

***NATURAL JUSTICE FOR EMPLOYEES: THE PROBLEM OF
JUDICIAL REVIEW IN EMPLOYMENT RELATIONS***

By
Emmanuel Mduduzi Khoza

*Thesis submitted in fulfilment of the requirements for the degree of Master of
Laws, School of Law, University of Natal, Pietermaritzburg.*

ABSTRACT

Work plays a dominant role in modern society. It is through work that the economic well being of any society is sustained. Workers who perform various tasks contribute to the well being of society as well as to their betterment as individuals. Thus paid employment has assumed a prominent role in modern society. It is an incentive on individuals to contribute to socio-economic welfare, while their needs and aspirations as individuals are also satisfied. But for an orderly society to exist, there has to be a subjection of some members of society by others, a division between those who have the social mandate (express or tacit) to exercise power for and on behalf of others. Thus work relations comprise those who exercise managerial power (employers) and those subject to managerial power (employees). In broader political relations, the task of social management is performed by the state.

However those exercising managerial functions do not have unfettered discretion. Power should be exercised within acceptable social limits and be used to achieve realistic social goals. Thus it has been felt that the law should always ensure that the incumbents of governmental power do not exceed the scope of their power or abuse it. Hence the process of judicial review. This gives the courts the power to review the decisions of administrative authorities in order to protect individual citizens who might be adversely affected by bad administrative decisions. This analogy has been applied in employment relations in order to protect individual employees against arbitrary dismissal by employers. It has been held that an employee cannot be dismissed without a valid reason and in compliance with a fair procedure.

The question asked here is whether this is sufficient to ensure substantive employment protection. Is judicial review really effective in employment relations? It is observed that judicial review in labour law has many limitations as compared to the administrative law context. First, it comes face to face with the problem of the public/private law distinction, which holds the employment relationship to be fundamentally a private relationship between the employer and employee. This complicates the application of public law remedies in supposedly private relations, where the parties are assumed to have freedom of contract. The second problem involves the debate as to whether the state should impose many restrictions on the modern corporation or there should be minimal state intervention to allow the corporation to function in accordance with the labour market demands and economic necessity. It is concluded that the law of unfair dismissal has consequently been put in a dilemma. While the need has been perceived to curb the arbitrary use of managerial power by employers, substantive employment protection can hardly be guaranteed. The problem seems to be that of striking the balance between the interests of employees, employers and society at large.

DEDICATION

This thesis is dedicated to Mbali. "Thank you for always being on my side."

FORMAL DECLARATION

I hereby declare that this thesis is my own unaided work, and that all my sources of information have been acknowledged. To my knowledge, neither the substance of this thesis, nor any part thereof, is being submitted for a degree in any other University.

Dated at Pietermaritzburg on this 23rd day of AUGUST.....1995.

E. M. Khoza
.....
E.M. Khoza

TABLE OF CONTENTS

<u>CHAPTER</u>	<u>PAGE</u>
ONE: INTRODUCTION AND OUTLINE.....	1
1.1 Introduction.....	1
1.2 An Historical Analysis of the Background to the Law of Unfair Dismissal in South Africa...4	
1.2.1 The Pre-Wiehahn Era and Subsequent Changes...4	
1.2.2 The Industrial Court and Unfair Dismissal Before 1988.....15	
1.3 The Argument.....16	
1.4 Outline.....18	
TWO: GENERAL INTRODUCTION: THE PHILOSOPHICAL FOUNDATIONS OF EMPLOYMENT PROTECTION AND THE LEGAL BASIS OF UNFAIR DISMISSAL	
2.1 Introduction.....	19
2.2 The Meaning of Job Security.....	21
2.2.1 What is the Meaning of Work.....	22
2.2.2 Social Attitudes Towards Work.....	26
2.2.3 Reciprocity, Conflict and the Power Struggle in Employment Relations.....	30
2.3 Unfair Dismissal and the Role of Labour Law.....	41
2.3.1 The Role of Labour Law.....	42
2.3.2 The Theoretical Basis of Unfair Dismissal....	43
2.3.2.1 The Private/Public Law Distinction....	46
2.3.2.2 Is it Necessary to Invoke Public Law Principles in the Employment Context?.....	47
2.4 Conclusion.....	52
THREE: NATURAL JUSTICE AND THE EMPLOYMENT RELATIONSHIP	
3.1 Introduction.....	53
3.2 The Nature and Meaning of Natural Justice.....	54
3.3 The Scope and Application of Natural	

Justice.....	54
3.3.1 The English Doctrine of Natural Justice.....	55
3.3.2 Natural Justice in South Africa....	60
3.4 Natural Justice and the Futility Argument.....	65
3.5 Natural Justice and the Employment Relationship.....	67
3.6 Natural Justice and the Distinction between "Employer" and "Office-Holder".....	80
3.7 Conclusion.....	83

FOUR:***THE DOCTRINE OF UNFAIR DISMISSAL AND NATURAL JUSTICE: A REVIEW OF SOUTH AFRICAN LAW***

4.1 Introduction.....	84
4.2 A Critical Review of the Law of Unfair Dismissal in South Africa.....	89
4.2.1 Unfair Labour Practice as the Basis of Unfair Dismissal.....	89
4.2.2 Judicial Review, Unfair Dismissal and Employment Protection.....	95
4.3 A Comparative Analysis of English and South African Law of Unfair Dismissal.....	104
4.3.1 Background to the English Law of Unfair Dismissal.....	104
4.3.2 The Statutory Law of Unfair Dismissal.....	111
4.4 Conclusion.....	125

FIVE:***CONCLUSION: EMPLOYMENT PROTECTION, CORPORATE CONTROL AND THE DILEMMA OF LAW***

5.1 Introduction.....	127
5.2 Competing Paradigms of Corporate Control.....	129
5.2.1 The 'Contractual' Model.....	129
5.2.2 A Critical Review of the 'Contractual' Model and the Impact of the 'Organizational Paradigm.....	138
5.2.3 The Problem.....	142
5.3 The Dilemma of Law.....	144
5.4 GENERAL CONCLUSION.....	148

BIBLIOGRAPHY.....	155
--------------------------	------------

Chapter 1

INTRODUCTION AND OUTLINE

1. Introduction

The right not to be unfairly dismissed is a creature of both statute and case law in South Africa. The essence of the law against unfair dismissal is that a person should not be dismissed without a valid reason and in compliance with a fair procedure. In relation to the latter, the industrial court has insisted on compliance with the standards of fairness as found in the public law rules of natural justice.

However there has not been a happy marriage between the public law rules of natural justice and some fundamental principles of labour law. Natural justice is deeply rooted in the principle of judicial review which presupposes the regulation of the administrative powers of those holding public office. The rationale behind judicial review is to ensure that holders of public office exercise their powers in the public interest. The employment relationship on the other hand, is still firmly fixed in the private law doctrine of freedom of contract which holds the employment relationship to be a private relationship freely entered into by the employer and the employee. The clash lies in the fact that while judicial review advances public interest, freedom of contract emphasizes the private nature of contractual relations freely entered into by individuals. Ideologically it is inimical to external regulation as priority is given to the will and freedom of the parties to the contractual relationship to

determine their own terms and conditions.

This dichotomy is also reflected in the law of unfair dismissal. The rules of natural justice are founded on two principles, namely, that no man can be a judge in his own case (*nemo iudex in sua causa*) and that a man should not be condemned without being given a chance to present his defence (*audi alteram partem*).¹ The former principle however is not applicable in the employment relationship as the employer is invariably a judge in his own case.² The primary responsibility to initiate and conduct a disciplinary hearing, it has been held, lies with the employer.³ The main problem has been that of justifying judicial review of employers' decisions within the employment relationship⁴ that is supposedly a private relationship. The notion that the law seems to embrace is that the employer in a 'private' contract of employment is not the incumbent of a public office which, when abused, allows recourse by the aggrieved party to judicial review as is the case in the public sector. Thus the right to dismiss has been seen as an exercise of a personal right, which needs little or no external control.

¹ See Baxter L., *Administrative Law*, (Juta, 1984) p541ff and cases cited therein.

² See Fredman S. and Lee S., 'Natural Justice for Employees: The Unacceptable Faith in Proceduralism', 15(1986) *ILJ* (UK) p.15 at 17ff.

³ See *NUM v Western Areas Gold Mining Co.* 6(1985) *ILJ* (SA) 380 (IC) at 386D. See also Brassey M. *et al*, *The New Labour Law*, (Juta, 1987) p.414-419.

⁴ It has been argued by some that the main contributing factor is the reluctance of judges to interpret the law in favour of employees - see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 18(1989) *ILJ* (UK) p.1.; - 'Labour Law: From Here to Autonomy', 16(1987) *ILJ* (UK) p.1.

Views on this point are divergent. Those critical of contract as the basis of the employment relationship have advocated a departure from the 'contract' principle⁵ on the basis that the employment relationship is not a proper contractual relationship as envisaged by the principles of contract mainly because of the imbalance of bargaining power between the employer and employee which usually deprives the latter full freedom of contract. The less critical on the other hand, have acknowledged the shortcomings of contract as the basis of the employment relationship, but have argued that it is inevitable that contract plays a major role in any analysis of many aspects of employment despite the non-agreemental nature of many aspects of the relationship and the unsuitability of the contractual remedies.⁶

The effect of the public/private law dichotomy on the law of unfair dismissal has been to bring into question the substantive underpinnings and the rationale behind legal provisions against unfair dismissal. The question revolves around whether the role of law is to offer substantive employment protection to employees or merely challenging procedural improprieties while on the whole reinforcing managerial control and discretion. This raises a further pertinent question. How does the law perceive the business corporation and the role of those who partake in it, namely, management and workers?

⁵ See Lord Wedderburn (supra). See also Jordaan B., 'The Law of Contract and Individual Employment Relationship', (1990) *Acta Juridica* p.73.

⁶ Honeyball S., 'Employment Law and the Primacy of Contract', 18(1989) *ILJ (UK)* p.97. See also Ewing K.D., 'Job Security and the Contract of Employment', 18(1989) *ILJ (UK)* p.217.

Below is an examination of the historical background to the law of unfair dismissal in South Africa and its socio-economic setting.

1.2 An Historical Analysis of the Background to the Law of Unfair Dismissal in South Africa

1.2.1 The Pre-Wiehahn Era and Subsequent Changes

Prior to the introduction of the statutory doctrine of unfair dismissal, employees, other than those whose employment is regulated by particular statutes,⁷ could only have a claim of wrongful dismissal under common law. The overriding consideration under common law is lawfulness rather than fairness. Thus an employer can dismiss for any reason as long as dismissal is within the bounds of lawfulness. Lawfulness is determined by reference to the contractual terms of the employment relationship. Like any contract, the contract of employment may be terminated in a number of ways: by consent; by operation of law; by supervening impossibility of performance etc. This also means that either party is free to terminate the contract. This is part of the principle of freedom of contract observed in private contractual relations. The party terminating the contract is only required to give reasonable notice of termination to the other party.⁸ In principle, the rules governing

⁷ For example public servants are regulated by the Public Service Act 111 of 1984 which provides for disciplinary and dismissal procedures for these employees - see also p.32 below.

⁸ The notice requirement is not applicable in summary dismissal since summary dismissal is, by its very nature, instantaneous.

termination apply equally to both employer and employee.⁹ However given the power imbalance inherent in the employment relationship, common law affords the employer wide powers of termination but little security for the employee. Since the employee can be dismissed for any lawful reason (which need not be fair) and at any time,¹⁰ he has no remedy at common law. The employer's authority over the employee has been said to be not simply a matter of law but the product of economic and social ordering,¹¹ and is also rooted in the employer's ownership and control over industrial property¹² and originally found its expression in the status-relation of master and servant. Legislative intervention in this area has been held to be a significant departure from the common law position¹³ as legislation requires dismissal not only to be lawful but also fair.¹⁴ But what are the underpinnings of legislative intervention? How has it evolved? To what extent is it a significant challenge to the wide powers of the employer *vis-a-vis* the powerless employee?

⁹ See *Myers v Abrahamson* 1952(3) SA 121 (C) at 123 F-H; *Stewart Wrightson (Pty) Ltd. v Thorpe* 1977(2) SA 943 (A) at 952-3. See also generally Rycroft A. and Jordaan B., *A Guide to South African Labour Law*, (Juta, 1990) p.68-87.

¹⁰ Except in the case of fixed-term contracts which cannot be terminated before expiry of the term. An exception is made in situations where the fixed-term employee is appointed on probation and his performance proves unsatisfactory. In this case the contract of employment can be terminated on notice before expiry of the probation period - *Ndamase v Fyfe-King* 1939 EDL 259 at 263.

¹¹ Rycroft & Jordaan p.186.

¹² This notion is challenged in chapter 3 below.

¹³ See, for example, Thompson C., 'Trade Unions Using the Law', in Corder H., *Law and Social Practice in South Africa* (1988) p.335.

¹⁴ *MAWU v Barlows Manufacturing Co.* 4(1983) ILJ (SA) 283 (IC); *Gumede v Richdens (Pty) Ltd. t/a Richdens Foodliner* 5(1984) ILJ (SA) 84 (IC).

The turning point in South African labour law was marked by the changes introduced following the recommendations of the Wiehahn Commission in 1979. Yet the statutory doctrine of unfair dismissal only came up in 1988, almost a decade later, through the 1988 amendments to the Labour Relations Act 28 of 1956. The question therefore is, what took the legislature so long to provide for a statutory doctrine of unfair dismissal for South African workers.

Prior to the Wiehahn changes the country had a dual system of labour relations underpinned by the ideology of racial discrimination. Consequently black workers were excluded from the formal system of industrial relations, namely, they could not form legally recognized trade unions and bargain with their employers as did their white counterparts. Even the term "employee" was statutorily defined to expressly exclude black workers. Thus trade unions for black workers remained unrecognized by law and black workers could not consequently engage in lawful collective action.

This however did not stop the growth of black trade unionism and some employers from recognizing black trade unions in their plants. The growth of black worker militancy was also exacerbated by racial discrimination in other spheres of life coupled with the ruthless manner in which the government suppressed the black people's struggle against racial oppression. The struggle for political liberation had also been inextricably linked with the industrial oppression of a black worker. Thus the lull

characteristic of the 1950s and early 60s¹⁵ in black political activism engendered by tough government action against black rebellion also had an impact on black trade unionism. The 1970s however saw a resurgence of black trade unionism, and this period was characterised by higher levels of industrial unrest.¹⁶ Higher levels of industrial unrest also coincided with an unfavourable economic climate in South Africa.

The economic problems that faced South Africa since the late 1970s up until the 1980s necessitated the introduction of stringent economic policies. The 1980s in particular were characteristic of a serious economic decline. Factors responsible for this decline were both internal and external. Externally, the severe world recession and escalating inflation created stagnant conditions in the international markets for many of South Africa's exports including diamonds, gold, platinum, iron ore, chrome, manganese, maize and sugar. According to the South African Reserve Bank, the depressed world economic conditions had contributed to a sharp decline in the gold price - the largest generator of wealth within the country which also made possible a much higher level of imports,¹⁷ from an average of \$613 per ounce in 1980

¹⁵ This period also saw the emergence of more draconian legislation like the Suppression of Communism Act of 1950

¹⁶ The Durban Strikes for example - see Friedman S., *Building Tomorrow Today*, (Ravan Press, 1987) p.37ff.

¹⁷ In 1957, for example, the gold mines paid £17 000 000 in taxes, £73 000 000, in salaries and wages, and £105 000 000 for the purchase of supplies - see *State of the Union Year-Book for South Africa*, 1959-60, p.157. It was mainly through gold exports that South Africa maintained a favourable balance of trade - from 1950-58, the trade balance showed an export surplus of £459 100 000 gold inclusive - see *State of the Union Year-Book* (supra).

to \$460 in 1981 and \$346 in 1982.¹⁸ The effect of this decline was to reduce the dollar value of South Africa's nett gold output from about \$13 billion in 1980 to \$7 billion in 1982 - a 45% decline. The rate of inflation amounted to 14.4% between July 1981 and July 1982, almost twice the average rate of inflation of South Africa's main trading partners.

Internally other contributing factors can be identified which can be said to have been directly related to the nature of South Africa's economy, particularly the large base of cheap unskilled labour resulting from discriminatory labour policies pursued by the South African government, such as job reservation, which was a systematic exclusion of blacks from skilled jobs.¹⁹ Firstly, the impact of the abundance of cheap and unskilled labour had been felt in the general economy.²⁰

South Africa found itself in a position where there was large-scale unemployment with, at the same time, shortages of manpower in the semi-skilled and skilled categories: in 1981 labour shortages constituted 19% of the under-utilisation of production capacity in the manufacturing industry.

¹⁸ See Survey of Race Relations in South Africa (1982), SAIRR p.49.

¹⁹ This was further buttressed by the 'Bantu Education' policy that gave blacks inferior education, thus making them less skilled than their white counterparts.

²⁰ The abundance of cheap unskilled labour can also be linked with the Government's apartheid education policy which gave blacks inferior education relative to other race groups - see, for example, Brooks E.H., *Apartheid: A Documentary Study of Modern South Africa*, (Routledge & Kegan Paul, 1968) p.41-55; Auerbach F. and Welsh D. in van der Horst S.T. and Reid J. (Eds), *A Review of Race Discrimination in South Africa*, (David Philip, 1981) p.66-89.

Shortages were responsible for 7.7% and 5.3% of the under-utilisation of capacity in 1979 and 1978 respectively, indicating an increase in the shortage of skilled manpower.²¹ For example, several shortages of artisans were reported in the building and mining industries with a grave shortage of skilled manpower also being reported in the public service.²² The state of excess demand during 1980 and 1981 was reflected in the labour market, where active competition for skilled workers, together with upward adjustments in salaries and wages, led to a continued sharp rise in the average remuneration per worker in all non-agricultural sectors.²³

Secondly various stringent economic measures were adopted against South Africa by some of its trading partners in an endeavour to add to the pressure on the government to end apartheid, including the imposition of economic sanctions. Direct foreign investment in South Africa totalled R26 billion in 1984 while indirect investment amounted to R40 billion compared with R19 billion and R26.6 billion respectively in 1983;²⁴ the European Economic Community countries' total investment amounted to R32.6 billion in 1984 while the US investment totalled \$2.3 billion. In 1984 there was intense pressure both in the UK and in the US on companies doing business in SA to disinvest, and on organisations such as church groups, local

²¹ SAIRR (1982), op. cit. p.78.

²² See National Manpower Commission Annual Report 1981 p.86.

²³ South African Institute of Race Relations, *Race Relations Survey* (1982) p.49.

²⁴ South African Reserve Bank, *Quarterly Bulletin*, March 1986.

authorities and universities to withdraw their investment from such companies. In March the same year, it was reported that 121 local authorities in the UK were involved in the anti-apartheid campaign,²⁵ while a bill was introduced in the United States to ban all new American investment in South Africa which allowed for the disinvestment of up to R70 billion in state funds from firms which did not qualify under the Sullivan Code.²⁶ Although the direct economic impact of these measures on South African economy cannot easily be established and has always been a subject of controversy,²⁷ the economic image of South Africa in the global economy was nonetheless tarnished. As these mounting economic problems were also taking place in a politically volatile climate, a knock-on effect on the economy was inevitable. Thus the mid 1980s also saw an intense wave of resistance to apartheid structures resulting in massive township violence and labour unrest, which the government also acknowledged as having contributed to keeping interest rates up,²⁸ and also had a great impact on limiting the incentive of foreign

²⁵ SAIRR (1985) p.122.

²⁶ In March 1976, Rev. Leon Sullivan, a board member of IBM in the US, co-ordinated a move in which twelve of the biggest US firms operating in South Africa endorsed a set of six principles designed to end segregation and all job discrimination in their plants. These included, inter alia, equal pay and fair employment practices for all employees, and initiation of a development training programme that will prepare Africans in substantial numbers for supervisory, administrative, clerical and technical jobs.

²⁷ For example, the methods of disinvestment differed considerably. Some companies simply sold to existing managements in South Africa, while others planned to involve blacks as shareholders in new structures to distribute their products in South Africa after disinvesting. Hence many were criticised for their methods of leaving, being accused of doing so in such a way that they continued to make profits from the apartheid system - see *The Star* 7 November 1985.

²⁸ *Rand Daily Mail* 21 September 1985.

investment in South Africa.

It was of course not only at a macro-economic level and only reasons related with the apartheid economy that caused economic downturn. The three-year drought (1981-3) damaged the economy both directly and indirectly. In 1981 the direct share of agriculture in total GDP was about 7% and this contribution was estimated to have decreased by about 8% in 1982 and 22% in 1983, denoting respective declines in GDP of 0.6% and 1.6%.²⁹ The drought also had a direct bearing on the balance of payments. The free-on-board value of agricultural exports declined by 114% (from R200.4 million to R428.9 million) between 1982 and 83.³⁰

While the factors directly related with the unique nature of South Africa's capitalism and its development had a great impact on the subsequent economic decline, such decline cannot of course be solely attributed to these, since the relationship between capitalism and apartheid, as Lipton correctly argues,³¹ has been more complex and changing over time. But what did apparently become clear was the gravity of the economic decline arising from

²⁹ SAIRR (1984) p.195.

³⁰ Ibid.

³¹ Lipton M., 'Apartheid & Capitalism', in Lonsdale J.(Ed), *South Africa in Question*, (African Studies Centre, Cambridge University, 1988) p.52. On the debate concerning the relationship between capitalism and apartheid, see Natrass N., 'Controversies About Capitalism and Apartheid in South Africa: An Economic Perspective', *Journal of Southern African Studies* 17(1991) p.654; Moll T., 'Did the Apartheid Economy Fail?', *Journal of Southern African Studies* 17(1991) p.271.

both internal and external factors and the economy's inability to further finance apartheid. *The Economist*, a British weekly, commenting on South Africa's recession, held that '*the country was essentially a one-product economy weighed down by a falling GDP, rising unemployment and taxes, a balance of payments about R1 billion in the red, and a colossally expensive commitment to the policy of apartheid*'.³² The government's economic and labour policies therefore also did reflect the impact of the pressure exerted by the economics of the 1980s in South Africa.

The South African government sought a solution to the country's economic problems through the free-market principle. In February 1984, Dr. Koornhof, the then Minister of Co-operation and development, announced that Central Business District (CBD) would be open to different race groups. While in March the same year, the President's Council's Committee on economic affairs presented its report on measures restricting the functioning of the free-market system in South Africa, advocating that constitutional reform should be accompanied by greater access to and participation in economic activity by the lesser developed population groups.³³ Support was also voiced for the deregulation of small business. A survey by the School of Business Leadership at the University of South Africa revealed that top

³² Ibid. 28 July 1985.

³³ *Daily Dispatch* 29 February 1984. This proposal still had discriminatory elements as it recommended that while coloured people and indians should be allowed to own and occupy property in the CBD, africans could only be allowed to occupy and rent but not own property - see Hansard 21 cols. 9960-10007

management in 103 of the country's largest companies supported the deregulation of small businesses. Consequently the Minister for Administration and Economic Advisory Services in the state president's office, Mr. Eli Louw, announced, in August 1985, that the government had accepted the principle of the deregulation of the small business sector,³⁴ and the result was the Small Businesses Deregulation Act of 1984. In the public sector, the government also embarked on a privatisation programme with the aim, as the government held,³⁵ of improving the efficiency of public-sector commercial activities and industries. Unlike in Britain, the subscription of South Africa to the free market principle was obviously going to have more devastating consequences as there had already been in place an ideology and policies which discriminated against black workers, thus causing a great imbalance in socio-economic development between the races. Therefore the operation of a free market system meant that this gap was to be further widened, with black workers being left to face the vagaries of the free market forces and labour legislation that was hostile to collective action.

In as much as pressure for economic reform was both internal and external, so was pressure for labour legislation reform. Hence the appointment of the Wiehahn Commission in 1977 to investigate into South Africa's industrial relations and labour legislation. The problem at the time was mainly

³⁴ *Business Day* 8 August 1985.

³⁵ See White Paper on Privatisation and Deregulation in the Republic of South Africa, WPG 87, August 1987.

characterised as the rise of black trade unionism, and thus one of the Commission's main recommendations was the inclusion of black workers and their trade unions into the formal system of industrial relations. This meant that black workers also qualified as "employees" within the statutory definition and that their trade unions could be recognized. The operation of black trade unions outside the formal system of industrial relations was thought to have been the cause of the spread of unlawful or unofficial industrial action, and so their inclusion into the system, it was believed, would alleviate industrial conflict in South African industrial relations. Therefore given the detrimental effect of industrial unrest on the country's economy and the attendant international criticism and economic sanctioning of South Africa, the labour legislation was designed to institutionalise industrial conflict and also convince black workers and South Africa's trading partners that it was the legislative intent to ensure fair labour standards through statutory means.

The doctrine of unfair labour practice therefore was enshrined into the Labour Relations Act and it became the gateway to challenging unfair labour practices, mainly by employers. An unfair labour practice was broadly defined as any practice or change in practice with the effect or potential to infringe or impair the labour relations between an employer and an employee. On these broad but fragile grounds, as Cameron *et al* point out,³⁶ employees founded claims for protection from unfair dismissal. The express statutory doctrine of unfair dismissal at this time was noticeable by its absence in the LRA. This

³⁶ Cameron E. et al, *The New Labour Relations Act*, (Juta, 1989) p.107.

legislative omission, it is submitted, was the result of the fact that the prime legislative concern had been industrial conflict and its impact on South Africa's economy and industrial relations. Thus the Act's philosophy was heavily influenced by the desire to institutionalise industrial conflict. The doctrine of unfair labour practice was perceived within this perspective. The focus therefore was necessarily not upon employment protection as such, but the preservation or promotion of industrial peace and stability within the employment relationship while it subsists. The effect of the legislative omission of the doctrine of unfair dismissal was that the industrial court, as an adjudicator in labour disputes,³⁷ was left within a wide statutory ambit to develop the notion of unfair dismissal from the very broad doctrine of unfair labour practice. Below is an exposition of the industrial court's attempt to establish the unfair dismissal jurisprudence in South African labour law before the 1988 amendments to the LRA.

1.2.2 The Industrial Court and Unfair Dismissal Before 1988

It was the industrial court's view before 1988 that dismissal should be preceded by a fair hearing,³⁸ an employee should not be dismissed without being afforded the opportunity to formulate his defence or tell his side of the story. This, as the court believed, was in keeping with the doctrine of natural justice. Hence these were among the rules developed by the court as

³⁷ See section 17 of the Act.

³⁸ There are, of course, exceptions to this requirement. An obvious example is a case where the affected employee refuses to show up for a hearing.

guidelines on procedural fairness.³⁹

- The employee should be advised of the charge against him.
- There should be a hearing before dismissal.
- The hearing should be timeous.
- The employee should be given adequate time to prepare for the hearing.
- The employee should be permitted representation at the hearing.
- The presiding officer should be impartial.
- There should be a right of appeal.

Substantively dismissal had to have good and sufficient cause.⁴⁰ In relation to this requirement however the court vacillated between fairness and reasonableness as criteria for determining substantive fairness.⁴¹ Subsequent statutory amendments did not fundamentally alter these principles.⁴²

1.3 The Argument

It is argued here that while the law of unfair dismissal goes a long way in limiting management's right to dismiss, the law still has some fundamental

³⁹ See, for example, *Robbertze v Matthew Rustenburg Refineries* 7(1986) *ILJ* (SA) 64 (IC) at 67; *Myburgh v Danielskuil Munisipaliteit* 1985(3) SA 335 (NC); *Tshabalala v Minister of Health & Welfare* 7(1986) *ILJ* SA 168 (IC); *Van Zyl v O'Kiep Copper Co. Ltd.* 4(1983) *ILJ* (SA) 125 (IC); *NUM v Roodepoort Deep* 8(1987) *ILJ* (SA) 156 (IC) at 165.

⁴⁰ *Ntuli v Litemaster Products* 6(1985) *ILJ* (SA) 508 (IC) at 518G-H.

⁴¹ On this controversy, see Cameron *et al* p.109 and authorities cited therein. See also a critical review of "fairness" and "reasonableness" as determinants of substantive fairness in chapter 4 below.

⁴² See chapter 4 for comments on amendments effected by the 1988 and 1991 Labour Relations Amendment Acts respectively.

shortcomings. The law does not seem to have a coherent substantive framework. A case for a substantive framework is made from the 'organizational' theory which perceives the modern corporation as not based on private rights of ownership.⁴³ Instead, this theory looks at the modern corporation as an organization comprised of many participants, including management and employees. This theory challenges the old social and economic premises which turned all thought on a bilateral economic and social structure. These were capital and labour; the capitalist and the worker. The former was the owner or controller of the means of production, and as such was in a powerful position relative to the latter, who only had his labour to sell to the former. This is held to be no longer a valid analysis. According to professor Galbraith,⁴⁴ the great political dichotomy, the capitalist and the working masses, has retreated into the shadows. In the place of the capitalist is the modern great corporate bureaucracy; not capitalists but managers. Trade unions still exist but they are no longer a strongly combative force on behalf of the denied and deprived. Decimated by the decline or migration of mass-production industry, they frequently find themselves in tacit alliance with management for survival. Reference to the class struggle, he holds, has now a markedly antique sound.

Within this philosophical framework therefore dismissal cannot be

⁴³ See chapter 2 below for a detailed analysis.

⁴⁴ Professor John Kenneth Galbraith, *The Good Society Considered: The Economic Dimension*, Annual Lecture, Cardiff Law School, 26 January 1994 p.1.

perceived as an exercise of a personal right, but instead, it is a function performed by management by virtue of occupying a higher position in the hierarchy of the corporation, which gives him the right to manage. Thus his power and discretion can be challenged in the same way as judicial review does to any incumbent of a public office. Management has to run the corporation in the interest of all who participate and benefit from it. In other words business corporations are not seen as existing solely for the benefit of the shareholders. Other people also do have a stake in business corporations i.e. managers, employees and the wider social community. Thus decisions affecting the corporation should not be left to the unfettered discretion of those entrusted with the managerial function. This includes decisions taken by management within the sphere of the discretion to dismiss.

1.4 Outline

The study is contained in five chapters. Apart from this introductory chapter, chapter two examines the philosophical foundations of employment protection and the legal basis of unfair dismissal. Within the broader organizational perspective, the chapter sets out to establish the philosophical basis for employment protection and a framework from which the law can ensure employment protection. Chapter three examines how the doctrine of natural justice relates to the employment relationship; how the rules of natural justice can be used to challenge managerial discretion in cases of unfair dismissal. Chapter four is a critical review of the doctrine of unfair dismissal in South African law and how the industrial court has applied natural justice in cases

of unfair dismissal. The chapter also contains a brief comparative analysis of South African and English law of unfair dismissal. Such a comparative evaluation is necessitated by the fact South African and English law in respect of both the public law rules of natural justice and the labour law doctrine of unfair dismissal seem to show similar basic characteristics. Chapter five is the conclusion.

Chapter 2

GENERAL INTRODUCTION: THE PHILOSOPHICAL FOUNDATIONS OF EMPLOYMENT PROTECTION AND THE LEGAL BASIS OF UNFAIR DISMISSAL

2.1 Introduction

It has been observed by Miers and Page that: "*Notwithstanding the range and diversity of its formative influences, all legislation is a product of circumstances - political, administrative, economic or social - and of reactions to those circumstances in terms of which they are regarded as raising issues or constituting problems requiring action.*"¹ Thus for a better understanding of the role of law in social relations, it is important to identify the social issues in which the law is entangled; the social phenomena the law seeks to regulate. This requires a rigorous examination of the issues with which the law is involved. The law of unfair dismissal is no exception in this regard. Yet it has notably been difficult to establish a philosophical foundation for the law of unfair dismissal, more so in capitalist market economies.² At the centre of the debate has been the arguments for and against recognition of the property rights in a job.³ In this way, it has been held, the law could be called upon to protect jobs in the same way as it does with private property. The 'property right to a job' theory however seems to have enjoyed a short-

¹ Miers D. and Page A.C., *Legislation*, (Sweet & Maxwell, 1990) p.18.

² See Hepple B., 'A Right to Work?', 10(1981) *ILJ (UK)* p.68-73.

³ Ibid. See also Rottenburg S., 'Property in Work' 1961-2 *Industrial and Labor Relations Review* p.402.

shrift from a number of theorists.⁴ What then, the question may be asked, should be the social and political foundation for the protection of job security from which the law of unfair dismissal could derive its philosophical foundation? This chapter attempts an examination of this question in detail through an analysis of the wider context of job security and the role of law in employment protection.

2.2 The Meaning of Job Security

The *raison d'être* for the law against unfair dismissal is to protect employment and ensure job security by proscribing arbitrary decision making in relation to the employer's right to dismiss. Thus if job security is what the law seeks to ensure, it is important to examine what job security means. But before the meaning of job security is examined, it is apposite to review the meaning of work and social attitudes towards the whole work ethic.

2.2.1 What is the Meaning of Work?

What is it exactly that working people want to secure? Attachment to work has primarily been based on economic assumptions.⁵ This results from the inevitable juxtaposition of economic activity in most industrialised societies, where political and social stability heavily depends on economic stability, and governments are increasingly judged on their ability to manage the economy

⁴ See, for example, a critical analysis of this concept in Collins H., *Justice in Dismissal*, (Clarendon Press, 1992) p.9. See also Hepple (supra).

⁵ Rose M., 'Attachment to Work and Social Values', in Gallie D.(Ed), *Employment in Britain*, (Basil Blackwell, 1989) p.128.

and control industrial relations processes. In this environment, it has been readily accepted, mostly by economists, that people work solely for material or pecuniary reasons. In this respect also, the role of formal education is perceived as that of producing a better economic citizen, equipped with the necessary skills and knowledge to be of use in the economic system. However the analysis of attachment to work based on economic assumptions seems to be of little descriptive and theoretical value, although it might be statistically shown that the pecuniary element significantly pervades the work ethic.⁶

While 'economic' wants may play an important role in drawing people into employment and sustaining high levels of effort, non-economic factors, either in the wider society or in the workplace itself can play a significant role. For instance people can work for no pay or can perform work tasks where payment is less commensurate with the value or magnitude of the task performed. In this category one can include people working for charitable organisations and Biblical societies; even in commercial business where profit is generally held to be the key objective, it is not unheard of that company directors or self-employed businessmen have occasionally gone without pay or meagre salaries, especially during hard economic times. In this regard, Yankelovitch *et al's* survey also showed up to 50% of people with an inner need to do the very best job they can, regardless of pay, in the USA, Japan

⁶ See generally Meaning of Work (MOW), International Research Team, *The Meaning of Work*, (Academic press, 1987)

and Israel.⁷

What then is the meaning of work? First it has to be acknowledged that different individuals are motivated by different reasons to work, and thus an absolute definition of work is difficult to formulate. Nevertheless it is submitted that work cannot be divorced from man's search for the meaning of life in general, and his value as an individual and member of society. The divergent motives and perceptions of work seem to reflect different views individuals hold on what they perceive to be the meaning of life and their role in it. In a free and democratic society therefore individuals would legitimately expect that this individual freedom be protected by the political system. Thus individuals can be perceived as having a positive right or freedom to engage in activities they feel would advance their search for meaning in life and their role as individuals. The interests of an individual however have to be counterbalanced with those of society or other individuals with whom he or she co-exists. This is particularly so when the activity he engages in also involves the co-operation of other individuals in society. This means that an individual can either engage in an activity that is of a personal nature, requiring none or very minimal involvement of other members of society or can choose to join other members of society in search for a meaningful life.⁸

⁷ Yankelovitch D. *et al*, *Work and Human Values: An International Report on Jobs in the 1980s and 1990s* (Aspen Institute for Humanistic Studies, 1983) p.398.

⁸ See Gould C., *Rethinking Democracy: Freedom and Social Co-Operation in Politics, Economics and Society*, (Cambridge University Press, 1988) p.133.

In as far as this relates to work, it means that individuals are free to participate in opportunity structures that enhance self-actualization and advancement. Thus what is actually protected is one's right to seek self-actualization and advancement either as an individual or through co-operation with other individuals. The question then is whether or not this amounts to an automatic right to work or a property right to a job. The contemporary conceptions of property in most democracies emphasize the element of privacy in the form of an inalienable right to enjoy and protect one's property, a right which has been said to be enforceable against anyone seeking to threaten the use and enjoyment of it.⁹

This analogy has been extended to those who own or control the means of production in society. By virtue of their ownership of capital that starts the business, they are vested with a property right in the business undertaking. While it has not been argued that they also own the workers and their labour power, it has been argued however that workers cannot claim work as of right from the owners or controllers of the means of production.¹⁰ Employers are free to provide or deny employment to whoever they choose to; what the state can do is to guarantee that employers use this right in a fair manner. This has also been partly the genesis of the current theory of the law of unfair dismissal.

⁹ See Gould p.171 for a detailed criticism of this conception.

¹⁰ See Hepple p.73.

The fundamental flaw in this approach is that it accords supremacy to private ownership and the inalienability of such right to the extent that the element of reciprocity in work relations is virtually obliterated. As argued above, however, individuals in society seek to live a meaningful life through work, which means participation in opportunity structures that create or increase the chances of self-actualization or advancement. Within this analogy therefore it can be argued that by engaging in a commercial venture, an entrepreneur creates an opportunity structure for self-actualization or advancement. But the nature of his opportunity structure is such that the objectives of self-actualization and advancement cannot be achieved without the co-operation of other individuals in society, namely, workers. Workers will be rendering their services or labour to the enterprise while simultaneously benefiting from the enterprise as an opportunity structure for self-actualization. The reciprocity element lies in the fact that without workers the whole opportunity structure would not exist.

Within this framework therefore the sustenance of the business undertaking is not entirely dependent on the employer's private ownership of capital that finances the enterprise, but it partly derives from the role played by other individuals or groups in society who may also have a stake in it and without whom the undertaking would not exist. The enterprise thus becomes an opportunity structure to serve the respective needs of employers, employees, consumers and society at large. Consequently employees also come to play a significant political role in the undertaking. Job security also

becomes a reciprocal concern rather than a concern for those who officially hold the status of "employee". These characteristics can also be gleaned from a modern large enterprise. Management and workers can both be regarded as employees occupying different positions in the hierarchy of the firm.¹¹ The right of management to hire and fire is not part of his private property rights to the enterprise, but part of his duties as an employee in the enterprise. Employers therefore do not own work but are important participants in the work process. Similarly workers do not have a "right to work", but have the freedom generally to participate in the opportunity structures in society that enhance self-actualization - the work process being one of them. From this perspective, employers and employees are seen as having an equal right of participation in the opportunity structure of work, the security of which depends, inter alia, on their co-operation. This is what is called the 'organizational' paradigm of the employment relationship. Employers are seen as employees who merely perform the managerial function within the enterprise rather than individuals exercising rights of ownership, and thus the right to dismiss is not a property right but a managerial function.

2.2.2 Social Attitudes Towards Work

What is meant by job security depends, to a large extent, on the type of work performed and individual perceptions of people regarding work in general.

¹¹ Collins H., 'Market Power, Bureaucratic Power and the Contract of Employment', 15(1986) *ILJ* (UK) p.1.

Individual perceptions of work however diverge. As Bendix notes,¹² there has persisted a generally negative attitude to work. This, she argues, is engendered by the nature of the labour relationship as such, and by the presumed ills of industrial society; but they can also be traced back to the Biblical times when work was a form of punishment meted out for man's original sin. This negativism nowadays is underpinned by different considerations such as social inequality, which has led some, particularly subscribers to the marxist philosophy, to view society as consisting of the 'haves' and the 'have-nots'. The former have been held to own or control the means of production while the latter only have their labour to sell to the former. Thus a capitalist industrial society, within this view, survives on the oppression of the 'have-nots' or the working classes. This has also been seen as exploitation of the working classes requiring the combination and collective action of these classes against capital exploitation.¹³ Hence the negative perception towards work.

Yet in the modern world, work is central to man's existence. With the greater part of human activity and institutions centred in the economy, most people's identity is derived from the type of economic activity in which they are engaged. Thus for some, work is a source of human dignity; it represents personal achievement and value as an individual and a member of society.

¹² Bendix S., *Industrial Relations in South Africa*, 2nd Edn. (Juta, 1992) p.8.

¹³ See generally Hyman R., *Industrial Relations: A Marxist Introduction*, (Macmillan, 1975)

These are continually reinforced by changes taking place in modern society which have an impact on the work relationship and man's attitude to work. Technological innovation and better education standards all contribute to working people becoming increasingly better equipped to handle tasks of an advanced nature. Yet the paradox, as Thompson observes,¹⁴ is that behind this picture lies the reality of more routine tasks and less skilled jobs. This may be attributed to the fact that, for various reasons, not all individuals in society have equal access to the same opportunities, nor is it guaranteed that all those who do will succeed or will attain high levels of excellence demanded by the needs of the production process.

Thus in spite of all modern-day innovations in the sphere of work, attitudes to work are still far from being convergent. Those who possess high skills and professionalism may find dignity and gratification from the work they do, while those without these attributes and qualifications are more likely to embrace a more negative view of work. This negativism, as Bendix points out,¹⁵ increases if there is a markedly uneven distribution of wealth in situations where employees cannot perceive themselves as being advantaged by the increased profitability of the enterprise if too much power resides with some of the participants.

Therefore the more skilled and professional workers are more likely

¹⁴ As quoted by Bendix *op. cit.* p.10.

¹⁵ *Ibid.* p.5.

to place much emphasis on job satisfaction, which, in this context, means the right opportunity and environment to apply their skills and knowledge. The unskilled and unprofessional, on the other hand, may tend to focus much on the economic aspect of the labour relationship, namely, wages and other benefits. And indeed the nature of the employment relationship between the employer and these two categories of workers is different. In respect of the latter, the employer is less interested in the individuality of the worker or in his unique characteristics as a human being different from all other human beings, but merely in his ability to perform the work required. At worst, argues Bendix,¹⁶ he sees the worker as just another factor of production and at best, as another replaceable member of the labour force.¹⁷ In this context then the employment relationship can be viewed as a power relationship: the employer has economic power in the form of capital and finance; professional and skilled employees have their power in the form of knowledge and skills, while the less skilled and unskilled employees mainly have labour power.

These various forms of power on the side of employees make it difficult or even impossible to generalize on the meaning of job security. What job security means to a skilled and professional person may not necessarily be the case with the unskilled and unprofessional. While the economic survival of the undertaking is essential for both, within the enterprise the two

¹⁶ Ibid.

¹⁷ Hence the distinction between the contract of service and the contract of services.

categories of employees have divergent views on what constitutes job security. The question that can be asked at this point then seems to be whether or not job security can be defined in a manner that encompasses the interests of both categories of employees so as to facilitate the formulation of a universal philosophical framework from which legal rules designed to ensure job security can derive? While job security seems to be a relative issue, depending on the status of an individual worker and the position he or she occupies within the firm hierarchy, these differences, from the organizational perspective, would not necessarily have an overriding effect on deciding the question of dismissal of either type of employee. If dismissal is the exercise of the employer's duty by virtue of being a managerial agent of the firm, then the fairness or unfairness of the dismissal should not be determined on the basis of who has been dismissed; instead the issue should be whether the employer exercised his managerial discretion fairly under the circumstances.

2.2.3 Reciprocity, Conflict and the Power Struggle in Employment Relations

The reciprocity theory and the organizational paradigm, it would seem, appear to portray the employment relationship as founded on broadly non-conflictual interests and objectives between employers and employees or groups of these. As some might argue, the employment relationship is also conflictual. There is a constant power struggle resulting from the divergent objectives and conflicting interests of employers and employees; hence the need for processes such as collective bargaining, inter alia, to institutionalise industrial conflict. But the most pertinent question here is whether the power struggle is really

the cornerstone of the employment relationship. To what extent does it determine the day-to-day relations between management and employees or trade unions?

According to the Weberian notion, power is the substantive means by which society is stratified; the distribution of power within a community has decisive explanatory significance for 'class', 'status', and 'party' formation.¹⁸ Conventionally it has been the general opinion that Marx and Weber both defined social classes in terms of market situation,¹⁹ although each acknowledged the importance of power.²⁰ While in Weber's argument there were three underlying aspects of market situation, i.e. a common specific 'causal component' of life chances, represented in common interests and under conditions of commodity in labour markets, equally, class situation was to be understood as being ultimately determined 'by the amount and kind of power, or lack of such, to dispose of goods and skills for the sake of income in a given economic situation'.²¹

Furthermore, in Weber's conception, power itself did not necessarily

¹⁸ Gerth H.H. and Mills C. Wright, *From Max Weber: Essays in Sociology*, (Routledge & Kegan Paul, 1948) p.181.

¹⁹ Marx K., London, March 1872, quoted in the opening of Althusser L. and Balibar E., *Reading Capital*, (New Left Books, 1970). See also Crompton R. and Gubbay J., *Economy and Class Structure*, (Macmillan, 1977) p.5-19.

²⁰ Gerth and Mills (supra). See further Weber M., *The Theory of Social and Economic Organisation*, (Oxford University Press, 1949) p.181.

²¹ Ibid.

derive from economic structures - on the contrary, 'the emergence of economic power may be the consequence of power existing on other grounds'.²² The issues of control and power have also assumed prominence in recent marxist expositions. The argument has been that the original aspects of the marxist theory of class stemmed precisely from their anchorage in production relationships. This means that although Marx himself affirmed that, while no credit was due to him for discovering the existence of classes in modern society - including the struggle between them, equally the novel features of the thesis were seen as the relationship between social classes and 'particular phases in the development of production'.²³

As Poole maintains however,²⁴ it is one thing to propose that power, control and social classes have a decisive role in precipitating patterns of social inequality in modern societies, but quite another to demonstrate any substantial link with union action and behaviour. Although Marx and Weber were concerned with the relationship between power, class and trade unionism, in neither case was this prominent in their respective theories. In Weber's opinion, societal or communal action need in no way emanate exclusively from a common class; instead:

"...the direction of interests may vary according to whether or not a communal action or smaller portion of those commonly

²² Ibid.

²³ Marx K., letter to Wedermeyer J. 5 March 1852, in Marx K. and Engels F., *Selected Correspondence 1843-1895*, p.86.

²⁴ Poole M., *Theories of Trade Unionism: A Sociology of Industrial Relations*, (Routledge & Kegan Paul, 1981) p.92 at 96.

*affected by the 'class situation', or even an association among them, e.g. a 'trade union', has grown out of the class situation from which the individual may or may not expect promising results...The rise of societal or even of communal action from a common class situation is by no means a universal phenomenon."*²⁵

For Weber, the growth of class consciousness depended upon considerable transparency between causes and consequences of class situation. But for the most part, 'the determination of the price of labour' was the crucial manifestation of class struggle even though its thrust was primarily directed towards management²⁶ rather than towards other groups within 'capital', in spite of the fact that it is precisely the cash boxes of the rentier, share-holder and banker into which the more or less "unearned" gains flow, rather than into the pockets of the manufacturers or of the business executives'.²⁷ Weber's concern seems to have been to show how status groups were stratified according to 'their relations to the production and acquisition of goods', while categories, too, may also be conceived in terms of status categories in union contexts.²⁸ But above all, Weber's argument was also that 'class' and 'status' forms of consciousness were variously encouraged by changes in underlying economic and technical conditions. His view is that:

"When the basis of acquisition and distribution of goods are relatively stable, stratification by status is favoured. Every technological repercussion and economic transformation threatens stratification by status and pushes the class situation into the foreground. Epochs and countries in which the naked

²⁵ Ibid. p.183.

²⁶ As the most visible actors in the bargaining relationship.

²⁷ Ibid. p.186.

²⁸ Ibid. p.193. See also Poole p.197.

class is of predominant significance are regularly the periods of technical and economic transformations. Any slowing down of the shifting economic stratification tends, in due course, to the growth of status structures and makes for a resuscitation of the important role of social honour."²⁹

As Poole notes,³⁰ even among Marxist scholars, the view that trade unions directly reflect class division and class consciousness has been received with much circumspection. Marx himself, he argues, was conscious that the growth of middle and intermediate strata could 'obliterate' primary lines of class distinction and observed that trade unions work well only as centres of resistance against the encroachment of capital,³¹ while 'pessimists' in the revolutionary tradition have emphasized the incorporation of unions and the inherent limitations to trade union consciousness itself. Yet, building on the premise of Weberian and Marxian scholarship, early contributions from industrial relations sociologists had focused upon the themes of social stratification, social imagery and trade unionism, some of them fundamentally linking classic and modern conceptions in the history of trade union thought.³² However Hyman has identified a number of changes in power

²⁹ Ibid. p.193-4.

³⁰ Ibid. p.98.

³¹ Marx K., *Value, Price and Profit*, (Harper & Row, 1954) p.94.

³² See, for example, Blackburn R.M., *Union Character and Social Class: A Study of White-Collar Unionism*, (Batsford, 1967); Goldthorpe J.H. and Lockwood D., 'Affluence and British Class Structure', *Sociological Review* 11(1963) p.133-63; Lockwood D., *The Blackcoated Worker*, (Allen & Unwin, 1965); Prandy K., *Professional Employees*, (Faber & Faber, 1965); Scheler M., *Die Wissenformen und die Gesellschaft*, (Francke, 1960). See also Poole, op cit. p.98-106 for a discussion on early contributions to the debates on social inequality and trade unionism.

relationships in industry since Marx's time.³³ These have been seen to reinforce an analytical interpretation of the market in terms of power and control rather than 'narrowly economic processes of supply and demand'; an insight reflecting not only the premises of the 'political school' of labour theory, but also the Weberian interpretation of market relationships,³⁴ the Webbs' understanding of collective bargaining,³⁵ and Flanders'³⁶ reformulation to accelerate the significance of political and social forces in trade union action itself.

From the above, it appears that the element of power is not necessarily the driving force behind the everyday-relations between management and workers or trade unions. The management-worker relationship cannot be entirely contained within the straightjacket of the power-struggle theory in industrial relations. Yet one more crucial question can still be asked in challenge to the reciprocity theory. If the reciprocity thesis is to be maintained, the question that has to be answered is, what then happens to industrial conflict? The same question is also relevant to the exponents of the

³³ Notably the contraction of the 'reserve army of unemployed'; the increase in unionization by more than a factor of ten; price inflation, and the 'historical' and 'moral' element which reflect 'relative deprivation' and helps to 'explain the differentials between the earnings of various occupational groups - see Hyman R.(1975) p.75.

³⁴ See generally, Weber M., *Economy and Society*, (Bedminster Press, 1968); Gerth and Mills, op. cit. p.180-95.

³⁵ Sidney and Beatrice Webb, *Industrial Democracy*, (Longman Green, 1897) p.173-221.

³⁶ Flanders A., *Management and Unions: The Theory and Reform of Industrial Relations*, (Faber & Faber, 1970) p.38-47.

power-struggle theory; in their case one may ask, if the employment relationship revolves around the power struggle why is open conflict not the order of the day in industrial relations? The simplest answer would of course be that most conflict is institutionalised through processes like collective bargaining.

To attempt an answer to the above questions, it is important to examine the goals and objectives of employees in industrial relations. This involves an examination of the goals of trade unionism.³⁷ What are trade unions for, and what do they do?³⁸ It must be noted however that the phenomenon of trade unionism is hardly easy to study and confine to a particular set of objectives. This is due to the multi-faceted role of trade unions as they represent the sectional interests of their members. Crouch nonetheless provides a broad but useful framework of analysis.³⁹ He classifies union goals into three broad categories, defensive goals, revolutionary goals and every-day-trade unionism. Defensive goals revolve around protection against the vulnerability of the individual employment relationship i.e against possible actions of the employer which might jeopardise the employee's position. Revolutionary goals are

³⁷ It is not of course assumed that all employees are members of trade unions. Trade unions however are the most visible and common employee collectivities through which employees channel their interests in a collective manner.

³⁸ Logically one would also be required to analyze the goals of management too. But these, although it cannot be assumed that they are fairly obvious, seldom give rise to many theoretical problems in industrial relations and labour legislation than those of trade unions.

³⁹ Crouch C., *Trade Unions: The Logic of Collective Action*, (Fontana Press, 1982) p.120ff.

related to the social change function of trade unions. These goals though, as Crouch also acknowledges,⁴⁰ rarely feature most in actual union behaviour. They are occasionally present in labour movement rhetoric and as a motivation for some activists, and also indicate a desire on the side of unions to influence social change. This frequently less prominent feature of trade unionism in the daily operation of industrial relations questions the role of trade unions or worker organisations as revolutionary vehicles in a capitalist society, the question being, is there really a space for the insertion of revolutionary ideals in the regular employment relationship?⁴¹ Are individual workers actually motivated by these considerations when deciding to join trade unions?

While this element of trade unionism seems to feature less prominently in the ordinary relations between management and trade unions, it however contributes to the conflictual nature of industrial relations. Workers' discontent arising from issues they perceive to be related with their dissatisfaction about the capitalist social order does not go away but gets re-channelled within the system of industrial relations. For example management's refusal to increase wages when this is demanded by the trade union is frequently interpreted as economic exploitation of the working class, and a strike may be called in order to extract some wage concessions from management. Although the grievance may not be couched in 'revolutionary' language, the revolutionary

⁴⁰ Ibid. p.28.

⁴¹ See also Westergaard J. and Resler H., *Class in a Capitalist Society*, (Heinemann, 1975) p.390-1.

ideals are often used to appeal to workers' sentiments and encourage participation in a strike or boost the morale and militancy of those participating. As Hyman rightly maintains:

*"Collective bargaining is a meaningless ritual if nothing more is involved on the side of trade unions than the eloquence and statistical finesse of the official negotiators. For the employer can always ignore the union's case however solidly documented and cogently argued, unless it is backed up by the overt or implicit threat of collective action, the mobilisation of the power of the membership, if a satisfactory settlement is not achieved."*⁴²

Hence it has been said that the paradox of industrial conflict is that once it has been openly articulated, it stimulates institutions of regulation which limit its disruptive manifestations as most differences get resolved through peaceful negotiation.⁴³ This then brings us to the third goal of trade unionism, as identified by Crouch, namely every-day trade unionism. Accommodation and conflict, according to Hyman,⁴⁴ are two contradictory but inescapable aspects of industrial relations. The tension between pressures generating regulation and disorder is an inevitable reflection of capitalist social relations of production: the one conditions the other. This tension, he argues,⁴⁵ necessarily sets limits to the function of trade unionism. This is where the co-operative and reciprocal element in employment relations

⁴² Hyman R. (1975) p.189-90. The same is equally true of management. Employers are often willing to bear considerable strike losses in order to sustain a position of power in their negotiations with trade unions. Both unions and employers often feel they would lose all credibility if each does not take a firm stand - see also Hyman p.191.

⁴³ Hyman p.193.

⁴⁴ Ibid. p.199.

⁴⁵ Ibid.

assumes paramountcy (especially through collective bargaining). The grievances of workers and their discontent are properly channelled through the institutions of negotiation and job regulation. A trade union officer thus becomes a 'manager of discontent', examining and refining the workers' grievances, shaping them into issues that can be negotiated by management and union representatives.

For employees, the processes of co-operation and joint control play an immediate role as a source of power, job and economic regulation. This view has been challenged mainly by the critiques of 'union bureaucracy', the claim being that those continually engaged in a representative capacity perform a crucial mediating role in sustaining tendencies towards an accommodative and subaltern relationship with external agencies (employers and the state) in opposition to which trade unions were originally formed. However, as Hyman also points out, some form of accommodation with external agencies is undoubtedly inevitable, for:

*"...those within unions who primarily conduct external relations do not merely react to irresistible pressures; they help shape and channel the nature and extent to which trade union goals and methods adapt to external agencies which seek to minimise the disruptive impact of workers' collective resistance to capital."*⁴⁶

The complex task of a trade union officer therefore is to organise, negotiate and police agreements once they have been entered into. This also came forth clearly, for example, in Watson's survey of British industrial

⁴⁶ Hyman R., *The Political Economy of Industrial Relations: Theory and Practice in a Cold Climate*, (Macmillan, 1989) p.149-50.

relations as one trade unionist remarked, "*Contrary to what people think and believe, I don't spend that much of my time on disputes. My time is spent trying to avoid them.*"⁴⁷ The same is also true of management, who, according to Collins, operate within bureaucratic organisations and are at the forefront of industrial relations regulation. As one personnel director in Watson's survey held:

*"My responsibility, first and foremost, is industrial relations. I deal with...unions...all works negotiations go on between the works unions and the works manager, but I have to get involved. I provide a helping, assisting and advising role with staff unions. Industrial relations is the hardest bit and after that, personnel problems, accidents, safety, training and security, I can delegate all that."*⁴⁸

The co-operation of workers and trade unions is thus vital to management, who is primarily the controller of the complex and 'often baffling' processes of industrial relations and production.

2.3 Unfair Dismissal and the Role of Labour Law

From the above it follows that dismissal is the exercise of managerial discretion bestowed upon management by virtue of occupying a higher position in the hierarchy of the enterprise. Unfair dismissal thus is the unfair use of this discretion. This bureaucratic view of the employment relationship

⁴⁷ Watson D., *Managers of Discontent: Trade Union Officers and Industrial Relations Managers*, (Routledge, 1988) p.29. The term "*managers of discontent*" was coined by C. Wright Mills in his works - *The New Men of Power: America's Labor Leaders*, (Harcourt Brace, 1948); 'The Trade Union Leader: A Collective Portrait', in Horowitz I.L.(Ed), *Power, Politics and People: The Collected Essays of C. Wright Mills*, (Oxford University Press, 1970)

⁴⁸ Ibid. p.47.

has ushered in public law remedies into the realm of labour relations.

Reiterating this view, Collins maintains that:

"The law of unfair dismissal should be regarded as an attempt to introduce a review of the exercise of private bureaucratic power... Once we view the law of unfair dismissal as a measure designed to review the exercise of private bureaucratic power, the natural questions to ask become whether the power has been used rationally with due respect for the rights of those affected. Hence the central question of the reasonableness of the employer's decision should be measured against the standard that his action furthered the business interests of the enterprise."⁴⁹

However the importation of public law remedies into the realm of labour law has been fraught with problems. This has been observed in the administrative law doctrine of natural justice which has also become part of labour law. As we saw in chapter one, some of the tenets of natural justice have not been applicable to the labour relations context. The rule against bias has hardly found application as the employer, though an interested part, still acts as adjudicator.⁵⁰ Hence the private/public law distinction in labour law has been the bone of contention, particularly in relation to unfair dismissal. Before examining the private/public law debate, it is essential to look into the function of labour law in industrial relations.

2.3.1 The Role of Labour Law

The function of labour law cannot be looked at in isolation from the general function of law in society. This is aptly encapsulated by Davies and Freedland

⁴⁹ Ibid. p.11. See also Stokes M., 'Public Law Remedies for Dismissal', 14(1985) *ILJ* (UK) p.117.

⁵⁰ Fredman S. and Lee S. 'Natural Justice for Employees: The Unacceptable Faith in Proceduralism', 15(1986) *ILJ* (UK) p.15 at 17.

when they write:

*"Law is a technique for the regulation of social power. This is true of labour law, as it is of other aspects of any legal system. Power - the capacity effectively to direct the behaviour of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to ensure that these are obeyed, is a social power...it is sometimes supported and sometimes restrained, and sometimes even created by the law, but the law is not the principal source of social power."*⁵¹

The essence of this definition is that law is a secondary force in human affairs. Its main function therefore is not that of a provider of social power, but it is fundamentally the regulator of social power. Labour law therefore does not tell employers when to raise employees' wages nor tell employees when to demand a raise in their wages and engage in industrial action if they do not get it. These issues depend, among other things, upon the productivity of labour, forces in the labour market and effective organization of the workers in trade unions, all of which can only be influenced by law in a modest way. Akin to this view is the idea that the law is the product of social intercourse. It cannot be understood outside the social context in which it exists and the people whose conduct it seeks to regulate.⁵²

This exposition of the role of law however seems to portray a picture of society as being in a state of harmony and equilibrium. It appears to take

⁵¹ Davies P. and Freedland M., *Kahn-Freund's Labour and the Law*, (Stevens, 1983) p.14.

⁵² Ehrlich E., *Fundamental Principles of the Sociology of Law*, vol.5 (Harvard Studies in Jurisprudence, 1936).

little account of social inequality and conflict. Hence the contention, particularly from the Marxist school of thought, has been that the law is not a neutral force in social relations; it has been seen as mainly protecting the interests of the socially privileged. Hence it has been held to be an instrument of class oppression.⁵³ While this notion can be criticised for adopting a materialist view of society, that of looking at society in terms of the relations of production, from either perspective however there seems to be an implicit consensus that the law *is* actually the product of social intercourse, whatever interests it may seem to foster most. Thus if the law is mainly a reflection of the prevailing social values, attitudes and norms, it is primarily not the law that has to change, but society itself.

It is in this web of conflicting social values, norms and attitudes that the private/public law remedies and the role of unfair dismissal law are embroiled. Below then is an examination of the impact of the private/public law distinction on the law of unfair dismissal.

2.3.2 The Theoretical Basis of the Law of Unfair Dismissal

The basis of the modern concept of democracy in capitalist societies, as we saw above, is the protection of individual freedom and private property. This view of democracy, as has been observed, also seems to take insufficient account of the element of reciprocity in human relations. The function of the

⁵³ See an analysis of this notion in Collins H., *Marxism and Law*, (Oxford University Press, 1984) p.17ff. See also Beirne P. and Quinney R.(Eds), *Marxism and Law*, (John Wiley & Sons, 1982) Chpt.2.

political system has also been perceived within the protection of individual rights, including the right to private property. It is also upon this basis that contemporary legal conceptions of property are found.⁵⁴ Against this background, the employment relationship has been considered as an essentially private arrangement between the employer and the employee. The business undertaking has been regarded as private property of the employer and the power to employ and dismiss has also had its roots in the philosophy of private rights of ownership. In the same vein employees have been presumed to be using their freedom as individuals to freely bind themselves in the contract of employment. However the perception of the employment relationship as reflecting the contractual freedom and equality of the parties before the law has been criticised as incongruent with some of the basic principles of contract. This is because the employer sets the terms of contract while the employee has little freedom to alter them or make any counter-offers.⁵⁵ What actually underpins the contract of employment is not the supposed freedom of contract but the respect the law accords to the employer's private property right to his business undertaking, the managerial prerogative.

As we saw above however the pivot of the work process is the reciprocity element. The private property right of the employer lies with the

⁵⁴ See Gould (supra).

⁵⁵ See generally Freedland M., *The Contract of Employment*, (Clarendon, 1976).

capital he expends in the establishment and maintenance of the business undertaking. Employers do not buy labour nor do workers sell it. Workers are not commodities within the business enterprise. The decision to dismiss, as argued above, means the denial of the employee's right to self-actualization and advancement. Such a decision therefore should not be left to the 'unfettered discretion' of the employer.⁵⁶ The employer must have a valid reason for dismissal and this must be double-checked by granting the employee a fair hearing. Hence the administrative law doctrine of natural justice has been adapted to the labour law jurisdiction. The substantive basis of the law of unfair dismissal has had its wellsprings from labour law, while the rules of procedural fairness have been borrowed from administrative law. This jurisprudential overlap has prompted two main questions, which might be interrelated, (1) how ideologically valid is the private/public law distinction, and (2) is the administrative law doctrine of natural justice superior to the labour law's scheme of unfair dismissal; in other words, is it really absolutely necessary to implant the administrative law rules of procedural fairness into the labour law realm of unfair dismissal? These questions are examined in turn below.

2.3.2.1 The Private/Public Law Distinction

While the assimilation of public law remedies into the realm of labour law signifies a desire to use these to circumvent the managerial prerogative or

⁵⁶ See, for example, Dworkin R, *Taking Rights Seriously*, (Duckworth, 1977) p.31 on the question of 'unfettered discretion'.

discretion in the employment relationship, this trend however illustrates the manner in which the boundaries of the private/public law distinction are shifted without any relevant change in the underlying sociology of the employment relationship.⁵⁷ This makes it difficult to reconcile the conceptual framework of the employment relationship based on private property and individual freedom with the public law tenets which are more bent towards the protection of public interests. This has also brought into question the private nature of corporate power; whether private corporations are really exercising private power when almost all their actions have public or social consequences.⁵⁸ The effect of this distinction in social relations is to inhibit the perception that institutions in which we live are the product of human design and can therefore be changed.⁵⁹ In the employment context, it implies that participants in the community of work must be made to believe that industry and commerce can only function on a largely authoritarian basis, and the private/public distinction is used to explain why the basic principles of democracy do not apply in the workplace.⁶⁰

The recognition of the business enterprise as a private domain of the employer seems to suggest that democratic processes ought not to meddle in

⁵⁷ See Klare K., 'The Public/Private Distinction in Labor Law', 130(1982) *University of Pennsylvania Law Review* p.1358 at 1363.

⁵⁸ See, for example, Parkinson J, *Corporate Power and Responsibility*, (Clarendon, 1993).

⁵⁹ Frug, 'The City as a Legal Concept', 93(1980) *Harvard Law Review* p.1057 at 1129.

⁶⁰ Klare p.1417.

industrial relations and should leave economic hierarchies in place. As Klare argues:

*"It denies the crucial role of public law in establishing and protecting the 'autonomous' industrial rule of law. The 'autonomy' formula also implies, however, that through unions employees have already participated in constructing the industrial status quo, a point that is all the more convincing because it contains an important element of truth. On the other hand, the formulation also legitimates existing arrangements and deflects scrutiny from the question whether they can or should be altered so as to increase employee control over the institutions that dominate their lives."*⁶¹

2.3.2.2 Is it Necessary to Invoke Public Law Principles in the Employment Context?

The question whether public law principles are a welcome innovation in the employment context is intricately linked with the question whether the private/public law distinction is ideologically valid. If the work process is viewed from a reciprocal perspective, with management or the employer in charge of the political aspect of the employment relationship, then the powers he exercises are not private in that he is not the only one with a vested interest in the employment relationship. His powers, it follows, are administrative and thus must be subject to certain limitations. There is no such thing as absolute or unfettered discretion or administrative power; it is always possible for any power to be abused.⁶²

⁶¹ Ibid. p.1418. Even within the purview of Administrative law the 'public/private' law distinction has been doubted - see, for example, Beatson J., 'Public and Private in English Administrative Law', 103(1987) *The Law Quarterly Review* p.34. See also Tanney A., 'Procedural Exclusivity in Administrative Law', *Public Law*, Spring 1994 p.51.

⁶² Wade W., *Administrative Law*, 6th Edn. (Clarendon Press, 1988) p.5.

The primary purpose of administrative law, as Professor Wade aptly puts it:

*"...is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. 'Abuse', it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain. Abuse therefore is inevitable, and it is all the more necessary that the law should provide means to check it."*⁶³

The role of management as the incumbent of administrative powers in the enterprise can hardly escape this analogy. The touchstone, it is submitted, is the quest for administrative justice. Employees in a business undertaking stand in a position similar to the public: subject as they are to the vast empires of executive power, they must be able to rely on the law to ensure that all this power can be used in a way comfortable with the ideas of fair dealing and good administration. As liberty is subtracted, justice must be added; the more power the government or employer wields, the more sensitive is public or employee opinion to any kind of abuse or unfairness.⁶⁴

The debate over public/private law regulation has been renewed as some governments have embarked on privatization⁶⁵, deregulation⁶⁶ and

⁶³ Ibid.

⁶⁴ Ibid. p.7.

⁶⁵ This means the conversion of public sector industries into private sector industries by selling them to private entrepreneurs.

⁶⁶ This is the reduction of the impact of state generated regulation upon the employment relationship and the labour market.

contracting-out⁶⁷ programmes. The effect of these on services and industries in the public sector is to shift a considerable amount of power from the public authorities to the private sector. South Africa has been no exception in this regard. With the transfer of more power to the private sector, considerations of public policy and public interest tend to be marginalised by commercial and competitive considerations.⁶⁸ Employment relationships are consequently corporatized and contractualized; new corporate hierarchies are created within the new units of management. In this way, public law is placed in a situation of retreat and retrenchment in relation to these re-structured employment relationships much in the ways that this occurs in the face of the new institutional relationships.⁶⁹

The concern over more power being transferred to the private sector and its regulation through the principles of contract seems to arise out of an apparent lack of the element of distributive justice within the principles of contract. The law of contract, as Collins notes,⁷⁰ assumes neutrality; it does not include a redistribution of wealth towards either greater equality between

⁶⁷ This is a process whereby a portion of the public sector industry is left to be run by the private sector as opposed to full privatisation thereof.

⁶⁸ See also Freedland M., 'Government by Contract and Public Law', *Public Law*, Spring 1994 p.86 at 103.

⁶⁹ Ibid.

⁷⁰ Collins H., 'Distributive Justice Through Contracts', *Current Legal Problems* (1992) p.49.

members of society.⁷¹ The legal tests for the formation of a binding contract merely establish fair procedures by which individuals may reach agreements; they do not ensure that the outcomes of bargains conform to some fair distributive pattern of wealth in society. In this sense, the law of contract adopts a purely procedural character. It relies, for its coherence, upon a separation of procedural fairness from substantive fairness. The concern seems to be that of procedural fairness rather than an evaluation of the substantive outcome of contracts. Thus the key feature of pure procedural justice, as found in the law of contract, is the absence of an independent criterion of fair distribution. However, as Collins rightly argues:

*"The procedure must produce a fair outcome by virtue of the procedure having been followed, not because of the result obtained. In contrast, perfect procedural justice rests upon an independent standard by which to judge the fairness of the outcome. This standard may be equality, so that perfect procedural justice will only be established if the procedure is guaranteed to achieve the correct outcome of equal shares."*⁷²

The question therefore is whether private power should be subject to the same controls as public power. Answering this question affirmatively, Borrie has argued that trade associations and professional groups have considerable power which is not only enhanced by privatization, deregulation and contracting out, but also by mergers, take-overs and the creation of

⁷¹ This, however, is not to say that the law of contract is devoid of distributive consequences. As Collins also concedes, since it encompasses the main rules of law which facilitate market transactions, it must have the distributive consequences of a market system under which some people become better off than others as a result of successful trading. But the aim of the law can be distinguished from its effects.

⁷² Ibid. p.53.

cartels.⁷³ With this considerable power they can act in ways that are inimical to individual members as well as to the public. While it is acknowledged that there is a number of regulatory controls already in place, the question is whether these are adequate. Is it satisfactory that the courts should seemingly have a small part to play? The courts' supervisory jurisdiction, as Borrie points out,⁷⁴ helps to ensure that public bodies do not abuse their power and so not act arbitrarily, capriciously, unreasonably or unfairly. Whatever other regulatory controls they may be subject to, it is becoming increasingly desirable that private bodies be generally subject to some measure of judicial supervision.

2.4 Conclusion

The work process is undoubtedly a bureaucratic and hierarchical relationship as separate tasks have to be performed by different participants in the enterprise. However its characterization as a relationship between the bearer of power and a non-bearer of power is misleading. The labour relationship is not only premised upon economic power, and thus not necessarily a contract of purchase and sale of labour. The right to dismiss therefore is also not a private personal right, but part of the exercise of an administrative discretion. Such discretion however is not unfettered. It is circumscribed by the

⁷³ Sir Gordon Borrie, 'The Regulation of Public and Private Power', *Public Law* (1989) p.552 at 560.

⁷⁴ Ibid. p.561. See also Fredman S. and Morris G.S., 'The Cost of Exclusivity: Public and Private Re-examined', *Public Law*, Spring 1994 p.69; Fredman S. and Morris G.S., 'Public or Private? State Employees and Judicial Review', 107(1991) *The Law Quarterly Review* p.298.

requirements of justice and administrative fairness. Thus the right to dismiss should also conform to the principles of natural justice.

Chapter 3

THE DOCTRINE OF NATURAL JUSTICE AND THE EMPLOYMENT RELATIONSHIP

3.1 Introduction

The essence of the doctrine of unfair dismissal is that no man should be deprived of his livelihood and opportunity of self-advancement without a valid substantive basis. Furthermore procedural fairness and regularity are of indispensable essence of liberty; severe substantive laws can be endured only if they are fairly and impartially applied.¹ Thus dismissal should not only be substantively fair, but should also comply with the requirements of procedural fairness. It is procedural fairness that is also the cornerstone of the doctrine of natural justice. Below is a review of the doctrine of natural justice and its application in employment relations.

3.2 The Nature and Meaning of Natural Justice

Natural justice, as broadly defined by Lord Esher in *Voinet v Barret*,² simply means 'the natural sense of what is right and wrong'. Natural justice has also been equated with 'fairness'.³ In the administrative law context, natural justice has been held to comprise two fundamental rules of fair procedure: *nemo iudex in sua causa* (no man can be a judge in his own case) and, *audi*

¹ *Shalighnessy v United States*, 345 US 206

² (1885)55 LJQB 39 at 41.

³ See *Ridge v Baldwin* [1964] AC 40; Wade, *Administrative Law*, 6th Edn. (Clarendon Press, 1988) p.522-526.

alteram partem (a man should always be heard in his defence). These, according to Baxter,⁴ are only conceptions or applications of the broader concept of natural justice or procedural fairness. The range and variety of situations to which these rules apply is extensive, and if they are to serve efficiently the purpose for which they exist, it would be counterproductive to attempt to prescribe rigidly the form the principles should take in all cases.⁵ What is required, in essence, is that the administrative agency should act fairly in affording the affected party the opportunity of making representations in an appropriate manner. Thus M.T. Steyn J. in *Motaung v Mothiba NO*⁶ held that they are subject to continual development and reformulation in the light of changing circumstances and needs.

Natural justice therefore derives from common law.⁷ One looks to the statute not for the rules of natural justice, but to see whether natural justice has been expressly excluded or modified, the presumption being that the legislator has not excluded their operation.⁸ This presumption is of course a rebuttable one as the statute might be couched in a language that purports to exclude natural justice, depending on the circumstances of the case, the nature

⁴ Baxter L., *Administrative Law*, (Juta, 1984) p.541.

⁵ Ibid.

⁶ 1975(1) SA 618 (O) at 629.

⁷ See Rose-Innes, *Judicial Review of Administrative Tribunals in South Africa*, (Juta, 1963) p.146.

⁸ Ibid. See also *Minister van Naturellesake v Monnakgotla* 1959(3) SA 517 AD; *Administrator, TVL & Others v Traub & Others* 1989(1) SA 731 (A).

of the inquiry, the rules under which the tribunal is acting and the subject matter to be dealt with.⁹ It would thus appear that natural justice is always applicable except when expressly excluded by statute. Yet the scope and applicability of natural justice, as will be reviewed below, have been fraught with inconsistency throughout its evolution.

3.3 The Scope and Applicability of Natural Justice

The prominence of the rules of natural justice as the prime test of proper administrative procedure has undergone different evolutionary phases which have not placed the same emphasis on the applicability of natural justice in particular circumstances. This trend, as illustrated below, has been characteristic of both English and South African jurisprudence on natural justice.

3.3.1 The English Doctrine of Natural Justice

The dawning age for natural justice in England was marked as early as 1723, by the decision in *R v University of Cambridge*.¹⁰ In this case Cambridge University had deprived its disobedient scholar, Dr. Bentley, of his degrees on account of his misconduct in insulting the Vice Chancellor's court. He was however reinstated on a mandamus from the court of the King's Bench on the ground that deprivation was not justifiable and that he should have received notice so that he could formulate his defence. It was here that Fortescue J.

⁹ See Wade p.535.

¹⁰ [1723] 1 Str. 557.

made his powerful speech:

*"I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree whereof I commanded thee thou shouldst not eat?' And the same question was put to Eve also."*¹¹

The early cases mainly concerned restoration to office. Where natural justice was violated, it was no justification that the decision was in fact correct. It was also clear from the decisions that the courts would apply the principle of natural justice to cases of administrative character. But the same principle was also extended to bodies such as clubs and societies. It was held to be an implied term of each member's contract of membership that he could not be expelled without a hearing.¹² Thus the court in *Wood v Wood*¹³ held that this rule is not confined to the conduct of strictly legal tribunals, but it is applicable to every tribunal or board of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. Eventually the doctrine of natural justice found another field of application in protecting members and officers of trade unions from unfair expulsion or other penalties. Hence the court in *Abott v Sullivan*¹⁴ held that the bodies which exercise in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary

¹¹ Ibid.

¹² *Dawkins v Anthrobus* (1881) 17 Ch.D 615. See also *Fisher v Keane* (1878) 11 Ch.D 853.

¹³ (1874) LR 9 EX 190.

¹⁴ [1952] 1 KB 189.

rules of natural justice. They must not condemn a man without giving him an opportunity to be heard in his own defence; and agreement or practice to the contrary would be invalid. In the administrative law context, the decision that became the hallmark of the doctrine of natural justice was Cooper v Wandsworth Board of Works.¹⁵

However the declining phase in the evolution of natural justice subsequently began to emerge. The deviation path from the observance of natural justice was paved in R v Leman Street Police Station Inspector ex Parte Venicoff.¹⁶ The Home Secretary had been empowered by legislation to deport an alien whenever he deemed this to be conducive to public good.¹⁷ When a deportation order was impugned, it was held that he was exercising purely executive functions, importing no duty to act judicially. The court laid much emphasis on the amplitude of the Secretary's discretion, the context of emergency and the impracticability of giving prior notice in such a case. The impact of a deportation order on personal liberty was treated as an irrelevant consideration and the feasibility of requiring a hearing after the order had been made but before it had been executed was also not canvassed in the judgement.

¹⁵ [1863] 14 CB (NS) 180.

¹⁶ [1920] 3 KB 72.

¹⁷ In terms of Article 12(1) of the Aliens Order 1919 made under the Aliens Registration Act of 1914.

Likewise in *Franklin v Minister of Town and County Planning*¹⁸ an attempt was made to nullify an order relating to Stevenage in that the Minister had not called evidence of the enquiry in support of the draft order and had been biased in favour of the order itself when he finally made it. These contentions were rejected by the House of Lords. It held that the enquiry was directed to the objections, not to the order itself and was prescribed for the further information of the Minister. The criterion of bias appropriate to measure the conduct of a quasi-judicial officer had no relevance to the functions of the Minister, which were purely administrative. Nevertheless, while it was undoubtedly proper to conclude from the nature of the legislative scheme that the Minister was entitled to approach his statutory duty to consider objections with a strong inclination to implement his own policy, the House of Lords used terminology which could be regarded as lending support to the view that a public authority did not act in a judicial capacity in the sense of being required to observe the rules of natural justice.¹⁹

Among factors that accounted for this unwarranted deviation from natural justice was the division of powers into judicial, quasi-judicial or purely administrative.²⁰ Again a sharp distinction was drawn between the deprivation of a right and that of a mere privilege, the latter function being

¹⁸ [1948] AC 87.

¹⁹ See also De-Smith S.A., *Judicial Review of Administrative Action*, 4th Edn. (Stevens, 1980) p.169-70.

²⁰ See also Yardely D.C.M, *Principles of Administrative Law*, (Butterworths, 1986) p.92-101.

held to impart no judicial duty. Views were also expressed by Lord Goddard C.J. in R v Metropolitan Police Commissioner, ex parte Parker²¹ that it was undesirable to control the exercise of disciplinary powers by characterizing them as judicial. Some of these trends had been illustrated in Nakkuda Ali v Jayaratne.²²

It was the celebrated decision of the House of Lords in Ridge v Baldwin²³ that marked the turning point for natural justice. The Chief Constable of Brighton had been tried and acquitted on a criminal charge of conspiracy to obstruct the course of justice. Two other police officers were convicted, and the judge in this case commented adversely on the Chief Constable's leadership of the force. Thereupon the Brighton Water Committee, without giving him any notice or offering any hearing, unanimously dismissed him from office. The Chief Constable, after fruitless attempts to secure a hearing, turned to the court, claiming a declaration that his dismissal was void since he had been given no notice of any charge against him and no opportunity of making up his defence. The House of Lords held that the initial dismissal was void since it was contrary to the express provisions of the statutory regulations governing police discipline, which, in cases of misconduct, required notice of the charge and an opportunity of self-defence. Thus decisions like Nakkuda and R v Metropolitan Police

²¹ [1953] 1 WLR 1150

²² [1951] AC 66

²³ [1964] AC 40; [1965]2 ALL ER 66 HL.

Commissioner received a short-shrift from Ridge v Baldwin. The Baldwin decision has been applied in subsequent decisions. As Lord Diplock has held in O'Reilly v Mackman:

*"A right of man to be given a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that parliament intended that failure to observe it should render null and void any decision reached in breach of this requirement."*²⁴

3.3.2 Natural Justice in South Africa

From the period up to the 1940s South African courts rarely held natural justice to be applicable when a discretion was granted to an administrative agency.²⁵ Among influential decisions were Judes v Registrar of Mining Rights, Krugersdorp²⁶ and Shidiack v The Union Government,²⁷ which provided that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere to make him change his mind or to substitute its conclusion for his own. These decisions and a number of others placed great emphasis upon the unreviewable nature of discretionary powers.

The trend to extend substantially the scope of natural justice was set

²⁴ [1983]2 AC 237 at 276.

²⁵ See Dean 1979 THRHR p.267 at 281ff.

²⁶ 1907 TS 1046

²⁷ 1912 AD 642

in *Pretoria North Town Council v AI Electric Ice Cream*.²⁸ The appellant council had refused certificates to blacks to hawk ice cream without reasons being given. The court held that while the council might not be obliged to furnish reasons for its refusal of certificates, nevertheless, if it was in possession of any private information which might found an objection to the granting of any certificate, it was obliged to disclose such information to the applicant and give him an opportunity to deal with it. This paved the way to applying the principles of natural justice to powers which bore little relation to ordinary judicial powers. The emphasis fell on the potential effect or results of the exercise of power.

The hallmark decision on natural justice however was *R v Ngwevela*.²⁹ Ngwevela had been caught for contravening a banning order on attending an illegal gathering. The conviction of Ngwevela was attacked, inter alia, on the ground that the notice banning him was invalid in that the Minister failed to give appellant an opportunity of defending himself before the banning order. The court, per Centlivres C.J, held that the appellant was entitled to be given an opportunity of being heard before the Minister exercised his powers. It went on to say that the maxim *audi alteram partem* should be enforced unless it is clear that parliament has expressly or by necessary implication enacted that it should not apply, or that there are exceptional circumstances which would justify the court's not giving effect to it. The Ngwevela case was

²⁸ 1953(3) SA 1 (A)

²⁹ 1954(1) SA 123 (A)

soon followed and applied in the unanimous decision of the Appellate Division in Saliwa v Minister of Native Affairs.³⁰

As in the case of the UK, South Africa also experienced a period of decline in the prominence of the doctrine of natural justice. The period from the late 1950s to early 1960s was a period of confusion and uncertainty about the application of natural justice. Pioneering decisions like Ngwevela and Saliwa began to be qualified. Some of the qualifying decisions were Sader and Others v Natal Committee Group Areas Board³¹ and Laubscher v Native Commissioner, Piet Retief.³² Sader concerned the proclamation of a group area by the Governor-General which, in terms of the Group Areas Act,³³ was preceded by an enquiry into the desirability of issuing such proclamations. The Act made it clear that the board was not obliged to give advance notice of the proposed group area and was obliged to receive written representations, but the board was not obliged to hold a public inquiry or to hear oral evidence. The court held that the principles of natural justice *might* apply although this did not help the appellant. Schreiner AJ held that:

"It may be assumed that if an interested person is allowed to appear at an enquiry and to make oral representations, he has a right to make such representations without unfair obstruction by the board; it may be assumed also that the oral representations, like those in writing, must be fairly considered."

³⁰ 1956(2) SA 310 (A)

³¹ 1957(2) SA 300 (N)

³² 1958(1) SA 546 (A)

³³ 36 of 1966 as amended (now repealed).

In *Laubscher* the appellant was deprived of permission to carry out his professional duties in a trust land. When he challenged this deprivation without being heard, the court held that he had no antecedent right to go upon the property, and the refusal did not prejudicially affect his property or his liberty nor any legal right that he already had. Therefore he could not exert the right to be heard. Reynolds J.A and Halls J.A in this case based their decisions on the quasi-judicial classification, the value of which had been doubted in the *Electric Ice Cream* case.³⁴ The doubts about natural justice were confirmed in *Minister van Naturellesake v Monnakgotla*³⁵ and *Cassem en 'n Ander v Oos-Kaapse Komitee van Groepsgebiedraad*.³⁶ In *Monnakgotla* the court indicated that it might be more willing to accept the ouster of natural justice than in the past,³⁷ while in *Cassem* the court relied heavily upon the concept of quasi-judicial function³⁸ to exclude the observance of natural justice in the proclamation of a group area notwithstanding the serious consequences for individuals which could flow from such action.

As Dean correctly suggests,³⁹ the cases in the fifties mostly concerned highly contentious legislation which, by the standards of the time, was also

³⁴ See also Dean p.283.

³⁵ 1959(3) SA 517 (A)

³⁶ 1959(3) SA 651 (A)

³⁷ Ibid. p.521F-G.

³⁸ Ibid. p.600C-G.

³⁹ Ibid. p.285.

unusual, the examples being the Group Areas Act and the Suppression of Communism Act.⁴⁰ Hence the shift away from natural justice. The early sixties saw more draconian legislation which was characterised by the granting of wide discretionary powers to the executive. It was often pointless to hold principles of natural justice applicable because of the doctrine of parliamentary sovereignty which could be used to reverse decisions which held natural justice applicable.

However natural justice saw its resurrection through decisions like Turner v Jockey Club of South Africa,⁴¹ Strydom v Staatspresident, RSA,⁴² Attorney-general, Eastern Cape v Blom & Others,⁴³ and later Administrator, TVL & Others v Traub & Others.⁴⁴ These decisions have jettisoned the quasi-judicial distinction and confirmed the classic formulation of natural justice, that the doctrine is applicable when a public official or body is empowered to make a decision prejudicially affecting an individual in his liberty or property or existing rights, unless the statute expressly or by necessary implication indicates the contrary. The courts have also extended the application of the doctrine to situations where a person's liberty, rights or property are not necessarily prejudicially affected, but also to instances where a person is

⁴⁰ 44 of 1950 (now repealed).

⁴¹ 1974(3) SA 633 (A)

⁴² 1987(3) SA 74 (A)

⁴³ 1988(4) SA 645 (A)

⁴⁴ Ibid.

thought to have a legitimate expectation of being heard under the circumstances.⁴⁵

3.4 Natural Justice and the Futility Argument

It has been argued that natural justice is merely a procedural device and thus insistence on the observation of the rules of natural justice even where substantive justice has been complied with, is futile.⁴⁶ It has also been asserted, by Fredman and Lee, that the futility argument is the touchstone for the effectiveness of procedural justice, the argument being that, despite a lack of procedure, no injustice has been done anyway. The implication here is that there is no essential connection between substantive and procedural justice; the required procedure is not necessarily the determinant of the actual decision.

This view however is not plausible. The nexus between substantive and procedural fairness, it is submitted, lies at the heart of natural justice. Substantive justice is invisible without procedural justice. It consists of the motives, prejudices and all other inner feelings of the person making the decision, which cannot be ascertained without the benefit of procedural fairness. Hence the court in *R v Thames Magistrate's Court, ex parte*

⁴⁵ See Traub case (supra). See also Hlophe J.M. 'The Doctrine of Legitimate Expectation and the Appellate Division', *SALJ* 107(1990) p.197. For a critical review of the application of Traub in subsequent cases, see Grogan J., 'Audi After Traub', 111(1994) *SALJ* p.80.

⁴⁶ See, for example, Fredman S. and Lee S., 'Natural Justice for Employees: The Unacceptable Faith in Proceduralism', 15(1986) *ILJ (UK)* p.15.

Polemis⁴⁷ correctly remarked that:

"It is absolutely basic...that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, ...it seems no answer to...say: 'well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing that justice is done."

In the same vein Lawton L.J in Maxwell v Dept. of Trade⁴⁸ held that *"Doing what is right may still result in unfairness if it is done the wrong way."* It is because the assurance that justice has been seen to be done is in itself an important element in the public confidence in the settlement of disputes, whether in the courts or by other bodies, that, for example, the rules of natural justice may apply to what might be regarded as "open and shut cases".⁴⁹ The application of natural justice even where the case is open and shut was ably explained by Megarry J. when he said:

"When something is obvious , it may be said, 'Why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not...do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any

⁴⁷ [1974] 1 W.L.R 1371 per Lord Widgery CJ.

⁴⁸ [1974] 1 QB 523 at 540

⁴⁹ Jackson P., *Natural Justice*, (Sweet & Maxwell, 1979) p.87.

*opportunity to influence the course of events.*⁵⁰

It is also the objective of the doctrine of natural justice to ensure an objective and informed decision. Thus it is essential that a hearing be granted before the decision is made.⁵¹

3.5 Natural Justice and the Employment Relationship

The employment relationship is characteristic of an imbalance of power between the employer and the employee. This derives from the perception of the employer as the provider of employment who, in the same vein, also has the managerial discretion. The question here is whether or not managerial discretion supersedes the rules of natural justice. Can employers be compelled to observe the rules of natural justice?

In its broadest sense, as Professor Wade suggests,⁵² natural justice simply means the sense of what is right and wrong. If so, then employers

⁵⁰ *John v Rees* [1970] Ch.D 345 at 402. See also *NAAWU v Pretoria Precision Castings* 6(1985) ILJ (SA) 369 (IC).

⁵¹ In the field of administrative law however, it is possible, as a matter of exception, to hear after deciding. This is possible where (1) A statute authorizes emergency ex parte action. Here, unless natural justice is excluded altogether, a hearing need only be given after the decision has been taken - see *Sachs v Minister of Justice* 1934 AD 11; *Heatherdale Farms v Deputy Minister of Agriculture* 1980(3) SA 476 (T) 485D-E; *Everett v Minister of the Interior* 1981(2) SA 453 (C) at 458E and *Nkondo and Gumede v Minister of Law and Order* 1986(2) SA 756 (A). See also Baxter, op. cit. p.587 for the analysis of the Nkondo and Gumede case; (2) There is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing: where the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision and where the affected individual has not thereby suffered prejudice - see Baxter p.588.

⁵² *Ibid.* p.466.

should also be required to do what is right. The rules of natural justice apply equally to administrative powers and also to powers created by contract.⁵³ This view however has not been readily accepted by the courts when it comes to the contract of employment. The dominant view has been the perception of the employment relationship as a contractual relationship. Thus under common law, the concept 'unfair dismissal' was alien as common law only recognised 'wrongful' dismissal, which merely means repudiation of the contract of employment.⁵⁴

This view has been criticized, inter alia, for assuming equality of bargaining power between the employer and the employee, ignoring the fact that the employee has little or no freedom of choice but to accept the terms of the contract as tabled before him by the employer.⁵⁵ Hence among the critics of this view, there has also been a school of thought that seeks to advance the employment relationship away from its contractual premise towards autonomy.⁵⁶ The more moderate view has been that of supporting

⁵³ Ibid. p.561. See also *Rampa en Andere v Rektor, Tshiya Onderwyskollege en Andere* 1986(1) SA 424 (A); *Lunt v University of Cape Town & Another* 1989(2) SA 438 (C).

⁵⁴ See Freedland M.R., *The Contract of Employment*, (Clarendon Press, 1976) p.234ff.

⁵⁵ See, for example, Fox A., *Beyond Contract: Work, Power and Trust Relations* (Faber, 1974) Ch.4. See also Jordaan B., 'The Law of Contract and the Individual Employment Relationship', (1990) *Acta Juridica* p.73.

⁵⁶ See Lord Wedderburn, 'Labour Law: From Here to Autonomy,' 16(1987) *ILJ (UK)* p.1. For a critical review of Wedderburn, see Howarth D., 'The Autonomy of Labour Law: A Reply to Professor Wedderburn', 17(1988) *ILJ (UK)* p.11; Summers C., 'Lord Wedderburn's New Labour Law: An American Perspective', 21(1992) *ILJ (UK)* p.157.

the use of public law remedies in the employment relationship in order to control managerial discretion.

The criticism of the contractual premise of the employment relationship has cast some doubt upon the efficacy of the common law remedies and the whole question of the primacy of contract as the basis of the employment relationship. What is wrong with contract as the basis of the employment relationship? Is the law of contract totally irrelevant in employment relations? If not, to what extent is the employment relationship susceptible to the principles of contract? A view which has been traditionally held by the courts is that of a contract signifying that employment is basically the product of agreement or the consensual meeting of the minds in the context of bargaining with the intention to create a legal relationship. This approach thus attempts to fit the employment relationship within the framework of the law of contract, and the remedies it presupposes are common law remedies. Thus under common law, as we saw above, a dismissal would only be challenged on the grounds of unlawfulness and not unfairness. Hence the critiques of this approach have also been at pains to pinpoint the fact that the employment relationship is not a contract in the strict sense of the word, where all the fundamental elements of contract are applicable. Thus the principles of contract and common law remedies have been doubted as the cornerstones of the employment relationship.

The flaw apparent in the common law approach is that it fails to

accommodate the *sui generis* nature of the employment relationship.⁵⁷ The *sui generis* nature of the employment relationship derives from the prominence of power imbalance and the inequality of bargaining strength between the employer and the employee. In this sense it cannot be said that employee participation is premised upon freedom of contract, which is a prerequisite for other normal contractual undertakings, as he has very little (if any) influence to effectively determine the terms and conditions of employment although he has a stake in it. Furthermore the terms of the employment contract are far from being certain as required by the normal rules of contract. The amount of labour the employee must render cannot be quantified, nor can wages be ascertained with any permanent exactitude as these are now and then subject to market fluctuations; while again the number of overtime hours and pay cannot be stipulated in advance. On the whole therefore terms and conditions of employment are inevitably always subject to variation. Thus failure to recognise this peculiar feature of the employment relationship and simply characterise it in terms similar to those of ordinary contractual undertakings yields unfair results, particularly on the part of the employee who is already in a weaker bargaining position. The problem however is more probably located in the wider social context than within the narrow confines of the legal institutions.

⁵⁷ This notion is challenged by Stone M., 'Labour Markets, Employment Contracts and Corporate Change', in McCahery J. *et al* (Eds), *Corporate Control and Accountability*, (Clarendon Press, 1993) p.61ff, on the basis that this feature is not only unique to the employment contract. For a detailed discussion, see chapter 5 of this thesis below.

Referring to administrative law, Craig has correctly argued that:

*"An understanding of the nature and purpose of administrative law requires us to probe further into the way in which our society is ordered. At the most basic level it requires us to articulate more specifically the type of democratic society in which we live and to have some vision of the political theory which that society espouses. The role of more particular legal topics which constitute administrative law, such as natural justice, judicial review...can only be adequately assessed within such a framework. Concepts such as accountability, participation and rights do not possess only one interpretation which can be analyzed by a purely 'factual' inquiry. Nor can the place of such ideas be understood by pointing to their general connections with democracy...Law is easier to understand when such background ideas are revealed, precisely because the rationale for the topics which make up the subject and the manner in which they interrelate, becomes clearer."*⁵⁸

In relation to labour law, it can be argued that this situation is partly or even mainly redeemed by labour legislation which imports the tenets of public law into the realm of supposedly private relations of employment by requiring, among other things, the observance not only of the rules of lawfulness but also those of fairness. In general the 'freedom of contract' which, according to classical law, meant freedom of the parties to choose who they contracted with and under what terms without much legal interference, has been significantly restricted by statute law not only in relation to labour law but many other areas involving contractual relationships more likely to be characterised by the inequality of bargaining power between the parties.⁵⁹ As Atiyah notes:

⁵⁸ Craig P., *Administrative Law*, (Sweet & Maxwell, 1989) p.3.

⁵⁹ Statutory inroads have been made into areas such as marriage contracts where the law has imposed a number of statutory regulations regarding the proprietary aspects of the marriage institution. In the area of commercial contracts an example can be said to be the growth of legislation ensuring consumer protection.

"One reason why the law traditionally paid little attention to inequality of bargaining power was that these inequalities were thought to be matters involving distributive justice rather than corrective justice. The law of obligations was traditionally concerned merely with corrective justice, with putting things right, that is, things which had gone wrong as the result of a breach of contract, or a wrong done by one person to another. Inequalities in society which resulted from the way wealth and resources were distributed were thought to be essentially political matters, to be dealt with by Parliament..."⁶⁰

Change in this regard, particularly in England, was brought about by changes in political thought, in social and economic conditions, and in the law.⁶¹ The 1950s in England, also known as the period of *laissez-faire*, saw changes in political thought which had significant implications both for the economic life of the English people and the law. The concept of democracy as rooted in the philosophy of individual freedom was increasingly seen as inadequate and in need of redefinition to include the social welfare dimension to it. Democracy did not only have to mean a guarantee of political citizenship but individuals also had to be full economic citizens. Hence the role of the state also took a welfare dimension: the state had to manage the economy in a way that ensured full employment and ensured better welfare for all citizens. The legal implications of this were that the law was also increasingly seen as a vehicle for the achievement of a welfare state. The law had to intervene in social relations to ensure not only that legal rules were observed but more importantly to establish the standards of fairness and equity.

⁶⁰ Atiyah P.S., *An Introduction to the Law of Contract*, 4th Edn. (Clarendon Press, 1989) p.16.

⁶¹ See Atiyah p.17-30.

Freedom of contract therefore ceased to mean *carte blanche* to engage in contractual relations without or with minimal legal restrictions. Freedom of choice was counterbalanced with the requirements of fairness. Although this took a while to be introduced into the area of industrial relations, the subsequent labour legislation, especially after the Donovan Commission Report in 1968,⁶² embraced these ideals of fairness. The Industrial Relations Act of 1971 and the Employment Protection Act of 1975 came up with the legal concept of 'unfair dismissal', grounded on the rationale of protecting those already in employment against arbitrary dismissal.

However the 1980s saw a dramatic decline in the belief in the concept of a welfare state, and the virtues of the free market principles were once again proclaimed.⁶³ And indeed the Thatcher administration of 1979 sought to take Britain back to the free market world through policies of deregulation and privatisation, giving more power to industrialists and limiting the power of the workers, which, according to the Tory philosophy, was one of the elements that stifled the competitiveness of the British economy. Thus the period saw the withdrawal of many statutory protective enactments, especially

⁶² The Donovan Commission had been appointed in 1965 to investigate on matters involving trade unions and employers' associations, with the object of finding ways and means by which British industrial relations and labour legislation could be improved, especially following the spate of industrial conflict which seemed to be on the increase in British industrial relations at the time.

⁶³ See Atiyah, *op. cit.* p.30-39.

in labour relations.⁶⁴

Coincidentally this period in South Africa was a period of labour relations reform following the Wiehahn proposals. As has been noted,⁶⁵ South African labour law is also a melange of foreign principles of labour law which have been adapted to the South African industrial relations environment. It should also be borne in mind that the new labour dispensation was also brought about by union pressure and the increasing level of political conflict which was jeopardizing South Africa's world economic and political standing, thus exerting more pressure for reform. But with hindsight, it can probably be said that if South Africa was out to borrow foreign labour law principles, success in this venture can hardly be said to have been dramatic. Apart from the fact that South Africa had not as yet embarked on the path to political reform, the signs from abroad were almost conflicting. With some of the major industrialised countries such as Britain, who also had important trade links with South Africa, rejecting the path towards a welfare state and the attendant legal reforms, the signals could not have been more confusing for a country which desperately needed not only economic and industrial

⁶⁴ Among these were statutory recognition provisions which had been introduced by both the 1971 and 1975 Acts, which left employers with freedom not to recognise trade unions if they didn't want to.

⁶⁵ See, for example, Thompson C., 'Borrowing and Bending: The Development of South Africa's Unfair Labour Practice Jurisprudence', in Blanpain R. and Weiss M.(Eds), *The Changing Face of Labour Law and Industrial Relations*, (Nomos, 1993) p.109. See also Brassey M., 'Something New, Something Borrowed...': Comparative Labour Law in South Africa, in Blanpain and Weiss, op. cit. p.133.

reform but also political reform.⁶⁶ Hence the Wiehahn proposals were implemented, inter alia, with extreme caution not to give too much power to trade unions while also not taking away too much of managerial power. Therefore with some of the more industrialised countries almost returning to the 'freedom of contract' position, the problem apparently seemed to be not knowing the extent to which South African labour legislation should engender a departure from the common law principles. This problem therefore is seemingly not only unique to South African labour law.

The question that still remains however is, what is or should be the status of contract in the employment relationship? Contract *per se*, it is submitted, should not necessarily be viewed as inimical to the employment relationship;⁶⁷ it is the classification of the entire relationship as purely contractual that is problematic. Contrary to the traditional and still currently prevailing analysis of the relationship as being rooted in agreement, the employment relationship seems to function primarily on the basis of implied terms rather than fixed and certain terms, terms which, as we saw above, are constantly subject to variation by the parties to suit the dynamic nature and

⁶⁶ However it is not argued that labour law reform in South Africa was primarily based on the British model. British labour law was mainly one of the systems from which principles were borrowed.

⁶⁷ As there are employees who are not necessarily adversely affected by the classification of their relationship with employers as "contractual". However these are invariably professional and highly skilled employees in the case of whom it case of whom the bargaining power with their employers is not so disparate like their semi-skilled or unskilled counterparts, and are more likely not to be dismissed arbitrarily. See further Ewing K.D., 'Remedies for Breach of the Contract of Employment', 52(1993) *Cambridge Law Journal* p.405, who argues that the position on the remedies for breach of the contract of employment is still unclear.

demands of industrial relations. Thus a contract of employment is not an agreement as to the terms on which the relationship is to be conducted, as presupposed by ordinary principles of contract, but can instead, be seen as an agreement to enter into and create a legal relationship between the parties. As

Collins argues:

*"...the ordinary nexus between manager and employee cannot be described as a contractual relation, for they have never actually made a contract together. Instead, they have agreed with a third party, usually a company or government agency, to join the same organisation at different points of entry in the hierarchy of ranks... Plainly, the ordinary relations of authority found in employment cannot be reduced to a simple contractual formulation... unlike a contractual or market relation, a manager's natural remedy for an employee's deviation from the bureaucratic rules consist not of economic compensation to himself or his employers but of punitive sanctions, such as a reprimand or demotion or even expulsion from the organisation. Similarly an employee receives a wage which does not depend directly on the amount he produces, so that like a normal contractual relation he does not suffer economic loss for defective or tardy performance."*⁶⁸

In this regard Hepple correctly submits that the contract of service should be replaced by a broad definition of an "employment relationship" between the worker and the undertaking by which he is employed.⁶⁹ Such a relationship would be based on voluntary agreement between the worker and the undertaking to work in return for pay. The contractual status of this arrangement derives from the fact that it is based on agreement rather than status.

⁶⁸ Collins H., 'Market Power, Bureaucratic Power and the Contract of Employment', 15(1986) *ILJ* (UK) p.1 at 4ff.

⁶⁹ Hepple B., 'Restructuring Employment Rights', 15(1986) *ILJ* (UK) p.69. at 74.

Another characteristic of the relationship would be that the "veil of corporate personality" would be pierced so far as the identity of the employer is concerned. The "employer" would have to be defined as the company or other person or persons who has control of the undertaking in which the worker is employed.⁷⁰ The more fundamental point is that in order for a statute to ensure reasonable job security for employees there has to be a significant shift from the common law perception of the employment relationship as contractual relationship based on the status of the employer as the owner of capital and the employee as a "seller" of labour. This approach seems to view workers as commodities within the enterprise, which can be bought and dispensed with at will.

For legislation to have a significant impact, it should not stop at challenging the arbitrary use of managerial discretion. The protective impact of legislation is severely limited when it is premised on the assumption that the right to dismiss is part of the property rights of the employer. The definitions of "employer" and "employee" in the Labour Relations Act⁷¹, for example, are also reminiscent of this notion. An "employer" is defined as 'any person who employs or provides work for another...or who permits another person to...assist him in the carrying on of *his business*.' An "employee" on

⁷⁰ In the case of doubt as to which person has such control, the burden of proof should be on the person denying the power of control - see Hepple op. cit. p.75. An implication of this definition would be that the worker would retain rights on a change of control, such as a change in the share ownership of the controlling company.

⁷¹ Section 1 of the Act.

the other hand is defined as 'any person who is employed by or who *works for* an employer...or assists an employer in the carrying out of *his business*...'

In both definitions the enterprise is viewed as the property of the employer, while the employee is merely there to assist the employer, his only stake in the enterprise being the pecuniary benefit in the form of his wages or salary. With these definitions it is difficult to advance the protective ambit of the statute because the statute itself does not seem to depart significantly from the "property rights" notion of the employment relationship.

The contradiction lies in the fact that the law regards employers as having powers which ordinary property owners have in relation to their property and simultaneously seeks to impose restrictions by telling them when not to dismiss an employee when they feel like. In this way the law renders itself impotent because in order to be able to sustain a claim of unfair dismissal the law will have to look for reasons why the employer's property right has to be restricted or curtailed.

Although it has been said that the yardstick is that of fairness, in the absence of a firm and clear doctrinal basis for the law of unfair dismissal, there seems to be an inevitable temptation on the courts to judge fairness not by whether the decision to dismiss was fair to the employee (for whom the law exists to protect), but instead legislation requires the courts to treat unfair dismissal as a dispute between the employer and the employee. As we saw in

chapter two above, this approach is inappropriate for claims of unfair dismissal as these are not, in the strict sense of the word, disputes. Rather these are situations where aggrieved (dismissed) employees seek employment protection more than the resolution of the dispute that led to dismissal. However when the employment relationship is premised upon the contractual and "property rights" of the employer, it becomes difficult for the courts to find reasons to compel him to keep someone in employment against his (the employer's) will.

Furthermore the "property rights" approach adds another complication: if the enterprise is the property of the employer, and he has the right to employ and dismiss, can it be equally said that the employee has a property right or title to his job? If the answer is in the negative, then the court's task of protecting the weaker employee against a powerful employer gets even more complicated as it has nowhere to look for any substantive basis for deciding in favour of the employee. The issue of termination as well as the fairness thereof should be decided by the industrial court/tribunal on "industrial" rather than contractual principles.

One of the remedies in the English law of unfair dismissal, for example, has been that of requiring employers to pay a particular amount of compensation to the unfairly dismissed employee when reinstatement does not seem possible. The deterrent effect of this remedy is however limited mainly to those employers who cannot afford to pay compensation; and to those who

can, the right to terminate employment at will still subsists as long as they can pay for it. As Hepple correctly argues,⁷² the concept of contract which is utilised as the cornerstone of statutory rights is inherently biased in favour of the so-called "natural" rule-making power of the employer; and it is small wonder that statutory rights, such as those of protection from unfair dismissal, have been interpreted from the view point of the "reasonable" employer rather than that of the employee's right to remain employed.

It is therefore important to note that dismissal is not strictly a breach of contract that can be adequately redressed through the application of common law principles based on contract. Dismissal is the use of the power vested in the employer as the "manager" of the enterprise and not the use of a property right. Thus there is an apparent need for dismissal to comply with both substantive and procedural fairness.

3.6 Natural Justice and the Distinction between "Employee" and "Office-Holder"

A line has been drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other hand, a mere contract of service. The distinction is reminiscent of the old times when offices were looked upon as a form of property which could be held and recovered in specie; if the holder was wrongfully removed, he could obtain restoration by a court order or he might be granted prohibition or an

⁷² Ibid. p.82.

injunction.⁷³ A servant under a mere contract of service enjoyed no such protection: whatever his contractual rights, he could always be dismissed, and his remedy lay in damages for breach of contract.⁷⁴ In other words, there was always a power to dismiss him, even though under the contract there was no such right. The principle was that no man could be compelled to employ another or keep another in employment against his will.

It had been held that the distinction was of importance for natural justice because if an office-holder is removed without a hearing in a case where he had a right to one, he could specifically recover his office.⁷⁵ This right however was not available to a mere 'servant'. Legally the reason that was advanced was that the law will not specifically restore employment, which means that the court in the case of an ordinary contract would not be able to order reinstatement. In modern employment relations however this view has become increasingly hard to maintain for two main reasons. Firstly the distinction between an office-holder and a mere servant is hardly sustainable: while jobs which can be viewed as 'lower status jobs' are still prevalent alongside highly professional and skilled jobs, the organization of the modern enterprise has shifted the old conceptions of power traditionally perceived to reside in the hands of those who provided capital for the business undertaking,

⁷³ Wade p.561.

⁷⁴ Ibid. 599.

⁷⁵ Ibid. p.562. See also *Schierhout v Minister of Justice* 1926 AD 107; *Kubheka & Another v Imextra* 1975(4) SA 484 (W). A different view was adopted in *NUTW v Stag Packings* 1982(4) SA 151 (T).

both as owners and administrators of business undertakings, thus paving the way for the bureaucratization of work relations. The term "management" does not necessarily signify the "owner" of the business, but mainly refers to both a process and a distinct group of roles within the organization.⁷⁶ For example, a doctor and a cleaner working in the same public hospital perform two different functions and yet they work for the same institution, however different their terms and conditions might be. They both fit the broad description of "public servant". The former is a professional, while the latter is more likely to be a simple semi-skilled employee. In this case justice cannot be done by discriminating on the basis of hierarchy and status.⁷⁷ Commenting on the decision in *Vidyodaya University v Silva*,⁷⁸ which endorsed the 'office-holder-servant' distinction, Lord Wilberforce pointed out that:

*"A comparative list of situations in which persons have been entitled or not entitled to a hearing, or to observation of the rules of natural justice, according to the Master and Servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a University professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it..."*⁷⁹

Secondly when the court is called upon to pronounce on issues of natural justice, it is simply being called upon to do simple justice between man and man. The court's task therefore is to dispense justice by basing its

⁷⁶ See Salamon M., *Industrial Relations: Theory and Practice*, 2nd Edn. (Prentice Hall, 1992) p.213ff.

⁷⁷ See also 2.4.2 above.

⁷⁸ [1965] 1 W.L.R 77.

⁷⁹ *Malloch v Aberdeen Corporation* [1971] 1 W.L.R 1578 at 1595-96.

decision upon the tenets of fairness. Thus a defect in procedural justice cannot be condoned on the basis of the non-applicability of specific performance.

3.7 Conclusion

It is a rule of substantive justice that employment should not be terminated without a valid reason; and also a rule of procedural justice that it is not sufficient to decide on the basis of substantive justice alone, but justice should also be manifestly seen to be done. The right to fair treatment is an immutable right in a democratic society. Thus natural justice should not be circumscribed by rigid conceptions of futility. Even where substantive justice has been satisfied, there is always a possibility of a valid explanation, and it is by hearing the other side that this can be achieved. The *audi alteram partem* principle thus does not only serve the ends of procedural justice but also improves the quality of decision making and public faith in the process of administering justice.

Chapter 4

THE DOCTRINE OF UNFAIR DISMISSAL AND NATURAL JUSTICE: A REVIEW OF SOUTH AFRICAN LAW

4.1 Introduction

Having seen in chapter one the determinants of the philosophy behind the Labour Relations Act, in particular the strong objective to preserve industrial peace, it would seem to follow that the statutory doctrine of unfair dismissal was to be the plutonic product of the broader philosophy of the Act. There were many pressures necessitating the amendment of the LRA as it stood before 1988. The industrial relations system in South Africa developed rapidly since the Wiehahn reforms. Freedom of association which had been extended to black workers greatly enhanced the growth of black trade unionism. Their strength lay not only in their numbers but also in their influence both on the shopfloor and in society at large.¹

The government's objective, also enshrined in the LRA, to preserve industrial peace was however thwarted because many black trade unions stood opposed to the system of registration which was meant to be the gate to using the statutory procedures for collective bargaining and engaging in lawful industrial action if need be. The unions, as has been argued,² were sceptical

¹ See Bendix S., *Industrial Relations in South Africa*, 2nd Edn. (Juta, 1992) p.365ff. See also Friedman S., op. cit. p.243.

² Bendix (supra). See also Friedman (supra); Piron J., *Recognition or Rejection: Trade Union Recognition in South Africa*, 2nd Edn. (Macmillan, 1984) p.1-6; Nel P.S. and Van Rooyen P.H., *Worker*

of anything that smacked of state control after decades of discrimination and ruthless state suppression of black workers as such and as citizens of South Africa. Instead most black unions opted for private recognition agreements with employers, which meant bargaining outside the statutory framework which had been provided by the LRA.³ With hindsight, it can be said that trade union scepticism and ambivalence towards legislative reforms in labour relations did not go down very well with the government as this also meant that the problem of "unofficial" industrial action which had contributed greatly to the problem of escalating industrial conflict in South Africa was far from being solved.

There was thus a need, from the government's perspective, to introduce tighter controls to avert this and reinforce the philosophy behind the LRA. The 1988 amendments therefore first sought to review the machinery for promoting fair labour standards and secondly, to tackle the problem of "unofficial" industrial action. In relation to the former, a new definition of "unfair labour practice" was incorporated into the Act, while in respect of the latter the Act increased the cost of "unofficial" industrial action, inter alia, by imposing civil liability on any trade union responsible for an unlawful strike.⁴

Representation in Practice in South Africa, (Academica, 1985) p.44.

³ For a more detailed discussion - see Maree J. (Ed), *The Independent Trade Unions 1974-1984* (Ravan Press, 1987) p.116-279.

⁴ This was provided for in the now repealed section 79(2) of the Act which was heavily opposed by both the trade union movement and employers' associations, which, finally led to its repeal in 1991. Also, the new definition of 'unfair labour practice' was amended to include strikes and lockouts.

It was in the revised definition of "unfair labour practice" that the doctrine of unfair dismissal was incorporated. The new definition however was still not exhaustive.⁵ Its starting point was '*any act or omission which in an unfair manner infringes or impairs labour relations between an employer and employee..*', with fifteen other added specified components. The definition branded as an unfair labour practice '*the dismissal by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure.*' This was the birth of a statutory doctrine of unfair dismissal. However this did not substantively alter the industrial court's jurisprudence. The criterion of reasonableness, which the industrial court sometimes applied, was rejected by the legislature and 'fairness' was confirmed as the criterion with which to determine unfair dismissal.⁶ The court's guidelines in the determination of the fairness of the dismissal included the following aspects:

- (a) Did the employee's conduct under the circumstances justify dismissal, or was it of sufficient gravity to justify dismissal?⁷
- (b) Were there any prior warnings which may have a bearing on

⁵ See Cameron *et al*, op. cit. p.109.

⁶ The distinction between "reasonableness" and "fairness" as criteria for determining the fairness or unfairness of dismissal in English and South African law is discussed in greater detail below at p.53ff.

⁷ *Noddele v Mount Nelson Hotel* 5(1984) *ILJ* (SA) 216 (IC); *Dreyer v Frank Textiles* 6(1987) *ILJ* (SA) 223 (IC); *Rossouw v SA Mediese Navorsingsraad(2)* 8(1987) *ILJ* (SA) 660 (IC); *G v K* 9(1988) *ILJ* (SA) 314 (IC).

the assessment of the equity of the case?⁸

- (c) Was there a disciplinary code or any other system designed to draw the employee's attention to the potential effects of this conduct if it did not meet certain standards?⁹
- (d) Was the reason for dismissal consistently applied in the employer's undertaking in similar circumstances?¹⁰
- (e) Were the personal circumstances of the worker concerned and other mitigating considerations taken into account in determining the disciplinary penalty?¹¹

The statutory basis for procedural fairness was found in the words 'not in compliance with a fair procedure'. The Act did not prescribe a pre-ordained formula of procedural justice; it only spoke of some form of fair procedure. The legislation thus confirmed the industrial court's approach of the

⁸ *Rhodes v SA Bias Binding Manufacturers* 6(1985) *ILJ* (SA) 107 (IC); *King v Beacon Island Hotel* 8(1987) *ILJ* (SA) 485 (IC); *Rampersad v BB Bread* 7(1986) *ILJ* (SA) 367 (IC).

⁹ *FAWU v Delmas Kuikens* 8(1987) *ILJ* (SA) 5(1984) 628 (IC); *Moahlodi v East Rand Gold & Uranium Co.* 9(1988) *ILJ* (SA) 597 (IC).

¹⁰ *Fihla v Pest Control, TVL.* 5(1984) *ILJ* (SA) 165 (IC); *NUM v Kloof Gold Mining Co.* 7(1986) *ILJ* (SA) 375 (IC); *BASODTW v Homegas* 7(1986) *ILJ* (SA) 411 (IC).

¹¹ *Fihla* (supra); *NUM v East Rand Property Mines* 8(1987) *ILJ* (SA) 315 (IC); *Moahlodi* (supra).

application of the rules of natural justice in their flexible form.¹²

The 1991 amendments came about partly as a result of pressure from employers and trade unions to repeal the provisions that made the cost of collective action on the part of trade unions high by classifying unlawful strikes and lockouts as unfair labour practices, and imposing civil liability on trade unions responsible for unlawful industrial action. Thus the more audacious elements of the 1991 Labour Relations Amendment Act concerned the repeal of the provisions relating to the classification of strikes and lockouts as unfair labour practices, which, as Landman notes,¹³ had the advantage that they were bargained by the major actors in the labour relations community.¹⁴ An unfair labour practice now means any act or omission, other than a strike or lockout, which has or may have the effect that:¹⁵

- (a) Any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;
- (b) The business of any employer or class of employers is or may

¹² See Cameron 7(1986) *ILJ (SA)* 183 at 185 and 9(1988) *ILJ (SA)* 147 at 149 for the industrial court's judgments emphasizing the element of flexibility in procedural fairness.

¹³ Landman A.A., 'The Implications of the Labour Relations Amendment Act of 1991', *Industrial Relations Journal of South Africa* 11(1991) p.15.

¹⁴ See n.11 above.

¹⁵ Section 1(a) of the LRAA 1991. See Landman p. 21 for the analysis and interpretation of the new definition of unfair labour practice.

be unfairly affected or disrupted thereby;

- (c) Labour unrest is or may be created or promoted thereby;
- (d) The labour relations between employer and employee is or may be detrimentally affected thereby.

PART I

4.2 A Critical Review of the Law of Unfair Dismissal in South Africa

4.2.1 Unfair Labour Practice as the Basis of Unfair Dismissal

This new definition however has virtually reverted to its pre-1988 wording. While the unfair dismissal of an employee would probably still be an unfair labour practice, the industrial court has once again been largely left to rely on its own jurisprudence on unfair dismissal. The classification of the doctrine of unfair dismissal under unfair labour practice involves some doctrinal contradictions. Unfair dismissal and unfair labour practice, it is submitted, are underpinned by different philosophical considerations.

The primary object of the doctrine of unfair labour practice, which is also partly the main objective of the LRA, is to preserve industrial peace and stability through the encouragement of fair labour practices between employers and employees. On the other hand, while it can be argued that the doctrine also encourages employers not to dismiss arbitrarily, the effect of dismissal

whether fair or unfair is to terminate the employment relationship between the employer and employee. When the employment relationship has been so terminated the question of trying to encourage fair labour practices, it would seem, is a *non sequitur*. Such an objective can be effectively pursued while the employment relationship subsists. In other words, one can also say that the unfair labour practice doctrine is forward-looking, aiming at the maintenance and encouragement of good industrial relations practices. Also, when either party approaches the industrial court with a claim of unfair labour practice, they are asking the court to play its role as a promoter of good industrial relations. However with unfair dismissal only one party can make a claim, and that is the employee. This time it is not primarily a request to promote good industrial relations¹⁶ (because the employment relationship has been terminated anyway),¹⁷ but the dismissed employee is seeking protection or vindication of justice. The immediate objective of the legal provisions against unfair dismissal therefore is employment protection.

Looking at the history and developments that led to provision for the unfair labour practice doctrine, it is apparent that the prime legislative concern

¹⁶ At least not in the medium-term.

¹⁷ It has been argued that a dismissed employee is not in the same position as an unemployed one - see Brassey M. *et al*, *The New Labour Law*, (Juta, 1987) p.27-28. This distinction however is mainly of technical and procedural significance. It derives support from the fact that unfair dismissal is treated as an industrial dispute, and as such, it is dealt with in the same way as other industrial disputes, which means, *inter alia*, that status quo orders (under s43(1) of the LRA) may be granted in this sort of disputes. But these are mainly procedural niceties which may not necessarily lead to reinstatement even when dismissal is eventually found to be unfair. Although procedural requirements have to be complied with, the primary concern of the dismissed employee is to regain employment and continue to earn his livelihood.

was industrial conflict¹⁸ more than employment protection. Thus the difficult task that faced the industrial court was that of establishing, within a labour jurisprudence designed to curb industrial conflict, a system whereby this could be usefully put into effect in challenging unfair dismissal.

As we saw above, the subsequent insertion of provisions relating to unfair dismissal was mainly a legislative confirmation of the approach adopted by the industrial court in cases of unfair dismissal before the 1988 amendments. There was not perceived a need for separate and more detailed statutory provisions regulating unfair dismissal. This, it is submitted, did not make the task of the industrial court easier.¹⁹ The inconsistency and uncertainty noticeable in the industrial court's approach towards its role in the evolution of the unfair dismissal jurisprudence were partially a result of a lack of detailed statutory guidelines on unfair dismissal. Examples involve the following instances where:

- (a) the court thought that a hearing was not necessary;
- (b) employees were dismissed *en masse*;
- (c) the dismissed employees occupied managerial positions;
- (d) dismissal occurred in the heat of large-scale unrest.

¹⁸ See also Levy A., *Unfair Dismissal: A Guide for SA Management*, (Divaris Stein, 1984) p.63, who argues that unfair dismissal is a major contributing factor to industrial unrest and strikes.

¹⁹ The unfair labour practice definition was still inexhaustive - see also Cameron *et al*, *op. cit.* p.109. Equally this did not make the legal position on unfair dismissal clearer as the industrial court still had to rely mainly on its past jurisprudence, except that this time, its approach had a legislative approval.

Each of these is briefly considered below.

(a) Where a Hearing is not necessary

The court upheld this contention in *Lefu v Western Areas Gold Mining Co. Ltd.*,²⁰ where the applicants were dismissed instantly without the benefit of a hearing, within hours after a riot had been quelled, in the course of which some people died and others injured and damage to buildings and equipment had occurred. The court held that the considerations of fairness in regard to particular circumstances may require or permit a complete or partial departure from this principle. Thus considering that a tense situation prevailed whilst dismissals took place, the court therefore felt that there was no time to hold enquiries. The basis of this exception was rejected in *Thwala v ABC Shoe Store*²¹ and the requirement of compliance with procedural fairness reaffirmed.²²

(b) Where Employees Have Been Dismissed en masse

As we saw above, the requirement of a fair hearing was also dispensed with in the Lefu case because it was thought that it would be cumbersome for the employer to hold an enquiry in respect of each of the 205 employees who had been dismissed. Procedural non-compliance was similarly condoned in

²⁰ 6(1985) *ILJ* (SA) 307 (IC).

²¹ 8(1987) *ILJ* (SA) 714 (IC); see also *Rostoll v Leeupoort Minerale Bron (Edms) BPK* 8(1987) *ILJ* (SA) 366 (IC).

²² See also Cameron E., 'The Right to a Hearing Before Dismissal - Problems and Puzzles' Part II 9(1988) *ILJ* (SA) at 166-7.

Rikhotso v TVL Alloys (Pty) Ltd.²³ and MAWU v BTR Sarmcol²⁴. This was however contrary to the correct view held in NUM v Durban Roodepoort Deep Ltd.,²⁵ where the court held that:

*"The fact that it may simply be inconvenient or bothersome to hold an inquiry involving hundreds of employees is no justification for not holding an inquiry at all."*²⁶

(c) Dismissal of Managerial Employees

This was the case in Stevenson v Sterns Jewellers Ltd.²⁷ Stevenson had been appointed as managing director of the respondent company. Three weeks later he was dismissed because his style of management allegedly did not suit the company. The applicant had not committed any gross misconduct. The only allegation against him was that he did not have the right attitude to make him suitable for his office. On the strength of James v Waltham Holy Cross Urban District Council,²⁸ where it was held that in cases of an irredeemable incapacity on the part of a managerial employee, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business; the court felt it should not replace the company's decision with its own.

²³ 5(1984) *ILJ* (SA) 69 (IC).

²⁴ 8(1987) *ILJ* (SA) 815 (IC).

²⁵ 8(1987) *ILJ* (SA) 156 (IC).

²⁶ *Ibid.* at 164F-H.

²⁷ 7(1986) *ILJ* (SA) 318 (IC).

²⁸ (1973) ICR 398.

Apart from the doubtfulness of the fact that Stevensons' case could really be classed as a case of incapacity,²⁹ it was subsequently established that there is no jurisdictional bar preventing the industrial court from adjudicating the claims of unfairly dismissed senior executives, including company directors.³⁰ Their claim to procedural fairness before dismissal must be assessed in the same way as those of other employees.

(d) Dismissal During Time of Large-Scale Unrest at the Workplace

The audi alteram principle was also dispensed with in the Lefu case on the basis of the fact that dismissal occurred during the time of large-scale unrest in the workplace. The court held that, faced with the responsibility of maintaining law and order in the mine, a situation caused by the peculiar circumstances of the mine, it could not be said that the respondent was obliged to hold a hearing in respect of the applicants before terminating their services. This sympathetic view however received short shrift in *Leboto v Western Areas Gold Mining Co. Ltd.*,³¹ which arose from the same circumstances in which Lefu and others had been dismissed. The court took the view that there was no justification for holding that because the charges were similar, the

²⁹ Reference was made to his attitude and style which some members of the company did not like, but it was not shown that as a direct consequence of that the company suffered loss, damage or poor production, as it would invariably be the case in situations of incapacity. The issue therefore was more of a clash in personalities than incapacity on the side of Stevensons - see also Cameron (supra).

³⁰ See *Oak Industries (SA) (PTY) LTD. v John NO. & Another* 8(1987) ILJ (SA) 756 (IC).

³¹ 6(1985) ILJ (SA) 299 (IC).

respondent may dispense with procedural formalities which generally apply even once the situation has returned to normal.³² Later a similar view was also taken in an English case which involved similar circumstances, namely, *McLaren v National Coal Board*,³³ where the court held that:

*"Standards of fairness are immutable. Acceptable reasons for dismissing may change in varying industrial situations, but standards of fairness never change. Thus no amount of heat in industrial conflict can justify failing to give an employee an opportunity of offering an explanation, though it may create a situation in which conduct which would not normally justify dismissal becomes conduct which justify dismissal."*³⁴

The above examples, apart from showing the industrial court's inconsistent approach to unfair dismissal, also point towards the complexity of unfair dismissal, more so when applied in the absence of a precise and more detailed statutory basis and guidelines. While the overriding principle can be said to be that of fairness, the very concept of fairness is characteristically relative, and could thus be itself problematic if not confined within a specific ambit and used to achieve a specific result.

4.2.2 Judicial Review, Unfair Dismissal and Employment Protection

While judicial review has been extended to employment relations, it has not affected all employees in the same way. The effect of judicial review seems to depend largely on the employee-category in which a person falls. State employees have traditionally enjoyed greater job security than ordinary

³² at 303F-G.

³³ [1988] IRLR 215 CA.

³⁴ Ibid. See also p.218.

employees whose terms and conditions are governed by common law. Today most public employees are governed by legislation containing detailed provisions laying out the grounds upon which they may be dismissed and the procedures to be followed before a decision to dismiss is taken.³⁵ Statutory provision for dismissal procedures means that they can be challenged in court in terms of judicial review, and that the court will scrutinize the dismissing official's decision to ensure that there has been compliance with the legislation in question.³⁶ This position has been confirmed even in situations where a public authority enters into an ordinary contract of service with an employee, where the former reserves the right to dismiss on notice.³⁷ Here it has been held that the prime consideration is the fact that an employee is employed by a public body or administration, and thus such relationship is not only governed by the terms of the contract but also by the terms of the relevant statute and regulations made thereunder.³⁸

It is mainly in relation to private sector employees that the effect of judicial review is questionable. The question is whether the role of judicial

³⁵ See, for example, The Public Service Act 111 of 1984, ss 16-21; The SA Transport Services Conditions of Services Act 41 of 1988, s 22; The Prisons Act 8 of 1959, ss 12(4) & 13, and The Defence Act 44 of 1957.

³⁶ See *Evans v Public Service Commission* 1920 TPD 170; *Union Government v Schierhout* 1922 AD 179 at 187ff; *SA Airways Pilots Association v Minister of Transport Affairs* 1988(1) SA 362 (W).

³⁷ S 16(4) of the Public Service Act.

³⁸ See *Langeni v Minister of Health & Welfare* 1988(4) SA 93 (T) at 100F. For a detailed analysis - see Grogan J., 'Unfair Dismissal of 'Contractual' Public Employees', 11(1990) *ILJ (SA)* p.655; Rycroft A., 'Is There Still A Right to Terminate Employment on Notice Without Giving Reasons?', 107(1990) *SALJ* p.279.

review in respect of these employees is to guarantee job security in the same way as it does with the public employees, or whether it merely ensures that whenever private employees are dismissed, certain procedural requirements are complied with. In other words, is there substantive employment protection in relation to private sector employees? To what extent does the law limit the employer's power to dismiss a private sector employee?

It has been said, albeit correctly, that the disciplinary power of the employer illustrates the nature and extent of the employee's subordination in the employment relationship.³⁹ The traditional legal approach views dismissal within the wider context of discipline in the workplace.⁴⁰ Thus dismissal is taken to be part of the employer's right to discipline. Unlike public employees, the employer's right to dismiss in the case of private employees seems to be taken for granted. This finds its justification from the traditional distinction between the public and private sector. The former is held to be run by the state in the interests of the public at large and is largely financed by public funds. Thus the "employer" in this case merely exercises a public duty which must be exercised in the public interest. Hence the applicability of the process of judicial review where and when it is believed that such a person has not properly carried out his duty. In other words the courts intervene on behalf of the ordinary citizen who is infringed by an improper administrative

³⁹ See Davies P. and Freedland M.R., *Labour Law: Text and Materials*, (Weidenfeld & Nicolson, 1984) p.421.

⁴⁰ See, for example, Rycroft A. and Jordaan B., *A Guide to South African Labour Law*, (Juta, 1990) Ch.4.

action of a public official. This analogy has not been applied in relation to private sector employees. Since the private sector is not, inter alia, financed by public funds and is not bound by public interest considerations like the public sector, there has been a reluctance to impose many external constraints upon it. Thus private sector employers are seen as exercising private power. The right to dismiss in their case seems to be treated as a personal right of the employer. The law against unfair dismissal does not challenge this right, but it simply sets limits on the employer's power to dismiss arbitrarily.⁴¹

The question that has been asked is whether these statutory limitations to the employer's traditionally wide powers of discipline and dismissal vest the employee with a legally protected right to his job.⁴² However if it is accepted that the effect of the law is merely to set the limits on the employer's power to dismiss arbitrarily, the answer to this question would be in the negative. The employer's right to dismiss, it is submitted, is still intact. It is the abuse of this right that the law seeks to avoid. An employee would be held to have a legally protected right to his job if it was legally possible for him to actually challenge the employer's power to dismiss. The employer's right to dismiss

⁴¹ There are also other statutory measures that limit the power of private sector employers -see, for example, section 14 of The Basic Conditions of Employment Act 3 of 1983 which sets minimum notice periods. The Wage Act 5 of 1957 may also provide for minimum notice periods. Again employees cannot be dismissed for trade union membership - see section 66 of the Labour Relations Act 28 of 1956; section 18 of Act 3 of 1983; section 25 of Act 5 of 1957; section 48 of The Manpower Training Act 56 of 1981 and section 18 of The Machinery and Occupational Safety Act 6 of 1983.

⁴² Cassim N., 'Unfair Dismissal' 5(1984) *ILJ* (SA) 275 at 292; Le Roux P A K, 'The Unfair Dismissal of Employees' 1983 *Industrial Relations Journal of South Africa* p.28.

cannot, for example, be challenged on the basis that it is *ultra vires* because it is only the employer who has the power to dismiss. More importantly, it does not seem to be the legislative intention to introduce a fully-fledged system of judicial review within industrial relations. The industrial court's function is not primarily to review management decisions but, as Rycroft and Jordaan also observe,⁴³ the Wiehahn Commission recommended the establishment of an industrial court not simply to relieve pressure on the ordinary courts but to introduce a mechanism whereby unnecessary strike action would be replaced by a judicial enquiry into the dispute. This has been confirmed by the Appellate Division in *Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others*⁴⁴, where it has been held that the Supreme Court's review jurisdiction has not been ousted by either the Industrial Court or the Labour Appeal Court. The Labour Appeal Court's power to review decisions of the industrial court was held to be narrower than the common-law powers of review exercised by the Supreme Court.⁴⁵ The implication of this dictum is that the statutory system of judicial review cannot surpass judicial review as grounded on common law.

Thus the pre-existing rights of the parties aggrieved by the decisions of the industrial court to seek redress by way of common law review have not

⁴³ Ibid. p.189.

⁴⁴ 1993(4) SA 621 (A). See also *SA Technical Officials Association v President of the Industrial Court* 1985(1) SA 597 (A).

⁴⁵ At 639E.

been curtailed.⁴⁶ The Supreme Court therefore still retains its concurrent jurisdiction with the Labour Appeal Court.

Although Botha JA in the above case could not find anything in section 17B(2) of the Labour Relations Act which specifically seeks to curtail or oust the review powers of the Supreme Court, neither could his Lordship find a reasonable explanation of the concurrence of jurisdictions between the two forums. As correctly argued by Gauntlett SC in the case, the status and staffing of the Labour Appeal Court, the powers accorded to it and the procedures under which it operates, place it in the hierarchy of the Supreme Court, in which it operates as a Specialist Higher Court.⁴⁷ While Botha JA acknowledged the existence of Specialist Courts in our judicial system, such as Water Courts, Special Income Tax Courts etc., in whose case the jurisdiction of the Supreme Court has been ousted, in the case of these, his Lordship observed, there has been a clear legislative policy which recognises and gives effect to the desirability, in the interests of administration of justice, of creating such structures to the exclusion of the ordinary courts. But while the Labour Appeal Court was clearly intended to be a Specialist Court, the legislature never intended it to have exclusive jurisdiction.

Furthermore, while the court acknowledged that it is difficult to think of a sensible reason why the legislature would have wished to bestow upon the

⁴⁶ At 641A-C.

⁴⁷ Ibid. p.628B-E.

newly created Labour Appeal Court, which ranks equal in status with the Supreme Court, the power to review the proceedings of the industrial court, while at the same time retaining the parallel existing procedure in the Supreme Court, the court treated as remote, the probability of 'forum-shopping' created by concurrent jurisdiction.⁴⁸ Instead the court saw no reason why it would be difficult or inconvenient in practice to cope with a dual system of review.⁴⁹ However the problem of forum-shopping in labour law, it is submitted, is more than a procedural problem. It lies at the very heart of legislative intervention in labour relations. It brings into question the whole object of legislative intervention, the question being, if labour legislation is meant to be a departure from the common law of 'master and servant' why then retain its control over statutory procedures which are meant to protect employees?

This, in other words, means that employers would be bound by statutory mechanisms only when they choose to. While the malpractice of forum-shopping in practice may be less frequent, that should not and does not necessarily point towards the efficiency of the concurrent jurisdiction system. There are many probable reasons why employers may choose not to engage in the malpractice of forum-shopping. One of the obvious reasons is the cost of litigation. Secondly it may not always be to the advantage of employers to

⁴⁸ See Zondo R.M.M., *Forum-Shopping: The Industrial Court versus the Supreme Court*, (1987)8 *ILJ SA* p.571.

⁴⁹ At 640E-G.

challenge the statutory procedures of judicial review by resorting to the common law jurisdiction of the Supreme Court as industrial disputes involve costs to all the parties engaged in them. But in matters which employers feel they cannot be moved, it is quite conceivable that resort might be had to the Supreme Court; even the cost of litigation and industrial action in these circumstances might be less of a deterrent. It has been noted, for example, that American employers have been prepared to pay heavy fines for refusing to comply with the statutory requirement of recognising trade unions in their plants.⁵⁰

The question whether common law powers of review are retained because the legislature intended them to remain or whether such is a matter of judicial interpretation, is part of the wider debate concerning the autonomy of labour law.⁵¹ The issue revolves around the often divergent roles of both common law and legislation in labour relations. It has been argued by some, Lord Wedderburn in particular, that in order for legislation to have a greater impact on labour relations, the role of common law should be excluded or be very minimal. The critiques of this view have pointed towards both conceptual and practical problems within the 'autonomy' school of thought⁵², in

⁵⁰ See, for example, Townshend-Smith R., 'Trade Union Recognition Legislation - Britain and America Compared', (1981) *Legal Studies* p.190.

⁵¹ See Lord Wedderburn, 'Labour Law: From Here to Autonomy', 16(1987) *ILJ (UK)* p.1.; Howarth D., 'The Autonomy of Labour Law: A Response to Professor Wedderburn', 17(1988) *ILJ (UK)* p.11.; Summers C., 'Lord Wedderburn's New Labour Law: An American Perspective', 21(1992) *ILJ (UK)* p.157.

⁵² See Howarth (supra).

particular, that it would be difficult for labour law to exist independent of other fields of law and that it is not necessarily common law that is inimical to employment relations, but those who interpret the law in a way that does not favour or protect the employees.⁵³

But if one accepts that judges do not make but merely apply the law,⁵⁴ and that the curtailment of the powers of a court of law will not be presumed in the absence of an express provision or a necessary implication to the contrary,⁵⁵ then the retention of common law review over decisions of the industrial court goes beyond the parameters of judicial interpretation. One can thus agree with Botha JA in the above case, that parliament never intended statutory judicial review to supersede common law review, and by the same token, that parliament did not contemplate the establishment of an autonomous system of labour law. The crux of this problem, it is submitted, lies not within the legal rules per se, but is firmly rooted in the broader social and economic norms. Thus what the law against unfair dismissal has achieved is not, as Rycroft and Jordaan also observe,⁵⁶ greater job security; it has

⁵³ Ibid.

⁵⁴ Whether judges do make the law or merely apply it, is still a jurisprudential conundrum. See, for example, Cotterrell R., *The Politics of Jurisprudence*, (Butterworths, 1989) Ch.6.

⁵⁵ See *De Wet v Deetlefs* 1928 AD 286 at 290; *Lenz Township Co. (Pty) Ltd. v Lorenz NO en Andere* 1961(2) SA 450 (A) at 455A-D; *Minister of Law and Order & Others v Hurley and Another* 1986(3) SA 586 (A) at 584A-C; *Administrator, TVL. & Others v Traub & Others* 1989(4) SA 731 (A) at 764E-F; *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government & Others* [1959] 3 ALL ER 1 HL at 6D-F.

⁵⁶ Rycroft & Jordaan p.137.

done little else than to reform management practice and to increase the cost of implementing disciplinary decisions. The law has hardly challenged the actual power of employers to dismiss.

This question will be considered in detail in chapter five below, but suffice it for now to point out that two major points of criticism have been made in relation to South African law of unfair dismissal, namely; that viewing unfair dismissal within the wider doctrine of unfair labour practice involves some doctrinal problems, and secondly, that the impact of the law against unfair dismissal is limited in as far as it does not yield substantive employment protection for employees. The question considered below is whether South African law is unique in this regard; whether the discrepancies identified in South African law can be remedied by a separate and detailed statutory provision for the doctrine of unfair dismissal. Thus what follows below is a comparative analysis of English law of unfair dismissal, which has a broader and more detailed statutory framework, and South African law.

PART II

4.3 A Comparative Analysis of English and South African Law of Unfair Dismissal

4.3.1 Background to the English Law of Unfair Dismissal

Prior to 1971 in England an employer was entitled to dismiss an employee for any reason or no reason at all. The only issues involved were whether or not the employee was entitled to a certain period of notice or his conduct was

such as to warrant instant or summary dismissal.⁵⁷ The Contracts of Employment Act 1963⁵⁸ did however lay down certain minimum periods of notice which had to be given in respect of a lawful dismissal, but such a notice could be increased either because there was an express provision to this effect in the individual contract of employment or because the position of the employee was such that a period in excess of the statutory minima could be implied into the contract, and the decisions of the court in the latter cases ranged from one week to one year, depending on the facts of the case.

There were also special cases where the right not to be dismissed unfairly was enshrined into an employee's contract by virtue of a special status. This includes office holders⁵⁹ and crown employees.⁶⁰ Other cases involved instances where a dismissal could not be carried out unless the rules of natural justice were observed,⁶¹ and cases where the approval of some other person or body had to be obtained before dismissal.⁶² In 1971 the Industrial Relations Act created a right for many employees not to be unfairly dismissed. The law was substantially re-enacted, though with some minor amendments, in the Trade Union and Labour Relations Act 1974 and further

⁵⁷ See, for example - *Mentzer v Bolton* (1854) 9 Exch. 518; *Vernon v Findlay* [1938] 4 ALL ER 311; *Payzu v Hannaford* [1918] 2 KB 348.

⁵⁸ Repealed and re-enacted in 1972.

⁵⁹ See, for example, *Knight v A-G* [1979] ICR 194.

⁶⁰ See *R v Civil Service Appeal Board, ex parte Bruce* [1989]2 ALL ER 907; [1989] ICR 171 CA.

⁶¹ See *Ridge v Baldwin* [1964] AC 40, [1965]2 ALL ER 66 HL.

⁶² *Cory Lighterage v T & GWU* [1973]2 ALL ER 558, [1973] ICR 339.

amendments were made by the Employment Protection Act 1975.

The 1975 Act had two broad objectives: first, to use the law to support and extend collective bargaining and, second, to extend the employment rights of individual employees. As Davies and Freedland also point out,⁶³ the dividing line between the two is not clear-cut. Some rights conferred upon individuals, such as the right not to be discriminated against by employers on the grounds of trade union membership or activities, were clearly also intended to support collective bargaining. Here one sees a convergence of public policy and labour legislation between South Africa and Britain. As it can be argued, the doctrine of unfair labour practice in South Africa had, as its broader objective, the discouragement of unfair labour practices which contribute to bad industrial relations and lead to industrial conflict. By discouraging these, the LRA seeks to promote good industrial relations where issues affecting the interests of employers and employees (or trade unions) are resolved amicably through the processes of collective bargaining provided by the Act, i.e. industrial councils and conciliation boards.⁶⁴ As we saw above, the doctrine of unfair dismissal in South Africa is also part of the broader doctrine of unfair labour practice. Hence the convergence with the British system as the wider doctrine of unfair labour practice seeks to promote both the collective interests and simultaneously guarantee individual rights.

⁶³ Davies P. and Freedland M., *Labour Legislation and Public Policy*, (Clarendon Press, 1993) p.376ff.

⁶⁴ See also the long title of the Act.

Also discernable, is some convergence on the background behind the EPA 1975 in Britain and the LRA after the Wiehahn reforms. As we saw above, the Wiehahn reforms were mainly brought about by the powerful emergence of the black trade union movement and its impact on the country's industrial relations, part of which was a spate of industrial unrest during the 1970s. The major cause of this was the policy of racial discrimination which was also characteristic of industrial policy and labour legislation. The general lack of statutory protection for the majority of black workers meant more room for the application of common law principles of 'master and servant', which did not offer much protection for workers. In Britain, up until the mid 1960s, the dominant philosophy in industrial relations was that of collective *laissez-faire* or voluntarism. This generally meant that the state played a limited role in industrial relations.

The roots of this philosophy were firmly fixed in the history and development of the British trade union movement. These developed in a hostile environment without much government and legal intervention.⁶⁵ The unions fought and won recognition battles with employers all by themselves. This consequently engendered self-reliance on the part of the trade union movement. The state on the other hand felt less obliged to intervene as industrial relations seemed to be an autonomous process.

⁶⁵ For a detailed analysis of the impact of collective *laissez-faire* in British industrial relations and labour legislation - see Davies & Freedland, op. cit. p.8-59.

However the mid 1960s witnessed a dramatic increase in industrial unrest in Britain. This was sufficient to change both public and government attitude towards autonomous industrial relations. The concern was the growth of trade union power, which was believed to be one of the major causes of industrial unrest. This, in Britain, necessitated a break with the tradition of voluntarism, while in South Africa the need was felt to abandon discriminatory labour policies and legislation. This was the birth, in both jurisdictions, of a comprehensive labour legislation,⁶⁶ legislation that sought to provide some statutory protection for employees while at the same time regulating trade union power. The first piece of legislation in Britain was the Industrial Relations Act 1971.⁶⁷ Later also came the 1974 Trade Union and Labour Relations Act.

Because the TULRA 1974 contained many provisions that sought to regulate trade unions and somewhat restrict their power, the EPA 1975 was intended by the 1974 Labour Government to demonstrate the "positive" use

⁶⁶ Statutory intervention of course dated further back than this. However most of intervening statutes mainly laid down minimum conditions of employment. They did not seek to regulate much of the conduct of industrial relations, in particular collective labour relations. For example, in South Africa, the Basic Conditions of Employment Act 3 of 1983 was preceded by the Shops and Offices Act 41 of 1939, 1964. In Britain an example is The Contracts of Employment Act 1963.

⁶⁷ However this Act was subsequently repealed as it did not achieve dramatic success. In fact there was much opposition to it from sections of both the trade union and employer camps. It has been argued that the Act overestimated the impact of law on the conduct of the parties to the labour relationship by introducing a too comprehensive regulatory programme parts of which were inimical to the voluntarist background of British industrial relations. For an analysis of the impact of the 1971 Act - see Weekes D. *et al*, *Industrial Relations and the Limits of the Law*, (Basil Blackwell, 1975).

of labour law.⁶⁸ Hence the twin objectives of strengthening collective bargaining and securing individual employment rights. It was in the 1975 Act that unfair dismissal was expressly provided for in greater detail. Subsequently all relevant law was brought together in the Employment Protection (Consolidation) Act 1978 and a number of additional amendments are to be found in the Employment Acts 1980-90.

Although the statutory protection against unfair dismissal has replaced most of the common law principles, these however still remain applicable, especially those relating to summary, lawful and wrongful dismissal as there may be situations when the common law remedy is more appropriate or even the only remedy available. The following particular circumstances may be noted:

- (a) The maximum compensatory award for unfair dismissal is currently £10 000 plus an appropriate basic award. Thus a highly paid employee who is entitled to a long period of notice may be able to obtain substantially higher damages at common law.
- (b) An employee who lacks a sufficient period of continuous employment to qualify for unfair dismissal rights may nonetheless sue for wrongful dismissal and may also be able to sue for the loss of his right to bring a claim for unfair

⁶⁸ Davies & Freedland (1993) p.378.

dismissal.⁶⁹

- (c) A fair dismissal may nonetheless be a wrongful dismissal.⁷⁰
- (d) The dispute may have a public law element, and not be concerned with contractual rights.⁷¹
- (e) A Dismissal which is in breach of a contractual or statutory dismissal procedure may enable an employee to bring an action for breach of contract⁷² or to seek an injunction to restrain the breach.⁷³

Generally, since the jurisdiction of industrial tribunals is concurrent with that possessed by the ordinary courts, an employee will thus opt for whichever remedy will produce the most advantageous results.

4.3.2 The Statutory Law of Unfair Dismissal

The law of unfair dismissal is contained in sections 54-65 of the Employment

⁶⁹ See *Robert Cort & Son LTD. v Charman* [1981] IRLR 437; [1981] ICR 816 EAT. See also *Stapp v Shaftesbury Society* [1982] IRLR 326 CA.

⁷⁰ *Trenagowan v Robert Knee & Co. Ltd.* [1975] ICR 405, [1975] IRLR 492.

⁷¹ *R v Secretary of State for the Home Department, ex parte Benwell* [1985] QB 554, [1984] ICR 723.

⁷² *Shook v London Borough of Ealing* [1986] ICR 314, [1986] IRLR 46.

⁷³ *Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590, [1985] IRLR 203.

Protection (Consolidation) Act of 1978. These statutory provisions remain the primary source of the law of unfair dismissal despite the vast number of reported cases on the issue.⁷⁴

4.3.2.1 Application of the Act

(a) Qualifications

Under section 54(1), every employee shall have the right not to be unfairly dismissed by his employer. However there are certain requirements to be met before one qualifies to bring a claim of unfair dismissal.⁷⁵

- An employee must be able to show continuous employment in a job which is not an excluded category of work. The minimum period of continuous employment is not less than two years ending with the effective date of termination.
- If on or before the effective date of termination, the employee has reached the normal retiring age, or if more than the age of 65, then there is no right to present a claim. As held in Waite v Government Communication Headquarters,⁷⁶ normal retiring age refers to the age that employees can normally be

⁷⁴ See Harrison T., *Employment Law*, (Business Education, 1990) p.187.

⁷⁵ Harrison, op. cit. p.187-9.

⁷⁶ [1983] AC 714. See also *Hughs v DHSS* [1985] AC 776, *Discount Tobacco and Confectionary LTD.* [1990] IRLR 15 and *Wood v Cunard Line LTD.* [1990] IRLR 281. The exclusion does not apply if an employee is dismissed for trade union membership or activities of a trade union or intention to join a trade union.

compelled to retire, unless there is a special reason to apply a different age in a particular case.

(b) Exclusions

The following persons are not protected by the provisions of the EPCA:

- Any employment as a master or member of the crew of a fishing vessel where the employee is remunerated by a share of the profits;

- Any contract of employment where the employee ordinarily works outside Great Britain. Even if an employee works for most of his time outside Great Britain or for a majority of his time, he can still be said to be ordinarily working outside Great Britain;⁷⁷

- A fixed term contract of one year or more where the dismissal consists of a failure to renew, if, before that term has expired, the employee agrees in writing to exclude any claim in respect of his dismissal. In so far as successive fixed term contracts are concerned, it is the length of the final contract that matters. If this is less than one year, an exclusionary clause cannot

⁷⁷ *Tye v Mower Scaffolds* [1976] IRLR 91. See also *Wilson v Maynard Shipbuilding Consultants AB* [1978] QB 665, [1978] ICR 376, [1977] IRLR 491 CA.

operate.⁷⁸

- Any employment covered by dismissal procedure agreement which has been designed and approved by the Secretary of State.
- Employees who work for foreign Governments and other international organisations which enjoy diplomatic immunity.⁷⁹

4.3.2.2 Objects of the Act

The English statutory doctrine of unfair dismissal sought to meet the following shortcomings of the common law of wrongful dismissal:⁸⁰

- The level of damages, generally only compensating for the appropriate notice period;
- The inability of the dismissed employee to regain his job;
- The artificiality and archaism of the principles of summary dismissal;

⁷⁸ *Open University v Triesman* [1978] ICR 324, [1978] IRLR 114.

⁷⁹ *Gadhok v Commonwealth Secretariat* (1977)12 ITR 440 CA.

⁸⁰ See Bowers J., *A Practical Approach to Employment Law*, 2nd Edn. (Financial Training, 1986) p.143.

- The lack of procedural protection for most employees.

4.3.2.3 Substantive Provisions

(a) The Fairness or Unfairness of Dismissal

Once it has been established that dismissal has taken place, it must then be determined whether or not the dismissal was unfair. In this regard section 57 of the EPCA lays down five grounds on which dismissal is capable of being fair, as follows:

- A reason relating to the capacity or qualifications of the employee for performing the work of the kind which he was employed by the employer to do. 'Capability' here includes any assessment by reference to skill, aptitude, health or other physical or mental quality, and 'qualifications' means any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee holds;
- A reason which relates to the conduct of the employee;
- The redundancy of the employee;
- Because the employee could not continue to work in the position which he held without contravening (either in his part or on the part of the employer) a restriction or a duty imposed

by or under a statute;

- Some other substantial reason as to justify the dismissal of an employee holding the position which he held.

Whether a particular dismissal on one or more of these five reasons will be fair or unfair will depend on the circumstances of each case; whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee, and the question will be determined in accordance with equity and the substantial merits of the case.⁸¹ Furthermore while it is for the employee to prove that he was dismissed, it is for the employer to show the reason for the dismissal, and that it was one of the above mentioned reasons. It will then be for the industrial tribunal to find, on the basis of the evidence presented whether or not the employer acted reasonably in treating that reason as a sufficient ground for dismissal. Should he fail to show the reason which is one of the above five, then the dismissal is automatically unfair.

In *Raynor v Remploy LTD.*⁸² a group general manager was dismissed for alleged lack of business judgment and general inefficiency. He had been employed for five years and the tribunal rejected the company's allegations as spurious. Since there was no evidence of incapacity, the dismissal was unfair.

⁸¹ EPCA, section 57(3) as amended by Employment Act 1980.

⁸² [1973] IRLR 3.

The tribunal in *Castledine v Rathwell Engineering LTD.*⁸³ refused to accept the general allegations of incompetence, pointing to the favourable reference given to an employee subsequent to his dismissal. The employer cannot be expected to win his case if he fails to give or call evidence on which the tribunal can reach its conclusion on the reason for the dismissal or its reasonableness, and general allegations without such evidence will normally be insufficient.

The test is 'did the employer act reasonably?', and not whether the industrial tribunal agrees with what the employer did.⁸⁴ A decision whether the employer acted reasonably is a question of fact for the industrial tribunal to decide,⁸⁵ which can only be challenged if the decision was perverse or based on an incorrect perception of the law. The point in time at which the reasonableness of the employer's decision to dismiss is to be tested is when the employment comes to an end, not when the decision to dismiss is taken, nor when the notice to terminate is given.⁸⁶

The Employment Appeal Tribunal⁸⁷ provided useful guidelines in relation to the approach to be adopted in applying the test of reasonableness

⁸³ [1973] IRLR 99.

⁸⁴ *Grundy (Teddington) LTD. v Willis* [1976] ICR 323, [1976] IRLR 118.

⁸⁵ *Iceland Frozen Foods LTD. v Jones* [1982] IRLR 439. See also *Kent Community Council v Gilham* [1985] ICR 233, [1985] IRLR 18 CA.

⁸⁶ *Stacey v Babcock Power LTD.* [1986] QB 308, [1986] ICR 221.

⁸⁷ Equivalent of the Labour Appeal Court in South Africa.

in *Iceland Frozen Foods v Jones*.⁸⁸ Here Browne-Wilkinson J. suggested that the approach which should be adopted by tribunals was to start by considering the words of section 57(3)⁸⁹ and then determine the reasonableness of the employer's conduct, not whether they believe the conduct to be fair. The tribunal must resist the temptation to substitute its own views as to the right course for the employer to adopt and recognise that there is a band of reasonable responses to the employer's conduct. Within this band reasonable employers could take different views.⁹⁰ The role of the tribunal then is to decide whether the decision of the employer in the case before it comes within the band of reasonable responses which the employer might have adopted. If the dismissal is within the band of reasonable responses which the employer might have taken, it is fair, but otherwise it is unfair.⁹¹

South African law has been distinguished in this regard on the basis of the fact that the industrial court in South Africa is guided by "fairness" and not "reasonableness" as is the case with the industrial tribunal in Britain. However this does not really seem to be "the" distinction between the two jurisdictions. The touchstone of the law of dismissal in both jurisdictions clearly appears to be fairness. The distinction, it is submitted, lies in the approach or criterion adopted by the industrial courts in both countries in

⁸⁸ (supra).

⁸⁹ The section makes a provision for the test of reasonableness.

⁹⁰ Harrison p.196.

⁹¹ See also *Rentokil v Mackin & Another* [1989] IRLR 286.

determining the fairness of dismissal. The English industrial tribunal uses the criterion of reasonableness as a means towards arriving at the fairness or unfairness of each dismissal. Thus "reasonableness" in this case is not an end in itself, but a step on the path towards fairness. While reasonableness is not an express statutory guideline for the industrial court in South Africa, it is doubtful whether the industrial court can actually avoid having to consider certain issues relating to reasonableness at some point in its enquiry. Since one of the basic requirements of a fair dismissal is a valid reason, part of the court's task therefore is to determine the validity of the reason for dismissal. What the court is asked to do here is to determine whether the employer made a sound or sensible judgment. This is still the first stage of the enquiry, and the court would invariably not rush into questions of fairness without fully ascertaining the validity of the reason for dismissal. And in determining validity, the court is unlikely to find valid a reason upon which any other sensible employer in the same situation would have dismissed the employee in question. Thus in so doing, the court is, consciously or unconsciously, applying the test of reasonableness.

What this means is that fairness and reasonableness are not totally mutually exclusive. What is fair may also be reasonable and vice versa. As Cameron *et al* correctly suggest, validity goes to proof and to the applicability to the particular employee of the reason for the dismissal; while fairness goes to the weight or sufficiency of the reason.⁹² In both English and South

⁹² Ibid. p.111 and 144.

African law therefore the ultimate guideline is that of fairness. But there has to be a way of arriving at a decision as to whether dismissal was fair or unfair. The enquiry does not stop at determining the validity of the reason for dismissal, but it is when all the merits of the case have been evaluated that the court can make a decision as to whether dismissal was fair or unfair.

Anderman criticises the reasonableness criterion on the basis that it does not impose on employers an objective test of fairness; instead, he argues, it implies that reasonableness is to be limited to reflecting the lowest common denominator of acceptable managerial practice.⁹³ For employers, it is submitted, applying the objective standards of fairness would be difficult since they are interested parties. The test of fairness to employers is more likely to be a subjective one; one that is partially based on standard managerial practice and established norms of the workplace, which may not necessarily or always be judged as objectively fair by the court. Hence the court's enquiry first has to determine whether the reason for dismissal was valid before coming to the question of fairness.

Reasonableness has also been held to be less exacting than a criterion simply based on equity, since it is possible for reasonable people to act differently.⁹⁴ While it is true that reasonable people can and do act differently, it would however be wrong to assume or imply that the criterion

⁹³ Ibid. p.322.

⁹⁴ Cameron E. *et al*, *op. cit.* p.109.

of equity or fairness is itself more exact. Both reasonableness and fairness tend to suffer from a common problem of relativity. Nothing is absolutely fair or reasonable. Reasonableness in this case, it is submitted, would be less exacting if the sole and ultimate object was to determine whether dismissal was reasonable or not. It should also be borne in mind that the role of the court is not merely to use its casting vote in favour of either the employer or employee. The primary duty of the court is to adjudicate using the tenets of fairness. In so doing, it has to take on board the interests of both the employer and the employee. This task however is compounded by the fact that the tenets of fairness are not absolute.

Therefore while reasonableness can be criticised for placing too much emphasis on the interests of the employer by making an enquiry depend on what a reasonable employer would do, it does not necessarily follow that an enquiry based on equity excludes the interests of the employer. What seems to be the crux of the distinction between the English criterion of reasonableness and the criterion of equity/fairness in South Africa is that English law apparently assumes the legitimacy of managerial control and power over employees.⁹⁵ Thus dismissal is perceived purely as part of the

⁹⁵ The English approach, it can be argued, reflects the unitarist perception of relations between employers and employees. This is an industrial relations theory that rejects the conflict of interests in labour relations and postulate that management has the right to manage and that employees or trade unions are not a opposing force. The interests of these are seen as fundamentally common. The implication this theory makes is that employees do not and should not question the employer's right to manage - see further Fox A., 'Industrial Relations: A Social Critique of Pluralist Ideology', in Child J (Ed), *Man and Organization* (Allen & Unwin, 1973) p.189; Farnham D. and Pimlott J., *Understanding Industrial Relations*, 2nd Edn. (Cassell,

managerial prerogative. The equity criterion in South Africa on the other hand, appears to play down this assumption and portrays the role of law to be that of balancing the interests of both employers and employees through the application of the rules of fairness.⁹⁶

(b) Other Reasons for Dismissal

The EPCA provides for other reasons upon which an employee may be dismissed, and these include:

(i) Automatically Fair Reasons

These mean that a dismissal under these conditions is automatically fair. The tribunal is statutorily bound to find such dismissal fair. These include cases where:

- the decision was taken with the purpose of safeguarding national security and a certificate signed by or on behalf of the

1983) p.52. See also Batstone E., *The Reform of Workplace Industrial Relations: Theory, Myth & Evidence*, (Clarendon Press, 1988) p.1-71.

⁹⁶ The South African approach seems to be more in line with pluralism in that it sees the degree of common purpose which can exist industry as being of very limited nature. This theory holds that conflict is inevitable in industrial relations; and thus there should be in place, mechanisms and institutions within the industrial relations system, which are designed to institutionalise industrial conflict and avert its harmful effect. See further Fox A., 'Industrial Sociology and Industrial Relations', *Royal Commission Research Paper No.3 HMSO*, 1966 p.2. See also Davis D. 'The Functions of Labour Law', XIII *CILSA* 1980 p.212. The adherence to the pluralist tradition in South Africa could probably be explained through the fact that the system of industrial relations developed and operated in a socially conflictual environment, and has not been able to escape conflict that resulted from the policies of racial discrimination which were also vigorously pursued in industrial relations.

Minister is conclusive evidence of this fact;⁹⁷

- dismissal was for taking part in a strike when all strikers are sacked.⁹⁸

(ii) Automatically Unfair Reasons

The Act also identifies a number of reasons for dismissal which are automatically unfair. These include, inter alia, dismissals in connection with:

- union activities
- pregnancy

While the Act provides that such dismissals are automatically unfair, a tribunal however may still decide that the employer acted reasonably in the circumstances and so the dismissal be held to be fair.

4.3.2.4 Procedural Provisions

(a) Procedural Fairness

Procedural fairness is provided for in the code of practice drawn up by ACAS

⁹⁷ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Council of Civil Service Unions* [1985] IRLR 28.

⁹⁸ *McCormick v Horsepower LTD.* [1981]2 ALL ER 746, [1981] ICR 535, [1985] IRLR 217 CA.

(The Advisory, Conciliation and Arbitration Service),⁹⁹ on "Disciplinary Practice and Procedures in Employment". The code provides that employees should be fully informed of disciplinary rules and procedures and the likely consequences built in a process involving formal, oral and written warnings. In particular, at some point, the employee should be given the opportunity of putting his case accompanied by a representative from a trade union or otherwise. Another source of procedural standards is the increasing tendency of tribunals to require that the process of dismissal adheres to the rules of natural justice developed and refined in administrative law.¹⁰⁰

The need to comply strictly with disciplinary procedures to justify a dismissal as fair was a feature of the tribunals' approach to reasonableness in the 1970s but by the end of the decade there was a change in approach.¹⁰¹ In *British Labour Pump v Byrne*¹⁰² the EAT formulated the "no difference" principle under which procedural defects could be overlooked. If, despite the non-compliance with a disciplinary procedure, the employer could show that, on a balance of probabilities, the same cause would have been adopted, the tribunal was entitled to find the decision to dismiss a fair one. The "no difference" principle was subsequently approved by the court of appeal in *W*

⁹⁹ This is a statutory body created in terms of the Employment Protection Act 1975, whose task is to adjudicate, arbitrate and conciliate on industrial relations disputes and generally give advice to the parties whenever sought.

¹⁰⁰ See *Whitebread & Co. plc v Mills* [1988] IRLR 501.

¹⁰¹ See *Earl v Slater & Wheeler LTD.* [1972] ICR 508 and *Budgen v Thomas* [1976] ICR 344.

¹⁰² [1979] IRLR 94.

& J Wass LTD. v Binns.¹⁰³

A change of attitude was expressed by the House of Lords in the important case of Polkey v AE Dayton Services LTD.¹⁰⁴ Here both previous cases espousing the "no difference" principle were overruled. The basic facts of the case were that the complainant, a van driver, employed by the defendants for over four years, was without warning or consultation, handed a letter of redundancy. His claim of unfair dismissal was based on the employer's failure to observe the statutory code of practice which provides for warning and consultation in a redundancy situation. Despite there being a disregard of the code, the tribunal, the EAT and the Court of Appeal all found that dismissal was fair. Applying the "no difference" principle, it was held that even if a fair procedure had been adopted, the employer could still have reasonably decided to dismiss.

This approach was rejected by the House of Lords, who held that the employer's decision to dismiss had to be judged by applying the wording of section 57(3), the test of reasonableness. There was no scope for deciding what the employer might have done had he adopted a different procedure. Where the employer fails to observe the code, he will only be acting fairly if the tribunal is satisfied that 'the employer could reasonably have concluded in the light of circumstances known at the time of dismissal that consultation or

¹⁰³ [1982] IRLR 283.

¹⁰⁴ [1987]3 W.L.R 1153.

warning would be utterly useless'. The effect of the Polkey decision then was to restore the importance of procedural requirements in relation to dismissal and to prevent an employer arguing that compliance with the procedure would have made no difference to the final outcome.

4.4 Conclusion

From the above analysis it appears that employment protection is seen within the broader objective of promoting fair labour standards or good industrial relations, particularly from the point of view of the framers of legislation. The main concern seems to be to limit industrial conflict more than to provide employment protection. In this regard, South African law of unfair dismissal has not developed in a totally unique fashion. Similar traits, as we saw above, can also be found in English law. The legislative concern over industrial conflict is understandable when one looks at the evolution of unfair dismissal legislation. The law of unfair dismissal has developed in a conflictual industrial relations environment where the interests of labour and those of capital have been perceived as diametrically opposed to each other. Thus the role of labour legislation has fundamentally been perceived to be to strike a balance between the interests of both capital and labour.

However conflict, as we saw in chapter two, is not necessarily the foundation of the work relationship. An individual hardly enters into a work relationship determined to fight the class war between capital and labour, although a conflict of interest is sometimes inevitable. The conflict approach

seems to assume that industrial relations problems revolve around the conflict between employers and employees or trade unions. While this may be partially true, there are many forces active in the industrial relations environment other than the actions of employers and employees. Job security is not only threatened by the unfair use of managerial power but the market forces also play a decisive role. The impact of these on the modern corporation is immense.¹⁰⁵

In the modern corporation management can no longer be looked upon solely as an owner of the business undertaking, exercising private rights of ownership, including the right to hire and fire. These have increasingly become employees themselves, only charged with the function of managing the firm in the interests of the shareholders. Since it is mainly market forces that seem to be the dominant force in threatening job security, the question has been whether it is fair to leave the interests of employees to the vagaries of the market forces. This has caused some, as we shall see below, to call for more state intervention, as more power is being transferred from the public to the private sector through massive privatisation programmes.¹⁰⁶ Once again the relevance of the distinction between public and private power has been called into question. Whether it is still valid to distinguish between public power and private power when more power has been transferred to the private sector. It has thus been argued that the scope of judicial review should

¹⁰⁵ See chapter 5 below.

¹⁰⁶ This will be discussed in greater detail in the following chapter.

be further extended to regulate the power of the private sector.

For the law of unfair dismissal the significance of this argument has been that the public law rules of natural justice could be efficiently used to enhance job security¹⁰⁷ when judicial review is used to regulate private power. According to Collins, since in a mixed economy, most employees can allege that their employers are either the government itself or industries and services licensed as a state monopoly, the scope of public law is extremely broad.¹⁰⁸

¹⁰⁷ See Collins H., 'Dismissal and Public Law Remedies', 13(1984) *ILJ* (UK) p.174.

¹⁰⁸ *Ibid.*

Chapter 5

CONCLUSION: EMPLOYMENT PROTECTION, CORPORATE CONTROL AND THE DILEMMA OF LAW

5.1 Introduction

With the application of the public law rules of natural justice in unfair dismissal cases, it was hoped to introduce into labour law higher standards of fairness. It has also been readily accepted that the rules of natural justice are merely a procedural device; a practical mechanism to achieve procedural fairness. However there can hardly be any procedure without substance; policy emanates from principle. The rules of natural justice thus can hardly be perceived as solely procedural. The broader principle behind natural justice is the promotion of justice, equality and fairness in society. When these ideals are not aspired to, the application of natural justice becomes nothing else than a 'useless formality' or 'an unacceptable faith in proceduralism'. Hence the introduction of these public law rules into the realm of labour law has called into question the efficacy of contract as the basis of the employment relationship; while at the broader jurisprudential level, the public/private law distinction has been under fire.

At the heart of the public/private law debate is the question whether or not the law should be used to advance public policies and public interest in labour and industrial relations. In other words, the state should play a more affirmative role in the regulation of corporate power. For unfair dismissal, the

question is whether the law should regulate the power of management to dismiss or whether such decisions should be left to management to decide in accordance with the demands of the labour market and economic necessity. The application of the public law rules of natural justice in cases of unfair dismissal presupposes the use of law to curb managerial power to dismiss. This view, as we saw in chapter two, is supported from the organizational perspective, which looks at employers and employees as part of the same organization performing different functions, with the former entrusted with the duty to manage the firm. And as such, employers have been held not to have an unfettered discretion or unlimited powers in their management of the firm. It is this discretion that the law seeks to circumscribe. The opposing view, also called the 'contractual' paradigm, advocates a limited role of state or legal intervention in the regulation of corporate power. It advances an economic argument that the corporation should be rid of stringent external controls; employers should be given freedom to determine the labour requirements of the firm according to the dictates of the labour market. In this chapter then we examine comparatively both views and their implications on the substantive underpinnings of the law of unfair dismissal.

5.2 Competing Paradigms of Corporate Control

5.2.1 The 'Contractual' Model

Within the labour law spectrum, as we saw in chapter 4, some scholars have argued against the contract as the basis of the employment relationship, while those who have not, have at least doubted the validity of the 'contractual'

model. However outside the labour law spectrum the debate is more complex than merely determining whether contract should still be the cornerstone of the employment relationship. The broader question seems to be whether or not to tighten external controls over the modern corporation. This derives from the many changes through which the modern corporation has been over the last decade in many industrialised and industrialising countries.

The decade witnessed a revolution in the practices and theory of the business corporation. Due to, among other things, changes in the international economy, the decade saw, for example, a dramatic wave of take-overs, buy-outs and mergers among corporations. Many countries saw rising levels of inflation and unemployment. The cumulative effect of these changes was to necessitate economic and industrial restructuring. As Stone observes,¹ the wave of corporate restructuring produced unprecedented wealth of corporate raiders, enormous commissions for investment bankers, and substantial gains for many stockholders. At the same time, it left a trail of devastation for employees and the communities in which they live.

For policy makers in government the question has been the extent to which the power of the modern corporation has to be regulated, including protective measures for employees as it has been increasingly difficult for the labour movement to protect its members in the face of business change. In the unfair

¹ Stone K., 'Labour Markets, Employment Contracts and Corporate Change', in McCahery J. *et al* (Eds), *Corporate Control and Accountability: Changing Structures And Dynamics of Regulation*, (Clarendon, 1993) p.61.

dismissal arena, for example, employees have notably been powerless against economic dismissals or retrenchments.

The exponents of the 'contractual' theory have advanced an economic argument against the tightening of external controls over corporate power. One argument has been that job loss that follows corporate restructuring is not a problem because an employee who loses his or her job will get another one at a wage equal to the value of his or her marginal product; in the meantime, according to this view, everyone is better off because production has been made more efficient. Perhaps employees pay some slight costs in terms of transitional unemployment, but it is short-lived, and is off-set by the net gains from capital mobility. This theory however has been held to be incongruent with reality, with the evidence of extensive and lengthy job loss too convincing, and human suffering too poignant to gainsay the fact that corporate transformations and restructuring have imposed serious costs on employees.²

Another view holds that employees pay a price for corporate transformation, but that is ultimately for the greater good. If someone has to pay:

"...why not employees?...If employees want to strike a better deal and shift the costs to someone else, they should try to do so. For example, they could unionize and bargain collectively for provisions that ensure that the costs of corporate restructurings are not borne by them. Alternatively, they could

² Ibid. p.62.

*invest in human capital, and learn valuable skills or even a profession, thereby enhancing their labour market power. If they cannot or do not choose either to unionize or to invest in human capital, then they will be the ones to pay the price of economic restructuring, and deservedly so."*³

These two arguments draw support from the contractual theory of the firm. The firm, according to Jensen and Meckling,⁴ only exists as a metaphor for the contractual relations between a set of constituent parts. These parts include capital, supplies of raw materials, customers for output and the communities in which the firm operates. The different parts come together to form the 'modern' business firm. The parts are interdependent in so far as each is better able to pursue its interests if it does so in conjunction with others. The way the parts come together is defined by private contracting and external law - meaning, that contract and legal regulation define the relations of dependency, power and advantage between the various constituencies of the firm.

Stone challenges this contractarian theory of the firm in a fashion similar to many labour lawyers. She equally challenges the assumption that the employment relationship is actually based on the express terms of the contract. In challenging this notion, she argues that the employment contract does not involve a simple exchange process between wages and labour, and is not

³ Ibid.

⁴ Jensen M.C. and Meckling W., 'Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure', 305(1976) *Journal of Financial Economics* p.311.

founded upon express terms and conditions.⁵ Instead she argues that an employment contract can be compared, for example, with a contract between a dealer and a manufacturer where the latter agrees to supply the former with the product for a certain period of time. This type of contract, she argues, is not usually premised on specific and certain terms. It does not, for example, cover contingencies like when the manufacturer cannot deliver the goods because of unforeseen circumstances, like when the bridge over which the delivery van drives has collapsed and the goods cannot reach the dealer on time. On this basis she convincingly contests the view that the employment contract is the only *sui generis* type of contract because of uncertain and non-specific nature of its terms. The reason, she holds, some scholars argue that labour contracts are different from other contracts, is to escape the *laissez-faire* policy conclusions that seem to follow from the contract and market model of commodity exchanges, and to justify instead some sort of externally imposed regulation to protect labour.⁶

Stone's thesis on the other hand is not a significant departure from the contract model. She argues that the employment relationship is founded on an 'implicit' contract model. Borrowing from the theories of labour economics,⁷

⁵ Ibid. p.67-74.

⁶ Ibid. p.69.

⁷ Ehrenberg R. and Smith R., *Modern Labor Economics*, 4th Edn. (Scott, Foreman & Co., 1988) p.425-30; Lazear E.P., 'Why is there Mandatory Retirement?', 87(1979) *Journal of Political Economy* p.1261; Lazear E.P., 'Agency, Earnings Profiles, Productivity and Hours Restrictions', 71(1981) *American Economic Review*, p.606; Hutchens R., 'Delayed Payment Contracts and A Firm's Propensity to Hire Older Workers', 4(1986)

she argues that the internal labour market of career compensation describes the compensation function for employees through various phases of their employment. By doing so, it demonstrates the way in which employees are vulnerable to expropriation by other groups within the firm.

Briefly the model works as follows. Both companies and workers invest in the acquisition of skills and knowledge on the job, skills and knowledge which are necessary for employees to function productively. Some of this investment in human capital is general and gives workers an asset they can sell in the general labour market. Some of this investment however is firm-specific so that the knowledge gained redounds primarily to the firm.⁸

Employees benefit from acquiring firm-specific capital only if their firm rewards them for acquiring it. Because some of the investment that employees make in their training is firm-specific, the employees' value to their employer increases over time as they acquire more firm-specific capital. Thus a joint investment in the firm is established. At this phase, Stone argues, the employee can accept a pay not only less than the value of his or her marginal

Journal of Labor Economics, p.439; Hutchens R., 'Tests of Lazear's Theory of Delayed Payment Contracts', 4(1987) *Journal of Labor Economics*, p.153; Malcomson J., 'Work Incentives, Hierarchy and Internal Labor Markets', 92(1984) *Journal of Political Economy*, p.486.

⁸ Doeringer P. and Piore M., *Internal Labor Markets and Manpower Analysis*, (Lexington Bks., 1971); Willis R., 'Wage Determinants: A Survey and Reinterpretation of Human Capital Earnings Functions', in Ashenfelter O. and Layard R. (Eds), *Handbook of Labor Economics*, (Elsevier Science Publishers, 1988) p.594; Reynolds R.L. *et al*, *Labor Economics and Labor Relations*, (Prentice Hall, 1986) p.162-71.

product, but also less than his or her opportunity wage. The reason is that in this phase the employee has an expectation that the job will be steady and that the wage will keep rising throughout his or her career; and for that expectation, he or she defers compensation. The expectation is created by the employer and is a defining element in the notion of the internal labour market. In later years, and at the advanced years of the person's employment - his or her productivity begins to lag. But due to customs, norms, policies or incentive schemes, the employee's pay is not reduced. This is the stage which Stone calls the recoupment stage, a stage in which the employee recoups on his or her investment in firm-specific training and deferred compensation. Should employees suffer involuntary job loss before this stage is attained, their investment is lost. The implicit contract therefore in the internal labour market is that in the early phases of their career, employees will be paid less than the value of their marginal product and less than their opportunity wage in exchange for a promise of job security and a wage rate later in their working lives that is greater than the value of their marginal product and their opportunity wage.⁹ According to Rosen, if employees lose their investment at the point when they are about to recoup as a result of decisions made by and for the benefit of other constituent groups within the firm, then they have

⁹ This notion also ties up with the widely held intuition that it is unfair to lay off workers who have substantive seniority without some form of warning, severance pay and pension protection - see also Weiler P., *Governing the Workplace: The Future of Labor and Employment Law*, (Harvard University Press, 1990) p.140-1.

been treated unfairly and should have some additional means of legal recourse.¹⁰

Furthermore Stone acknowledges that the employment relationship contains a built-in incentive for managers to breach their implicit promises of job security and deferred compensation, and appropriate that investment to the firm or to themselves.¹¹ This incentive for managers to renege on implicit contracts, she argues, may well be constrained during 'normal' times when both management and employees share a commitment to their long-term relationship as defined by the internal labour market job structures such as seniority systems, internal promotion ladders and pensions. But during 'abnormal' times, such as mergers or buy-outs, management's view of the employment relationship may change. While the employee views the relationship as an ongoing one governed by the terms of the implicit promise, management may view it in terms of short-term efficiency. At that point, the incentive of managers to breach the contract renders employees particularly vulnerable. But because employees' contracts are implicit, they do not carry the usual legal enforcement mechanisms.

In this regard Stone suggests three mechanisms for protecting employees' interests. These are (i) individual regulatory approaches, (ii)

¹⁰ Rosen S., 'Implicit Contracts: A Survey' 23(1985) *Journal of Economic Literature*, p.1144.

¹¹ Ibid. p.73.

collectivist contractual approaches and (iii) collectivist regulatory approaches.¹² Under individual regulatory approaches Stone envisages legislative measures and practices which would enable individual employees to enforce their implicit contracts of job security. The advance notification of all employees in the event of an unanticipated and imminent plant closure serves as an example.¹³

Conceding the inadequacy of the individual-based approaches to enforcing workers' implicit contracts, collectivist approaches are seen by Stone as being more effective. In the collectivist contractual model, workers whose jobs entail substantial investments in firm-specific human capital have to develop a means to protect these investments. Such workers could combine or unionize and collectively bargain with their employers in order to police their implicit contracts. The collectivist regulatory approach is not substantially different. It involves creating rights to collective participation by statute and creating bodies such as works councils who would constantly liaise with management.

5.2.2 A Critical Review of the 'Contractual' Model and the Impact of the 'Organizational' Paradigm

The contribution made by the contractual model in this debate is to introduce and emphasize the economic aspect of job security. Job security should also be seen from the perspective of the goals of production and organizational

¹² Ibid. p.82-86.

¹³ Stone p.87.

needs in a fluid economic environment and changing labour market conditions.¹⁴ In this regard Stone's thesis emphasizes that job security is not just an automatic right for every employee; instead, employees should earn their job security by investing in human capital useful to the firm.

The contractual paradigm however, as criticized by Collins,¹⁵ seems to leave too much to market forces. The weakness of Stone's thesis lies in the implicit nature of the promise of job security that employers give to employees. As she concedes, the main problem with these contracts being implicit is that they can hardly be enforced through the normal legal mechanisms available to all breaches of contract. This is further evidenced by Stone's proposed remedies for employees whose promises of job security have been breached. What she suggests is tantamount to what the law already does. For example individual employees can procedurally challenge unfair dismissal on the basis of non-compliance with the advance notice requirement. In relation to collective methods, the law already has provided collective bargaining rights to employees which they can also use to collectively bargain for better terms and conditions including dismissal procedures.

If contracts, whether explicit or implicit, are permitted to allocate rights, then the market forces will play a dominant role in the distribution of

¹⁴ See also Professor Brassey's analysis of fairness as having a commercial rationale - in Brassey M. *et al*, *The New Labour Law*, (Juta, 1987) p.60-97.

¹⁵ Collins H., 'Organizational Regulation and the Limits of Contract', in McCahery J., *op. cit.* p.91 at 98ff.

rights, and the rights will be forgone whenever the workers' bargaining power is weak.¹⁶ The question thus becomes whether or not workers' interests should be left to the vagaries of the market forces. The organizational perspective presupposes that owners of capital or employers should have a social obligation to minimize the social costs of their action of dismissals. Hence legal measures against unfair dismissal have been given a public law dimension which, *inter alia*, seeks to induce the elements of public interest and accountability on those who exercise governmental powers.

The issue then, as Collins points out, becomes not how to alter the bargaining strength of workers so that they may improve their prospects for job security, but how justifiable it is that managerial members of the organization should have in law the exclusive and unfettered power to alter the labour requirements of the firm.¹⁷ This theory is further buttressed by the imperfections of the contractual model in its implicit assumption that firms operate in a competitive economic environment and have no capacity to exercise significant choice: they have no option but to obey the signals of the market. In the perfect competitive model the number of producers is sufficiently large that all firms are 'price-takers'. A firm cannot charge more for its goods than the current market price. Because firms have no discretion over prices but must passively accept the price prevailing in the market they have no 'market power'. They can make profits only at the level that justifies

¹⁶ Ibid.

¹⁷ Ibid. p.100.

the continued employment of their assets in their existing use and are unable to affect a transfer of wealth from customers to themselves. Another strand of the 'competitive' model holds that competitive conditions also ensure that firms have no discretion over the quality of goods supplied, since failure to match the quality or provide features demanded by the market would mean that a firm with production costs higher than those of rivals would not survive.

However, as Parkinson correctly argues,¹⁸ it is because markets are not perfect that companies have power. In reality companies operate in conditions which, to a greater or lesser extent, are uncompetitive. Though technical monopoly may be a rarity, markets are commonly dominated by a small number of large producers.¹⁹ In such circumstances, by colluding or by virtue of the structural properties of the oligopolistic markets, companies are able to obtain variable degrees of protection from competitive pressures.²⁰ And in addition to the relatively small number of producers, other requirements for perfect competition are also unlikely to be met in practice. Thus an uncompetitive market structure may be maintained indefinitely because of barriers to entry and exit; products are not homogenous, but have different characteristics which enable producers to raise

¹⁸ Parkinson J.E., *Corporate Power and Responsibility*, (Clarendon, 1993) p.10.

¹⁹ Ibid. p.11.

²⁰ See also Lipsey R.G., *An Introduction to Positive Economics*, 7th Edn. (Weidenfeld & Nicolson, 1989) Ch.14.

prices without causing a total shift in demand to their rivals; and purchasers usually lack perfect information and may thus pay higher prices than they would if they were aware of alternative, cheaper sources of supply.²¹ The cumulative effect of these imperfections is to cede to companies a zone of discretion in relation to a wide range of factors connected with the production process, including the labour requirements of the firm.

It is therefore not primarily the market forces *per se* that the state seeks to regulate, but managerial discretion. Akin to this is the acknowledgement of the fact that corporations are not absolutely autonomous entities. The objectives of the corporation cannot be achieved totally within the narrow corporate framework. First and foremost, the corporation exists within a particular social and political framework, and thus its objectives cannot be divorced from those of the social and political environment in which it operates.

Corporations are important mechanisms of wealth generation in many societies. To all intents and purposes, a corporation is a social institution. It is made up of members of society who coalesce in order to engage in the production process whose end-products are consumer goods and services necessary for the welfare of society at large. Hence the state, as the incumbent of political powers, is charged not only with the responsibility to ensure that

²¹ See Scherer F.M., *Industrial Market Structure and Economic Performance*, 3rd Edn. (David Ross, 1990) Ch.2.

wealth is justly distributed, but also that the right of the members of society to participate in such opportunity structures is protected. Thus from the organizational perspective, state intervention is not an intrusion in a supposedly private domain. State regulation is founded on the belief that the interests of the vulnerable members of society should not be entirely left to the discretionary powers of the managerial members of corporations. As Burden *et al* point out,²² state power should also be used to remedy the deficiencies of the market system. These deficiencies arise where consumers suffer because industries are monopolistic, where the economy fails to produce full employment and where an unacceptable level of poverty occurs. Thus from the organizational view, there is no conflict between the goals of corporate autonomy, as partially influenced by the market forces, and those of social welfare.²³

5.2.3 The problem

If one assumes that there is no inherent conflict between the goals of production and those of social welfare, then how does one explain the existence of competing paradigms?

The answer to this question may be attempted by looking into the connection between the values of business and public values. To what extent

²² Burden T. *et al*, *Business in Society: Consensus and Conflict*, (Butterworths, 1981) p.17.

²³ See also Trebilcock M.J., *The Limits of Freedom of Contract*, (Harvard University Press, 1993) Ch.10.

can the considerations underlying business activity be reconciled with social values? While it has been argued above that the broader objective of business is social in nature, this seems to be true mainly in principle. Corporate activity as governed by the free market ideology puts considerable stress on the value of the profit motive, competition and private property as the basic motivations for economic activity. As Burden *et al* argue,²⁴ the profit motive is valued for the incentive it creates for businessmen to work efficiently, while competition is seen as a means whereby the efficient prosper at the expense of the inefficient. Private property gives citizens a stake in society and promotes responsible attitudes. An economic system based on these principles, it has been argued, will produce goods and services cheaply and efficiently, while the demands of consumers are met; and economic progress will result from the competition between firms to produce the goods consumers want at prices they can afford.

Thus while one can discern a broader social connection between corporate objectives and social welfare, the actual premises upon which the modern corporation functions tend to blur this connection as new values are inserted i.e. competition and private ownership. It is these medium-term objectives that assume prominence in the daily functioning of business corporations. This gives rise to tension between public and corporate values as the latter tend to be individualistic in nature while the former put more emphasis on collectivistic objectives. Those exercising corporate power tend

²⁴ Ibid. p.16.

to concern themselves with the goals of profit-maximization, maintaining the competitiveness of the corporation in a fluid market environment, those outside the corporate power spectrum, who do not have a say in the corporate management and thus sometimes have no equal share in the profits of the enterprise, would invariably be more concerned with issues such as the equitable distribution of wealth and the protection against the abuse of managerial discretion and the deficiencies of the market. For the same reason, Bratton²⁵ has argued that corporations are, for the most part, instrumental associations; they do not give rise to strong community ties.

It appears therefore that in a system where social welfare goals are entangled with the ideals of the free market ideology, it is an inevitable factor that:

*"Tension between the free market ideology values and outside values will persist. So long as wealth creation depends on people's drive to maximize for themselves and distribution remains uneven, the business corporation will not be an institution fully satisfactory to those outside it."*²⁶

5.3 The Dilemma of Law

The medium-term goals of profit-maximization and competitiveness are invariably justified using the free market ideology, and the contractual model referred to in order to justify minimal external regulation of corporate power. It is in this dilemma that the law of unfair dismissal is caught up. As argued

²⁵ Bratton W.W. JR, 'Public Values, Private Business and US Corporate Fiduciary Law', in McCahery J. op. cit. p.23 at 36.

²⁶ Ibid.

in chapter three, the law is not the provider of social power but mainly the regulator of such power. There are often conflicting dimensions of power within the corporation which keep shifting from time to time in a fluid socio-economic environment of industrial and labour relations, thus complicating the task of regulation.²⁷

To think within the paradigm of an organization does not require one to abandon the notion of contracts entirely, but rather to recognize that other dimensions of power exist and need to be controlled within the corporation. The employer-employee relationship is not a uniform phenomenon. The determinants of the bargaining power of each employee in relation to his employer are varied. Hence highly skilled and professional employees, for example, have always enjoyed a relatively higher standard of job security, while the unprofessional and semi- or unskilled workers have invariably had to look to protective legislation and also rely on their collective strength to bargain for better conditions and job security.

It is primarily in the case of the latter that contractual remedies of unfair dismissal are insufficient. While the former do make use of protective legislation, there may arguably be situations where contractual remedies seem more appropriate. Thus the law of unfair dismissal has always been a

²⁷ There has also been an ongoing debate as to whether labour law can effectively cover small and medium-sized enterprises. In this regard - see Servais Jean-Michel, 'Labour Law in Small and Medium-Sized Enterprises: An Ongoing Challenge', 10(1994) *International Journal of Comparative Labour Law and Industrial Relations* p.119.

combination of legislative provisions and common law remedies for breach of contract.

Furthermore, while the law of unfair dismissal is basically there to protect employees against unfair or arbitrary dismissal by employers, the impact of unfair dismissal law cannot be looked at solely from the employee perspective. The potential effect of unfair dismissal legislation upon employers, for example, can be to deter them from dismissing workers because of the need to comply with certain stringent codes of practice and the risk of having to defend an industrial court claim. While there is no apparent data to back up the impact of unfair dismissal legislation on South African employers, its impact elsewhere,²⁸ has been said to be to increase the costs of employing labour with consequent higher prices and decreased demand for labour.

Another argument holds that the potential costs result in the retention of poor and unsatisfactory workers - thereby reducing efficiency. For the government, in charge of both economic policy and social welfare, these criticisms have to be considered in order to strike a balance between the demands of economic efficiency and social welfare needs; and invariably most governments would give priority to the needs of economic efficiency. This seems to be mainly driven by the belief that an efficient social welfare system

²⁸ See, for example, Westrip A., 'Effects of Employment Legislation on Small Firms', in Watkins D. *et al.*, *Stimulating Small Firms*, (1983) p.44-9, for an evaluation of the impact of the law on British small firms.

is heavily dependent on an efficient economy; that one cannot talk of wealth distribution before wealth has been generated.

As Hepple observes,²⁹ the law of unfair dismissal has to reconcile three sometimes conflicting objectives:

- (a) The first is the legitimate demand by employers for flexible and efficient use of labour.
- (b) The second is the demand by workers and unions for security of employment.
- (c) The third is the interest of government in avoiding an imbalance between the interests of the two and the impact of such an imbalance on the whole economy and society.

The question therefore is whether or not it is possible to have a universal philosophical framework for the law of unfair dismissal. Some have held that the law of unfair dismissal owes its resilience to the ability to adapt to the needs of employees, management, unions workers and government through changing economic and political circumstances. The law, according to Hepple,³⁰ displays chameleon-like qualities both of protecting individuals

²⁹ Hepple B.A., 'The Fall and Rise of Unfair Dismissal', in McCarthy W., *Legal Intervention in Industrial Relations: Gains and Losses*, (Blackwell, 1992) p.79 at 95.

³⁰ Ibid.

against arbitrary management, and simultaneously of strengthening managerial legitimacy and control. The question however still remains to be whether or not this is sufficient.

5.4 GENERAL CONCLUSION

From the above analysis of the English law of unfair dismissal, it appears that the fundamental elements of the English and South African law of unfair dismissal are not substantially dissimilar, namely, that the requirements of substantive and procedural fairness are the cornerstones of the doctrine of unfair dismissal. Of note is the fact that tribunals in these jurisdictions have played a vital role in the development of the unfair dismissal jurisprudence. The industrial court in South Africa has had to interpret the LRA's provisions relating to unfair dismissal and establish practical guidelines for dealing with cases of unfair dismissal such as the prevailing standards of procedural fairness, while the same is equally true of the industrial tribunal in England.³¹ It is however worth noting that even though the doctrine of unfair dismissal has a separate statutory provision in England, employment protection, apparently, has not necessarily been the sole objective and motive behind unfair dismissal legislation.

As we saw above, the twin aims of legislation were the provision of a general protection for individual employees against arbitrary termination of

³¹ See, for example, Lewis R., 'The Role of the Law in Employment Relations', in Lewis R.(Ed), *Labour law in Britain*, (Basil Blackwell, 1986) p.21.

employment by employers and secondly, to promote collective bargaining. The expectations arising out of these objectives however have hardly been met; for example, the reduction of industrial action.³² A number of reasons has been advanced as to why the hope of a reduced level of industrial action over discipline/dismissal because of the existence of the statutory provisions may not have been realized. The majority of those who seek redress through statutory machinery in Britain are not necessarily trade unionists, and thus for them collective action is not an option anyway. Although a few applicants are trade union members, this need not indicate that the legal route is being used instead of collective action since a collective action in their cases may not have been possible: some trade union members apply to the industrial tribunal because industrial action is not an option, perhaps because they could not receive support from their fellow workers or union. Also, where collective action is a viable option, the legal route is likely to be used only if the industrial tribunal system is seen as offering the possibility of an outcome as favourable as that which could be obtained by exerting pressure on the employer through a work stoppage or perhaps provides some trade-offs in terms of less cost in obtaining a remedy.³³ Industrial action has an immediacy which the statutory procedure lacks and offers the chance to impose workers' definitions of "fairness" or to negotiate such definitions rather than accept those of 'reasonable' management backed by law of

³² See also Dickens L. *et al*, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*, (Basil Blackwell, 1985) p.224-232.

³³ *Ibid.* p.227.

'fairness' as determined by the industrial court under the circumstances, and if successful, it results in re-employment.

It has also been held that the impact of the statutory process of challenging unfair dismissal in Britain has been limited by its very scope and coverage.³⁴ The Act excludes many employee-categories and makes it difficult for some employees to qualify for bringing a claim of unfair dismissal. Most of these, it has been noted, are employees who are not dependent upon membership of trade unions. They belong to the secondary sector where pay and job security are relatively low.³⁵

It is also apparent in the case of English law that the importation of the public law principle of judicial review into the realm of labour law has not been without problems. The crux of the problem seems to be the difficulty in fully adapting the principle of natural justice to the employment relationship. Fredman and Lee have identified issues of central distinction between procedural justice in industrial tribunals and natural justice in administrative law generally. These include the rule against bias and the futility argument.³⁶ In its labour law guise, natural justice excludes the crucial rule against bias, thus enabling the employer, albeit an interested party, to act as adjudicator.

³⁴ See Anderman S.D., *The law of Unfair Dismissal*, 2nd Edn. (Butterworths, 1985) p.319-20.

³⁵ See Hepple B.A., 'A Right to Work?', 10(1981) *ILJ (UK)* p.65.

³⁶ Fredman S. and Lee S., 'Natural Justice for Employees: The Unacceptable Faith in Proceduralism', 15(1986) *ILJ (UK)* p.15 at 17.

This is made possible by the statutory provisions which assign the task of holding an enquiry to the employer.

Ironically however some of the landmark decisions on natural justice involved employment.³⁷ This irony can be explained through the distinction between public and private sector employees. As we saw above, the employer in the case of the latter is invariably a government department where there is a clear separation of powers which make it possible for an entirely different authority to review the employer's decision to dismiss. Furthermore, there is invariably a statute which regulates the terms and conditions of public employees, laying down conditions under which employees can be dismissed and procedures to be followed. For private sector employees this is hardly applicable. Thus an employer is ultimately a judge in his own case. Another problem is that of the futility argument.³⁸ One of the central difficulties in allowing the employer to rely on the futility argument, as Clark points out,³⁹ is the fact that the court's process is not a substitute for that of the original decision maker. The court mainly hears evidence on the lack of compliance with procedure. In this regard Fredman and Lee have observed that industrial tribunals have resorted to procedural safeguards partly to avoid substantive

³⁷ For example *Administrator, TVL & Others v Traub* 1989(1) SA 731 (A).

³⁸ The futility argument holds that insistence on procedure is futile if adherence to procedure will not change the final outcome. This is discussed in greater detail in chapter 4 below.

³⁹ Clark P.H., 'Natural Justice: Substance or Shadow', (1975) *Public Law* p.27.

intervention.⁴⁰

The big question therefore still turns on how sufficient the substantive justice element in the law of unfair dismissal is? Can industrial tribunals be criticized for insisting on procedural safeguards? As we saw above, the aims of unfair dismissal legislation themselves are open to question in this regard. There does not appear from the objectives of legislation a clear intention to ensure substantive justice in dismissals. The aims of legislation are spread between the promotion of collective bargaining while at the same time trying to safeguard individual employment rights. While legislation makes it possible for industrial tribunals to apply public law rules of judicial review in employment relations, the big gap caused by the distinction between public and private sector makes it difficult to adapt principles of judicial review to private sector employment, and use them to challenge managerial power in this sphere.

Furthermore there is no doubt that the old conceptions of society as a bilateral economic and social structure comprised of the capitalist camp and the worker movement has been invalidated by modern developments. The effect of the demise of these conceptions on the modern corporation has been that other dynamic forces that influence the regulation of the modern firm have been unleashed. The modern corporation is now a multi-dimensional power structure. It is not merely the power of 'capital' that workers have to

⁴⁰ Ibid. p.31.

contend with. The market forces also play a decisive role in the employment relationship. Thus there seems to be two major factors that threaten job security, namely, the abuse of managerial discretion and the market forces.

The law of unfair dismissal as it stands is designed to tackle the abuse of managerial discretion mainly in relation to procedural improprieties. There is thus the need for a more coherent substantive framework for the law of unfair dismissal; a framework that would not only challenge managerial discretion, but also take account of the impact of the market forces upon job security and provide a bridge between procedural and substantive fairness.

Such a coherent substantive framework for employment protection would depend on how the state perceives its role as the manager of the economic and political systems. In particular, whether the state deems it necessary that the interests of employees should be left to the vagaries of the market forces; whether the state finds it justifiable to intervene and tighten the external controls over the corporation in the public interest. More importantly, it would depend on the type of society that the government wants to create or promote. There seems to be a strong case for an advance towards a more democratic and egalitarian society, more so than before. The demise of the old conception of society as divided between the 'capitalists' and the 'working class' has made way for what Professor Galbraith calls the 'managerial bureaucracy', the 'public bureaucracy', and the lawyers, physicians, educators and members of other professions, all of whom make up the dominant

political force. This new class, which is comfortably situated, has replaced the once-dominant capitalist. On the other hand the modern equivalent of the one-time industrial proletariat is an underclass in the service of the comfortably situated. This underclass does much of the heavy repetitive industrial work that stills survives. Yet these are the very people with little or no influence in the political system; it is their livelihood that is mainly left to the harsh forces of the market system.

Therefore there is a need, for a government committed to a free and democratic society, to pay attention to a range of activities that are beyond the time horizons of the market economy. And one cannot but agree with Professor Galbraith that:

"In the good society there cannot, must not, be a deprived and excluded underclass. Those who... have made it up must be fully a part of the larger social community. There must be full democratic participation by all, and from this alone can come the sense of community which accepts and even values diversity"⁴¹

⁴¹ Professor John Kenneth Galbraith, *The Good Society Considered: The Economic Dimension*, Annual Lecture, Cardiff Law School, 26 January 1994, p.2.

BIBLIOGRAPHY

A. Books and Articles

Anderman S.D., **The Law of Unfair Dismissal**, 2nd Edn. (Butterworths: London, 1986)

Atiyah P.S., **An Introduction to the Law of Contract**, 4th Edn. (Clarendon Press: Oxford, 1989)

Auerbach F. et al (Eds), **A Review of Race Discrimination in South Africa**, (David Philip: London, 1981)

Batstone E., **The Reform of Workplace Industrial Relations**, (Clarendon Press: Oxford, 1988)

Baxter L., **Administrative Law**, (Juta: Cape Town, 1984)

Beatson J., 'Public and Private in English Administrative Law', 103(1987) **Law Quarterly Review** p.34.

Beirne P. and Quinney R. (Eds), **Marxism and Law**, (John Wiley & Sons: New York, 1982)

Bendix S., **Industrial Relations in South Africa**, 2nd Edn. (Juta: Cape Town, 1992)

Blackburn R.M., **Value, Price and Profit**, (Harper & Row, 1954)

Borrie G. Sir, 'The Regulation of Public and Private Power', (1989) **Public Law** p.552.

Bowers J., **A Practical Approach to Employment Law**, 2nd Edn. (Financial Training: London, 1986)

Brassey M., 'Something New, Something Borrowed...: Comparative Labour Law in South Africa', in Blanpain R. and Weiss M. (Eds), **The Changing Face of Labour Law and Industrial Relations**, (Nomos: Baden-Baden, 1993) p.133.

...et al, **The New Labour Law**, (Juta: Cape Town, 1987)

Bratton W.W.JR, 'Public Values, Private Business and US Corporate Fiduciary Law', in McCahery J. *et al* (Eds), **Corporate Control and Accountability**, (Clarendon Press: Oxford, 1993) p.23.

Brooks E.H., Apartheid: A Documentary Study of Modern South Africa, (Routledge & Kegan Paul: London, 1968)

Burden T. et al, Business in Society, (Butterworths: London, 1981)

Cameron E., 'The Right to a Hearing Before Dismissal - Problems and Puzzles', 9(1988) *ILJ (SA)* p.147.

..., 'The Right to a Hearing Before Dismissal', PART I 7(1986) *ILJ (SA)* p.183.

...*et al, The New Labour Relations Act,* (Juta: Cape Town, 1989)

Cassim N., 'Unfair Dismissal', 5(1984) *ILJ (SA)* p.275.

Clark P.H., 'Natural Justice: Substance or Shadow' (1975) Public Law p.27.

Collins H., 'Market Power, Bureaucratic Power and the Contract of Employment', 15(1986) *ILJ (UK)* p.1.

..., *Justice in Dismissal,* (Clarendon Press: Oxford, 1992)

..., 'Distributive Justice Through Contracts', (1992) *Current Legal Problems* p.49.

..., *Marxism and Law,* (Macmillan: London, 1984)

..., 'Dismissal and Public Law Remedies' 13(1984) *ILJ (UK)* p.174.

..., 'Organizational Regulation and the Limits of Contract', in McCahery J. op. cit. p. 91.

Cotterrell R., The Politics of Jurisprudence, (Butterworths: London, 1989)

Craig P., Administrative Law, (Sweet & Maxwell: London, 1989)

Crompton R. and Gubbay J., Economy and Class Struggle, (Macmillan: London, 1977)

Crouch C., Trade Unions: The Logic of Collective Action, (Fontana: Glasgow, 1982)

Davis D.M., 'The Function of Labour Law', 1980 *CILSA* p.212.

Davies P. and Freedland M., Kahn-Freund's Labour and the Law, (Stevens: London, 1983)

..., **Labour Legislation and Public Policy**, (Clarendon Press: Oxford, 1993)

De Smith S.A., **Judicial Review of Administrative Action**, 4th Edn. (Stevens & Sons: London, 1980)

Dean W.H.B., 'Whither the Constitution', 1976 *THRHR* 266.

Dickens L. et al, **Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System**, (Basil Blackwell: Oxford, 1985)

Doeringer P. and Piore M., **Internal Labor Markets and Manpower Analysis**, (Lexington Books: Lexington, 1971)

Dworkin R., **Taking Rights Seriously**, (Duckworth: London, 1977)

Ehrenberg R. and Smith R., **Modern Labor Economics**, 4th Edn. (Scott, Foreman & Co.: Glenview, 1988)

Ehrlich E., **Fundamental Principles of the Sociology of Law**, vol.5, (Harvard Studies in Jurisprudence, Cambridge, Mass., 1936)

Ewing K.D., 'Remedies for Breach of the Contract of Employment', 52(1993) *Cambridge Law Journal* p.405.

Farnham D. and Pimlott J., **Understanding Industrial Relations**, (Cassell: London, 1983)

..., 'Job Security and the Contract of Employment', 18(1989) *ILJ (UK)* p.217.

Flanders A., **Management and Unions: The Theory and Reform of Industrial Relations**, (Faber & Faber: London, 1970)

Fredman S. and Lee S., 'Natural Justice for Employees: An Unacceptable Faith in Proceduralism', 15(1986) *ILJ (UK)* p.15.

... and *Morris G.S.*, 'The Cost of Exclusivity: Public and Private Re-Examined', *Public Law* Spring 1994 p.69.

... ..., 'Public or Private?: State Employees and Judicial Review', 107(1991) *Law Quarterly Review* p.298.

Freedland M., **The Contract of Employment**, (Clarendon Press: Oxford, 1976)

..., 'Government by Contract and Public Law', *Public Law* Spring 1994 p.86.

Friedman S., **Building Tomorrow Today**, (Ravan Press: Johannesburg, 1987)

Frug, 'The City as a legal Concept' 93(1980) *Havard Law Review* p.1057

Fox A., **Beyond Contract: Work, Power and Trust Relations**, (Faber: London, 1974)

..., 'Industrial Relations: A Social Critique of Pluralist Ideology', in Child J.(Ed), **Man and Organization** (Allen & Unwin: London, 1973)

..., 'Industrial Sociology and Industrial Relations', *Royal Commission Research Paper* No.3 HMSO, 1966.

Galbraith J.K., 'The Good Society Considered: The Economic Dimension', Annual Lecture, Cardiff Law School, 26 January 1994.

Gerth H.H and Mills C. Wright, **From Marx to Weber: Essays in Sociology**, (Routledge & Kegan Paul: London, 1948)

Goldthorpe J.H and Lockwood D., 'Affluence and British Class Structure', 11(1963) *Sociological Review* p.133.

Gould C., **Rethinking Democracy**, (Cambridge University Press: Cambridge, 1988)

Grogan J., 'Audi After Traub', 111(1994) *SALJ* p.80.

..., 'Unfair Dismissal of "Contractual" Public Employees', 11(1990) *ILJ (SA)* p.655.

Hepple B.A., 'Restructuring Employment Rights', 15(1986) *ILJ (UK)*

..., 'The Right to Work?' 10(1981) *ILJ (UK)* p. 65.

..., 'The Fall and Rise of Unfair Dismissal', in McCarthy W.(Ed), **Legal Intervention in Industrial Relations**, (Basil Blackwell: Oxford, 1992) p.79.

Hlophe J., 'The Doctrine of Legitimate Expectation and the Appellate Division', 107(1990) *SALJ* p.197.

Honeyball S., 'Employment Law and the Primacy of Contract', 18(1989) *ILJ (UK)* p.97.

Horowitz I.L. (Ed), **Power, Politics and People: The Collected Essays of C. Wright Mills**, (Oxford University Press: Oxford, 1970)

Howarth D., 'The Autonomy of Labour Law: A Response to Professor Wedderburn', 17(1988) *ILJ (UK)* p.11.

Hutchens R., 'Delayed Payment Contracts and A Firm's Propensity to Hire Older Workers', 4(1986) *Journal of Labor Economics* p.439.

..., 'Test of Lazear's Theory of Delayed Payment Contracts', 4(1987) *Journal of Labour Economics* p.153.

Hyman R., **Industrial Relations: A Marxist Introduction**, (Macmillan: London, 1975)

..., **The Political Economy of Industrial Relations**, (Macmillan: London, 1989)

Jackson P., **Natural Justice**, (Sweet & Maxwell: London, 1979)

Jensen M.C. and Meckling W., 'Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure', 305(1976) *Journal of Financial Economics* p.311.

Jordaan B., 'The Law of Contract and the Individual Employment Relationship', (1990) *Acta Juridica* p.73.

..., and Rycroft A., **A Guide to South African Labour Law**, (Juta: Cape Town, 1990)

Klare K., 'The Public/Private Distinction in Labor Law', 130(1982) *University of Pennsylvania Law Review* p.1538.

Landman A.A., 'The Implications of the Labour Relations Amendment Act 1991', 11(1991) *Industrial Relations Journal of South Africa* p.15.

Lazear E.P., 'Agency, Earnings Profiles, Productivity and Hours Restrictions', 71(1981) *American Economic Review* p.606.

..., 'Why is there Mandatory Retirement?', 87(1979) *Journal of Political Economy* p.1261.

Le Roux PAK, 'The Unfair Dismissal of Employees', *Industrial Relations Journal of South Africa*, p.28.

Levy A., **Unfair Dismissal: A Guide for SA Management**, (Divaris Stein, 1984)

Lewis R., 'The Role of the Law in Employment Relations', in Lewis R.(Ed),

Labour Law in Britain, (Basil Blackwell: Oxford, 1986)

Lipsey R.G., **An Introduction to Positive Economics**, 7th Edn. (Weidenfeld & Nicolson: London, 1989)

Lipton M., 'Apartheid and Capitalism', in Lonsdale J.(Ed), **South Africa in Question**, (African Studies Centre, Cambridge University, 1988)

Lockwood D., **The Blackcoated Worker**, (Allen Unwin: London, 1965)

Malcomson J., 'Work Incentives, Hierarchy and Internal Labor Markets', 92(1984) *Journal of Political Economy* p.486.

Maree J. (Ed), **The Independent Trade Unions - 1974-1984** (Ravan Press: Johannesburg, 1987)

Marx K., **Value, Price and Profit**, (Harper & Row, 1954)

Miers D. and Page A.C., **Legislation**, (Sweet & Maxwell: London, 1990)

Moll T., 'Did Apartheid Economy Fail?', 17(1991) *Journal of Southern African Studies* p.171.

Natrass N., 'Controversies About Capitalism and Apartheid in South Africa: An Economic Perspective', 17(1991) *Journal of Southern African Studies* p.654.

Nel P.S. and Van Rooyen P.H., **Worker Representation in Practice in South Africa**, 2nd Edn. (Academica: Johannesburg, 1985)

Parkinson J.E., **Corporate Power and Responsibility**, (Clarendon Press: Oxford, 1993)

Piron J., **Recognition or Rejection: Trade Union Recognition in South Africa**, 2nd Edn. (Macmillan: Johannesburg, 1984)

Poole M., **Theories of Trade Unionism**, (Routledge & Kegan Paul: London, 1981)

Prandy K., **Professional Employees**, (Faber & Faber: London, 1965)

Reynolds R. et al, **Labor Economics and Labor Relations**, (Prentice Hall: New York, 1986)

Rose M., 'Attachment to Work and Social Values', in Gallie D., **Employment in Britain**, (Basil Blackwell: Oxford, 1989)

Rose-Innes, Judicial Review of Administrative Action in South Africa, (Juta: Cape Town, 1963)

Rosen S., 'Implicit Contracts: A Survey', 23(1985) *Journal of Economic Literature* p.1144.

Rottenburg S., 'Property in Work', 1961-2 *Industrial and Labor Relations Review* p.402.

Rycroft A., 'Is there Still A Right to Terminate Employment Without Giving Reasons?', 107(1990) *SALJ* p.279.

Salamon S., *Industrial Relations: Theory and Practice*, 2nd Edn. (Prentice Hall: London, 1992)

Scherer F.M., *Industrial Market Structure and Economic Performance*, 3rd Edn. (David Ross: Boston, 1990)

Scheler M., *Die Wissenformen und die Gesellschaft*, (Francke: Bern, 1960)

Selwyn M., *Law of Employment*, 7th Edn. (Butterworths: London, 1991)

Servais Jean-Michel, 'Labour Law In Small and Medium-Sized Enterprises: An Ongoing Challenge', 10(1994) *International Journal of Comparative Labour Law and Industrial Relations* p.119.

Stokes M., 'Public Law Remedies for Dismissal', 14(1985) *ILJ (UK)* p.117.

Stone M., 'Labour Markets, Employment Contracts and Corporate Change', in McCahery J. op. cit. p.61.

Tanney A., 'Procedural Exclusivity in Administrative Law', *Public Law* Spring 1994 p.51.

Thompson C., 'Borrowing and Bending: The Development of South Africa's Unfair Labour Practice Jurisprudence', in Blanpain and Weiss, op. cit. p.109.

Townshend-Smith R., 'Trade Union Recognition Legislation - Britain and America Compared', (1981) *Legal Studies* p.190.

Trebilcock M.J., *The Limits of Freedom of contract*, (Harvard University Press: Cambridge, Mass., 1993)

Summers C., 'Lord Wedderburn's New Labour Law: An American Perspective', 21(1992) *ILJ (UK)* p.157.

Wade W., *Administrative Law*, 6th Edn. (Clarendon Press: Oxford, 1988)

- Watson D.*, **Managers of Discontent**, (Routledge: London, 1988)
- Weber M.*, **The Theory of Social and Economic Organization**, (Oxford University Press: Oxford, 1949)
- ..., **Economy and Society**, (Bedminster Press: New York, 1968)
- Wedderburn K.W. Lord*, **The Worker and the Law**, 3rd Edn. (Penguin: London, 1986)
- ..., 'Labour Law: From Here to Autonomy', 16(1987) *ILJ* (UK) p.1.
- ..., 'Freedom of Association and philosophies of Labour Law', 18(1989) *ILJ* (UK) p.1.
- Weekes D. et al*, **Industrial Relations and the Limits of the Law**, (Basil Blackwell: Oxford, 1975)
- Weiler P.*, **Governing the Workplace: The Future of Labor and Employment Law**, (Harvard University Press: Cambridge, Mass., 1990)
- Westergaard J. and Resler H.*, **Class in a Capitalist Society**, (Heinemann: London, 1975)
- Westrip A.*, 'Effects of Employment Legislation on Small Firms', in *Watkins D. et al*, **Stimulating Small Firms**, (1983)
- Willis R.*, 'Wage Determinants: A Survey and Reinforcement of Human Capital Earnings Functions', in *Ashenfelter O. and Layard R.*(Eds), **Handbook of Labor Economics**, (Elsevier Science Publishers: Amsterdam, 1988) p.594.
- Yankelovitch D. et al*, **Work and Human Values: An International Report on Jobs in the 1980s and 1990s**, (Aspen Institute for Humanities: Queenstown, 1983)
- Yardely D.C.M.*, **Principles of Administrative Law**, 2nd Edn. (Butterworths: London, 1986)

B. LIST OF CASES

- Abbot v Sullivan* [1952]1 KB 189
- Administrator, TVL. & Others v Traub & Others* 1989(1) SA 731 (A)
- Attorney-General, Eastern Cape v Blom & Others* 1988(4) SA 645 (A)

BASODTW v Homegas 7(1986) ILJ (SA) 411 (IC)
British Labour Pump v Byrne [1979] IRLR 94
Budgen v Thomas [1976] ICR 344

Cassem en 'n Ander v Oos-Kaapse Komitee van Groepsgebiedraad 1959(3) SA 651 (A)
Castledine v Rathwell Engineering Ltd. [1973] IRLR 99
Cooper v Wandsworth Board of Works [1863] 14 CB (NS) 180
Cory Lighterage v T & GWU [1973] ALL ER 558

Dawkins v Anthrobus (1881) 17 Ch.D 615
De Wet v Deetlefs 1928 AD 286
Discount Tobacco & Confectionary Ltd. v Armitage [1990] IRLR 15
Dreyer v Frank Textiles 6(1985) ILJ (SA) 223 (IC)

Earl v Slater & Wheeler Ltd. [1972] ICR 508
Evans v Public Service Commission 1920 TPD 170
Everett v Minister of the Interior 1981(2) SA 453

FAWU v Delmas Kuikens 8(1987) ILJ (SA) 628 (IC)
Fihla v Pest Control, TVL. 5(1984) ILJ (SA) 165 (IC)
Fisher v Keane (1878) 11 Ch.D 853
Franklin v Minister of Town and County Planning [1948] AC 87

G v K 9(1988) ILJ (SA) 314 (IC)
Gadhok v Common Wealth Secretariat (1977) 12 ITR 440
Greenall Whitely plc v Carr [1985] 451; [1985] IRLR 289
Grundy (Teddington) Ltd. v Jones [1982] IRLR 439
Gumede v Richdens (Pty) Ltd. t/a Richdens Foodliner 5(1984) ILJ (SA) 84 (IC)

Heatherdale Farms v Deputy Minister of Agriculture 1980(3) SA 476 (T)
Hughs v DHSS [1985] AC 776

Irani v South West Hampshire Health Authority [1985] ICR 590; [1985] IRLR 203
Iceland Frozen Foods Ltd. v Jones [1982] IRLR 439

James v Waltham Holy Cross Urban District Council (1973) ICR 398
John v Rees [1970] Ch.D 345
Judes v Registrar of Mining Rights, Krugersdorp 1907 TS 1046

Kent Community Council v Gilham [1985] ICR 233; [1985] IRLR 18 CA
Knight v A-G [1979] ICR 194
Kubheka & Another v Imextra 1975(4) SA 484 (W)

Langeni v Minister of Health & Welfare 1988(4) SA 93 (T)

Laubscher v Native Commissioner, Piet Retief 1958(1) SA 546 (A)
Leboto v Western Areas Gold Mining & Co. Ltd. 6(1985) ILJ (SA) 299 (IC)
Lefu v Western Areas Gold Mining Co. 6(1985) ILJ (SA) 307 (IC)
Lenz Township Co. (Pty) Ltd. v Lorenz NO en Andere 1961(2) SA 450 (A)
Lunt v University of Cape Town 1989(2) SA 438 (C)

Malloch v Aberdeen Corporation [1977]1 W.L.R 1578
MAWU v Barlows Manufacturing Co. 4(1983) ILJ (SA) 283 (IC)
MAWU v BTR Sarmcol 8(1987) ILJ (SA) 815 (IC)
Maxwell v Dept. of Trade [1974]1 QB 523
McCormick v Horsepower Ltd. [1981]2 ALL ER 746; [1981] ICR 535; [1981] IRLR 217 CA
McLaren v National Coal Board [1988] IRLR 215 CA
Mentzer v Bolton (1854) 9 Exch. 518
Minister of Law and Order & Others v Hurley and Another 1986(3) SA 568 (A)
Minister van Naturellesake v Monnakgotla 1959(3) SA 517 (A)
Moahlodi v East Rand Gold Uranium Co. 9(1988) ILJ (SA) 597 (IC)
Motaung v Mothiba 1975(1) SA 618 (O)
Myburgh v Danielskuil Munisipaliteit 1985(3) SA 335 (NC)
Myers v Abrahamson 1952(3) SA 121 (C)

NAAWU v Pretoria Precision Castings 6(1985) ILJ (SA)
Nakkuda Ali v Jayaratne (1951) AC 66
Ndamase v Fyfe-King 1939 EDL 259
Nkondo & Gumede v Minister of Law & Order 1986(2) SA 736 (A)
Ntuli v Litemaster Products 6(1985) ILJ (SA) 156
NUM v Durban Roodepoort Deep Ltd. 8(1987) ILJ (SA) 156 (IC)
NUM v East Rand Property Mines 8(1987) ILJ (SA) 315 (IC)
NUM v Kloof Gold Mining Co. 7(1986) ILJ (SA) 375 (IC)
NUM v Roodepoort Deep 8(1987) ILJ (SA) 156 (IC)
NUM v Western Areas Gold Mining Co. 7(1986) ILJ (SA) 380 (IC)
NUTW v Stag Packings 1982(4) SA 151 (T)

Open University v Triesman [1978] ICR 324; [1978] IRLR 114
O'Reilly v Mackman [1983]2 AC 237

Paper, Printing, Wood and Allied Workers' Union v Pienaar NO & Others 1993(4) SA 621 (A)
Payzu v Hannaford [1918]2 KB 348
Polkey v AE Dayton Services Ltd. [1987]3 W.L.R 1153
Pretoria North Town Council v AI Electric Ice Cream 1953(3) SA 1 (A)
Pyx Granite Co. Ltd. v Ministry of Housing and Local Government & Others [1959] 3 ALL ER 1 (HL)

R v Civil Service Appeal Board, ex parte Bruce [1989]2 ALL ER 907; [1989] ICR 171 CA

- R v Leman Street Police Station Inspector, ex parte Venicoff* [1920]3 KB 72
R v Metropolitan Police Commissioner, ex parte Parker [1953]1 W.L.R 1150
R v Ngwevela 1959(1) SA 123 (A)
R v University of Cambridge [1723]1 Str. 557
R v secretary of State for the Home Dept., ex parte Benwell [1985] QB 554;
 [1984] ICR 723
*R v Secretary of State for Foreign & Commonwealth Affairs, ex parte Council
 of Civil Service Unions* [1985] IRLR 28
R v Thames Magistrate's Court, ex parte Polemis [1974]1 W.L.R 1371
Rampa en Andere v Rektor, Tshiya Onderwyskollege en Andere 1986(1) SA
 424 (A)
Rampersad v BB Bread 9(1988) ILJ (SA) 628 (IC)
Raynor v Remploy Ltd. [1973] IRLR 3
Rentokil v Mackin & Another [1989] IRLR 286
Rhodes v SA Bias Binding Manufacturers 6(1985) ILJ (SA) 107 (IC)
Ridge v Baldwin [1964] AC 40; [1965]2 ALL ER 66 HL
Rikhotso v TVL. Alloys (PTY) Ltd. 5(1984) ILJ (SA) 69 (IC)
Robert Court & Son Ltd. v Charman
Robbertze v Matthew Rustenburg Refineries 7(1986) ILJ (SA) 64 (IC)
Rostoll v Leeupoort Minerale Bron (Edms) Bpk 8(1987) ILJ (SA) 366 (IC)
Rossouw v SA Mediese Navorsingsraad(2) 8(1987) ILJ (SA) 660 (IC)
- SA Airways Pilots Association v Minister of Transport Affairs* 1988(1) SA 362
 (W)
Sachs v Minister of Justice 1934 AD 11
Sader & Others v Natal Committee Group Areas Board 1957(2) SA 300 (N)
Schierhout v Minister of Justice 1926 AD 107
Shalighnessy v United States 345 US 206
Shidiack v The Union Government 1912 AD 642
Shook v London Borough of Ealing [1986] ICR 314
Stacey v Babcock Ltd. [1986] QB 308; [1986] ICR 221
Stapp v Shaftesbury Society [1982] IRLR 326 CA
Stevenson v Sterns Jewellers Ltd. 7(1986) ILJ (SA) 318 (IC)
Stewart Wrightson (Pty) Ltd. v Thorpe 1977(2) SA 943 (A)
Strydom v Staatspresident, RSA 1987(3) SA 74 (A)
- Thwala v ABC Shoe Store* 8(1987) ILJ (SA) 714 (A)
Trenagowan v Robert Knee & Co. Ltd. [1975] ICR 405
Tshabalala v Minister of Health & Welfare 7(1986) ILJ (SA) 168 (IC)
Turner v Jockey Club of SA 1974(3) SA 633 (A)
Tye v Mower Scaffolds [1976] IRLR 91
- Union Govt. v Schierhout* 1922 AD 179
- Van Zyl v O'Kiep Copper Co. Ltd.* 4(1983) ILJ (SA) 125 (IC)
Vernon v Findlay [1938]4 ALL ER 311
Voinet v Barnet (1885) 55 LJQB 39

Waite v Government Communications Headquarters [1983] AC 714

W & J Wass v Binns [1982] IRLR 283

Whitebread & Co. Ltd. v Mills [1988] IRLR 501

Wilson v Maynard Shipbuilding Consultants AB [1978] QB 665

Wood v Cunard Line Ltd. [1990] IRLR 281

Wood v Woad (1874) LR 9 EX 190

Zungu v Strip & Gasket Industries 7(1986) ILJ (SA) 747 (IC)

C. STATUTES

1. The Defence Act 44 of 1957 - (SA)
2. Employment Act 1980 - (UK)
3. Employment Protection (Consolidation) Act 1978 - (UK)
4. Industrial Relations Act 1971 - (UK)
5. Labour Relations Act 28 of 1956 - (SA)
6. Prisons Act 8 of 1959 - (SA)
7. Public Service Act 111 of 1984 - (SA)
8. SA Transport Services Conditions of Service Act 41 of 1988 - (SA)
9. The Trade Union and Labour Relations Act 1974 - (UK)