82.

> sonable grounds that this pilot was lacking in proper capability to fly aircraft on behalf of the company, that was a good and sufficient reason for the company to terminate the employment then and there.[60]

The increasing deference afforded the actions of employers in unjust dismissal cases may lead to the dismissal of an employee on the basis of prejudice rather than objective fact. *Saunders v. Scottish National Camps*[61] illustrates this potential problem. In *Saunders,* an employer dismissed a maintenance employee who worked at a camp "attended by young persons of both sexes" because the employee was a homosexual. A psychiatrist, testifying for the employee, stated that he did not think that the employee's homosexuality created a danger to young people. He admitted, however, that many employers probably believed, without any scientific basis, that homosexuals may "interfere" with children. After noting this evidence, the EAT concluded that "[there is considerable support for the judgment that] employers would take the view that the employment of a homosexual should be restricted, particularly when required to work with children."[62] The EAT then upheld the tribunal decision to permit dismissal.

Thus, the refusal of the EAT to evaluate objectively the adequacy of the facts supporting the dismissal permitted the employer to discharge an employee because of employer beliefs regarding the dangerousness of homosexuals. The decision in *Saunders* led one commentator to warn that "[t]his is a dangerous development, for if this kind of argument becomes widely accepted it will result in reasonableness being defined by the attitudes of the most prejudiced body of employers rather than by the Tribunal's perception of how an enlightened employer might behave."[63]

This deference to the decisions of an employer also applies in cases concerning the choice of disciplinary measures. Under the "range of responses" doctrine, first articulated in *Rolls Royce Ltd. v. Walpole,*[64] an industrial tribunal may not substitute its own views in considering the appropriateness of discharge as the penalty for that of an employer for employee misconduct. As the EAT stated in *Walpole*:

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60. *Id.* at 84.

61. [1980] Indus. Rel. L. Rep. 174, *aff'd*, [1981] Indus. Rel. L. Rep. 277.

62. *Id.* at 175. That is, in assessing the reasonableness of the employer's belief regarding homosexuals, the EAT was not concerned with scientific evidence as much as with whether most employers probably believed that homosexuals should not work with children.

63. *See* Elias, *supra* note 1, at 213.

64. [1980] Indus. Rel. L. Rep. 343. For a discussion which is critical of the "range of responses" doctrine, see Collins, *Capitalist Discipline and Corporationist Law—Part II,* 11 INDUS. L.J. 170, 173-74 (1982).

> Frequently there is a range of responses to conduct or capacity of an employee on the part of the employer, from and including summary dismissal downwards to a mere formal warning, which can be said to have been reasonable. It is precisely because this range of possible responses does exist in many cases that it has been laid down that it is neither for us on an appeal, nor for an Industrial Tribunal on the original hearing, to substitute ours or its respective views for those of the particular employer concerned.[65]

The Court of Appeal endorsed this test in *British Leyland UK Ltd. v. Swift,*[66] where an employer dismissed an employee for having a company registration on his personal vehicle. The industrial tribunal held that the dismissal was unfair in view of the employee's long work record, the minor nature of the offense, and the fact that the employee had already been punished through the criminal justice system. The EAT agreed with the industrial tribunal, but the Court of Appeal reversed, noting that the question is not whether a lesser penalty is appropriate, but whether dismissal falls within that "band of reasonableness within which one employer might reasonably take one view . . . [and] another quite reasonably take a different view."[67]

What is the reason for this increasing deference towards employer decisions in dismissal cases? One purported explanation for this development is that the current reasonableness test testifies to the importance of an employer's continued confidence in his employees. Although factual guilt is the critical issue in the criminal justice system, it is less important in the industrial relations system. The proponents of this position maintain that an employer must remain confident in the loyalty, honesty and ability of his employees. If an employer believes that an employee is a thief, for example, that belief may be as destructive of the employment relationship as would be the actual guilt of the employee.[68]

This justification for the recent developments in the British law on unfair dismissal,[69] however, is valid only if the typical result of a finding of unfair dismissal is the reinstatement of the factually innocent but currently mistrusted employee. Reinstatement is the pri-

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65. [1980] Indus. Rel. L. Rep. at 346.

66. [1981] Indus. Rel. L. Rep. 91.

67. *Id.* at 92.

68. The case of *Ferodo Ltd. v. Barnes* illustrates this position. The employer suspected an employee of vandalism in the company toilets, and dismissed him based upon these suspicions. The EAT recognized the importance of this loss of confidence in the employee, and stated that the proper test for adjudging the fairness of dismissal as a penalty was not whether the employee actually committed the offense, but whether the employer could reasonably believe that the employee committed the misconduct. Hence, a tribunal must ask only whether they are "satisfied that the employer had . . . reasonable grounds for believing that the offense . . . was committed." *See* [1976] Indus. Rel. L. Rep. 302, 303.

69. *See supra* notes 54-66 and accompanying text.

mary statutory remedy available to unfairly dismissed employees;[70] in practice,[71] however, compensation remains the remedy most often granted in unfair dismissal cases.[72] If compensation rather than reinstatement is the primary remedy afforded to unfairly dismissed employees, the subjective reasonableness of an employer's decision is less important than the objective guilt of an employee. Further, if it is unlikely that a finding of unfair dismissal will re-establish the employment relationship, a tribunal should concern itself only with the factual guilt of an employee.

Although recent developments in the law indicate that tribunals defer to the plausible judgments of an employer in determining both whether *any* discipline is appropriate and *what* discipline is appropriate, some vestiges of objective analysis remain. An examination of the actual analysis used by industrial tribunals in dismissal cases involving misconduct will illustrate this point.

2. The Reasonableness Requirement and the Decision to Discipline

As mentioned above, a determination of "reasonableness" involves an inquiry into the sufficiency of the reason for the discharge, as well as an examination of the appropriateness of the choice of discharge as a penalty. The three-stage test announced in *British Home Stores Ltd. v. Burchell*[73] provides the proper mode of analysis for determining the appropriateness of the choice to discipline an employee in misconduct cases. In *Burchell,* an employer dismissed an employee for dishonesty. The industrial tribunal found the dismissal unfair on the ground that the employer did not prove that the employee actually committed the misconduct. The EAT reversed the tribunal, however, noting that the proper test was "whether the employer who discharged the employee on the grounds of the misconduct in question . . . entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time".[74] The *Burchell* court further defined the mode of analyzing the reasonableness of an employer's belief as involving (1) whether the employer subjectively believed that the employee committed the misconduct; (2) whether the employer based that belief on reasonable grounds which he considered at the time of discharge; and (3) whether the employer conducted a reasonable investigation into the circumstances surrounding the discharge and,

70. *See* EPCA, 1978, ch. 44, § 68(1).
71. *See infra* note 162.
72. See *infra* notes 162-78 and accompanying text.
73. [1978] Indus. Rel. L. Rep. 379.
74. *Id.* at 380.

thereby, verified his belief.[75]

a. The Existence of an Employer's Subjective Belief

The easiest part of the *Burchell* test for an employer to satisfy is the existence of his subjective belief. Under section 57 of the Act, an employer must "show . . . the reason . . . for the dismissal," i.e., the employer has the burden of going forward.[76] An employer who complies with the requirements of section 57 also establishes a basis for the existence of his subjective belief under this first-prong of the *Burchell* test. Because industrial tribunals lack the authority to construct their own justification for the dismissal from the evidence brought before it, the employer must articulate this reason for the dismissal at the initial hearing. An employer, however, may change the reason or legal justification for the dismissal between the time of discharge and the commencement of the hearings, provided that the second reason emerges from the same set of facts as did the first reason.[77]

In *Abernethy v. Mott, Hay and Anderson,*[78] for example, the employer dismissed a civil engineer for redundancy.[79] At the formal hearing on the unfair dismissal complaint, however, the employer abandoned the redundancy claim and asserted the employee's incapability for employment. The Court of Appeal upheld the validity of the discharge, and ruled that the statute does not require an employer to label correctly *the reason* for the discharge, although, after *Atkins,*[80] an employer must rely on *evidence* known at the time of discharge. Consequently, *Abernethy* does not permit an employer to alter the factual justification for the decision to discipline. Instead, the Court of Appeal in *Abernethy* permitted the employer to change only the justificatory reason precisely because the same factual basis supported both causes of action, i.e., the employee could

75. *Id.* at 380. The Court of Appeal recently adopted the *Burchell* test. In W. Weddel & Co. v. Tepper, [1980] Indus. Rel. L. Rep. 96, an employee was dismissed for theft, but was not given an opportunity to defend himself at a hearing. The court held that, under the *Burchell* test, the failure to provide the employee with an opportunity to clear his name was an unreasonable investigation under part three of the test. *Id.* at 98. *See also infra* notes 97-115 and accompanying text.

76. EPCA, 1978, ch. 44, § 57(1)(a).

77. *But cf. Nelson v. The British Broadcasting Corp.,* where the employer allegedly dismissed the employee for redundancy. *See supra* note 2. Although it had doubts as to the alleged redundancy justification, the EAT nevertheless upheld the discharge because it concluded that the employer could have established "some other substantial reason" for the discharge. The Court of Appeal reversed, holding that the tribunal and EAT erred as a matter of law in considering any other reason than the reason proffered by the employer. [1977] Indus. Rel. L. Rep. 148, 151. *See also infra* note 81.

78. [1974] Indus. Rel. L. Rep. 213.

79. *See supra* note 2.

80. *See supra* notes 32-36 and accompanying text.

not perform the work that the employer had available.[81] Under these circumstances, the employee was not prejudiced because he knew the factual basis for the discharge, and could prepare his defense accordingly.

b. Proof of a Reasonable Basis for an Employer's Subjective Belief

The burden of showing a reasonable basis for discharge remained on the employer between 1974 and 1980.[82] During those years, an employer had the burden of establishing a reason for dismissal, and of proving by a "balance of the probabilities" that the discharge was "reasonable" in view of the circumstances.[83] The Employment Act, 1980, however, returned to the "in the air" onus of proof found in the 1971 unfair dismissal legislation.[84] The burden of showing a reasonable basis for discharge, therefore, is neutral, and once the employer establishes any reason for the dismissal, it is left to the industrial tribunal to assess the evidence offered by the parties and to determine whether the discharge was reasonable.

Several British commentators presently are debating whether this change in the law will result in any material differences in practice. Gwyneth Pitt, for example, argues that the change will have serious consequences.[85] Pitt observes that, at the time it was adopted, the shift from the "in the air" onus of proof in the 1971 Act to a standard that placed the burden on the employer in the Trade Union and Labour Relations Act, 1974, was recognized as being an "important change."[86] When the employer has the burden of proof,

81. In *Nelson v. The British Broadcasting Corp.,* for example, the parties agreed that the employer had ceased operations as defined in the statute, but disagreed as to the construction of the terms of the contract of employment. To the extent that this can be characterized as a mistake of law, the employer's reason for dismissal arguably falls under the *Abernethy* doctrine. Nevertheless, the Court of Appeal found that the employer's incorrect choice of a reason for dismissal was more than a legal technicality, and upheld the employee's claim. [1977] Indus. Rel. L. Rep. 148.

82. *See* Trade Union Labor Relations Act, 1974, ch. 52, sch. 1; EPCA, 1978, ch. 44, § 57(3).

83. *See, e.g.,* Ferodo Ltd. v. Barnes, [1976] Indus. Rel. L. Rep. 302, where the EAT observed that "the burden is placed upon the employer to show that the reason was a justifiable one." *Id.* at 303.

84. *See* Industrial Relation Act, 1971, ch. 72, § 24(1). The 1980 Act provides:

> Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and adminstrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and the question shall be determined in accordance with equity and the substantial merits of the casse.

Employment Act, 1980, ch. 42, § 6.

85. Pitt, *Individual Rights Under the New Legislation,* 9 INDUS. L.J. 233 (1980).

86. *Id.* at 234.

Pitt argues, a tribunal which was not satisfied with the quantum or credibility of the employer's proof, even if it was the only evidence presented, could find that a dismissal was unfair solely on the grounds that the employer failed to meet his onus of proof.[87] After the change in the Employment Act, 1980, however, because an employer need only establish a reason for the discharge, a tribunal may find it more difficult to declare a dismissal unfair solely because the quantum of proof does not satisfy the tribunal.[88]

Pitt also argues that a reversion to a neutral burden of proof may alter the procedures presently used by tribunals.[89] Instead of requiring an employer to proceed first on the question of reasonableness, a tribunal may instruct the employee to proceed first, even though the relevant facts in dismissal cases often are peculiarly within the knowledge of the employer.[90]

On the other hand, other commentators insist that the change enacted in 1980 will make little difference in the outcome of unfair dismissal cases. Patrick Mayhew, the former Under Secretary of State for Employment, stated that "in terms of law the clause will have little effect."[91] Because the employer still has the burden of establishing a reason for the dismissal under Section 57(1) of the

87. *See, e.g.,* Day v. Diemer & Reynolds, Ltd., [1975] Indus. Rel. L. Rep. 298. In *Day,* an employer, a publisher, dismissed an employee for improperly conducting his book binding duties. There was conflicting testimony as to whether the employee was responsible for the product defects. The industrial tribunal observed that:

> Although it is not very satisfactory to come back to the onus of proof, the position is that the Tribunal is not satisfied that the [employer's] version is correct. We are not saying that it is incorrect. It is just that we are not satisfied one way or the other. . . . The onus is on the [employer] to satisfy us that [he] acted reasonably and [he has] failed . . . on this particular point.

Id. at 301.

88. It is quite possible, for example, that the result in *Day* would be different if the neutral burden rule was in effect.

89. *See* Pitt, *supra* note 85, at 234-35.

90. It is doubtful, however, that a tribunal would permit an employer to remain silent where the employer is either the only or the primary source of information concerning the dismissal. Nonetheless, there is no sound reason for introducing uncertainty into this area of the law. As Pitt observes,

> The facts are peculiarly within the employer's knowledge, and an employee starting first would be seriously disadvantaged by having to try to foresee and deal with all possible points which might be raised, an impossible task for the unrepresented applicant. Beginning is far less of a disadvantage for the employer, partly because he is far more likely to have legal representation than the employee, and partly because under the 1980 Regulations, the respondent can ask for further and better particulars before entering his notice of appearance, so that there can be no excuse for his being uninformed about the substance of the applicant's case.

Id. at 235.

91. Mr. Mayhew observed, however, that " 'in terms of psychology it [the shift to a neutral burden of proof] will have a significant effect,' meaning that employers will no longer feel that they are having to prove themselves innocent." *See* Pitt, *supra* note 85, at 234.

EPCA, it is likely that the employer will present all the relevant evidence in order to meet that burden, including whatever evidence exists on the question of reasonableness.[92]

Regardless of the impact that this shift in the burden of proof may have on the outcome of unfair dismissal cases, the tribunal still must find that a reasonable basis existed for the decision to discipline. In *Burchell*, the EAT articulated the test as whether the evidence, by a "balance of the probabilities," allowed the employer to "entertain a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time."[93] The tribunal may not ask whether the evidence establishes "beyond a reasonable doubt" that the employee committed the offense; nor, from an objective standpoint, should the tribunal assess whether the evidence demonstrates by a "balance of the probabilities" that the employee committed the offense.[94] Instead, the law limits the inquiry of the tribunal to the issue of whether the evidence supports the employer's "reasonable suspicions," i.e., as the EAT stated in *Ferodo Ltd. v. Barnes,*[95] whether or not the employee actually committed the offense is currently only one factor to examine in determining whether the employer acted reasonably.[96]

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92. Although the new provision has been in operation for nearly three years, its true effect is still unclear. It is possible that the change was merely cosmetic, designed to manage the complaints of aggravated employers regarding the unfair dismissal laws in general. *See* Pitt, *supra* note 85, at 234. Problematic cases, however, may arise. In the 1976 decision of Bristol Channel Ship Repairers Ltd. v. O'Keefe, [1977] Indus. Cas. R. 492, for example, the EAT held a dismissal for redundancy unfair because the employer failed to show who had made the actual decision to dismiss the employees, what information they had relied upon, and what criteria they had used in making their decision. One questions whether this dismissal would be held unfair under the current neutral burden of proof standard. The employer merely would prove that the redundancies were necessary for business reasons, and, thereby, would satisfy the requirement of showing a reason for dismissal. If the employer then rested, as it did in the *Bristol Channel* case, the tribunal would have to determine, with only the information that the employer provided, whether the decision to dismiss was reasonable. Although it is submitted that all reasonable tribunals would require the employer to come forward with evidence of its procedures, such a result should be required as a matter of law.

93. [1978] Indus. Rel. L. Rep. at 380.

94. *Id.* at 380.

95. [1976] Indus. Rel. L. Rep. 302.

96. *Id.* at 303.

The *Burchell* test does not apply to conduct involving at least two employees. Where there is a "reasonable suspicion" that one of two or possibly both employees have acted dishonestly, the employer does not have to establish that he subjectively believes them both to be guilty. In Monie v. Coral Racing Ltd., [1980] Indus. Rel. L. Rep. 464, for example, an employer discovered money missing from a safe. Because only two employees had the combination to the safe, the employer fired both of them. The Court of Appeal upheld the dismissal, and Stephenson, L.J. discussed the applicability of *Burchell:*

> To treat belief in the guilt of the particular employee as applicable to a situation in which an employer finds himself reasonably believing in the guilt of one or more of two or more employees but unable in fairness to decide which of them is

c. An Employer's Obligation to Conduct a Reasonable Investigation

It is important to maintain the procedural integrity of unfair dismissal proceedings for two reasons. First, by providing procedures relating to such matters as adequate notice, an opportunity to be heard, cross-examination, and appeals, unfair dismissal proceedings should produce objectively more accurate results. Second, employees are more likely to accept the legitimacy of disciplinary measures emerging from hearings that are conducted in a procedurally fair manner. That is, the opportunity to present one's case, whether or not one is ultimately successful on the merits, often establishes an objective sense of fairness that is not necessarily associated with *ad hoc* disciplinary actions.

The British law on unfair dismissal traditionally has insisted upon strict adherence to the requirements of procedural fairness when considering the reasonableness of a discharge. In *Earl v. Slater & Wheeler (Airlyne) Ltd.,*[97] for example, the court held that a dismissal for misconduct was *per se* unfair if the employee was not given an opportunity to state his case, unless "there can be no explanation which would cause the employers to refrain from dismissing the employee".[98] This standard, which came to be known as the "inconceivability test,"[99] made it very difficult for an employer to prove that providing an employee with an opportunity to "state his case" would make no difference in the outcome of a dismissal hearing.

Similarly, the 1980 *Code of Practice for Disciplinary Practice and Procedures in Employment,* a publication of the Advisory Conciliation and Arbitration Service, recognizes the importance of maintaining the procedural integrity of disciplinary proceedings, and provides employers with a list of suggested procedures in dismissal

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guilty is to pervert a valuable guideline . . . in a way . . . which constrains Tribunals to decide cases contrary to justice and equity and to the letter and spirit of the statute.

Id. at 471. Similarly, in McPhie and McDermott v. Wimpey Waste Management Ltd., [1981] Indus. Rel. L. Rep. 316, one of the employer's trucks was damaged because of a failure to put transmission oil in the crankcase. Two mechanics had signed reports stating that they had "topped off" the oil only eleven days earlier. The employer fired both employees, and the EAT ruled that the dismissal was fair. Stating first that the "balance of probabilities" test does not require that the employer prove that the gearbox stayed under constant supervision for all eleven days, the EAT then held that where a tribunal finds that the employer is convinced that misconduct occurred, that only one or both of the employees could have committed the misconduct, and that the employer conducted adequate investigations into the possible liability of both employees, then the dismissal of both is fair. *Cf. infra* notes 148-50 and accompanying text.

97. [1973] 1 All E.R. 145.

98. *Id.* at 149.

99. *See* Elias, *supra* note 1, at 214.

cases.[100] The *Code of Practice* does not bind employers to any particular procedures, but industrial tribunals often look to the *Code of Practice* for guidance and standards in order to ascertain whether the procedures implemented by an employer meet the "reasonable investigation" requirement under the third-prong of the *Burchell* test. In *W. Weddel & Co. Ltd. v. Tepper,*[101] for example, the Court of Appeal ruled that the dismissal for an alleged theft was unfair because, contrary to the *Code of Practice,* the employer had not provided the discharged employee with an adequate opportunity to defend himself. The court determined that the employer did not conduct a "reasonable investigation," as required by *Burchell,* because he failed to provide the employee with an opportunity to be heard.[102]

A number of recent cases, however, have limited some of the procedural protections traditionally afforded employees in unfair dismissal cases. First, in *Walton v. TAC Construction Materials Ltd.,*[103] the EAT replaced the "inconceivability test" with the "balance of probabilities test." The Tribunal found that "it is now established that if it is shown on a balance of probabilities that such an investigation would have produced exactly the same result, then the dismissal does not become unfair just because of a failure to investigate."[104] Additionally, in *Hollister v. The National Farmers Union,*[105] the Court of Appeal rejected the reasoning of two earlier cases that had held that, as a general rule, the failure to follow fair dismissal procedures was *per se* unfair.[106] In *Hollister* an employee was dismissed after he refused to agree to a change in the terms and

100. *See Code of Practice, Disciplinary Practice and Procedures in Employment*, paras. 9-10, (Advisory Conciliation and Arbitration Service, 1977). The *Code of Practice* is not legally binding, but it is admissible as evidence and its provisions may be considered in determining liability. *See* Employment Protection Act 1975, ch. 71, § 6(11); Employment Act, 1980, ch. 42, § 3(8). *See also infra* note 109.

101. [1980] Indus. Rel. L. Rep. 96.

102. "Agreeing as I do with the submissions accepted by the Employment Appeal Tribunal that the Industrial Tribunal was entitled to conclude on the evidence that there had been an unreasonable departure from fair procedure, and that is fortified by the failure of the employers to comply with the Code of Practice or to notify the employee of his right to appeal. . . ." [1980] Indus. Rel. L. Rep. at 100. *See also* Ferodo Ltd. v. Barnes, [1976] Indus. Rel. L. Rep. 302, 303 (EAT refers to the "appropriate procedures enshrined in the Code of Practice . . . .").

103. [1981] Indus. Rel. L. Rep. 357.

104. *Id.* at 359. This proposition was first formulated in British Labour Pump v. Byrne, [1979] Indus. Rel. L. Rep. 74, and was approved by the Court of Appeal in Wass v. Binns, [1982] Indus. Rel. L. Rep. 283. *But cf.* the recent holding by the EAT in Sillifant v. Powell Duffryn Timber Ltd., [1983] Indus. Rel. L. Rep. 91.

105. [1979] Indus. Rel. L. Rep. 238.

106. *See* Kelly v. Upholstery & Cabinet Works (Amesburg) Ltd., [1977] Indus. Rel. L. Rep. 91, 93 ("generally speaking it is unfair to dismiss employees for redundancy without prior warning or consultation."); and Lowdnes v. Specialist Engineering Ltd., [1976] Indus. Rel. L. Rep. 246, 247 ("No doubt, as a general rule, a failure to follow a fair

conditions of his employment contract following a reorganization of the operations of the employer.[107] An industrial tribunal found that the dismissal was unfair because the employer had not consulted the employee about the changes. The Court of Appeal reversed, however, stating that "[n]egotiation is only one of the factors which has to be taken into account when considering whether a dismissal is fair or unfair."[108] Similarly, the Court of Appeal ruled that the failure of the employer to follow the dismissal procedures was but one factor relevant to a determination of the reasonableness of discharge.[109]

Recent cases also create uncertainty on the issue of whether an employer must follow contractually established internal appeals procedures in discharge cases.[110] The traditional view, as recently espoused in *The Distillers Company (Bottling Services) Ltd. v. Gardner,*[111] is that an employer must follow established procedures or

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procedure, whether by warning or by giving an opportunity to be heard before dismissal, will result in the ensuing dismissal being found unfair.").

107. [1979] Indus. Rel. L. Rep. at 239.

108. *Id.* at 240.

109. The Court, quoting from *Lowdnes, supra* note 106, noted that" 'as a general rule, a failure to follow a fair procedure, whether by warnings or by giving an opportunity to be heard before dismissal will result in the ensuing dismissal being found to be unfair.' There is something similar to be found in *Kelly v. Upholstery & Cabinet Works (Amesbury) Ltd.* [1977] IRLR 91, where somewhat similar words are used. It seems to me that that would be putting the case far too high. One has to look at all the circumstances of the case and at whether what the employer did was fair and reasonable in the circumstances prior to the dismissal." [1979] Indus. Rel. L. Rep. at 240. Indeed, in *Hollister,* Lord Denning referred to recommendations in the *Code of Practice* as only a gloss on the statute, and noted that the words of the statute, and not the *Code of Practice,* controlled the case. *Id.* at 241. Similarly, in Retarded Children's Aid Society Ltd. v. Day, [1978] Indus. Rel. L. Rep. 128, Lord Denning, speaking for the Court of Appeal, reversed the EAT's determination that the dismissal of a 19-year old counselor for insubordination was unfair. Although the employer did not warn the employee that his refusal to accept the employer's policies would lead to termination, Lord Denning maintained that the right of the society to run its centers as it chose mandated that dismissal of the employee for insubordination be adjudged fair under the statute. The procedural requirements of the *Code of Practice,* then, simply do not apply to every case involving unfair dismissal allegations. *See also supra* notes 100-02.

110. An employer, it should be noted, need not provide an internal appeals system to adjudge dismissal cases. In *Shannon v. Michelin (Belfast) Ltd.,* for example, the Northern Ireland Court of Appeal, interpreting a statute that provides employees with protection against unfair dismissal that is substantively the same as the British law, upheld a discharge even though the company rules did not provide for internal appeals or arbitration. The court noted that it was not "satisfied that the absence of an appeal on review would not in itself make a dismissal unfair, nor do I think that an employer could be said to be unreasonable in failing to create some *ad hoc* appeal or review in the absence of agreements between him and the trade union." [1981] Indus. Rel. L. Rep. 505, 507.

Although EPCA, 1978, ch. 44, § 1(4) requires that employers institute internal appeals procedures, the legislation provides no meaningful sanction for a failure to institute such procedures. Tribunals, however, generally frown upon employers who do not use the suggested disciplinary procedures of the *Code of Practice* and the Act. *See supra* notes 100-02 and accompanying text. Consequently, most employers do institute some type of multi-step disciplinary proceedings.

111. [1982] Indus. Rel. L .Rep. 47.

risk a finding of unfair dismissal. In *Gardner,* the agreed upon disciplinary procedures provided that two warnings *for proven misconduct* must precede the dismissal of an employee. The employer dismissed the employee in *Gardner*, however, without establishing the validity of the second allegation of misconduct. Under these circumstances, the EAT upheld a finding of unfair dismissal on the ground that the employer did not follow its established internal appeals procedures.[112]

The holding in *Bailey v. BP Oil Kent Refinery Ltd.,*[113] however, raises the specter of an exception to this traditional rule in cases involving blatant employee misconduct. In *Bailey*, an employer dismissed an employee for abusing the employer's self-certifying sick leave provisions. The union and the employer agreed to a disciplinary procedure that required the employer to notify the appropriate union official about any proposed discipline for employee misconduct. After making unsuccessful attempts to contact the official, the employer dismissed the employee. The EAT ruled that the dismissal was unfair, reasoning that failure to comply with agreed upon disciplinary procedures was *per se* unreasonable. The Court of Appeal reversed, however, noting that the failure of the employer to follow agreed upon procedures is only one factor to consider in determining "reasonableness" under the unjust dismissal legislation.[114]

Despite these recent rulings, one should not underestimate the enduring significance of procedural protections under the British law

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112. *Id.* at 50.

113. [1980] Indus. Rel. L. Rep. 287.

114. It is quite possible that *Bailey* represents an aberration rather than a change in the law on unfair dismissal. A tribunal may reason that the procedural aspects of a dismissal case are less important in cases involving blatant misconduct by an employee. Bailey, for example, claimed "that he was sick when in fact he had been in Majorca on holiday." [1980] Indus. Rel. L. Rep. at 288.

Despite Bailey's somewhat outrageous conduct, two reasons exist for finding an unfair dismissal because of a failure to follow internally established procedures even in cases involving blatant employee misconduct. First, the employer, by agreeing to the procedures, morally, if not legally, obligates himself to follow the procedures. Second, the employee necessarily relies on the disciplinary procedures agreed to by his employer and labor representative. When discipline occurs without compliance with specified disciplinary procedures, the employer breaches the bargaining relationship between employer, union, and employee. Although British unfair dismissal law relates to the individual employment relationship, and not necessarily to the collective bargaining relationship, the concerns of both relationships frequently overlap. In this instance, a labor representative bargains for a grievance procedure that is not only for the good of the union, but primarily for the protection of the individual worker. A breach of such procedures, therefore, clearly affects the individual employee *vis-á-vis* his relationship with his employer. Thus, even if a dismissal would be fair if no agreed upon disciplinary procedure existed, the violation of an agreed upon procedure should render a dismissal *per se* unfair.

on unfair dismissal.[115] The traditional rule requiring strict adherence to the requirements of procedural fairness, the use of the procedural protections outlined in the *Code of Practice* as standards for assessing the fairness of an employer's dismissal process, and the existence of the third-prong of the *Burchell* test (requiring that an employer conduct a reasonable investigation) all testify to the significance afforded procedures in the current British law. The recent movement away from strict adherence to these procedural requirements, evinced in cases such as *Walton, Hollister* and *Bailey,* however, is disquieting. As noted above,[116] the focus of the British law relating to a determination of the factual adequacy of a dismissal decision has shifted away from an objective review of the alleged misconduct by a tribunal, towards a consideration of whether there is a reasonable basis to support an employer's reasonable suspicions regarding the misconduct or incapability of an employee. A requirement that employers strictly adhere to disciplinary procedures and conduct reasonable investigations at least would ensure a high degree of procedural adequacy and, thereby, would diminish the impact of the change in the focal point for determining the factual adequacy of a dismissal. If tribunals require that employers conscientiously follow sound dismissal procedures, employers necessarily would develop a better record upon which to base their "reasonable suspicion."

The relaxation of procedural requirements, in conjunction with the shifting of the focus for a determination of the factual adequacy of an employer's decision, however, threatens to sacrifice the objectivity of tribunal judgments in unfair dismissal cases. If employers may excuse their failures to follow suggested dismissal procedures merely by showing that the same result, on a balance of the probabilities, would obtain anyway, employees may be dismissed on the basis of an employer's "reasonable suspicions" formulated within a potentially inadequate truth-seeking process. Furthermore, these developments in the British law indicate that an employee may

115. *See, e.g., Marley Homecare Ltd. v. Dutton,* where an employer dismissed an employee for theft seven days after the occurrence of the alleged misconduct. During those seven days, the employee was not notified of the pending investigation and continued to work at her position as a cashier. When confronted with the allegations, the employee stated she could not remember the transactions at issue. The EAT upheld a finding of unfair dismissal on the grounds that, because of the time delay, the employee was not given a meaningful opportunity to respond to the charges. The EAT noted that it was unreasonable to expect a cashier to remember specific transactions one week after they occurred. [1981] Indus. Rel. L. Rep. 380. *See also* Allders International Ltd. v. Parkins, [1981] Indus. Rel. L. Rep. 68, 70 (a dismissal is unfair if, nine days after an alleged theft, an employer presents an employee with the option of resigning or calling in the police.)

116. *See supra* notes 53-63 and accompanying text.

not be permitted to challenge a dismissal decision on the basis that he did not, in fact, commit the misconduct, or because of procedural inadequacies in the employer's dismissal process. In view of these potentially unjust results, the authors recommend that British tribunals and courts maintain their traditional allegiance to the procedural integrity of the dismissal process.

3. *The Reasonableness Requirement and the Choice of Discharge as a Penalty*

Once a tribunal determines that a reasonable basis exists for some sort of discipline, a second question arises as to the reasonableness of the choice of discharge as a penalty. The "range of responses" doctrine, established in *Rolls-Royce Ltd. v. Walpole,*[117] limits the power of a tribunal to review an employer's decision to discharge. Under this doctrine, a discharge is reasonable if it falls within "the band of reasonableness within which one employer might reasonably . . . dismiss . . . [an employee whilst] the other [employer] would quite reasonably keep him on."[118] A tribunal, then, must accept any "reasonable" decision to discharge made by an employer, and may not consider whether some action other than dismissal might have been more reasonable under the circumstances. In *Bevan Harris Ltd. v. Gair,*[119] for example, an employer dismissed a sixty-one year old employee for failing to carry out his duties. The industrial tribunal noted that a reasonable employer would have demoted rather than dismissed the employee and ruled that the dismissal was unfair. The EAT, however, reversed, stating that "they [the tribunal] are in effect saying what they would have done had they been employers. They have not applied themselves to the question of whether or not dismissal fell within the range of options open to a reasonable employer in the circumstances of the case."[120] Once again,[121] it appears that the plausible judgments of an employer are sacrosanct.

The tribunal, however, must be certain that, in view of the surrounding circumstances, the discharge falls within that range of reasonable responses. Case interpretations of the statutory language and the *Code of Practice* both have supplied factors relevant to a

117. [1980] Indus. Rel. L. Rep. 343.
118. British Leyland UK Ltd. v. Swift, [1981] Indus. Rel. L. Rep. 91, 93.
119. [1981] Indus. Rel. L. Rep. 520.
120. *Id.* at 521.
121. *Cf.* Ferodo Ltd. v. Barnes, [1976] Indus. Rel. L. Rep. 302, and *supra* notes 54-72 and accompanying text, where the EAT moved from an objective test for determining whether the employee's infractions constituted a punishable offense, to an examination of whether the employer himself had reasonable grounds to conclude subjectively that the employee was guilty of misconduct.

determination of whether the decision to discharge falls within this "band of reasonableness." Section 57(3) of the EPCA states that the question of reasonableness shall be determined "having regard to equity and the substantial merits of the case."[122] In several cases tribunals and courts used this statutory language to develop criteria for determining whether or not an employer's decision to discharge was reasonable. These criteria include the consistency in the choice of a particular penalty for certain types of misconduct,[123] employer responsibility for incompetency,[124] and the presence of equitable notions of estoppel.[125] Additionally, tribunals often consider an employee's length of service and previous good conduct when determining the appropriateness of a decision to discharge.[126]

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122. EPCA, 1978, ch. 44, § 57(3).

123. In The Post Office v. Fennell, [1981] Indus. Rel. L. Rep. 221, for example, an employer summarily dismissed an employee for assaulting another employee. The employer, however, did not dismiss all employees involved in fights. The tribunal found the dismissal unfair, and the Court of Appeal affirmed, stating:

> It seems to me that the expression 'equity' as there [section 57(3) of the EPCA] used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an Industrial Tribunal is entitled to say that, where that is not done, and one man is penalized much more heavily than others who have committed similar offenses in the past, the employer has not acted reasonably in treating whatever the offense is as a sufficient reason for dismissal.

Id. at 223. *See also infra* note 125.

124. In Inner London Education Authority v. Lloyd, [1979] Indus. Rel. L. Rep. 29, a probationary teacher was dismissed for incompetency after a two-year period. For the first 17 months, however, the employer did not know that the employee should have been a probationary teacher, and thus did not provide the level of assistance that normally is given to probationary teachers. The Court of Appeal upheld the finding of unfair dismissal on the ground that the employer was partially responsible for the employee's incompetency.

125. Inconsistencies in penalties also may lead to a finding of unjust dismissal on the ground of estoppel. In Hadjioannou v. Coral Casinos Ltd., [1981] Indus. Rel. L. Rep. 352, the EAT stated that the inconsistency of past penalties is relevant as evidence that the employer led employees to believe that certain conduct either would be overlooked or treated with a less severe sanction than dismissal. *Id.* at 355.

126. These factors have no relation to the misconduct, and, therefore, also function as mitigating factors in dismissal cases. In Taylor v. Parsons Peebles Nei Bruce Peebles Ltd., [1981] Indus. Rel. L. Rep. 119, for example, an employer dismissed an employee for fighting. The employer had a policy of dismissing all employees involved in fights. The tribunal held the dismissal fair because the employer's action was consistent with his policy concerning fighting on the job. The EAT reversed, saying that the employer's policy was just one factor to consider in adjudging reasonableness, and that the length of the employee's service and his good conduct in the past also were relevant considerations.

Length of service is not always a mitigating factor, however, especially where the offense is egregious. In AEI Cables Ltd. v. McLay, [1980] Indus. Rel. L. Rep. 84, for example, an employer dismissed an employee for filing false vouchers for gas purchases. Although recognizing that length of service sometimes acts as a mitigating factor, the Court of Session ruled that discharge is a reasonable penalty where the employer's confidence in the employee is irreversibly damaged because of the gravity of an employee's conduct. *Id.* at 87.

The *Code of Practice* also provides criteria for ascertaining the reasonableness of a discharge. Paragraph 10(d) of the *Code* states that an employer should publish the disciplinary actions associated with each type of misconduct.[127] In *Dairy Produce Packers Ltd. v. Beverstock,*[128] an employer discharged an employee for drinking in a public house during working hours. The evidence submitted at the hearing showed that the employer imposed lesser penalties on employees caught drinking in the factory. The EAT ruled that a reasonable employer may set different penalties for drinking off-grounds and drinking in the factory, but discharge in this case did not fall within the range of reasonable responses because the collective bargaining agreement did not clearly delineate the penalties associated with the misconduct.[129] The discharge, therefore, was unfair because the employee had no warning that a different penalty (i.e., discharge) would apply to drinking off-grounds.

In summary, then, in investigating both the decision to dismiss and the appropriateness of discharge as a penalty for misconduct or incapability, an increasing deference towards the plausible judgments of an employer has replaced the objective analysis formerly conducted by a tribunal. Although an employer must establish a reason for the discharge and conduct a reasonable investigation into the circumstances surrounding the alleged misconduct of an employee, a tribunal will adjudge the decision to dismiss as reasonable if the evidence, on a "balance of the probabilities," supports the subjective beliefs of an employer as to an employee's misconduct.

Industrial tribunals also afford employers a great deal of deference when reviewing a decision to discharge. If the decision to dismiss falls within the wide "range of responses" that reasonable employers could adopt under the circumstances, the tribunal affirms the decision to discharge. The tribunal does not decide what action ought to have been taken under the circumstances, but only whether the employer's choice of penalty (discharge) was one of the many possible reasonable responses.

A residual allegiance to the procedural integrity of the dismissal process, however, saves the British system from complete deference to the decisions of an employer in discharge cases. Although, in relative terms, the emphasis on procedural protections in unfair dis-

127. *See Code of Practice, Disciplinary Practice and Procedures in Employment* (Advisory Conciliation and Arbitration Service, 1977).

128. [1981] Indus. Rel. L. Rep. 265.

129. *Id.* at 266. Indeed, it is highly likely that an employee would infer that off-grounds drinking would subject him to a less severe penalty than drinking in the factory itself.

missal cases has waned in recent years, it remains an important consideration in a tribunal's review of the question of whether an employer has conducted a reasonable investigation under the third-prong of the *Burchell* test. Furthermore, tribunals will consider objective criteria, such as the consistency of the penalty chosen for certain types of misconduct and an employee's length of service, to limit the range of disciplinary responses available to an employer in a particular case.

C. Grievance Arbitration In The United States

1. The Principle of De Novo Review

American arbitrators, on the whole, exhibit less deference towards the judgments of management in dismissal cases than do British industrial tribunals. It is, of course, difficult to generalize about arbitration in view of the diversity that is characteristic of arbitration proceedings across the United States.[130] It is fair to say, however, that arbitration is most often viewed as an opportunity for *de novo* review of the grievance by an arbitrator. One arbitrator, commenting on his role in grievance proceedings, observed that "a discharge case in arbitration is a hearing in equity, permitting a flexibility and assessment of mitigating circumstances and factors not available under the more rigorous common law rules."[131] Similarly, Harry H. Platt, a well-known arbitrator, emphasized the importance of a *de novo* review in grievance proceedings, when assessing both the merits of the decision to discipline and the choice of discharge as a penalty. In one case, Platt observed that arbitrators must decide:

> what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.[132]

This approach outlined by Arbitrator Platt is quite similar to the view that characterized British tribunals as "industrial juries," a role adopted by the tribunals during the early years of the unfair dismissal legislation.[133]

Arbitrators in the United States, however, typically do exhibit deference towards managerial decisions related to the manufacturing

130. Arbitration is a private adjudicatory system, with the judges (arbitrators) appointed by the parties to the dispute, and their jurisdiction limited by the collective bargaining agreement. *See* M. Trotta, Arbitration of Labor Management Disputes 23 (1974).

131. Capital Packing Co., 36 L.A. 101, 102 (1961).

132. Riley Stokes Corp., 7 L.A. 764, 767 (1947).

133. *See supra* notes 50-52 and accompanying text.

of a company's product and to decisions concerning the safety of operations. In *Valley Steel Casting Co.,*[134] for example, the arbitrator stated that in cases involving misconduct with a direct relation to the company's product, "an arbitrator, in applying standards of 'proper cause' and 'injustice' . . . should be more hesitant in overruling management's decision."[135] Similarly, deference towards managerial decisions is common in cases involving safety considerations. In *Pacific Greyhound Lines,*[136] an employer dismissed a bus driver for unsafe driving. Although recognizing that an independent evaluation was still appropriate, the arbitrator stated:

> Even arbitrators who recognize what they are doing [i.e., making an independent evaluation] . . . in an ordinary dismissal arbitration, are rightfully hesitant to disturb a termination that is based partly on safety considerations. No one, not even an arbitrator . . . wants to bear the heavy weight of conscience for a lifetime, after returning a dangerous man to a job in which he continues to endanger everyone.[137]

In most cases, then, arbitrators engage in a *de novo* review of the decision of an employer to discipline or discharge. The adoption of an independent review of an employer's decision is in marked contrast to the more deferential posture adopted by British tribunals and courts in discharge cases. An examination of the mode of analysis often used by arbitrators in cases involving "just cause" determinations illustrates additional differences between the two systems.

2. *Proof of the Basis for the Discharge: The Employer's Burden of Proof*

As in the British law on unfair dismissal, the first question an arbitrator must ask is whether a sufficient basis exists for a finding of misconduct or incapability.[138] A major difference between British unfair dismissal law and American arbitration relates to which party has the burden of proving the misconduct or incapability. In Great Britain, the burden of showing the reasonableness of an employer's

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134. 22 L.A. 520 (1954).

135. *Id.* at 525. Similarly, the arbitrator noted that "[i]n such situations the manufacturing concern must be in a position to protect its reputation and the quality of its product." *Id.*

136. 30 L.A. 830 (1958).

137. *Id.* at 834. The arbitrator, however, did order reinstatement in view of the employee's past driving record which included seven safe driving awards. *Id.* at 835-36. *See also* American Synthetic Rubber Corp., 46 L.A. 1161, 1165 (1966); and United Airlines, Inc., 19 L.A. 585, 587 (1952).

138. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 621.

> There are two areas of proof in the arbitration of discharge and discipline cases. The first involves proof of wrongdoing, the second, assuming that guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified.

decision to discipline is neutral, and the employer's evidence need only establish, by a "balance of probabilities," a "reasonable suspicion" of the misconduct.[139] In the United States, however, the employer consistently has the burden of proving the existence of just cause for the discharge, although there is a variety of opinion as to the quantum of proof necessary to establish "just cause."[140] These differing standards of proof traditionally have been classified as proof beyond a reasonable doubt, by a preponderance of the evidence, and by clear and convincing evidence.

There is no consensus among the commentators on arbitration in the United States regarding the quantum of proof typically required by arbitrators. Owen Fairweather, for example, suggests that some arbitrators apply the "proof beyond a reasonable doubt" standard in cases involving discharge.[141] The apparent justification for the imposition of this somewhat strict quantum of proof requirement is that discharge is "the capital punishment of the labor-management relationship."[142] According to the well-known treatise by Frank and Edna Elkouri, however, the majority of arbitrators, in cases involving ordinary discipline and discharge, merely require proof by a preponderance of the evidence.[143]

The commentators also emphasize, however, that it is difficult to generalize about the quantum of proof requirement precisely because that requirement is often a function of the nature of the employee misconduct at issue.[144] In cases involving criminal conduct or conduct which is morally reprehensible, for example, arbitrators typically require proof beyond a reasonable doubt.[145] Arbitrators appear to be aware of the gravity of such alleged offenses, the stigma

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139. *See supra* notes 82-92 and accompanying text.

140. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 621.

> Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, *the burden generally is held to be on the employer to prove guilt of wrongdoing,* and probably always so where the agreement requires "just cause" for discharge. However, the quantum of required proof in this area is unsettled. (emphasis added)

See also Kroger Co., 25 L.A. 906, 908 (1955) (the principle is well established in arbitration that the employer has the burden of proof on the issue of the existence of "just cause" for disciplinary action).

141. *See* O. FAIRWEATHER, PRACTICE AND PROTECTION IN LABOR ARBITRATION 205 (1973).

142. *See* W. BAER, *supra* note 41, at 30. Baer goes on to suggest that "[a]lthough management will likely contest a depiction of discharge as equivalent to capital punishment, it will have to admit that such an action represents the severest penalty it can inflict on its workers and that it always creates a hardship, often quite a critical one." *Id.* at 35.

143. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 621-22.

144. *Id.*

145. *See* O. FAIRWEATHER, *supra* note 141, at 205-06; F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 623; and W. BAER, *supra* note 41, at 35.

that attaches to the "convicted" employee, and the concomitant difficulty such an employee may have in finding new employment. In cases involving alleged criminal conduct or moral turpitude, then,

> [i]t is not alone a question of breaking the plant rules, the customary type of case dealt with in labor arbitration, but also the breaking of the law of society. . . . It follows, therefore, that a decision against the individual would have more far reaching results than breaking plant rules, in that it would brand her for the rest of her life . . . before her associates, friends and neighbors. Considering the gravity of the consequences, it follows logically to my mind that the evidence should not leave the shadow of reasonable doubt in order to rule against [the employee].[146]

Finally, the collective bargaining agreement itself may limit the discretion of an arbitrator to select the required quantum of proof. If the parties specify the standard of proof in the contract, it will be binding on the arbitrator, regardless of his personal views on the

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146. Amelia Earhardt Luggage Co., 11 L.A. 301, 302 (1948). Another arbitrator observed that

> [i]n the field of proper industrial relations, the philosophy is as valid as in other sociological and jurisprudential relationships, that it is better for an occasional guilty person to escape unpunished than to court the possibility, through less exacting norms, not only of punishing employees with loss of their jobs for acts of which they may not be guilty but [of placing] . . . upon them what might be an insurmountable burden in getting other employment.

Publishers Association of New York City, 43 L.A. 401, 404 (1964). *See also* Standard Oil of Ohio, 75 L.A. 588, 591 (1980) (arbitrators should use a beyond reasonable doubt standard in cases involving alleged theft of company property); Federal Compress & Warehouse Co., 75 L.A. 217, 221 (1980) (use of beyond a reasonable doubt standard in a case involving theft of payroll checks); Safeway Stores, Inc., 55 L.A. 1195, 1201 (1971); and Aladdin Industries, Inc., 27 L.A. 463, 465 (1956) (proof beyond a reasonable doubt is required when conviction of charges (of plant sabotage and theft) reflects on the moral character of the employee).

One arbitrator, Benjamin Aaron, argues that the requirement of proof "beyond a reasonable doubt" involves a misconception of the role of an arbitrator in a labor dispute. Aaron maintains that employer and employee are not in a position of prosecutor and defendant, but rather that the employer, union, employee, and arbitrator are all partners in a relationship designed to preserve and develop the collective bargaining relationship. In this role, the arbitrator should balance the existence or nonexistence of any doubts as to an employee's guilt against other damaging or mitigating circumstances, such as past record, length of service, and the effect on the labor-management relationship. Aaron believes that a strict requirement of proof "beyond a reasonable doubt" would handicap the arbitrator in this role. *See* Aaron, *Some Procedural Problems in Arbitration,* 10 VAND. L. REV. 733, 740-41 (1957).

Aaron's notion of the arbitrator as "plant psychiatrist," if extended to its full potential, may radically alter the role of arbitrators in grievance resolution. *See* Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1559-65 (1981). Every grievance that reaches arbitration can be viewed, apart from its factual content, as a manifestation of employer-union conflict. Instead of providing judicial resolution to individual grievances, the arbitrator, following Aaron, would become more concerned with diffusing labor-management tensions and preserving industrial order. *Id.* The danger associated with this view of the arbitrator's role is that it may sacrifice justice in individual cases to the maintenance of an overall equilibrium between labor and management. The authors maintain that arbitration should remain a forum for the resolution of individual grievances and a source of industrial justice, while recognizing that the preservation of good industrial relations should be a factor in the equation. *Cf.* Aaron, *supra* at 741.

matter. If there is any ambiguity in the contract, the arbitrator will attempt to ascertain the standard of proof that the parties intended to be applied.[147]

Arbitrators in the United States also differ in their treatment of the problems of proof associated with dismissal cases involving more than one employee. Some arbitrators require proof linking each individual employee to the misconduct.[148] Other cases involving group discipline, however, require only that an employer establish the occurrence of the misconduct and that the dismissed employees have an opportunity to commit the misconduct.[149] Once again, unless prescribed by the requirements of a collective bargaining agreement, it appears that proof requirements in cases involving group discipline will vary with the facts of the case before the arbitrator.[150]

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147. Still other arbitrators insist upon proof by clear and convincing evidence. In *Kisco Company, Inc.,* the arbitrator ruled that he would not sustain a discharge "unless proof of misconduct is highly convincing. While the proof need not meet the criminal-law standard of 'beyond a reasonable doubt,' it should be more persuasive than simply the greater weight of the evidence." 75 L.A. 575, 585 (1980).

148. *See* Marhoefer Packing Co., 54 L.A. 649, 652-53 (1970) (arbitrator had no choice but to dismiss a grievance where the employer had not established the guilt of each employee); Westinghouse Electric Co., 48 L.A. 211, 213 (1967) (dismissal of 21 employees would not be sustained absent proof implicating all members of the group); Quick Manufacturing Co., 45 L.A. 53, 56-57 (1963) (the dismissal of 12 employees without establishing the guilt of any of them violated basic principles of justice in the United States); and Evinrude Motors Co., 36 L.A. 1302, 1303 (1961) (in cases involving defective work in the manufacturing process, where one of two employees was the culprit, group discipline was inappropriate absent evidence linking both employees to the alleged misconduct).

149. *See* Kennecott Copper Corp., 41 L.A. 1339, 1344 (1963) (proof of the culpability of each employee is unnecessary in cases involving production slowdowns). *See also* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 624 n.73. This position corresponds to the British law on burden of proof in group discipline cases. *See supra* note 96.

150. There is no simple answer to the nexus of problems involved in adjudicating multiple employee dismissal cases. An employer, of course, wonders why he must retain employees who refuse to exonerate themselves, and, in so doing, prevent the employer from ascertaining who is responsible for the alleged misconduct. The employer may argue that he has lost confidence in his employees, thereby rupturing an essential element in the employment relationship. *See* Marhoefer Packing Co., 54 L.A. 649, 651-52 (1970).

On the other hand, one can understand the moral repugnancy associated with informing on a fellow employee. Furthermore, the potential penalty that the silent employee must bear—loss of employment—may be unduly harsh in view of his possible factual innocence. *See id.* at 652.

In summary, both the employer and the employee have "understandable" positions in cases involving group discipline. The validity of the respective positions may well vary with the circumstances of a particular case. Consequently, the variety of views among arbitrators as to the proof requirements in group discipline cases is appropriate.

3. *The Standard for Determining the Appropriateness of Discharge as a Penalty*

After determining that a sufficient basis exists for disciplining an employee, the arbitrator must analyze whether discharge is the appropriate penalty. In Great Britain, discharge is appropriate if it falls within the band of reasonableness within which one employer might reasonably dismiss the employee whilst another would quite reasonably keep him on.[151] In the United States, most arbitrators will sustain a discharge if it is not "arbitrary and capricious." Instead of substituting his own judgment for that of an employer, the arbitrator will uphold the discharge if it is "rational."[152] This test seems to be equivalent to the range of responses doctrine[153]—reasonable employers may differ as to what penalties certain types of misconduct warrant, and tribunals must accept any reasonable decision. This apparent similarity between the "range of responses" doctrine and the "arbitrary and capricious" test, however, obscures an important substantive difference. The application of the "arbitrary and capricious" test in fact produces results that are far less deferential to management than those that are produced by the range of responses doctrine. As one arbitrator stated:

> The 'arbitrary and capricious' text . . . implies finer differentiation than. merely that between innocence, requiring absolution, and guilt, necessarily calling for dismissal. The contract provision envisions a *range* of discipline from reduction in job classification to discharge or other disciplinary action. This suggests that such matters as length of service, previous record, and the exact nature and extent of dishonesty involved might all be brought into play, both in the initial assessments of penalty, and in their subsequent review, under the 'arbitrary and capricious' test.[154]

When applying the arbitrary and capricious test, then, the arbitrator does more than ask whether a rational employer could have discharged the employee. Instead, as part of his *de novo* review, the arbitrator evaluates the decision to discharge in view of a broad

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151. British Leyland UK Ltd. v. Swift, [1981] Indus. Rel. L. Rep. 91, 93. *See also supra* notes 117-29 and accompanying text.

152. As one arbitrator stated:

> Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, . . . is no justification for changing it. The minds of equally reasonable men differ.

Stockham Pipe Fittings Co., 1 L.A. 160, 162 (1945).

153. Rolls-Royce Ltd. v. Walpole, [1980] Indus. Rel. L. Rep. 343, 346.

154. Schmitt v. Local No. 34, Food Store Employers Union, FMCS Case No. 79 K/06383, October 24, 1979 (unpublished, Hanslowe).

range of possible penalties and mitigating factors.[155]

In determining whether the selection of discharge as a penalty is "arbitrary and capricious," an arbitrator applies many of the same criteria used by British industrial tribunals under the "equity and substantial merits" test.[156] In their treatise on arbitration, Frank and Edna Elkouri have compiled a useful survey of factors that have appeared in numerous arbitration cases. They include the following: the nature of the offense; the extent to which procedures were followed; post-discharge conduct of the grievant; the past record of the grievant; the grievant's length of service with the company; the grievant's knowledge of the penalties; the consistency of enforcement and penalties for similar conduct; whether or not the grievant alleges anti-union discrimination; and the extent to which management is also at fault.[157]

In summary, the determination of "reasonableness" under British unfair dismissal law and of "just cause" under American arbitration is quite similar in some respects. A significant difference, however, exists in the determination of the sufficiency of the basis for discipline. In Great Britain, the employer does not have the burden of showing the reasonableness of his decision to discipline, and the tribunal need only find, by a "balance of the probabilities," that the evidence created a "reasonable suspicion" in the mind of the employer that the misconduct occurred. In the United States, however, arbitrators generally perform an independent examination or *de novo* review to determine whether misconduct actually occurred, and, although the quantum of proof required may differ among arbitrators, the onus of proof is consistently placed upon the employer.

A less significant though important difference exists between the two systems in their modes of determining the appropriateness of discharge as a penalty. In Great Britain, the "range of responses" doctrine instructs industrial tribunals to ask only if discharge was a reasonable penalty under the circumstances, and not to substitute their own perception of the proper penalty for the employer's perception. In the United States, although arbitrators generally accord some deference to the penalty selected by the employer under the

155. Other arbitrators, however, may utilize the same independent analysis used in determining the sufficiency of the basis for discipline when determining the appropriateness of discharge. As one arbitrator candidly admitted: "We may mouth the words [never to substitute one's judgment for that of the employer], but we know that in order to determine whether a dismissal is for just or sufficient cause, we must consult our own hearts and minds to ascertain justice." Pacific Greyhound Lines, 30 L.A. 830, 834 (1958).

156. *See supra* notes 122-26 and accompanying text.

157. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 630-47.

"arbitrary and capricious" test, they remain less hesitant to overturn a discharge where the aforementioned mitigating factors are present.

III
AUTHORITY TO INSTITUTE ALTERNATIVE REMEDIES

Once an employer establishes an employee's misconduct or incapability, the question arises as to the authority of third party adjudicators to devise an alternative remedy where discharge is not an appropriate penalty. Under the British law on unfair dismissal, a tribunal decides the fairness of an employer's decision to discharge. If a tribunal finds a dismissal unfair, it provides the employee with one of his statutory remedies—compensation, reinstatement, or re-engagement.[158] Most arbitration agreements in the United States, on the other hand, provide arbitrators with far greater flexibility in cases where dismissal is too harsh a penalty for an employee's misconduct.[159] Once again, however, it is important to realize that the power of an arbitrator to alter an employer's penalty decision is a function of the contractual agreement between the employer and the union. Consequently, an arbitrator may be without the power to alter an employer's penalty decision upon a finding of employee misconduct.[160]

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158. *See* EPCA, 1978, ch. 44, § 68. The statute provides the following procedures:

> 68.—(1) Where on a complaint under section 67 an industrial tribunal finds that the grounds of the complaint are well-founded, it shall explain to the complainant what orders for reinstatement or re-engagement may be made under section 69 and in what circumstances they may be made, and shall ask him whether he wishes the tribunal to make such an order, and if he does express such a wish the tribunal may make an order under section 69.
>
> (2) If on a complaint under section 67 the tribunal finds that the grounds of the complaint are well-founded and no order is made under section 69, the tribunal shall make an award of compensation for unfair dismissal, calculated in accordance with sections 72 to 74, to be paid by the employer to the employee.

159. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 648, wherein the authors note that,

> If a penalty of discharge is upset through arbitration, the award often will order reinstatement either with back pay, without back pay, or with partial back pay, and often will further order that other rights and privileges shall remain unimpaired; or the discharge may be commuted to suspension for a specified period, or even to a reduced penalty of only a reprimand or warning.

160. *See generally* O. FAIRWEATHER, *supra* note 141, at 280-300. One arbitrator, for example, concluded that he had no authority to reinstate 21 wrongfully discharged strikers because the contractual agreement limited the arbitrator to a decision as to whether the employee did or did not participate in the misconduct charged, and prohibited the arbitrator from substituting "his judgment or discretion for that of management." Magnavox Co., AAA Case No. 111-8 Oppenheim, (1967), as cited in O. FAIRWEATHER, *supra* note 141, at 288.

A. THE BRITISH LAW ON UNFAIR DISMISSAL

The reinstatement of the discharged employee is the primary statutory remedy available to employees in cases involving unfair dismissal.[161] In practice, however, British tribunals and courts rarely invoke the reinstatement remedy.[162] Instead, tribunals typically pro-

161. *See* EPCA, 1978, ch. 44, § 68. The Act differentiates reinstatement from re-engagement in the following manner:

69.—(1) An order under this section may be an order for reinstatement (in accordance with subsections (2) or (3)) or an order for re-engagement (in accordance with subsection (4)), as the industrial tribunal may decide, and in the latter case may be on such terms as the tribunal may decide.

(2) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, and on meeting such an order the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal, including arrears of pay, for the period between the date of termination of employment and the date of reinstatement;

(b) any rights and privileges, including seniority and pension rights, which must be restored to the employee; and

(c) the date by which the order must be complied with.

(3) Without prejudice to the generality of subsection (2), if the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) An order for re-engagement is an order that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment, and on making such an order the tribunal shall specify the terms on which re-engagement is to take place including—

(a) the identity of the employer;

(b) the nature of the employment;

(c) the remuneration for the employment;

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal, including arrears of pay, for the period between the date of termination of employment and the date of re-engagement;

(e) any rights and privileges, including seniority and pension rights, which must be restored to the employee; and

(f) the date by which the order must be complied with.

EPCA, 1978, ch. 44, § 69. *See also supra* note 11.

162. See S.D. ANDERMAN, *supra* note 30, at 81-82 for a discussion of the prevalence of the compensation remedy in dismissal cases under the 1971 Act.

More recent statistics indicate the continued importance of compensation as a remedy in unfair dismissal cases. In 1981, for example, 2778 employees were successful at the industrial tribunal level in actions alleging unfair dismissal. Of those employees, the tribunal ordered only 55 (2%) reinstated, and 23 (1%) reengaged. Further, those awarded compensation received nominal amounts in view of the seriousness of an employee's loss of employment. In 1981, the median compensation was £963; over 28% of the awards were under £500; over 50% of the awards were under £1,000; 43% of the awards were between £1,000 and £5,000; and 47% of the awards were over £5,000. *See* 90 DEP'T EMPL'T GAZ. 538 (Dec., 1982). It also should be noted that of cases reaching the hearing stage, only 23% of the employees succeeded in their complaints alleging unfair dismissal.

vide unfairly dismissed employees with monetary compensation after perfunctorily noting the "impracticability" of the reinstatement and re-engagement remedies.

Once a tribunal determines that a discharge was unfair, the statute expressly limits a tribunal's authority to implement alternative remedies. Section 68 of the EPCA provides that a tribunal, upon a finding of unfair dismissal, must explain to the employee the reinstatement or re-engagement remedies, and consult with the employee as to the preferred remedy.[163] If the employee wants to return to work, Section 69 of the EPCA instructs the tribunal to consider reinstatement as the primary remedy.[164] When considering the reinstatement remedy, the tribunal must take three factors into account: (1) whether the complainant wishes to be reinstated; (2) whether it is practicable for the employer to comply with an order for reinstatement; and where the employee's conduct justified some action by the employer, (3) whether it would be "just" to order the reinstatement of the employee.[165] The statute provides that a tribunal may not consider the fact that the employer hired a permanent replacement for the complainant, unless the employer proves that it was not practicable for him to arrange for the completion of the work done by the dismissed employee without engaging a permanent replacement.[166]

If the tribunal determines that reinstatement is impracticable, it then must consider the possibility of the re-engagement of the dismissed employee. Pursuant to section 69, the factors relevant to a determination of the appropriateness of this remedy include: the wishes of the employee; the practicability of re-engagement by the employer, associated employer, or successor employer; and, where the actions of the employee justified some action by the employer, whether it would be "just" to order his re-engagement.[167] Finally, if the tribunal finds both reinstatement and re-engagement impracticable or inequitable, it then must consider what monetary compensation is appropriate under sections 72-74 of the EPCA.[168]

In 1975, Parliament amended the employment statute to highlight the preferred status of reinstatement and re-engagement as the

Id. Because of this difference between the statutory scheme and the common practices of tribunals, Anderman notes: "the safeguards against unfair dismissal contained within the act have added less to security of employment than to an entitlement to compensation for loss of that security." S.D. ANDERMAN, *supra* note 30, at 82.

163. EPCA, 1978, ch. 44, § 68(1).

164. *Id.* § 69(5).

165. *Id.*

166. *Id.* § 70.

167. *Id.* § 69(4) and (6).

168. *Id.* § 68(2).

appropriate remedies in cases involving unfair dismissals.[169] The EAT also began to instruct the tribunals to consider more seriously the implementation of these remedies. In *Qualcast (Wolverhampton) Ltd. v. Ross,*[170] for example, the industrial tribunal refused to order reinstatement because they "did not consider it expedient."[171] On appeal, the EAT ruled for the employee, and criticized the tribunal for its perfunctory dismissal of the reinstatement remedy.[172] Similarly, in *Pirelli General Cable Works Ltd. v. Murray,*[173] the tribunal, upon a finding of unfair dismissal, ordered the re-engagement of the dismissed employee, but left the terms of the negotiations to the parties. The EAT ruled that the tribunal must determine the terms of re-engagement, and that the failure to do so inadequately protects the remedial rights of the employee.[174]

There remains some resistance to the use of the reinstatement and re-engagement remedies, however, perhaps stemming from some residual allegiance to the notion that the employment relationship is entirely voluntary. Accordingly, there are indications that compensation will remain the primary remedy in unfair dismissal cases. In *Nothman v. London Borough of Barnet,*[175] for example, the employee, although unfairly dismissed, was denied reinstatement because she had made allegations against staff member that precluded her from working side by side with them again. The Court of Appeal dismissed Ms. Nothman's appeal of the denial of her reinstatement request, and held that the proper test was whether, in the employer's eyes, the employee was likely to perform her work satisfactorily if reinstated or re-engaged.[176] Furthermore, the court noted that even if reinstatement was proper, the Act gave the tribunals no authority to compel reinstatement if the employer would not agree to that remedy.[177] Under these circumstances, the court ruled, a tribunal could only increase the compensatory award to the employee.[178]

169. Employment Protection Act, 1975, ch. 71, §§ 71-80, particularly at § 71(2)-(7).
170. [1979] Indus. Rel. L. Rep. 98.
171. *Id.* at 98.
172. *Id.* at 101. The EAT ruled that considerations of expediency were not relevant to a determination of the appropriateness of the reinstatement of an employee upon a finding of unfair dismissal. In the future, the EAT noted, industrial tribunals must rely upon statutorily prescribed criteria for assessing the appropriateness of the reinstatement remedy. *Id. See also* EPCA, 1978, ch. 44, § 71.
173. [1979] Indus. Rel. L. Rep. 190.
174. *Id.* at 192. *See also* EPCA, 1978, ch. 44, § 69(b).
175. [1980] Indus. Rel. L. Rep. 65.
176. *Id.* at 66.
177. *Id.*
178. *Id. See also* EPCA, 1978, ch. 44, §§ 69 & 71(2)(b). Furthermore, in Enessy Co. SA/TA The Tulchan Estate v. Minoprio & Minoprio, [1978] Indus. Rel. L. Rep. 489, 490, the EAT noted, in dicta, that the involvement of a small employer in an unfair

In summary, although the employment statutes direct tribunals to consider reinstatement as the primary remedy, it appears that, in practice, compensation will remain an employee's primary remedy in most unfair dismissal cases. Furthermore, the EPCA limits the remedial measures available to tribunals in unfair dismissal cases to reinstatement, re-engagement or compensation. The arbitration process in the United States, however, provides a potential for the implementation of a broader variety of employee remedies.

B. GRIEVANCE ARBITRATION IN THE UNITED STATES

The authority of American arbitrators to modify penalties is entirely a function of the contractual relations existing between the parties. Consequently, one will find that some collective bargaining agreements provide arbitrators with far-ranging modification powers, while other agreements deny arbitrators these powers even in cases where mitigating factors indicate that a less severe penalty would be appropriate.[179] Where the contract is silent on the issue of an arbitrator's power to modify penalties, most arbitrators assume that the power to modify is implicit in their arbitral role:

> In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him.[180]

Several considerations may limit the discretionary powers of an arbitrator to modify an employer's decisions. First, arbitrators receive very little objective information upon which to base a deci-

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dismissal case forces a tribunal to consider a number of factors not relevant in reinstatement cases involving larger employers. The tribunal observed that

> It is one thing to make an order for reinstatement where the employee concerned works in a factory or other substantial organization. It is another to do so in the case of a small employer with few staff. . . . Where there must exist a close personal relationship as is the case here, reinstatement can only be appropriate in exceptional circumstances and to enforce it upon a reluctant employer is not a course which an industrial tribunal should pursue unless persuaded by powerful evidence that it would succeed.

Id. at 490.

179. In Consumers Oil Co., 77 L.A. 141 (1981), for example, the contract prohibited the arbitrator from reducing a discharge penalty, and restricted his role to that of determining whether the "employee committed the offense for which he was charged." *Id.* at 141.

180. F. ELKOURI & E.A. ELKOURI, *supra* note 18, at 629, citing from Platt, *The Arbitration Process in the Settlement of Labor Disputes,* 31 J. AM. JUD. SOC. 54, 58 (1947). Case examples of modified penalties are legion. Some of the most recent decisions include: Holiday Markets, 77 L.A. 648 (1981) (discharge modified to 60 day suspension because of grievant's good record); Oscar Meyer & Co., 77 L.A. 478 (1981) (discharge modified to one-year suspension because contract did not specifically state that discharge was the only penalty for leaving work early); and Borg-Warner Corp., 77 L.A. 443 (1981) (discharge modified to 60-day suspension because of grievant's good record).

sion to modify.[181] Both the union and the employer will advocate only their respective sides, and little incentive exists for either party to be the first to support a compromise position. Thus, although the arbitrator may have the authority to modify, he may choose not to exercise that power because of the lack of an adequate factual basis from which to determine the appropriate penalty. Second, if prior settlements between the employer and the union have led to one specific type of compromise penalty, the arbitrator may feel restricted by deference to the past practices between the parties when considering whether or not to use his modification powers.[182]

Regardless of its comparative merit, the authority to select alternative penalties is a major distinguishing characteristic between the American arbitration system and the British law on unfair dismissal. There is no statutory basis in Great Britain for remedies such as suspensions, leaves without pay, or warnings, remedies that often are available to arbitrators in the United States. It is difficult to ascertain precisely how these limited remedial measures affect unfair dismissal findings, but the statutory restrictions necessarily inhibit a British tribunal's capacity to achieve industrial justice in the individual case. On the other hand, the practical problems that may limit the discretion of an arbitrator in the United States, namely a lack of information and the past practices between the parties, may produce modified penalties that are the results of guesswork or may produce results that surprise the parties. If this is the case, industrial justice similarly may be lacking in individual arbitration cases.

IV

COMMENTARY ON THE TWO SYSTEMS

Our comparative examination of the British law on unfair dismissal and American arbitration reveals a variety of differences and similarities between the two systems. Recent developments in the British law indicate an increasing deference towards the views

181. *See* Seitz, *Substitution of Disciplinary Suspension For Discharge,* 35 ARB. J. 27, 28 (June, 1980).

> An advocate for the employer intent upon proving to the arbitrator just cause for discharge cannot be expected, in most cases, to furnish him with the facts that would enable him to fashion or shape the more appropriate remedy of disciplinary suspension. An advocate for the union, whose single position is that the grievant should be reinstated with full back pay, similarly, cannot be expected, at the hearing or in his brief, to discuss the disciplinary measure deemed to be more appropriate than discharge. Yet, the arbitrator, his eyes bound like the statue of Justice . . . is expected, by both parties and their advocates, to ignore their arguments to sustain the grievance and to commute the discharge penalty to something more appropriate in the circumstances.

182. *Id.* at 28.

and judgments of management in unfair dismissal cases. After *Taylor v. Alidair Ltd.,*[183] for example, we noted that the focal point for determining the reasonableness of a dismissal decision is not whether or not the alleged misconduct occurred, but, rather, whether a reasonable employer could reasonably believe that an employee committed the misconduct. Similarly, the "range of responses" doctrine of *Rolls-Royce v. Walpole*[184] presents an employer with a broad spectrum of possible rational penalties rather than encouraging the choice of the best penalty available under the circumstances. These disquieting developments are indicative of a movement away from an objective adjudication of the basis of a discharge; a movement that may jeopardize the realization of substantive justice in unfair dismissal proceedings. The British courts and tribunals, however, remain committed to procedural justice in dismissal cases, although recent developments in this area are also troubling.[185] The *Burchell* test, for example, requires that an employer engage in a reasonable investigation before dismissing any employee.[186] Furthermore, the *Code of Practice* delineates important procedural guidelines for assessing an employer's disciplinary procedures and for a tribunal's determination of fairness, exhibiting a continuing concern for the procedural adequacy of discharge proceedings. Therefore, while many of the developments noted above impede the realization of substantive justice, the present state of the British unfair dismissal system does provide distinct procedural protections.

Arbitration in the United States, on the other hand, exhibits a continuing commitment to the realization of substantive justice. Unlike British industrial tribunals, American arbitrators generally engage in an objective examination of the basis of a discharge, and proceed as an "industrial jury" by independently assessing the propriety of discharge. Furthermore, arbitration in the United States requires an employer to prove, by varying degrees of proof depending upon the nature of the misconduct, that "just cause" exists for a discharge decision, while the burden of proving the fairness of discharge is neutral under the current British system. Finally, Ameri-

183. [1978] Indus. Rel. L. Rep. 82.

184. [1980] Indus. Rel. L. Rep. 343.

185. Although this article notes a trend in some recent decisions away from the strong emphasis on proper dismissal procedures, it is the view of the authors that many of these decisions are explained by the heinous nature of the employee's misconduct. *See, e.g., supra* notes 113-14 and accompanying text. Furthermore, other decisions, and the continuing viability of the *Code of Practice,* indicate a strong concern in the tribunals and courts that employers follow established disciplinary procedures when discharging an employee. *See supra* notes 100-02 and accompanying notes. For a more political discussion of the proceduralist aspects of the British law, see Collins, *supra* note 3, at 87-88.

186. *See supra* notes 97-116 and accompanying text.

can arbitrators frequently use reinstatement as a remedy in unfair dismissal cases, while the British dismissal proceedings presently function primarily as a guarantor of severance pay where a dismissal is unfair. Arbitration in the United States, then, tends to promote true job security for those employees whose employment contracts contain arbitration clauses.

The major weaknesses associated with the mode of adjudicating unjust dismissal cases in the United States are a function of the dependence of the arbitration process upon the individual collective bargaining agreements. Consequently, arbitrators, unlike British industrial tribunals, serve at the will of the employer and union. Additionally, because private-sector arbitration exists only where union representation is present, a lower percentage of American employees enjoy protection from unfair dismissal than do employees in Great Britain under the unfair dismissal law.[187] Finally, there is a potential for a pronounced disparity in the substantive rights among employees in the United States, precisely because there is a potential for pronounced differences in the provisions of the individual employment contracts.

Our comparative examination of the strengths and weaknesses of the American and British systems reveals the contours of a better method of adjudicating unjust dismissal cases. An unfair dismissal statute, covering all employees, with independent arbitrators determining the fairness of dismissals based upon objective considerations, would protect employees from the arbitrary actions of employers. Furthermore, legislation that places the burden of showing "just cause" on the employer, and mandates the use of reinstatement as the primary remedy in unfair dismissal cases, would protect innocent employees from unfair discharges. In the United States, a federal statute would achieve these aims; in Great Britain, adherence to objective criteria rather than an employer's impressions, and a return to an independent role for industrial tribunals, would correct many of the extant inadequacies in the unjust dismissal law. During times of high unemployment and economic uncertainty, this system of law would provide employees in both the United States and Great Britain with an equitable degree of job security.

187. *See supra* notes 23-26 and accompanying text.