

# Legislating Against Unfair Dismissal: Implications from British Experience

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*The debate over wrongful discharge legislation in the United States has caused many observers to look at the experience under Great Britain's wrongful discharge statutes. The author reviews the history of the British system, noting its effect on the formalization of dismissal procedures. He offers insight into the current operation of this system through both statistical data and a survey of employers. The author compares this statutory system to collectively bargained grievance arbitration, and discusses the implications of the adoption of similar statutes in the United States.*

## INTRODUCTION

British experience with statutory protections against unfair dismissals merits serious consideration in the United States.<sup>1</sup> The inferences to be drawn from such an analysis are particularly relevant since no problem in human resource management has attracted more recent interest than the issue of unfair dismissals. There has also been an outpouring of both academic and practitioner views on a related topic: judicial decisions modifying the long-standing common law doctrine of employment-at-will. Legal scholars have called for enactment of legislation designed to protect employees in the United States against unfair dismissals.

In Britain, as in the United States, a variety of methods exist for structuring organizational due process. Among those alternative forms, the most significant are individual grievance procedures in unionized workplaces, complaint procedures in nonunion employment, and dismissal review processes under professional, public employee, and other codes of conduct. This study examines both the provision of direct legislative protections and the effects of such protections on private procedures. The purpose of this analysis is to explore the implications of the British experience as a method of evaluating the various proposals made to pro-

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1. British statutory protections against unfair dismissals refer to an evaluation of the circumstances involving the loss of a job for causes related to an employee's capacity or conduct, or to the manner of selection for redundancy, *i.e.*, layoff.

vide due process, especially legislative attempts to provide relief for unfair dismissals in the United States.

One such proposal was made by Professor Theodore J. St. Antoine at the thirty-fourth annual meeting of the National Academy of Arbitrators in 1981. His view was cogently summarized in "Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come."<sup>2</sup> Two years later in his presidential address to the thirty-sixth annual meeting of the Industrial Relations Research Association, Professor Jack Stieber called for the passage of legislation to do away with the employment-at-will doctrine.<sup>3</sup> And Professor Clyde W. Summers, a steadfast advocate for employment rights, has consistently argued for statutory "just cause" protections to safeguard employees from arbitrary dismissals.<sup>4</sup>

What are the likely results of such protective legislation in the United States? This study provides some answers to that question by analyzing the British experience under five topical headings. The first section discusses elements of the British approach: the nature of private dispute settlement procedures, the evolution of the statutory framework, and the role of key public agencies entrusted with implementation of the legal mandate. The second section examines the major statutory impact through published sources describing the procedural changes and degree of protection provided against unfair dismissal. The third section summarizes the results of two surveys regarding the implications of unfair dismissal legislation for seven selected firms and for the unionized electrical contracting industry. The fourth section presents a brief review of interested party views. The fifth section provides a summary of findings and their implications.

## I

### THE SETTING

#### A. *Industrial Procedures*

The British industrial relations system uses three dispute settlement procedures to resolve employer-employee conflicts. These procedures are not in practice mutually exclusive since great emphasis is placed on flexibility under the highly voluntary character of the system. The particular procedure selected for a specific dispute is likely to depend on the parties'

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2. St. Antoine, *Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come*, in *ARBITRATION ISSUES FOR THE 1980'S: PROCEEDINGS OF THE THIRTY-FOURTH NATIONAL ACADEMY OF ARBITRATORS* 43-62 (J. Stern & B. Dennis eds. 1982).

3. Stieber, *Employment-at-Will: An Issue for the 1980's*, in *PROCEEDINGS OF THE THIRTY-SIXTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION* 1 (B. Dennis ed. 1983).

4. Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 159 (B. Aaron ed. 1976).

past practice, the nature of the dispute, and whether an individual or group issue is involved. The three types of dispute settlement are:

- *Discipline and Dismissal Procedure*, which involves individual unfair or disparate treatment complaints;
- *Individual Grievance Procedure*, which resolves claims regarding employees' rights under a formal contract, agreement or standard practice;
- *Disputes Settlement Procedure* (often referred to as a "negotiating procedure"), which resolves group or union-developed issues regarding pay and conditions of employment.

The individual grievance and dispute settlement procedures have the greatest amount of overlap. In practice, the two may appear indistinguishable because the British, unlike North Americans, do not differentiate between collective bargaining "interests" and "rights." Thus, the latter two kinds of British procedural mechanisms encompass all aspects of the North American collective bargaining process, accommodating the *interests* of all parties under a collective bargaining agreement and determining the *rights* of individuals or groups under the agreement through grievance arbitration. The focus of this study is, however, on the first type of dispute settlement, the discipline and dismissal procedure.

In the late 1950's, the British legal system governed dismissal procedures through contract law.<sup>5</sup> Inequities growing out of differences in master and servant bargaining positions of the parties were modulated in several ways. Protection from arbitrary dismissal was provided by the "precedential influences of the common law" in conjunction with its recognition of customs and usages, by the presence of trade unions, by voluntary adherence to the terms of collective bargaining agreements, and by traditional procedures followed by most employers.<sup>6</sup>

By the 1960's the United Kingdom began to experience strong external and internal pressures to enhance employment security for its workers. In 1963, the International Labour Organization ("ILO") adopted its Recommendation No. 119, TERMINATION OF EMPLOYMENT, after a 1962 survey of sixty-eight countries found that most had protections against unjust dismissals.<sup>7</sup> Developments abroad strengthened the consensus in the United Kingdom that workers needed better protection from unjust dismissals and that such protection would lessen industrial strife by reducing industrial actions over dismissals.

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5. For a discussion of dismissal procedures and the common law, collective agreements, redundancy practices, avenues open to challenge dismissals, and the plight of dismissed employees, see *Dismissal Procedures*, 80 INT'L LAB. REV. 347 (1959).

6. *Id.*

7. The International Labour Organization's Recommendation No. 119 was superseded in 1982 by Convention No. 518, TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER. See Clark, *Remedies for Unjust Dismissal: Proposals for Legislation*, 36 POL. & ECON. PLAN. Broadsheet 518 (1940).

In 1965, the Minister of Labour set up a Committee of the National Joint Advisory Council on Dismissal Procedures.<sup>8</sup> He hoped that "the publication of this report [would] stimulate the growing interest in dismissal procedures and encourage the development and extension of good procedures throughout industry."<sup>9</sup> In a generally disappointing concluding recommendation, this tripartite Committee advised the Minister of Labour not to introduce unfair dismissal legislation in the near future but to review this position in accordance with the future progress (or lack of it) achieved through voluntary extension of employer-initiated protective procedures and after considering the Royal Commission on Trades Unions and Employers' Associations ("Donovan Commission") report.<sup>10</sup>

## B. *The Rise of Statutory Protection*

### 1. *The Background*

In 1968, the Donovan Commission issued its report calling for statutory protections against unfair dismissals, creation of state tribunals to enforce these protections, and encouragement of comparable voluntary procedures in industries by exempting them from certain statutory requirements.<sup>11</sup>

By 1970, a broad consensus had formed in support of legislation to protect employees against unfair dismissal:

Both major political parties are now committed to introducing legislation of this kind. The government's White Paper indicated that they would broadly follow the lines of the recommendations of the Donovan Commission. The Conservative Party's document "Fair Deal at Work," also accepts the reasoning of the ILO Recommendation and advocates that "dismissed employees should have the right of appeal to the Industrial Court (either direct or through their union) against alleged unjust dismissal—whether or not the employer has fulfilled the contract terms."<sup>12</sup>

The government continued the consultative process with the Confederation of British Industry, the Trades Union Congress, and other interested parties until agreement on unfair dismissal legislation was achieved.

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8. HER MAJESTY'S STATIONARY OFFICE [hereinafter cited as HMSO], *DISMISSAL PROCEDURES: REPORT OF A COMMITTEE OF THE NATIONAL JOINT ADVISORY COUNCIL ON DISMISSAL PROCEDURES* iii (1967) [hereinafter cited as NJAC REPORT ON DISMISSAL PROCEDURES].

9. *Id.*

10. *Id.* at iii, 55.

11. HMSO, *ROYAL COMMISSION ON TRADES UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968*, CMD. NO. 3623 (1968).

12. Clark, *supra* note 7, at 12.

## 2. Legislative Response

The Industrial Relations Act of 1971<sup>13</sup> included unfair dismissal prohibitions and a revised industrial tribunal system for adjudication of employee claims. The 1971 Act was amended and re-enacted in the Trade Union and Labour Relations Act of 1974;<sup>14</sup> further amended and consolidated in the Employment Protection Act of 1975;<sup>15</sup> and amended by the Employment Act of 1980<sup>16</sup> and the Employment Act of 1982.<sup>17</sup>

Under the statutory protections:

The employer is obliged to show the principal reason for dismissal and that it is a reason related to the employee's capacity, or his conduct, or that the employee was redundant, or that there was some other substantial reason of a kind such as to justify the dismissal of an employee holding the job in question. The employer must also satisfy an industrial tribunal that in all the circumstances (having regard to equity and the substantial merits of the case) [it] acted reasonably in treating this as a sufficient reason for dismissal. Since 1 June 1976, the primary remedy for unfair dismissal which the employee may claim is reinstatement or re-engagement, but in practice most employees are still awarded compensation rather than being put back on the job.<sup>18</sup>

Between 1970 and 1979, Parliament enacted thirty general acts regulating employment and establishing numerous individual legal rights, including the right not to be unfairly dismissed.<sup>19</sup> The impact of these statutes cannot be appreciated without an understanding of the nature and extent of voluntary dismissal procedures in place when the statutes were enacted.

## 3. Voluntary Procedures

S.D. Anderman generalized the characteristics of dismissals procedures at the time the Industrial Relations Act of 1971 was enacted.<sup>20</sup> Using survey data from secondary sources and his own investigations, Anderman concluded that only a small minority of private firms had formalized *internal* discipline and dismissal procedures. Moreover, not all those procedures provided comprehensive protection. Union participa-

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13. Industrial Relations Act, 1971, ch. 72.

14. Trade Union and Labour Relations Act, 1974, ch. 52. The Labour Government repealed all but the unfair dismissal portions of the original legislation.

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

16. Employment Act, 1980, ch. 42.

17. Employment Act, 1982, ch. 46.

18. Hepple, *Great Britain*, in INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 115 (R. Blanpain ed. 1980) (an unfair dismissal claim may be made where an employee alleges that her selection for layoff violates a contract provision or customary practice).

19. Hepple, *Individual Labour Law*, in INDUSTRIAL RELATIONS IN BRITAIN 393 (G.S. Bain ed. 1983).

20. See Anderman, *Voluntary Dismissals Procedure and the Industrial Relations Act*, 38 POL. & ECON. PLAN. Broadsheet 538, at 20-54 (1972).

tion in internal procedures varied widely, but there was a trend toward joint procedures. The type of internal appeals also varied widely, but appeal to higher management was most common.

Anderman found, when it came to *external*, typically industry-wide, dismissal procedures, most industries used their general dispute procedures to handle challenged dismissals. This system was used in unionized industries where the union must process the complaint and represent the grievant. External procedures handled dismissal appeals only rarely, but reinstatement or re-engagement was the most prevalent remedy. Most external procedures provided for joint adjudication, most often conciliation, and on occasion, voluntary arbitration.

In contrast to the private sector, Anderman found that dismissal procedures in the public sector offered protection to employees similar to the safeguards eventually provided by the Industrial Relations Act of 1971.

These voluntary procedures provided the only protections against unfair dismissals in 1971. Civil servants, employees in large progressively managed firms, and members of unions had some protection against unfair dismissal. However, a majority of workers in secondary and tertiary labor market<sup>21</sup> jobs enjoyed no effective common law protections against unfair dismissal.

This situation changed dramatically in February 1972 when the Industrial Relations Act of 1971 took effect. At that time, governmental agencies set about to implement a prohibition against unfair dismissals.

### C. *The Role of Public Agencies*

#### 1. *Industrial Tribunals*<sup>22</sup>

Quasi-judicial tribunals were originally set up under the Industrial Training Act of 1964<sup>23</sup> to handle disputes over levies which funded training boards in various industries. When the Redundancy Payments Act of 1965<sup>24</sup> was passed, these same tribunals were given the authority to resolve disputes over redundancy pay entitlements. The tribunal was empowered to adjudicate individual claims of unfair dismissal.

In 1968 the Donovan Commission had recommended that tribunals

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21. The "secondary" and "tertiary" markets, as opposed to the "primary" labor market, consist of short-term, low-skill, low-paid jobs with little chance of promotion. See L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 118-19 (7th ed. 1978).

22. The Industrial Relations Research Unit at the University of Warwick, England has conducted extensive research on unfair dismissals. For an excellent portrayal of the legal background, the set-up, operation and impact of industrial tribunals, see Dickens, Hart, Jones & Weekes, *The British Experience Under a Statute Prohibiting Unfair Dismissal*, 37 *INDUS. & LAB. REL. REV.* 497 (1984) [hereinafter cited as Dickens].

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

24. Redundancy Payments Act, 1965, ch. 62.

be given the authority to hear all individual employment disputes. The Commission's enthusiasm for tribunals was based on the view that they provided "a procedure which is easily accessible, informal, speedy and inexpensive and which gives employers and employees the best possible opportunities for arriving at an amicable settlement of their differences."<sup>25</sup>

Three people sit on a tribunal. The chairperson must be a barrister or solicitor of at least seven years experience and is appointed on a full- or part-time basis by the Lord Chancellor. The two lay members are appointed by the Secretary of State for Employment from panels recommended by employer associations and employee organizations (primarily the Trades Union Congress<sup>26</sup>). The tribunal members receive fees on an *ad hoc* basis. Each member has an equal vote, and the lay members are not expected to be partisan representatives. The voting pattern is instructive: about ninety-five percent of the decisions are unanimous, the remainder are two-to-one decisions—a few with the chairperson in the minority.

Tribunal decisions may be appealed to the Employment Appeal Tribunal ("EAT") only on a point of law. The composition of the EAT is similar to the lower tribunals except that the chairperson is a High Court judge and the lay members are more senior. The decisions of the EAT are binding on the tribunals but are appealable to the Court of Appeal and, finally, to the House of Lords. Several dismissal cases under closed shop arrangements, however, have been appealed to the European Economic Community's Court of Justice. Cases which are appealed are particularly significant since they become binding precedent.

Tribunal orders calling for monetary compensation are legally enforceable through the civil courts. Orders to reinstate or re-engage the complainant, however, are not directly enforceable, but if an employer ignores such an order, the tribunal will award extra compensation.

## 2. *Advisory, Conciliation & Arbitration Service*

The Advisory, Conciliation, and Arbitration Service ("ACAS") has extremely important roles and functions in unfair dismissal cases.<sup>27</sup> ACAS is an independent and impartial government agency dedicated to improving industrial relations. It encourages the parties to voluntarily

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25. HMSO, ROYAL COMMISSION, *supra* note 11.

26. The Trades Union Congress is an alliance of independent organizations similar to the AFL-CIO in the United States.

27. Unless otherwise noted, the following summary of ACAS roles and functions are taken from several excellent pamphlets distributed by the agency. THIS IS ACAS (rev. November 1983); CONCILIATION BY ACAS IN COMPLAINTS BY INDIVIDUALS TO INDUSTRIAL TRIBUNALS (1984) [hereinafter cited as CONCILIATION BY ACAS]; IMPROVING INDUSTRIAL RELATIONS: JOINT RESPONSIBILITY (1984).

use its services, but has no power to coerce cooperation. ACAS maintains confidentiality and charges no fee for services. A tripartite Council provides oversight and guidance, and an experienced specialized staff delivers services. ACAS offers advice and practical assistance in a wide array of human resources management areas. In addition, it provides opportunities for voluntary conciliation, mediation, and arbitration of employment disputes. The agency has a statutory duty to promote voluntary settlements of individual complaints arising under the various acts establishing individual employment rights. About ninety percent of all applications processed by ACAS involve a claim of unfair dismissal.

The individual conciliation process is most typically triggered by the written application to an industrial tribunal alleging unfair dismissal. All the relevant paperwork associated with the claim is routinely sent to the appropriate ACAS office and the case assigned to a conciliation officer ("C.O."). The C.O. contacts the applicant employee and respondent employer to determine if there is some hope that the claim can be conciliated before a formal tribunal hearing is held. The C.O. attempts to provide useful information and suggests options to the parties. Throughout the conciliation process, the C.O. is expected to be totally neutral and to avoid expressing any personal views on the dispute in order to prevent coercion or even influencing the parties. C.O.s do not seek to persuade claimants to drop their complaints. Approximately forty percent of all cases are settled by conciliation and another twenty-five percent are withdrawn before proceeding to a tribunal hearing. About sixty to seventy percent of all cases are thus cleared each year without the need for a tribunal hearing.<sup>28</sup> Usually, the failure to conciliate the dispute or the failure of the claimant to drop the action results in the parties appearing before an industrial tribunal. The ACAS' active involvement in unfair dismissal claims ends at this point. However, ACAS is also responsible for developing the Codes of Practice, a guideline for implementing and interpreting employment dismissal legislation. In 1977 ACAS issued Code of Practice 1, "Disciplinary Practice and Procedures in Employment."<sup>29</sup> This Code has exerted a pervasive influence upon the development and design of discipline and dismissal procedures. Although it is not legally binding on the parties, the tribunals must take account of the Code's recommendations when deciding unfair dismissal claims. Thus, the Code "gives practical guidance on how to draw up practical rules and procedures and how to operate them effectively."<sup>30</sup>

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28. CONCILIATION BY ACAS, *supra* note 27, at 10.

29. ACAS, DISCIPLINARY PRACTICE AND PROCEDURES IN EMPLOYMENT 1 (1977).

30. *Id.*



### 3. *Tribunal Hearings*

The hearing itself is very similar in many important ways to grievance arbitration in the United States.

Typically, the employer, or its representative, makes an opening statement and then calls witnesses. Each witness either takes an oath or affirms and gives direct testimony and is cross-examined by the employee or his representative. Tribunal members are free to question the witness on her testimony. The employer, if it wishes, may reexamine the witness and the employee then has that opportunity as well. When the employer's case is completed, the same process is repeated to present the applicant's case.

The employee and then the employer make closing statements. There may be some discussion about possible remedies before the tribunal adjourns to discuss the case. The tribunal most often renders a decision from the bench immediately upon returning from chambers. However, the tribunal may charge the parties to negotiate a compensation award under its guidelines. On occasion, the tribunal will adjourn the proceedings to give the employer time to reconsider a reinstatement or re-engagement remedy, either returning the employee to predissmissal terms and conditions of employment or under new terms decided by the tribunal.

On March 1, 1985, a procedural rule was changed to permit the industrial tribunals to issue decisions in summary form to save time and reduce the legal formality of the proceedings. However, this rule change will not apply when one of the parties requests a full, written decision or in some cases such as those involving alleged racial or sexual discrimination.<sup>31</sup>

There is a continuing and sometimes acrimonious debate in Great Britain regarding the effectiveness of the industrial tribunal system.<sup>32</sup> There is, however, consensus that a major innovation in British administrative law occurred with the extension of individual employment rights in the 1970's and the industrial tribunals' assumption of responsibility for adjudicating most of the disputes under the statutes. The tribunals have operated at the leading edge between the administrative law and industrial relations practices in forging new standards for dismissals.

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31. See, e.g., *Questions in Parliament*, 92 EMPLOYMENT GAZETTE 31 (1985). The parties may request a full decision up to 21 days after the summary decision is issued. A tribunal chairman, in a discussion with the author, believed that it would be very difficult to recall the nuances of a particular case if requested to write a full decision three weeks later.

32. See *infra* text accompanying notes 54-56, 89-99.

## II SYSTEMIC IMPACTS

Probably the most significant impact of the statutory protection against unfair dismissal under the tribunal system has been the revision and extension of discipline and dismissal procedures.

### A. Procedural Changes

Dismissal procedures typically take one of three forms: joint procedures negotiated by employers and unions, unilaterally formalized employer procedures, and informal "procedures" based on shop custom.

In the 1960's, there was very little reliable information available in Great Britain on the existence of formal discipline and dismissal procedures. The National Joint Advisory Council ("NJAC") Committee report, based on limited and nonrepresentative data from three samples, concluded that probably no more than twenty percent of the private-sector firms had formal procedures.<sup>33</sup> The NJAC concluded that:

It appears, therefore, that procedures are comparatively rare among firms employing under 1,000—the vast majority—but exist in quite a lot of firms employing over 1,000, and further analysis showed that they are found in many of those employing over 2,000. Indeed, it may be that they exist in a majority of those firms employing over 1,000 which pay attention to good personnel practices.<sup>34</sup>

In a later and more comprehensive report, the Government Social Survey found that of 1,100 establishments with over twenty-five employees, only 8% had formal dismissal procedures. Another 24% had limited informal procedures. Finally, a majority 54% had no systematic way at all to process dismissal or disciplinary action appeals.<sup>35</sup>

A 1976 study of grievance procedures in thirty-five plants in the carpet, chemical, and food industries is noteworthy. Overall, twenty-two plants (67%) possessed internal grievance procedures, while thirteen plants (37%) had no procedure. The great majority of the official written grievance procedures in the survey had been developed in the 1969-1972 period.<sup>36</sup>

Thus, the Donovan Report's recommendations,<sup>37</sup> the consultative process preceding the passage of the Industrial Relations Act of 1971, and the Act's implementation the following year, apparently had a pervasive positive influence on British management's view of establishing dismissal procedures.

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33. NJAC REPORT ON DISMISSAL PROCEDURES, *supra* note 8, at 7.

34. *Id.*

35. See Anderman, *supra* note 20, at 22.

36. See A. THOMPSON & V. MURRAY, GRIEVANCE PROCEDURES 56-59 (1976).

37. See *supra* text accompanying notes 10-11.

In fact, Daniel and Stilgoe,<sup>38</sup> in a survey of the impact of the employment protection laws, document the impact of the 1971 legislation on dismissal procedures. The study, which involved telephone interviews with 301 establishments and follow-up interviews at thirty-six plants, concluded that:

The aspect of employment protection legislation to have had the most widespread impact upon employers was unfair dismissal requirements. Their chief effect has been to encourage the reform or formalization of procedures adopted in taking disciplinary action and in executing dismissals.<sup>39</sup>

The Institute of Personnel Management ("IPM") conducted a major survey of disciplinary procedures and practice in 1978.<sup>40</sup> The IPM wished to determine how companies had responded to unfair dismissal legislation, the decisions of industrial tribunals, and Government Codes of Practice. The report was based upon mailed questionnaires returned by 273 organizations representing various industry groups. In addition, 206 company handbooks and procedures submitted by the surveyed firms were analyzed. Finally, IPM conducted a comprehensive literature review.<sup>41</sup>

IPM found that most public and private companies in the survey had responded to external pressure to formalize their disciplinary procedures.<sup>42</sup>

Nearly all the participating companies (98%) have written disciplinary procedures for blue collar workers and 93% have such procedures for white collar workers. Over three quarters (77%) have the same or identical procedures for blue and white collar workers. This marks a significant change in the proportion of companies with formal disciplinary procedures compared with ten years ago.<sup>43</sup>

The survey attributed this remarkable change of affairs to the laws on unfair dismissal, the decisions of industrial tribunals, the recommendations in the Codes of Practice, and pressure from trades unions and staff associations.<sup>44</sup> The relatively high percentage of British employees represented by trades unions or staff associations in the surveyed firms is worthy of note. The proportion of companies with trade unions for "op-

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38. See Daniel & Stilgoe, *The Impact of Employment Protection Laws*, 44 POL. STUD. INST. No. 577 (1978).

39. *Id.* at 74.

40. *Disciplinary Procedures and Practices*, 28 IPM INFO. REP. 1 (1979).

41. *Id.* at 1-3.

42. The IPM defined disciplinary procedure as "a formal procedure for dealing fairly and consistently with disciplinary matters through a system of progressively severe sanctions administered by successive levels of management." *Id.* at 7.

43. *Id.* at 73.

44. *Id.* at 7. The report noted the particularly important influence of a provision under the Employment Protection Act of 1975 requiring that all applicable disciplinary rules must be written down and either given or made readily accessible to the employee.

eratives" (blue collar workers) was 79%, for supervisory and technical, 64%, for clerical staff, 54%, and for managerial staff, 28%.<sup>45</sup> The proportion of companies which recognized staff associations ranged from a low of 5% for operatives to 16% for clerical staff.<sup>46</sup> Trade union participation in disciplinary matters increased with the size of the company. Participation was also greater in disciplinary procedures than in the establishment of rules.<sup>47</sup>

The final survey reported here<sup>48</sup> is the most extensive investigation of British workplace industrial relations since the Donovan Commission study in 1966. The Daniel and Millward survey covered the manufacturing and service sectors, both public and private, on a wide range of British industrial relations practices.

The design of the survey had three key features. First, the establishment (workplaces) was made the unit of analysis. Secondly, interviews were carried out with both management and worker representatives in establishments. Thirdly, the coverage was more comprehensive than that of any previous survey of its type.<sup>49</sup>

Interviews were conducted at 2,041 establishments with 2,439 worker representatives and 2,205 managers from May to August 1980.<sup>50</sup>

The Daniel and Millward survey documented the further growth and continuing formalization of discipline and dismissal procedures noted in the previous studies cited.<sup>51</sup> Management reported that discipline and dismissal procedures existed in 83% of all establishments. The probability that an establishment had formal procedures was strongly correlated with size, the existence of recognized trade unions, the extent of union membership, and location in the public sector. Of establishments following formal procedures, 91% had such procedures in writing. The small, independent private sector establishment was the least likely to have a written procedure; where such establishments followed formal procedures, only 73% had those procedures in writing.

The authors concluded that the legislative developments of the 1970's were undoubtedly an important stimulus to the growth of formalized dismissal procedures. "However, it remained the case that establish-

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45. *Id.* at 13. The contrast with the percentage of workers who are unionized in the United States is considerable: in 1984 the U.S. Department of Labor, Bureau of Labor Statistics unofficially estimated that only 20.9% of the work force was union-represented. A. SLOANE & F. WHITNEY, *LABOR RELATIONS* 4 (5th ed. 1985).

46. *Disciplinary Procedures and Practices*, *supra* note 40, at 15. "Staff associations," in British parlance, are in-house employee organizations which might be likened to "company unions" in the United States.

47. *Id.* at 73.

48. W. DANIEL & N. MILLWARD, *WORKPLACE INDUSTRIAL RELATIONS IN BRITAIN* (1983).

49. Millward, *Workplace Industrial Relations: Results of a New Survey of Industrial Relations Practices*, 91 *EMPLOYMENT GAZETTE* 280 (1983).

50. *Id.* at 281.

51. See W. DANIEL & N. MILLWARD, *supra* note 48, at 159-75.

ments with trade union representation were those most likely to have the more formalized, written procedures."<sup>52</sup>

In the final analysis, the only true test of the statutory protections is not measured by the number of companies or workers governed by formal procedures. Rather, the question is how effective these procedures are at protecting employees against unfair dismissals.

### B. *Protection Against Unfair Dismissal*

Precise statistics on involuntary terminations in general and on alleged unfair dismissals in particular are not readily available. However, some fragmentary estimates have been made.

#### 1. *Extent of the Problem*

The NJAC report estimated that over ten million employment terminations occurred in Great Britain during the mid-1960's. About three million dismissals took place each year: two million were due to individual causes and one million were due to redundancy.<sup>53</sup> This is to be compared to a total working population of over twenty million.<sup>54</sup>

The number of unfairly dismissed employees is also unknown. Clark estimated in 1970 that a rough estimate of the problem could be gleaned from analyzing unemployment benefit claims. Of 280,000 dismissals based on alleged employee misconduct, 100,000 were not upheld because the employers' charges were not proven upon appeal.<sup>55</sup>

Another author has calculated dismissal rates in British manufacturing using data from the Warwick University's Industrial Relations Research Unit's 1977-1978 survey. Employers were asked how many workers had been dismissed for cause during the last two years. Dismissal rates were then calculated on the proportion of total employees fired. Based on the replies from 953 plants, a very skewed frequency distribution was generated.<sup>56</sup>

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52. *Id.* at 290.

53. NJAC REPORT ON DISMISSAL PROCEDURES, *supra* note 8, at 3.

54. The total working population was 24.6 million as of 1978. Rojot, *Background Notes on Major Industrial Countries*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS* 143 (R. Blanpain ed. 1982).

55. Clark, *supra* note 7, at 5.

56. Deaton, *The Incidence of Dismissals in British Manufacturing Industries*, 15 *INDUS. REL. J.* 62 (1964). Variations in dismissal rates, based on regression analyses, were not unexpectedly found to be particularly dependent on four factors, "establishment size, white-collar, skilled, and union density." *Id.* at 62.

<u>Percentage Dismissed</u>	<u>Number of Plants</u>
1% or less	457
1%- 5%	378
5%-10%	78
10%-15%	26
15%-20%	9
20%-30%	2
30%-40%	3
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The survey reveals that the great majority of establishments have very low dismissal rates while a relatively few establishments have very high rates.

Finally, Daniel and Millward in their 1980 survey of over 2,000 establishments also found dismissal for cause to be a relatively infrequent occurrence. Only 42% of the establishments reported dismissing someone in the previous year. In only 9% were 5 dismissals reported, and 2% experienced more than 20 dismissals. Adjusting for size, establishments with fewer than 100 employees had a dismissal rate of 18 to 1,000 employed; the rate for establishments of 1,000 or more employees was 4 to 1,000. The average dismissal rate for all establishments was 11 to 1,000.<sup>57</sup>

Unfair dismissal statutory protections were designed to provide protection for workers' job security. There are disputes, however, regarding the statutes' purposes and effectiveness in providing worker job security.

## 2. *Statutory Intent*

Professor B.A. Hepple asserts that the underlying concepts applied to employment protection legislation are imprecise. Notions of "property in the job" and "right to work" provide a conceptual framework that emphasizes due process protections against loss of a job and re-employment as the remedy for unjust dismissal.<sup>58</sup>

However, Hepple identifies four purposes or functions which provide different emphases. In addition to the primary purpose of compensating unfairly dismissed workers, employment protection legislation performs other functions. It encourages management to be more careful

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57. W. DANIEL & N. MILLWARD, *supra* note 48, at 171. The NJAC report found in 1965 that firms possessing formalized dismissal procedures used them infrequently. Replies from 33 firms employing 123,000 persons indicated that 2,625 (6.4%) employees were dismissed for illness, unsuitability, and misconduct. However, dismissal rates of firms with formal procedures were 2% for total dismissals and 1% for misconduct. Corresponding rates for firms without formal dismissal procedures were 4% and 1.3%. NJAC REPORT ON DISMISSAL PROCEDURES, *supra* note 8, at 9-10.

58. Hepple, *Individual Labour Law*, *supra* note 18, at 408-09.

in recruiting and "shedding" labor. It may legitimize "the existing structure of authoritarian control and inequality of reward in industry." Finally, it provides a "floor of rights" upon which collective bargaining may improve.<sup>59</sup>

At least some of the apparent confusion probably results from the overlapping meanings given to "concepts," "purposes," and "functions," especially when the purposes are also related to the outcomes of the legislation. Paul Lewis, however, is adamant in claiming that "the primary remedy for unfairly dismissed employees has always been 're-employment.'"<sup>60</sup> In fact, successive legislative amendments since 1971 have emphasized re-employment, thus increasing pressure on industrial tribunals to employ it as the preferred redress for unfair dismissals.<sup>61</sup>

R. W. Rideout analyzed the historical record of re-employment as a remedy and speculated that its infrequent use disappointed proponents such as Lewis.<sup>62</sup> Rideout succinctly summarized statutory changes and their implementation by the tribunals.

The 1971 legislation, accordingly, provided only that an industrial tribunal might make a *recommendation* for re-engagement . . . . The difference between reinstatement and re-engagement is that the former involves the employer treating the employee in all respects as if he had not been dismissed, whereas the latter involves return to employment by the former employer on such terms as the tribunal shall decide.

The 1978 Act, in confirming the power of an industrial tribunal to make an order as distinct from a recommendation (Section 69), obviously seeks to suggest that this should be regarded as the primary remedy wherever it is practical for the employer to comply. As well as this element of practicality, the Act states in deciding whether to make such an order the tribunal shall take into account whether the complainant wishes to be reinstated, wherever the complainant caused or contributed to his own dismissal, whether it would be just to order reinstatement. . . . There is no machinery for enforcement of orders for reinstatement or re-engagement. Should such an order not be complied with an "additional award" of compensation may be made.<sup>63</sup>

Tribunal operating statistics reinforce Rideout's observations and provide an empirical basis for evaluating the system's effectiveness.

### 3. *Recent Tribunal Statistics*

The number of registered applications to tribunals has varied widely since 1972. The number increased threefold from 1972 to 1976 and then

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59. *Id.* at 409-12.

60. Lewis, *An Analysis of Why Legislation Has Failed to Provide Protection for Unfairly Dismissed Employees*, 19 BRIT. J. INDUS. REL. 316 (1981) (citation omitted).

61. *Id.* at 324 n.1.

62. R. RIDEOUT, *INDUSTRIAL TRIBUNAL LAW* 113 (1980).

63. *Id.*

decreased steadily (except for 1981 and 1982) through 1983.<sup>64</sup> A preliminary unpublished estimate from ACAS projects a decline of 200 applications for 1984.<sup>65</sup> The variation in registered applications was due to such factors as expanding tribunal jurisdiction, changing eligibility standards, rising unemployment, and the increasing use of lawyers by claimants. In 1983, almost 75% of all applications consisted of claims for unfair dismissal.<sup>66</sup>

Table 1, "Unfair Dismissal Cases: 1983," summarizes the most recently published data on tribunal operations. Roughly one-third of the 30,076 cases were withdrawn, one-third were resolved through agreed settlements, and one third were eventually heard by tribunals. Of that third of the cases receiving a full hearing, 31.8% were upheld and 62.2% were dismissed. As a proportion of all registered applications, 11.0% of tribunal cases were upheld and 33.4% resulted in agreed settlements, leading to an overall applicant success rate of 44.5%.

An analysis of the outcomes of tribunal proceedings provides a valuable but limited gauge by which to evaluate the level of protection afforded totally or partially successful applicants. Only 1.3% of all claimants were re-employed, 1.0% through voluntary agreements and 0.3% by tribunal awards. Compensation was the primary method of redress, as it was awarded in 38.2% of all claims made and 16.9% of all tribunal awards. A noteworthy recent development has been the tendency of tribunals to authorize the parties themselves to determine the appropriate remedy for unfair dismissal.

The size of monetary awards can be used to evaluate systemic effectiveness. Tribunal compensation orders are determined as follows:

There are two separate parts of an order for compensation for unfair dismissal, namely a basic award and a compensatory award. To the sum of these may be added an additional, and primarily punitive, award if an employer declines to comply with an order for reinstatement or re-engagement—supposing such an order to have been made in the face of an indication by the employer that he would not comply.<sup>67</sup>

Table 2, "Compensation Remedies," presents a percentage breakdown of levels of compensation awarded through conciliated agreements and tribunal awards for 1981-1983. The reader is cautioned that the data are not totally comparable because of relatively minor definitional changes and, of course, because of the influences of differing labor market conditions and inflation rates. The general picture is nevertheless quite clear.

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64. *Industrial Tribunals and the Employment Appeal Tribunal*, 92 EMPLOYMENT GAZETTE 488 (1984).

65. Personal Interview (February 4, 1985).

66. See *supra* note 64, at 487.

67. R. RIDEOUT, *supra* note 46, at 114.



TABLE I  
UNFAIR DISMISSAL CASES, 1983

	NUMBER	PERCENT	PERCENT OF ALL CASES
	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>
<u>Total Cases Completed</u>	<u>30,076</u>		<u>65.5</u>
<u>Cases Not Going to Tribunal Hearing</u>	<u>19,695</u>		<u>32.1</u>
All Withdrawals	9,644	49.0	
All Agreed Settlements	10,051	51.0	33.4
Reemployment Agreed	301	1.5	1.0
Compensation Agreed	9,546	48.5	31.7
Some Other Remedy	204	1.0	0.7
<u>Cases Proceeding to a Tribunal Hearing</u>	<u>10,381</u>		<u>34.5</u>
All Cases Dismissed	7,082	68.2	23.5
Out of Scope	1,231	11.8	4.1
Dismissal Upheld As Fair	4,484	43.2	14.9
For Other Reasons	1,367	13.2	4.5
All Cases Upheld	3,299	31.8	11.0
Reinstatement	61	0.6	0.2
Re-engagement	38	0.4	0.1
Compensation	1,756	16.9	5.8
Redundancy Payment	210	2.0	0.7
Tribunal Left Remedy to Parties	1,234	11.9	4.1

SOURCE: *Industrial Tribunals and the Employment Appeal Tribunal, 92 EMPLOYMENT GAZETTE at 490-91 (1984).*

TABLE 2  
COMPENSATION REMEDIES  
(PERCENT OF YEARLY TOTAL)

	CONCILIATED AGREEMENTS			TRIBUNAL AWARDS		
	1981	1982	1983	1981	1982	1983
TOTAL	10,726	9,879	9,546	1,945	2,045	1,752
Less than £200	32.0	26.7	21.4	11.1	9.1	7.2
£200 - £999	49.3	55.7	56.8	40.7	35.8	34.1
£1,000 - £4,999	17.2	15.4	19.3	43.5	49.4	51.9
£5,000 - £8,999	1.0	1.5	1.8	4.5	5.4	6.2
£9,000 and Over	0.5	0.7	0.7	0.2	0.3	0.6
All	100.0	100.0	100.0	100.0	100.0	100.0
Median Amount	£305	£349.5	£421	£963	£1,201	£1,345
Cases Where Basic Award Only Made <sup>a</sup>				9.3	7.1	6.6
Cases Where Compensatory Award Was The Maximum <sup>b</sup>				0.9	1.9	1.7

<sup>a</sup> The basic award is the equivalent of the statutory redundancy payment to which the employee is entitled based on age and length of service; the compensatory award is the amount *added* to the basic award to compensate for the actual loss suffered as a result of the dismissal minus any deductions made for subsequent earnings, benefits received, and possible contributory fault for the dismissal.

<sup>b</sup> Limits on the compensatory award only were £6,250 from February 1, 1980; £7,000 from February 1, 1982; and £7,500 from February 1, 1983.

SOURCE: Industrial Tribunals and the Employment Appeal Tribunal, 92 EMPLOYMENT GAZETTE at 490-91 (1984).

The median compensation award, the most common remedy, is relatively low and nowhere near the maximum allowed. The median compensation received through conciliated agreements was even smaller, less than one-third of that obtained through tribunal awards. Nearly four-fifths of conciliated agreements and over two-fifths of tribunal awards were below £1,000 in 1983. In that year only 1.7% of successful claimants received the maximum compensatory award possible (£7,000), while 2.5% in conciliated agreements and 6.8% in tribunal awards received £5,000 or more. According to Dickens, *et al.*, the median tribunal award of £963 in 1981 was about eight times the average weekly full-time earnings in the same year.<sup>68</sup>

#### 4. *Applicant Characteristics*

Data on the characteristics of applicants claiming unfair dismissal would be useful in interpreting the effectiveness of tribunal operations. Industry, age, length of service, sex, wage level, and occupation all seem to affect the frequency with which employees resort to unfair dismissal procedures.

The Department of Employment has published data on the characteristics of the parties for the years 1974-1976.<sup>69</sup> Although the data are not timely, they are nevertheless instructive and, hopefully, still representative.<sup>70</sup>

##### a. *Industry*

Three industries—construction, distribution trades, and “miscellaneous services”<sup>71</sup>—accounted for 46.5% of all applications. The proportions of total applications from the remaining twenty-four industrial classifications varied from a low of 0.1% for coal and petroleum products to a high of 6.5% for transport and communication.

##### b. *Establishment*

About one-fifth of all applications occurred in firms with fewer than twenty employees, almost two-thirds from firms with fewer than 250 employees, and 15.6% from firms with more than 1,000 employees.

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68. Dickens, *supra* note 22, at 509.

69. Unless otherwise noted, all data are from *Unfair Dismissal Application in 1976: Characteristics of the Parties*, 85 EMPLOYMENT GAZETTE 1214-17 (1977). The data in the report covered all finalized applications for 1974 and 1975, but for 1976 only the finalized applications on dismissals which had taken place prior to June 1, 1976. Data from 1976 are used in the following summaries and, unless otherwise stated, do not deviate significantly from the previous two years' data.

70. The author is not aware of any data that is more current.

71. The “miscellaneous services” category includes the broad range of service industries, with the exception of insurance, banking, finance, and professional and scientific services.

*c. Occupation*

The largest proportion of applications came from the professional and management employees (17.5%) and then, in descending order, the processing employees (14.5%), transport operating employees (12.9%), food service employees (10.1%), clerical employees (10.0%), and retail employees (9.7%). The remaining 25.3% of applications was apportioned among the remaining twelve occupational groups.

*d. Age*

Almost three-quarters of all applicants were between twenty and fifty years of age, 7.1% were under twenty years old, and 15.6% fell in the fifty to fifty-nine age bracket. In comparison with past years, age groups under forty comprised a greater proportion of the total, while the share of employees over fifty declined.

*e. Length of Service*

The seniority distributions for different years are not comparable because of changes in statutory qualifying periods. However, the data for 1976 indicate that nearly three-quarters of all applicants had less than five years seniority and less than a tenth had worked ten or more years for this employer.

*f. Sex and Wage*

One-fourth of all applications were filed by women, a significant increase from 1975. Basic weekly wages in 1974-1976 varied significantly because of inflation and changing labor market conditions. The data for 1976 reveal that almost two-thirds of male applicants earned less than £50 per week while over four-fifths of female applicants earned less than £40 per week. Only 11.4% of males and 1.6% of females achieved or exceeded earnings of at least £70 per week.

In summary, Professor Hepple concluded from his analysis of roughly comparable data:

that the industries which are overrepresented in unfair dismissal applications are generally those in which the density of union membership is relatively low and collective bargaining is relatively weak, and where there is a concentration of small employers and low-paid, short-service employees. These industries include agriculture, construction, distributive trades, and miscellaneous services. Industries which are underrepresented tend to be those where density of union membership is high and where there are large employers, such as mining, quarrying, gas, electricity, water, and public administration.<sup>72</sup>

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72. Hepple, *The British Experience with Unfair Dismissals Legislation*, in *ARBITRATION ISSUES*

### III FIELD STUDIES

This section summarizes the implications of unfair dismissal statutory protections on seven selected firms and on the unionized electrical contracting industry.

The seven firms were selected because they spanned a variety of sizes and because of the author's personal contacts with their managements, which greatly facilitated cooperation.<sup>73</sup> Unfortunately five of the seven firms are non-British owned which may limit the ability to generalize from this sample of management practices. However, the examination of the experience of these firms is intended only to supplement the earlier data with more recent data. This objective should not be affected by the nature of the firms' ownership.

The unionized electrical contracting industry, on the other hand, was selected because of the unique manner in which it adjudicates unfair dismissal appeals. The industry's internal appeal procedure is the only one exempted from industrial tribunal jurisdiction. Finally, the industry's alternative procedure and experience with appeals is not widely known and permits interesting comparisons to be drawn with the industrial tribunal and other systems.

#### *A. Seven-Firm Survey*

The firms are discussed in order of size as measured by the number of employees. The analyses focus on a description of each firm and its dismissal procedure and experience.

##### *1. Firm "A"*<sup>74</sup>

This firm is a branch office of a large foreign financial organization. It employs thirty people who sign a standard employment contract which is designed for young, unmarried females hired into clerk positions. The branch's "Terms and Conditions of Employment" document is given to each employee at the time the contract is signed.

Section 6 of the Terms and Conditions of Employment deals with termination of employment. It is a brief statement specifying the length of notice required from either party which varies with the length of service. Serious employee misconduct, however, will result in immediate termination without notice. There are no formal dismissal procedures or

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FOR THE 1980'S: PROCEEDINGS OF THE THIRTY-FOURTH NATIONAL ACADEMY OF ARBITRATORS 30 (J. Stern & B. Dennis eds. 1982).

73. The persons contacted were assured confidentiality and thus the names of the firms and individuals cannot be provided here.

74. The information for this firm was obtained from a sample employment contract, a telephone interview, and a letter dated January 31, 1985.

appeal mechanisms. Managers could not remember anyone being dismissed who either appealed internally or to an industrial tribunal.

## 2. Firm "B"<sup>75</sup>

This organization is a medium-sized manufacturer owned by a foreign company which employs 230 hourly personnel, who are represented by four unions. The handbook containing the organization's "Terms of Employment, Plant Rules and Procedure Agreement" is ten years old, and management has recently proposed various changes to the unions.

Section 8 of the company handbook outlines a disciplinary procedure calling for maximum involvement of managers, employees, and union officials to develop disciplinary rules and procedures consistent with concepts of social justice. The procedure is progressive, increasing from verbal warnings for minor offenses to instant dismissal for gross industrial misconduct.

Employees can appeal discipline and dismissal decisions under Section 7 which outlines a seven-stage grievance procedure culminating in "a form of Arbitration jointly agreed, the decision of which shall be binding on both parties."

Management has suggested eliminating the final appeal provisions for mutually agreed arbitration and substituting instead appeal to the Managing Directors Conference. However, all recent disputes have been settled internally except for a single 1984 arbitration under ACAS auspices, which involved interpretation of the agreement.

## 3. Firm "C"<sup>76</sup>

This is a branch of a foreign company which employs 1,400 in the food industry. The company prides itself on being a low-visibility firm and its more than sixty years of operation in the U.K. has been characterized by good employee relations. The employees have a high sense of loyalty; the average worker has served for over ten years. Plant and depot managers exercise authority in a decentralized system of control, negotiating twelve labor contracts and a "custom and practice" arrangement.<sup>77</sup>

Each employee receives a copy of the contract when hired, but there is no handbook available spelling out the terms and conditions of employment. Company discipline and dismissal procedures are contained

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75. The information for this firm was taken from company documents and a letter dated April 23, 1985.

76. This description is based on an interview with the Personnel Director on February 20, 1985.

77. In Great Britain, written labor agreements are brief, non-legally binding contracts. The parties, therefore, rely heavily on "custom and practice" arrangements to govern their relationships.

in a policy manual and applied by local managers at each company location. None of the contracts call for arbitration of disagreements.

The firm feels that it provides generous settlements in cases of group redundancies and individual dismissals of unionized workers. Managers are also generously compensated in cases of forced resignation because the company seeks to preclude bad publicity and tribunal hearings.<sup>78</sup> Salespersons, on the other hand, usually resign with little or no pressure if they are not performing well and thus only rarely have to be formally fired. This firm also facilitates these transitions by providing outplacement services contracted for through independent consultants.

#### 4. Firm "D"<sup>79</sup>

This firm, also owned by a foreign company, employs 3,500 in a service industry. Managerial and staff employees are nonunion and have individual employment contracts, while hourly workers belong to one of eight unions. The employee handbook sets down the terms and conditions of employment, company rules, disciplinary procedure, and appeals procedures for both management and nonmanagement employees.

The firm follows a progressive disciplinary procedure with immediate dismissal only for "serious misconduct." The employee has the right to appeal discipline or dismissal as well as the right to be represented by a colleague or trade union official at all stages of the procedure. Final appeal is to the head office personnel manager or a senior member of management.

Top executives feel that there is no way for a British firm to dismiss an employee with impunity. The degree of concern increases with the level of the dismissed employee's job. The firm's practice in dismissing managers is to consult with a lawyer to review the employment contract before setting the buyout price. Typically, the manager is given a year's salary, about the size of an industrial tribunal award for unfair dismissal. "Sweeteners" are sometimes added to ease the employee out with minimum disruption. Outplacement services are also provided to facilitate exit, especially for managers over forty-five years of age.

Industrial tribunals considered fourteen unfair dismissal cases from this firm between November 1979 through December 1984. The reasons for dismissal varied widely, but the most common charge—raised by four of the fourteen employees—was improper redundancy selection. Half of

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78. The government encourages employers to reduce inefficiency through laying off unnecessary employees by reimbursing the employer for 35% of statutory redundancy payments. The previous pay-back level was set at 40%.

79. The data for this firm came from company documents, industrial tribunal decisions, and interviews with the International Vice President for Personnel and Administration on May 7, 1985, the President of European Operations on January 29, 1985, the Chief Executive for Great Britain on February 11, 1985, and the Personnel Director on February 11 and March 12, 1985.

the applicants held managerial or supervisory positions and almost two-thirds (nine of fourteen) were males. The average length of service for eleven of the applicants was thirty-five months. In all fourteen tribunal cases, the firm was represented by a personnel official; five applicants represented themselves, four hired a lawyer, and two called on a relative to present their cases. The applicants were successful in only four cases (twenty-nine percent). The tribunal awards were made an average of six months after the applicant was dismissed.

According to a personnel official, most dismissals involved failure to complete a trial period, with discharge for improper conduct the second most common cause. Overall, however, dismissals occurred relatively rarely. Seventy percent of all dismissals involved female employees, but males were more likely to challenge their dismissals. The firm's approach is to make every attempt to reach an amicable agreement with the aggrieved employee. But once the case reaches the industrial tribunal hearing, the firm's representative assumes an adversarial role.

##### 5. Firm "E"<sup>80</sup>

This company employs 15,000 in the U.K. and 6,000 abroad in various manufacturing industries under a highly decentralized management system. The firm has undergone significant reductions in force since 1969 when it employed 26,000 employees in the U.K. The overall corporate objective was to improve operational efficiency and change the balance of activities by dropping low profit operations.

The firm's progressive dismissal procedure dates from the early 1960's. Its appeal procedure calls for arbitration by mutual agreement under ACAS auspices to resolve impasses. The 1980 agreement between the twelve companies within Firm "E" and the seven trade unions established disciplinary and appeal procedures. The agreement states that disciplinary rules are to be locally determined by management after consultation with union officials. The progressive procedure has two elements; it begins with oral warnings (informal procedure) and then progresses to "dismissal, with or without notice" (formal procedure). The final stage of the appeal is triggered by a request from a high union official that the dispute be referred to ACAS or an independent local arbitrator. If management agrees, the resulting arbitration is final and binding on the parties.

In the last five years, there have been four union requests for arbitration in the twelve companies: a three-day suspension was upheld, a dismissal was reduced to reinstatement without back pay, a charge of racial

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80. The discussion is based on company documents and agreements, a letter dated April 10, 1985, and interviews with the Industrial Relations Advisor and Employee Relations Director conducted on March 7, 1985.



discrimination was upheld, and management refused to arbitrate a dismissal which may yet result in an industrial tribunal hearing. In addition, one recent tribunal case resulted in reinstatement of the applicant.

In 1982 the unions requested several procedural changes in the 1980 agreement, and the parties finalized the modifications in March 1985. The unions had requested that work rules be negotiated, that a shop steward be present at all stages of the disciplinary process, that past disciplinary actions be disregarded after a shorter time, and that unilaterally triggered arbitration by either party be substituted for mutually agreed arbitration.

Management agreed to allow a union official to accompany an employee at every stage of the formal procedure "unless the employee decides otherwise," and to disregard disciplinary suspensions after eighteen months rather than only after two years. Significantly, the unions' request for unilateral arbitration was denied. One management argument for the denial was that "in cases of dismissal of course the ultimate decision of an industrial tribunal is a backstop." In other words, with arbitration unavailable, an employee could still take his case before the industrial tribunal.

#### 6. Firm "F"<sup>81</sup>

This firm, also owned by a foreign company, employs about 17,000 in more than forty plant and service locations. There are no trade unions recognized by firm "F," which is widely known for its progressive and effective human resources management program. The personnel policies emphasize respect for the individual, and company officials claim to "lean over backward" to provide a level of protection against unfair treatment equal to or better than a union shop would provide.

The employment offer letter spells out a few terms such as salary and refers the employee to the company handbook for additional terms and conditions of employment. The employee handbook is not exhaustive; the new employee therefore is instructed to ask her manager for any information not provided. Termination of employment contracts require varying notice periods geared to the employee's length of service except for dismissals based on major misconduct by either party which do not require notice.

The firm employs a constructive policy and progressive procedure in handling unsatisfactory performance or conduct situations. Suspensions with pay are utilized by management during investigations, and every dismissed employee has the right to request a written statement of the

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81. The information for this firm is based on company documents, internal publications and communications, and an interview with the Employee Relations Advisor on February 2, 1985.

reasons for discharge. At every stage of the discipline or dismissal process, the employee may appeal her treatment.

The appeals mechanism is an elaborate "open door" policy which is an integral part of the management system. Appeals progress up the management hierarchy to the chairman of the board of the corporation for final adjudication.

The open door policy is a flexible one allowing the individual employee to decide how to use it. Higher level managers tend to appeal directly to the executive levels, skipping their immediate supervisors and intermediate steps. Lower level employees, on the other hand, tend to go through the appeal levels outlined in the handbook. The employee typically represents herself, but is permitted to use a "soldier's friend" if desired. Senior executives who are asked to rule on appeals may appoint independent "ombudspersons" or investigators to gather the facts and make recommendations to executive decision makers.

The executive level receives approximately thirty open-door appeals annually. About one in four applicants is successful. In the period 1982-1984, ten employees appealed their dismissals, about 10% of the annual appeals total.

Even after exhausting internal procedures, an employee may still request an external review of her dismissal by filing a claim of unfair dismissal under the industrial tribunal system. Four such claims were made by dismissed employees: one each in 1976 and 1984, both unsuccessful; plus two others which underwent pre-hearing assessments but never received a formal tribunal hearing.

Firm "F" continually monitors its internal dismissal procedures trying to improve their effectiveness. Management believes, implementation problems notwithstanding, that the system is working well.

#### 7. Firm "G"<sup>82</sup>

This organization is a large, prosperous firm which employs more than 100,000 employees in eleven companies. The firm has made a major effort to decentralize operations, cut costs, and reduce employment at all levels of the firm. One of its companies cut back from 18,000 to 11,000 employees in less than three years.

The firm's approach is to deal with its employees in a fair way, often going beyond the basic standards of natural justice mandated by law. Thus, dismissal conflicts are typically bought-out by generous agreements which exceed the requirements of state schemes. Industrial tribu-

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82. The data reported for this firm was obtained from company documents, internal procedures, and interviews with a Managing Director on February 22, 1985, and the Manager of the Employee Relations Division on February 22 and on March 12, 1985. Two Personnel Officers were also present at the March 12th meeting.

nal awards provide a minimum floor of protection which this firm deems quite reasonable. This firm gets involved in tribunal proceedings only when a case involves a flagrant danger to corporate interests, such as stealing, drug abuse, and insubordination.

The staged decentralization process, termed "devolution," allows personnel policies and practices to vary not only among the eleven company profit centers, but among plant and departmental levels. Each department at the corporate headquarters, for example, has some form of "works council" allowing for employee input, but no central council exists for consultation. While the dismissal procedure is generalized for all companies, it is applied flexibly in each department.<sup>83</sup>

Each employee signs both an employment contract stipulating various conditions of employment and an attached "Statement of Main Terms and Conditions of Employment." The latter document includes a generalized statement of the appeals and disciplinary procedures. If an employee wants more detailed information, he is instructed to talk to his manager or personnel officer or to ask to see the "Guide to Personnel Policies" kept in each department. There is no handbook because of the great diversity among the companies and departments. Final appeals are usually made to the department head or his superior.

The dismissal experience of one department of 600 employees at corporate headquarters is instructive. There were only four or five appeals over the last three years, one of which went to a tribunal hearing. Many "problems" never reach the conflict stage.

Management makes a thorough investigation of the facts and assumes a high cost commitment to "ease out" non-performing employees by offering settlements which exceed tribunal awards for unfair dismissal. Redundancies are minimized through effective planning to protect employee interests, and a major effort is made to find alternative jobs or provide compensation beyond legal requirements. Finally, an internal "resettlement advisor" helps displaced employees to locate outside job opportunities.

### *B. The Joint Industry Board Experience*

The Electrical Contractors' Association ("ECA") and Electrical, Electronic, Telecommunications, and Plumbing Union ("EETPU") believe that they revolutionized industry dispute settlement procedures when they created the Joint Industry Board ("JIB") in the fall of 1967.<sup>84</sup>

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83. The 11 companies of firm "G" are heavily unionized and accordingly have had formalized dismissals and appeals procedures since the 1960's. The statutory requirements of unfair dismissal, however, resulted in an elaboration and formalization of procedures for the totally nonunion headquarters staff of 6,000.

84. The data in this section were obtained through interviews conducted with industry and union representatives and from various JIB documents.

The JIB system was patterned after a similar type of board established by Local 3 of the International Brotherhood of Electrical Workers in New York City in the 1930's. A major success of the JIB was the elimination of the constant disruptions caused by numerous industrial actions in the industry.<sup>85</sup>

The national and thirteen regional boards are funded jointly by the ECA and the EETPU. In 1979, the JIB established a Code of Good Disciplinary Practice which revised the agreed disciplinary procedure in conformity with statutory changes. The appeals procedure, Section III of the National Working Rules, is invoked in unfair dismissal cases. The appeal proceeds from a discussion between the applicant and the immediate supervisor to the employer and union representatives, the Regional JIB ("RJIB"), and the National JIB ("NJIB") for final internal adjudication.

Either party, however, may appeal (with the consent of the other party) a decision of the NJIB to a "legally qualified arbitrator" appointed by ACAS. Appeals are allowed only on matters pertaining to an alleged error in interpreting the procedure, the admission or rejection of evidence presented at a prior hearing stage, or new evidence. The decision of the arbitrator is final. However, a nonunion worker or worker who does not work for an ECA member firm may challenge a dismissal by appealing through *either* the JIB or industrial tribunal system. After using the JIB option, an applicant could conceivably vacate the arbitrator's "final decision" by applying for a tribunal hearing. This situation has not yet arisen, and it remains an open question whether a tribunal chairman would agree to hear such an appeal.

In October 1979, the Secretary of State issued an order permitting the substitution of the JIB unfair dismissal appeal process for the industrial tribunal procedure. This is the only exemption yet granted under the statutory option.<sup>86</sup>

According to JIB officials, several important differences exist between the JIB and tribunal systems: under the JIB proceedings, there is no qualifying period of employment for protection against unfair dismissal, the parties do not cite precedential cases in presenting arguments, the hearing atmosphere is less formal and questioning is not adversarial, lawyers are rarely involved and cases therefore are not won or lost on "legal quibbles," and re-engagement or reinstatement are more often the result of successful appeals.

A five-year operational analysis is summarized in Table 3, "JIB Dis-

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85. In 1968, the first full year of JIB operation, the industry experienced the fewest strikes and days idle because of disputes in its history.

86. The Employment Protection (Consolidation) Act, 1978 (Section 65) permits exemption of voluntary procedures that exceed the statutory requirements provided by the tribunal system.

TABLE 3  
JIB DISMISSAL CASES

YEAR	JIB GRADED OPERATIVES	COMPLETED CASES		FINAL APPEAL LEVEL		RULING		REMEDY				
		UNFAIR DISMISSAL	UNFAIR SELECTION FOR REDUNDANCY <sup>a</sup>	RJIB	NJIB	ARBITRATION	FAIR	UNFAIR	REIN-STATEMENT	RE-EMPLOYMENT	RE-ENGAGEMENT	MONETARY AWARD
1980	34,814	19	0	11	8	0	7(9) <sup>c</sup>	12(18)	2(6)	0	10(12)	797(3)
1981	31,998	36	0	31	3	2	12(19)	24(36)	4(5)	1	18(28)	643(17)
1982	29,196	29	5	27	7	0	15(17)	19 <sup>d</sup> (24)	3 <sup>e</sup>	1 <sup>f</sup>	14(15)	828(7)
1983	29,644	43	2	31	14	1(4)	19 <sup>g</sup>	26(31)	4	1	21(27)	591(9)
1984	30,000 <sup>h</sup>	35	2	32	5	1	18	19(20)	0	0	19(20)	1,331(11)
TOTAL	N/A	162	9	132	37	1(7)	71(82)	100(129)	13(18)	3	82(102)	N/A
5-YR. AVG.	31,130	32.4	1.8	26.4	7.4	0.8(1.4)	14.2(16.4)	20.0(25.8)	2.6(3.6)	0.6	16.4(20.4)	838.0(9.4)

<sup>a</sup> Unfair selection for redundancy is considered the equivalent of unfair dismissal under the tribunal system in this report.

<sup>b</sup> Due to incomplete data available, the averages are based on fewer than the total number of operatives receiving monetary awards.

<sup>c</sup> The figure in the parentheses indicates the total number of operatives involved in the outcome.

<sup>d</sup> The remedies in an appeal for four unfairly dismissed operatives are not known.

<sup>e</sup> Two operatives were also awarded lost earnings.

<sup>f</sup> A £200 monetary award was also made.

<sup>g</sup> One ruling involved an undisclosed number of operatives.

<sup>h</sup> Estimated.

<sup>i</sup> In all arbitrations since 1979, including one held in January 1985, the NJIB decision was reaffirmed.

SOURCE: JOINT INDUSTRY BOARD FOR THE ELECTRICAL CONTRACTING INDUSTRY, ANNUAL REPORT ON INDUSTRIAL DISPUTES, 1979-1984.

missal Cases."<sup>87</sup> The data, based on a five-year average, indicate that:

- Most appeals are adjudicated at the lower steps of the procedure with very few cases going to arbitration.
- Relatively few claims of unfair dismissal are heard under the formal procedure—only 0.06 (0.08)<sup>88</sup> percent of graded operatives.
- A relatively high proportion of appeals are at best partially successful—58.5 (75.4) percent.
- A relatively high proportion of the total number of appeals result in re-employment—9.4 (12.3) percent. Re-employment is also a relatively frequent outcome in unfair dismissal cases—16.0 (21.0) percent.

Table 4, "Cases Upheld" compares JIB and industrial tribunal findings of unfair dismissals for 1983. Clearly, it is not feasible to attempt a detailed comparative evaluation of industrial tribunal and JIB procedures based on the severely limited data in Table 4. However, the magnitude of the differences merits at least guarded inferences.

The JIB appeal procedure was more responsive to applicants' claims of unfair dismissal. Even if adjustments are made for conciliated agreements under the tribunal system,<sup>89</sup> the JIB procedure still provided the applicant a greater chance that the unfair dismissal claim would be upheld, and that he would be re-employed or receive a monetary award. The JIB monetary awards, however, were apparently smaller than those given by the industrial tribunal. Notwithstanding the statistical limitations in comparing the two appeals procedures, the data suggest significant differences not only in their mechanisms but in their outcomes as well.

#### IV

##### SELECTIVE VIEWS AND REACTIONS

What do those most directly involved have to say about the British system of statutory protections against unfair dismissals?

##### A. Employers

There is no unanimity of opinion among employers on unfair dismissal protections. The Institute of Directors still maintains that the employment contract is the privatized and preferred means to provide protection to both parties.<sup>90</sup> The Confederation of British Industry, on

87. The following analysis does not consider or include ACAS or JIB conciliated agreements.

88. The figure in the parentheses reflects the number of operatives involved, which is greater than the number of cases filed because a claim may be filed on a group basis.

89. See *supra* Table 1.

90. Hoskyns, *No Recovery Until the Tyrants are Tamed*, THE TIMES (London), Feb. 13, 1985, at 12. Hoskyns is the Director General of the Institute of Directors ("IOD"). The IOD provides a voice for conservative business and reputedly carries great weight in conservative party policy deliberations.

TABLE 4  
CASES UPHELD, 1983

	INDUSTRIAL TRIBUNAL	JOINT INDUSTRY BOARD
Total Cases Formally Heard	10,381	45
Cases Upheld <sup>a</sup>	31.8	57.8(68.9) <sup>b</sup>
Reemployment	1.0	19.2(16.1)
Compensation <sup>c</sup>	18.9	80.7(103.8)
Award Left to Parties	11.9	N/A

<sup>a</sup> This and the following subheading statistics are in percentages.

<sup>b</sup> The figure in the parentheses indicates the percentage of the total number of operatives involved in the outcome.

<sup>c</sup> The median industrial tribunal award was £1,345; the mean JIB award for nine operatives was £591.

SOURCE: Tables 1, 2, and 3.

the other hand, has come to accept employee protection legislation, and aside from advocating that specific provisions be repealed or added, simply advocates that administrative and financial burdens be lightened.<sup>91</sup>

The strongest criticism from employers has come from relatively small businesses, and it is to this group that the Thatcher government has been most responsive in changing the statutory requirements. For example, employees in firms with twenty or fewer workers must be continuously employed for at least two years before they can file a complaint of unfair dismissal. The qualifying period previously had been one year, and still is for employees of larger firms. Also, the test of whether a dismissal was fair or unfair was amended to take account of "the size and administrative resources" of the firm.<sup>92</sup>

The Institute of Personnel Management's National Committee of Employee Relations released the preliminary results of its survey on the industrial tribunal system.<sup>93</sup> The Institute's respondents were generally supportive of the system, while making some constructive suggestions for change. Only one issue apparently divided the membership: the positive and negative views of the growth of legalism in industrial tribunal proceedings.

### B. Trade Unions

Trade union views are more critical and focused than those of their management counterparts. The Labour Research Department ("LRD"), an "independent, trade-union-based research organization," maintains that since the Conservative Party came to power in 1979 it has systematically weakened employment protections. "Individual employment rights are whittled away while employers are given new legal loopholes which make it easier for them to escape their statutory obligations."<sup>94</sup> The LRD, "which exists to provide unionists with information they need," advised its clients that the Employment Act of 1980 removed the burden of proving that a dismissal was "fair" from the employer, eliminated the minimum basic award of two weeks' wages for all unfairly dismissed employees, and added the two advantages for small employers mentioned earlier: the extension of the applicant's qualifying period and the requirement that tribunals consider firm size and administrative sophistica-

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91. CONFEDERATION OF BRITISH INDUSTRY ("CBI"), *SCRUTINY OF ADMINISTRATIVE AND LEGISLATIVE BURDENS* (1984). The CBI is an independent non-party political body financed by contributions from industrial and commercial firms.

92. For a discussion of the Thatcher government's attempt to boost economic growth and job creation by favoring the small business sector, see *Small Firms Get Boost*, *THE SUNDAY TIMES* (London), Mar. 24, 1985, at 57.

93. *IPM Members Find ITs "Like the Curate's Egg"*, *IPM DIGEST*, Mar. 14, 1985, at 5.

94. LABOUR RESEARCH DEPARTMENT PUBLICATIONS, *LRD GUIDE TO THE EMPLOYMENT ACT 3* (1980).



tion in determining the fairness of a dismissal.<sup>95</sup>

The LRD criticism is rather mild when compared to an evaluation of industrial tribunals in a Haldane Society publication: "Recent figures showing the outcome of Industrial Tribunal cases have proved what trade union lawyers and officials have thought for a long time—that these Tribunals are a confidence trick."<sup>96</sup>

In the hope that the Conservative government would be replaced by the Labour Party in the 1983 Parliamentary election, the Trades Union Congress ("TUC") surveyed its affiliates on the best ways to improve unfair dismissal legislation. The 1983 TUC survey tried to collect member suggestions for discussions on how to improve statutory effectiveness, increase coverage, and determine whether members preferred arbitration to the industrial tribunal system.<sup>97</sup>

The Labour Party's loss of the election and the thrust of the Thatcher government's economic program have forced the TUC into a more defensive posture. Thus, the TUC is presently concerned with holding the "statutory line" against loss rather than pushing to enhance current statutory protections against unfair dismissal.<sup>98</sup>

### C. Public Officials

Officials in the Department of Employment and ACAS are studying the operations of the industrial tribunal system and are under some pressure to make changes in current requirements and practices.<sup>99</sup>

According to the officials, the review of industrial tribunal operations is going on constantly. A recent change announced in December 1984 and implemented in March 1985, requires that the industrial tribunal chairperson make only a bench decision and briefly summarize the case when the decision is formally issued. Unless either party asks for a detailed analysis, the abbreviated award stands, and the traditional longer document is no longer required. The objectives of the shortened decision are to reduce the use of precedents, protect the parties' confidentiality, cut delays and costs, and increase the number of bench decisions.

Other areas under review on a continuing basis are studies of cost effectiveness, administrative burdens, and reduction of red tape, especially for small employers. Additional studies are being conducted on how the statutes can more effectively meet their objectives. Officials state that cases are taking longer to process, more appeals to the Employment

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95. *Id.* at 21.

96. Hendy, *The Farce of Industrial Tribunals*, 2 HALDANE SOC'Y EMPLOYMENT BULL. 3 (1983). The Haldane Society is an association of socialist lawyers.

97. TRADES UNION CONGRESS, UNFAIR DISMISSAL (1983) (discussion paper).

98. Interview with TUC official (March 4, 1985).

99. The statements in this section are based upon interviews with agency executives conducted on January 30, February 4, and February 12, 1985.

Appeals Tribunal are being made, administrative costs are rising, and there is increasing pressure on the parties to use solicitors. The increasing use of legal representatives is particularly troublesome in the conciliation stage of the appeal process because it increases the industrial tribunal caseload.

Another recent change was the use of "pre-hearing assessments" ("PHAs") in unfair dismissal cases. The PHA was introduced in October 1980 to discourage "frivolous" and "hopeless" applications. The examination of whether a case should get a formal hearing before a tribunal can be initiated by the chairperson or either party. If there is a determination that the applicant has no case and does not meet the qualifications for coverage, the chairperson can warn the applicant that she may be liable for costs if the complaint is pursued further.<sup>100</sup>

Several radical changes have been suggested as well: for example, scrapping the industrial tribunal altogether and substituting either arbitration or county courts instead. Neither of these suggestions is a serious option at present. Nor does anyone seem to be calling for the repeal of employee protection from unfair dismissal. What seems most probable is that there will be a continued narrowing of individual protections, that is, the type of incremental changes made in 1979-1980 will continue. Finally, it is unlikely that the JIB model will be extended to other industries; there are no situations on the horizon in which the parties seem willing to accept the degree of joint regulation required. Therefore, the JIB approach will in all likelihood remain a special case.

#### SUMMARY AND CONCLUSIONS

The recent British experience with voluntary, unionized, and statutory protections against unfair dismissals is instructive notwithstanding the fundamental differences in our industrial relations settings. The systemic impacts since the passage of the Industrial Relations Act of 1971 are particularly noteworthy for any consideration of how the United States might improve the protection of employees against unfair dismissals.

The British statutory protections significantly improved and extended the formalization of discipline and dismissal procedures in commerce and industry. The confusion over statutory intent cannot diminish the fact that all British employees now have a minimum level of protection against arbitrary or capricious dismissal. The Codes of Practice, interpreted and applied by the tribunals, established standards of behavior to which all employers are expected to conform or face judicial retribu-

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100. For a report on the impact of PHAs on the conciliation process and its outcome, see Wallace & Clifton, *Pre-Hearing Assessments in Unfair Dismissal Cases*, 93 EMPLOYMENT GAZETTE 65 (1985).

tion. In some highly union-concentrated industries and progressive non-union firms, the key elements of mandated standards of behavior were basically in place even before the statute came into existence. The great majority of firms, moreover, created or revised their standards to meet or exceed the new statutory requirements. However, the industrial tribunals and Codes of Practice provided a degree of protection where it was most needed, that is, generally in labor-intensive, low-wage industries, and particularly in small firms.

About a quarter of a million unfair dismissal applications have been processed from 1972 to early 1985, with 130,000 resulting in some type of remedy for dismissed employees. For 1983, roughly one-third of the applications were resolved by agreed settlements and about one-third went to formal tribunal hearings. Of the latter one-third, roughly one-third of the claims were upheld. Thus, 11% of all registered applications were upheld by tribunals and 33.4% led to agreed settlements. Therefore, nearly forty-five percent of all applications resulted in some form of remedy for the applicant. However, only a miniscule 1.3% of all claimants were re-employed and median compensation awards were relatively low.<sup>101</sup>

Unfortunately, data on applicant characteristics are severely limited and not timely. Nevertheless, it is not surprising that what data exists suggest that most appeals came from industries which were not highly unionized and where unions were comparatively weak advocates. In addition, small firms paying low wages and employing short-service employees were fertile sources for claims of unfair dismissal.<sup>102</sup>

The seven-firm survey revealed several approaches to handling employee discipline and dismissal matters in the British setting. All but the smallest organization had formalized their dismissal procedures, while two used impartial arbitration in the final stage of their appeal processes. Moreover, very few appeals were heard by tribunals, with firm "D" being the notable exception. Lastly, several of the firms commonly made competitive offers to buy out employee job rights in order to obviate the need for tribunal hearings, maintain the morale of remaining employees or forestall unionization. As one manager put it, "We try to assure dismissed employees that they have more to gain by agreeing to a settlement than seeking redress by appealing to a tribunal." Negotiated settlements, however, were more customary for long-service managerial and professional employees than for rank-and-file employees.<sup>103</sup>

The JIB dismissal procedure, the only one granted an exemption to date under the statutory option, offers several noteworthy contrasts with

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101. See *supra* notes 58-62 and accompanying text.

102. See *supra* notes 63-66 and accompanying text.

103. See *supra* notes 68-77 and accompanying text.

the tribunal system. Its protective coverage is more inclusive. Further, the hearings are less formal and legalistic, and the applicant is more likely to get his job back. Finally, most appeals are settled locally with recourse to arbitration relatively rare.<sup>104</sup>

The strongest criticism of the statutory protections afforded employees comes from the small employers through their associations. The Thatcher government has responded by lowering threshold coverage and behavior standards for small firms. However, calls for statutory repeal from the Right and substitution of an arbitration procedure for the tribunal system from the Left are not likely to be answered in the near future. Rather, the attempts of public officials to incrementally improve the functioning of the present system will in all likelihood continue.

What conclusions can be drawn from the British situation that bear on the current debate in the United States regarding needed changes in our own system of protections against unfair dismissal?

The passage of legislation against unfair dismissals in the United States is likely to have only a moderate impact on private sector procedures already in place:

- It is almost fifteen years since the enactment of the British statute, and much of the extensive formalization and elaboration of voluntary dismissal procedures that resulted from that legislation's introduction in Britain has already occurred in the United States.
- Voluntary complaint procedures implemented by progressive firms motivated by enlightened self-interest would not require drastic revisions to meet any newly legislated standards except, perhaps, the inclusion of an external neutral, third-party final review of internal dismissal decisions.
- The current grievance arbitration procedure, like the JIB system, provides the most comprehensive and effective mechanism to ensure against unfair dismissals and would in all likelihood also be exempted from any alternative procedure set up by legislation.

The major potential impact of enacting federal or state unfair dismissal legislation would probably be similar to the primary effect experienced in Britain today:

- Statutory requirements would establish minimum standards of protection which all employers are expected to meet.
- The provision of a "floor" of legally mandated employer behavior would yield the greatest positive impact on unfair dismissal practices now concentrated in low-wage, competitive industries, the service sector, and small firms, especially those with fluctuating employment needs.

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104. See *supra* notes 78-82 and accompanying text.