The Burgeoning of Fairness in the Law Relating to Redundancy

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I: INTRODUCTION

Four days after its delivery, the split decision of the Full Court of Appeal in *Brighouse Ltd v Bilderbeck*[1] was described as "the most controversial labour-law case to reach the Court of Appeal since *G N Hale & Son Ltd v Wellington Caretakers' Industrial Union of Workers* in 1991".[2]

If anything, this response understates the significance of the decision. The comparison with the same Court's decision in *Hale*[3] is an interesting one. *Hale*, the Court of Appeal's last major excursion into the field of redundancy law, saw a wholesale endorsement of the managerial prerogative. A number of obiter statements made in *Hale* concerned matters of procedural fairness, as well as fairness in a more general sense. In *Bilderbeck* these issues arose in the form of questions to be decided, and the different views hinted at in *Hale* were fully canvassed.

In *Bilderbeck* the Court of Appeal considered inter alia: the nature of the employment relationship, the concept of fairness, the sanctity of contract under the Employment Contracts Act 1991 ("ECA"), the implication of contractual terms, and considerations of social justice.

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1 [1994] 2 ERNZ 243.

2 *The National Business Review*, 14 October 1994, 24.

3 *G N Hale & Son Ltd v Wellington Caretakers' IUW* [1991] 1 NZLR 151.

This article examines the recent emergence and development of these issues within the field of redundancy law. It begins by setting out the statutory context in which recent development has taken place and discusses the establishment of the personal grievance procedure in New Zealand. An examination of the origins and nature of the unjustifiable dismissal grievance procedure leads into an analysis of unjustifiable dismissal cases in the context of economic redundancy. The Courts[4] have reviewed both the substantive justification for the decision to dismiss, as well as the procedural fairness of the method of dismissal. These two elements are discussed in turn.

The article then considers the development of a new approach to unjustifiable dismissals. It is argued that recent authority, particularly *Hale* and *Bilderbeck*, reveals the Courts' inclination to decide unjustifiable dismissal cases on the simple basis of fairness. To date, the perceived dictates of fairness have resulted in the employment institutions expanding the rights and expectations of redundant employees.

Finally, this article considers the judicial prescription of redundancy compensation. The article concludes with the writer, and presumably employers, asking the question "at what price fairness?"

II: PERSONAL GRIEVANCES

1. The Origin of the Personal Grievance Procedure

Commentators note two factors arising out of the industrial climate during the 1960s which together led to the legislative introduction of personal grievance procedures.[5] The first was the International Labour Organisation ("ILO") led move towards increased protection of workers against the unjustified termination of their employment. Anderson observes:[6]

> The ILO's adoption of the Recommendation on Termination of Employment ... in 1963 provided a clear illustration of how the law in New Zealand had fallen behind internationally acceptable standards. In outline the ILO Recommendation provided that a worker's employment should not be terminated unless valid grounds connected with the conduct or capacity of the worker or the operational requirements of the undertaking existed.

In New Zealand, the only protection at this time was the common law action of

4 For the purposes of this article, the term "the Courts" pertains to all three employment institutions: the Employment Tribunal, the Employment Court and the Court of Appeal.

5 Anderson, "The origins and development of the personal grievance jurisdiction in New Zealand" [1988] 30 NZ Journal of Industrial Relations 257.

6 Ibid, 259.

wrongful dismissal.[7]

The second factor was the large number of work stoppages attributable to contested dismissals.[8] The debate over the Industrial Conciliation and Arbitration Amendment Act 1970 made it apparent that this factor was the government's primary motivation for introducing a statutory personal grievance procedure.[9] The then Minister of Labour said the Bill would provide:[10]

> A standard procedure for the settlement of personal grievances. These matters, particularly alleged wrongful dismissals, are a constant source of industrial disputes leading towards work stoppages.

The personal grievance procedure established by the Amendment Act effected little change because the legislation merely adopted the common law terminology of "wrongful dismissal".[11] Three years later, the Industrial Relations Act 1973 replaced the term "wrongful dismissal" with "unjustifiable dismissal".[12] Further, this Act made it mandatory for all awards and agreements to contain personal grievance procedures. These two changes remain part of the present scheme.[13]

2. Personal Grievances under the Employment Contracts Act

Although the Employment Contracts Bill initially contained a number of changes to the personal grievance procedure set up by the Labour Relations Act 1987,[14] these changes, with one exception,[15] do not appear in the ECA. Hughes comments that:[16]

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7 To have an action for wrongful dismissal an employee has to show that he or she has been dismissed both without good cause and without the appropriate period of notice. As Anderson points out, ibid, the only constraint the wrongful dismissal action places on an employer's ability to dismiss is that the employer must give the correct notice.

8 Mazengarb's Employment Law (April 1994), at A/231.

9 Supra at note 5, at 261.

10 368 NZPD 3127 (10 September 1970).

11 Boon, "Procedural Fairness and the Unjustified Dismissal Decision" (1992) 17 NZ Journal of Industrial Relations 301, 302.

12 In the Parliamentary Debate over this piece of legislation, the introduction of the term "unjustifiable dismissal" was referred to only twice. In the introductory speech to the first reading of the bill, the then Minister of Labour, David Thompson, simply stated: "The personal grievance procedure, introduced by this Government in 1970, is widened to apply to cases of unjustified dismissal": 381 NZPD 3477 (19 October 1972).

13 Although note that the ECA has broadened the application of the personal grievance procedure so that it is now part of every employment contract.

14 See Hughes, "Personal Grievances" in Harbridge (ed), *Employment Contracts: New Zealand Experiences* (1993) 89.

15 The ECA relegates the remedy of reinstatement.

16 Supra at note 14, at 91.

> The personal grievance jurisdiction is thus one of the few substantive parts of the Labour Relations Act 1987 to have survived relatively unscathed under the Employment Contracts Act 1991.

In *Bilderbeck* Sir Robin Cooke, the President of the Court of Appeal, reached a similar conclusion:[17]

> [T]he 1991 Act did not in general curtail the personal grievance provisions which in one form or another have been part of New Zealand statute law since 1970 ....

His Honour asserted that by leaving the personal grievance procedure in the ECA substantially unaltered, Parliament reaffirmed its original desire to provide a means by which employees could seek and obtain remedies for acts of unfairness.[18]

> [T]he very raison d'etre of the statutory jurisdiction was the perceived inadequacy in many cases of common law contractual rights and remedies. The philosophy reflected in this part of the Act is that the common law may well be inadequate to achieve justice between the employer and employee.

With respect, it should be noted that the President omits to mention the dominant rationale of Parliament, that being the maintenance of industrial harmony.

III: UNJUSTIFIED DISMISSAL

Redundant employees may bring personal grievance claims under the head of unjustified dismissal,[19] which is one of five categories of personal grievance set out under s 27 of the ECA. The remainder of this article is concerned with the changing judicial interpretation of "unjustifiably dismissed", a term which Richardson J has described as "elusive".[20]

The specialist Industrial and Arbitration Courts, reticent in defining the expression, merely recited the self-evident principle that substituting "unjustifiably" for "wrongfully" meant that wrongful dismissal authorities would have little or no application to the concept of unjustified dismissal.[21]

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17 Supra at note 1, at 251.

18 Ibid, 253.

19 Although, according to Gault J in *Bilderbeck*, this first category of grievance only applies to the substantive justification of the dismissal. His Honour commented that any procedural failure on the part of the employee would fall to be dealt with under the second personal grievance head, "unjustifiable action": ibid, 270.

20 *Wellington Caretakers' IUW v GN Hale and Son Ltd* [1991] 4 NZELC 95,310, 95,314.

21 See, for example, *Auckland Local Authorities IUW v Waitemata City Council* [1980] ACJ 35; *Hori v New Zealand Fire Service* [1978] ICJ 35.

Following considerable criticism of the specialist Courts' failure to define the term "unjustified dismissal",[22] the Court of Appeal in *Auckland City Council v Hennessey* stated that in the context of s 117:[23]

> [T]he word "unjustified" should have its ordinary accepted meaning. Its integral feature is the word unjust – that is to say not in accordance with justice or fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness.

Hennessey remains a leading authority in discussions on the scope of the unjustified dismissal grievance. This article argues that the above quote holds the germ of a general fairness requirement, the effect of which is only now being fully realised in redundancy law.

IV: THE DICHOTOMY: SUBSTANTIVE JUSTIFICATION AND PROCEDURAL FAIRNESS

Later cases which are cited as providing tests for unjustifiability tend to be variations on the *Hennessey* themes of justice and fairness.[24] These concepts, while being manifest goals of our legal system, are not conducive to the development of a coherent body of case law. Perhaps to fetter the arbitrary application of these objectives, the Courts have applied a two-step approach when considering the merits of any personal grievance dismissal claim. This approach comprises first, a substantive review of the decision to dismiss and second, a review of the procedural aspects of the dismissal.

The following sections examine the content of substantive justification and procedural fairness in redundancy situations.

1. Substantive Justification

Adzoxornu states:[25]

> Substantive justification requires the employer to rely on, inter alia, grounds which at common law would have justified the employee's dismissal. Normally this would involve proof that the

22 Supra at note 11, at 303; Mathieson, "The Lawyer, Industrial Conflict and the Right to Fire" [1981] NZLJ 216; Hughes, "Emerging Procedural Requirements under Section 117 of the Industrial Relations Act 1973" (1981) 5 Otago LR 162.

23 [1982] ACJ 699, 703.

24 See, for example, *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580.

25 Adzoxornu, "Procedural justification of dismissals: some recent developments" [1991] NZLJ 288, 288.

> dismissal was effected with the required or reasonable notice, that the contract was terminated upon the expiry of a fixed term, that the employee committed a serious misconduct or repudiated the contract of employment, or that there was a redundancy or will be a redundancy situation.

The definition of redundancy generally accepted in New Zealand is termination "attributable, wholly or mainly to the fact that the position filled by the worker is or will become, superfluous to the needs of the employer".[26] The simplicity of these descriptions belie the contentiousness of the issue. Various judicial approaches to the substantive/procedural dichotomy are discussed below.

(a) Narrow definition of substantive justification

In *Hale*, Richardson J equates "substantive justification" with "the reason for the dismissal", thus narrowly construing the first step of the test. This has the effect of restricting the first step to a review of the employer's motivation for the dismissal,[27] so that:[28]

> [If] for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the Courts or the unions or workers to substitute their business judgment for the employer's.

President Cooke reached a similar conclusion, holding that judicial interference with the "managerial prerogative"[29] should be limited to cases involving bad faith on the part of employers. His Honour stressed:[30]

> A worker does not have a right to continued employment if the business can be run more efficiently without him [sic].

A number of decisions since *Hale* have restricted the review of substantive justification to whether the particular dismissal was genuine or not,[31] thus following the approach perceived to have been taken by the Court of Appeal.

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26 Section 184 of the Labour Relations Act 1987, approved by Cooke P, supra at note 3, at 155.

27 For Richardson J, it would appear that adherence to contractual provisions relating to notice would fall to be determined under the procedural fairness head.

28 Supra at note 3, at 157-158.

29 A working definition of "managerial prerogative" for the purposes of this discussion is "the employer's right to manage the business": Szakats and Mulgan, *Dismissal and Redundancy Procedures* (2nd ed 1992) 202.

30 Supra at note 3, at 155. The other judges made similarly affirmative statements concerning the managerial prerogative.

31 For example, see *Atwill v Tanners* Employment Tribunal, 12 July 1993, AT 176/93 (Dumbleton). It should also be noted that the concept of a "genuine redundancy" is continuing to develop. In *Orringe v Forestry Corporation of New Zealand* [1992] 3 ERNZ 490, adjudicator Stephenson stated, at 495, that: "Redundancy arising from an opportunity for cost saving may be affected in

(b) Expansive definition of substantive justification

When *Hale* was referred back to the Labour Court, Chief Judge Goddard interpreted substantive justification expansively. Noting that a genuine redundancy justifies dismissal, provided that proper compensation and notice of termination is given in accordance with the terms of the bargain, the Chief Judge stated:[32]

> Failure to give the notice or to pay the compensation provided for in an award is characterised in some of the cases as going merely to procedure. But ... substantive and procedural considerations may and often do overlap .... [I]t is difficult to see how failure to observe provisions in an award dealing with the very event of redundancy can be described as merely procedural when the event occurs.

The logic of this final comment is irrefutable. If an employment contract specifies a particular notice period or compensation sum, or sets out a mechanism by which either can be calculated, surely the failure to adhere to that contractual provision undermines the contract's very substance.

Further, there is no reason why breaches of implied terms do not also go to the substance of the employment contract. As an example, the Chief Judge referred to the implied obligation of fair and reasonable treatment recognised in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[33] and *Marlborough Harbour Board v Goulden.*[34]

2. Procedural Fairness

The common law claim for wrongful dismissal imposed no independent requirement of a fair disciplinary procedure. The statutory regime, however, provides for a review of the procedural fairness of a dismissal. Since recent judicial attention has focused more on procedural fairness than on substantive justification, this article concentrates on the development of procedural fairness and considers its constituent elements, with the caveat that some may be more correctly categorised as elements of substantive justification.

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part by the employee's work history and skills. To some limited extent, job performance may also play a part in a decision by an employer to make a particular employee redundant, without rendering that dismissal unjustified."

32 Supra at note 20.

33 [1985] 2 NZLR 372.

34 [1985] 2 NZLR 378.

(a) The traditional function of procedural fairness

Adzoxornu has stated:[35]

> The scope of the rule [of procedural fairness], however, defies precise delineation. The rule as applied in New Zealand is much wider than what the administrative law concept of natural justice entails.

A major criticism of the employer's obligation to be fair is that any procedural fault tends to be merely technical. Critics argue that generally, failure to consult with employees will not alter the fact that the decision to dismiss is a reasonable one.[36] Arguably, in redundancy situations, nothing the employee may have to say will change the employer's economically justified decision to terminate the employment.

The traditional rationale asserts that whether procedural fairness requirements are followed will directly affect the substantive justification of the dismissal.[37] This rationale was recently applied by the Employment Court in *Cain v HL Parker Trusts*.[38] This approach was affirmed in *GWD Russells (Gore) Ltd v Muir*.[39] In *Cain*, the Chief Judge stated:[40]

> Few practitioners in this field will not have had the experience of a seemingly impending immediate termination of employment being converted as a result of frank and open discussion into a more gradual, orderly, and dignified severance. The appellant's personal grievance rests in the fact ... that he was not given the opportunity before being dismissed to take part in a discussion about his own destiny in an attempt to bring about a state of affairs involving a more fair (from his point of view) sharing of the saving to be effected by the employer from the termination of the employment and an opportunity for a suitably dignified end to an employment relationship of long standing.

Cain and *Muir* focus on the need to follow a fair procedure, because of its potential effect on the substantive justification, thus reflecting the statutory posi-

35 Supra at note 25, at 290.

36 This criticism was accepted in a line of English cases. See, for example, *British Labour Pump Co Ltd v Byrne* [1979] ICR 347, where it was held that where an employer could show that the decision to dismiss would have been made even if proper procedure had been followed, the procedural defect would be excused. Remedying the procedural defect would be futile in respect to averting the dismissal. This "futility test" was eventually rejected by the House of Lords in *Polkey v A E Dayton Services Ltd* [1988] ICR 142.

37 Johnston, Mitchell and Riekert, "Procedural Fairness in Dismissal Cases: What should be the approach in Victoria?" (1991) 4 AJLL 99, 117, assert that there are a number of commercially pragmatic factors which complement this traditional rationale behind compliance with fair procedure. Two of the most important of these factors are the human resource benefits of higher employee morale and potentially less industrial disputes.

38 [1992] 3 ERNZ 777.

39 [1993] 2 ERNZ 332 (FC).

40 Supra at note 38, at 784.

tion. Section 40 of the ECA sets out four remedies for unjustifiable dismissals, two of which can only be invoked in cases of substantively unjustifiable dismissals.[41] The other two are not automatically applicable in cases of procedural unfairness.[42] Both *Cain* and *Muir* also support the view that procedural fairness has an inherent value meriting protection.[43]

(b) Alternative functions of procedural fairness

Collins, an English commentator, identifies three paradigms of procedural fairness.[44] One of these paradigms, "efficiency", has been noted above.[45] The other two are "respect for dignity" and "democratic participation".

(i) Respect for dignity

Collins asserts that respect for the dignity of the individual is the predominant justification for the procedural fairness requirement in criminal and public law. In *Hennessey*, the Court appeared to extend this justification to the employment relationship:[46]

> [A] dismissal may be held unjustifiable where the circumstances are such that justice or fairness requires that the employee should have an opportunity, which he has not been afforded, of stating his case.

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41 Section 40(1)(a) provides for the reimbursement of wages and other money lost as a result of the grievance. In *Muir*, supra at 39, at 346, Travis J stated that: "If the evidence establishes that there is no reasonable possibility that proper consultations would have either delayed the dismissal or avoided it, then the employee would have failed to establish loss as a result of the personal grievance." Section 40(1)(b) provides for reinstatement. Johnston, Mitchell and Riekert, supra at note 37, at 122, suggest that where an employer has a good substantive ground for a dismissal, for example, genuine redundancy, which is carried out in a procedurally unfair manner, other remedies will generally be preferable to reinstatement. Although, they are of the opinion that reinstatement may be appropriate in cases of flagrant breaches of procedural fairness.

42 Only s 40(1)(c)(i), providing for compensation for humiliation, loss of dignity, and injury to feelings, and possibly s 40(1)(c)(ii), which provides for compensation for loss of any other benefit, can remedy an unjustified dismissal based on a procedural fault not affecting the substantive justification.

43 For example, in *Muir*, supra at 39, at 346, the Court indicated that the burden for an employer to prove the futility of consultation is a high one: "Where ... there were other options that could have been discussed, but were not, the Tribunal might properly be sceptical of an employer saying after the event that such options would not have either delayed the redundancy or have prevented it occurring."

44 Collins, *Justice in Dismissal* (1992) 105.

45 See supra at note 37.

46 Supra at note 23.

Collins opposes such an application of natural justice to economic dismissals, and considers that the right to a formal impartial hearing is inappropriate in the redundancy context:[47]

> Where management decides as a result of market considerations to reduce the size of the workforce ... the dismissals are not justified by reference to the fault of the employee, so a formal hearing is an inappropriate standard of procedural justice.

In *Gee v Kinsmen*, the Labour Court rejected the notion that natural justice cannot be flexibly applied:[48]

> The Labour Court is essentially one of equity and good conscience which must strive to find a just result more in the particular circumstances of a case before it than by reference to precedent or immutable notions of natural justice.

Adzoxornu asserts that natural justice has "rescued industrial law from the oppressive clutches of the common law of 'master and servant'".[49] President Cooke echoed this observation in *Bilderbeck*:[50]

> It may be ... that a need for secrecy of negotiations with a purchaser precludes any warning to staff; but, if so, when an unexpected sale is announced it would be all the more important to treat them considerately and not as chattels going with the business if the purchaser is prepared to accept them.

(ii) Democratic participation

While Collins sees the natural justice model as inappropriate, he regards the "democratic participation" model as applicable to economic dismissal:[51]

> The aim [of the democratic participation model] is to allow those likely to be affected by a decision an equal chance to have their views considered.

On the facts of *Gee*, the Labour Court considered that the democratic participation model was appropriate since the employer's position would not have been adversely affected.[52]

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47 Supra at note 44, at 107.
48 [1989] 3 NZILR 647, 660.
49 Supra at note 25, at 290.
50 Supra at note 1, at 255.
51 Supra at note 44, at 108.
52 Supra at note 48, at 661.

(iii) Property model

The property model, an extreme view, maintains that employees have something akin to a property right in their jobs.[53] In this context, the concept of procedural fairness takes on an entirely new meaning. If an employer dismisses an employee in a procedurally unfair manner, the employer is effectively alienating the employee's property in an unjust manner.

In *Bilderbeck*, Richardson J came uncharacteristically close to accepting some form of right in one's job akin to a property right:[54]

> A just employer having made the redundancy decision will recognise that an employee has an *investment* in and dependence on their job which include long term prospective financial benefits and also those intangible but very real benefits of personal identity and sense of self-worth associated with employment.

A fundamental problem with the property model is that such rights should not be conferred by judicial intervention; these rights could only be acceptable if imposed by Parliament.

(c) Content of procedural fairness

(i) Consultation

Consultation is the key element of procedural fairness.[55] Other procedural requirements tend to be constituents of consultation. This category includes exploration of redeployment and to some extent, selection criteria.

Despite Judge Colgan's extra-judicial observation that "the judgments [of the Court of Appeal in *Hale*] have muddled [sic] the waters of the second limb of the justification",[56] *Hale* remains a suitable starting point for a discussion on the consultative requirement of procedural fairness in New Zealand.

In *Hale*, Cooke P stated:[57]

> A reasonable employer cannot be expected to surrender the right to organise his own business. Fairness, however, may well require the employer to consult with the union and any workers whose

53 See text, infra at Part VI, 3(f).

54 Supra at note 1, at 259-260. Emphasis added.

55 The obligation to consult with employees is set out in paragraph 13 of the ILO's 1963 Termination of Employment Recommendations (No 119).

56 Colgan, in Haig, Muir, Colgan, "Dismissals – Recent Trends" Auckland District Law Society Continuing Legal Education Programme 1990, 28.

57 Supra at note 3, at 156. It should be noted that the President was referring to a requirement to consult not expressly set out in the agreement or contract of employment.

> dismissal is contemplated before taking a final decision on how a planned cost-saving is to be implemented.

In contrast, Richardson J favoured the managerial prerogative approach. His Honour maintained this view in *Bilderbeck*, where he observed:[58]

> Consideration of the best means of restructuring business operations, of redeploying capital resources and of utilising technological advances is essentially a matter of commercial judgment. The conclusion that the employer made the dismissal for genuine commercial reasons and, accordingly, that the dismissal was substantively justifiable forecloses any attack on that conclusion under the guise of procedural fairness.

Like Collins, Richardson J refutes the need for natural justice. For Collins, Richardson J, and possibly Somers J, the redundancy dismissal falls almost entirely within the scope of the managerial prerogative.[59] In contrast, advocates of pre-termination consultation in redundancy situations emphasize the procedural fairness rationales of respect for dignity and democratic participation. Between these two rationales, consultation will almost always be required to make a dismissal procedurally fair.

When Chief Judge Goddard reconsidered *Hale,* he broke the requirement of consultation into a number of constituent elements:[60]

> The employer was obliged to give its employee in these circumstances the opportunity to take part in the determination of his destiny. For that opportunity to be adequate, his employer had to provide him with enough information to enable him or his union to make representations intelligently .... There was also an obligation to listen to any representations which might be made and to that end to afford a reasonable time for both the making of these representations and their consideration by the employer before any action was taken to dismiss the worker.

This passage shows that the Chief Judge considers constructive dialogue to be an important part of the pre-termination process. If the employee has no genuine opportunity to consult with the employer, a subsequent dismissal will be procedurally unfair.

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58 Supra at note 1, at 259. A similar view was expressed by Somers J in *Hale*, supra at note 3.

59 Those who hold this view might recognise that pre-termination consultation is often pragmatically useful, but believe that it should not be compulsory.

60 Supra at note 20, at 95,319. It should be noted that these constituents look very much like the traditional notion of natural justice as developed in administrative law.

(ii) Selection criteria[61]

In *Polkey v A E Dayton Services Ltd*,[62] the watershed English case on procedural fairness in redundancy, Lord Bridge of Harwich held that employers are under an obligation to follow fair criteria when deciding which employees should be made redundant.[63] However, Lord Bridge considered that all a court or tribunal might review was the fairness of the selection criteria applied in the particular instance. Fairness in this context equates to the "genuineness" of the redundancy decision itself. This view, which reinforces the managerial prerogative, was adopted by Judge Colgan in *NZ Building Trades Union v Hawke's Bay Area Health Board*.[64]

In contrast, a number of Employment Court and Court of Appeal decisions support the notion that employees should have an input in dismissal decisions. In *Unkovich v Air New Zealand Ltd*,[65] for example, the Chief Judge doubted whether the manager in question, who was new to the company, could fairly select employees for redundancy without first hearing those employees' submissions. This case, and cases such as *Hildred v Newmans Coach Lines*,[66] suggest that employees will have the best understanding of their own worth. Thus, a decision made by management without the input of the affected employees will be ill-informed and as a consequence, irrational. In *Hildred*, the adjudicator held that the dismissed employee should have been extended an opportunity to discuss with his employer the business concerns which led to another employee being retained instead of himself.[67]

Both Richardson and Somers JJ have opposed this erosion of the managerial prerogative. In *Hale*, Somers J contended that the selection of employees for redundancy, although described in *Polkey* as procedural, in fact comes "close to matters of substance".[68] Accordingly, his Honour would regard an employer's selection of employees as justifiable, except where the selection was not bona fide. In *Bilderbeck*, Richardson J asserted that in cases of genuine redundancy there was no reason to hold that an employer should consult with the redundant employee over whether someone else should have been made redundant, or whether that

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61 This section is concerned with the obligation on the employer to make fair selection decisions when dismissing employees. The article does not make any assessment of, nor comparisons between, the various criteria applied by employers.

62 Supra at note 36.

63 See also the ILO 1981 Report VIII (1): Termination of Employment at the Initiative of the Employer 83.

64 [1992] 2 ERNZ 897.

65 [1993] 1 ERNZ 526.

66 [1992] 3 ERNZ 165.

67 Ibid, 187.

68 Supra at note 3, at 159. Justice Somers, at 158, doubts the application of any category of procedural fairness to redundancy cases: "I have reservations about both the application and the supposed content of the concept of procedural fairness in case of dismissal for redundancy."

employee could have been deployed elsewhere in the business.[69]

The need to consult over employee termination selection appears to remain unsettled. Notably, Cooke P refrained from expressly supporting this latter requirement in *Bilderbeck*. He possibly recognises that the inclusion of selection criteria in the pre-termination consultation process would seriously erode managerial prerogative. Perhaps also the self-promotion involved in employee consultation limits its value.

(iii) Redeployment

In *Polkey*, Lord Bridge referred to the employer's obligation to take reasonable steps to avoid or minimise redundancy by redeployment.[70] In New Zealand, the Courts have incorporated worker consultation into this basic requirement of considering redeployment.[71] In *Hale*, Cooke P stated that fair procedure will extend to "giving [the employee] a fair opportunity to make representations on the possibility of redeployment".[72] When the case returned to the Labour Court, Chief Judge Goddard affirmed this position, holding that the employer had been remiss in failing to discuss with the employee possibilities such as offering the employee part-time work or the contract for services.[73]

Consultation with individual employees over redeployment does not invoke the self-promotion problem involved in selection criteria consultation. Redeployment does not shift redundancy from one employee to another,[74] it averts redundancies. Another advantage of consultation is that the employee's input will often assist the employer in the decision-making process, since the employer may not have previously observed the employee's performance in the relevant area.

While prevailing judicial opinion in New Zealand appears to favour redeployment consultation,[75] the Court of Appeal is divided on this issue. Contrary to the majority in *Bilderbeck*, Richardson and Gault JJ strongly disapproved of the need for the employer to consult when considering redeployment. However, Gault J appears to use the term "redundancy" in the sense of individuals being made

69 Supra at note 1, at 259.

70 Supra at note 36, at 162-163. See also the 1981 ILO Report, supra at note 63, at 81, under the heading "Elimination of Excess Staff without Dismissals", where it is observed that certain countries have legislation requiring employers to consider the possibility of internal transfer.

71 The employee may not always be in favour of redeployment. In *Watties Frozen Foods Ltd v United Food & Chemical Union of NZ* [1992] 2 ERNZ 1038 an employer's unilateral decision to redeploy an employee, rather than declaring her redundant, was held to have unfairly disadvantaged the employee.

72 Supra at note 3, at 156.

73 Supra at note 20, at 95,319.

74 Except in the case of "roll-back" redundancies: see *Stanaway v Pacific Forum Line (NZ) Ltd (No. 2)* [1994]1 ERNZ 276.

75 See, for example, *Stoks v Kitchen Pak Distribution* Employment Tribunal, 17 May 1993 CT 51/93 (Teen), 5.

redundant, rather than the more accepted usage of a position being superfluous. His Honour asserted that consideration of possible redeployment goes to substantive justification, and thus is concerned with the genuineness of the decision.[76] One wonders in what circumstances Gault J would regard efficiency-driven redundancies as unjustified on the grounds that the employer had failed to consider the employee's future employment prospects.

(iv) Notice

If the contractual period of notice is not complied with, wrongful dismissal will result unless payment in lieu of notice is made. Where the contract of employment does not prescribe a period of notice, the courts imply a term of reasonable notice into the contract.

When *Stoks v Kitchen Pak Distribution*[77] was appealed to the Employment Court, Judge Palmer observed that the rationale behind the provision of notice had not changed since the venerable case of *Morrison v Abernethy School Board*, where Lord Deas stated:[78]

> The object [of notice] ... is ... to give the servant a fair opportunity of looking out for and obtaining another situation, instead of being thrown suddenly and unexpectedly upon the world ....

(v) "Special notice"

The three *Bilderbeck* cases trace the genesis and possible demise of a novel notice requirement. After finding that the employer had not acted in a procedurally fair manner, particularly as there was no consultation, the adjudicator in the Tribunal suggested:[79]

> In this case, the employer could have done much more for the employees by giving to them an extended or special period of notice, in addition to the contractual period, or alternatively paying to them compensation in lieu of such notice.

The adjudicator, having noted the suddenness of the redundancy announcements, stated:[80]

76 Supra at note 1, at 271. Chief Judge Goddard hinted at the same point when *Hale* was sent back to the Labour Court, supra at note 20, at 95,316, when he stated: "If this [discussion of employment alternatives] had been done, it is not unlikely that the redundancy could have been averted in whole or in part."

77 [1993] 2 ERNZ 401.

78 (1876) 3 Sess Cas 945, 950.

79 *Bilderbeck v Brighouse Ltd* [1992] 2 ERNZ 161, 173 per Dumbleton.

80 Ibid, 174.

> In my view, although one month was the contractual period of notice, in lieu of compensation the applicants were fairly and reasonably entitled to, and could have expected, an extended or additional period because of the nature of redundancy as the particular ground for their dismissal.

It was considered that in addition to the contractual notice period, three months further notice was appropriate, and this would equate with what the common law would have dictated as reasonable.

On appeal, Chief Judge Goddard upheld contractual convention:[81]

> [T]here being an express provision in force for notice to be of one month's duration, it was not open to the Tribunal to imply a term of some other period of notice. It is not relevant that, if the contract had been silent on the topic, the common law is likely to have implied a much longer period of notice as reasonable.

His Honour alluded to alternatives to "special notice":[82]

> However, the fact that there is laid down a contractual period of notice and the further fact that it was duly given do not preclude a finding, on the facts, that the giving of notice should have been preceded by some other process or by compensation for the omission to invoke it.

The Chief Judge suggested that the Tribunal might have considered how the dismissals could have been executed in a fair and sensitive manner. For example, employees could have received remuneration during an extended consultative process which allowed for discussions on compensation and alternatives to redundancy.

Of the five Judges sitting on *Bilderbeck*, only Richardson J commented on the existence of "special notice":[83]

> [P]rocedural fairness may require ... that the employer also provide a cushion of support either by allowing additional time beyond the contractual period of formal notice or by payment in lieu.

The future of "special notice" remains uncertain. The writer questions whether Chief Judge Goddard would have been so dismissive of the concept of special notice, if he did not consider that redundancy compensation alone is sufficient. In the event that the requirement of special notice is resurrected, the writer believes that it will provide a catalyst for the development of a corresponding "special compensation" requirement.[84]

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81 [1993] 2 ERNZ 74, 96.

82 Ibid.

83 Supra at note 1, at 267.

84 See text, infra at Part IX.

(vi) Other procedural requirements

Although Richardson J is critical of consultation being a procedural requirement in economic dismissals, he adheres to the orthodox view that a dismissal can be unjustifiable unless both substantive justification and procedural fairness are present.[85] In *Bilderbeck*, his Honour considered the following to be elements of procedural fairness:[86]

> Openness and frankness about the reasons for the redundancy, offering immediate counselling of employees affected and job search assistance[87] are obvious considerations. The length of time following the giving of notice before the employee is expected to depart may also be important.

It is interesting that these factors are also those approved of by Collins, who talks about "economic dismissals" resulting in a social cost. Collins searches for the "fairest" distribution of this social cost, as between the employee, the employer, and the state, using efficiency as the determining factor.[88] Collins believes that employers are the most efficient bearers ("avoiders") of social cost in certain circumstances. These circumstances include retraining, notice, counselling, and may also encompass "the right for employees to have opportunities to take time off work to look for a new job."[89]

In the writer's opinion, Richardson J also approves of these procedural elements since he adheres to similar economic tenets. While he may observe that employees have an "investment" in their jobs, presumably entailing some form of rights, Richardson J protects those rights following a doctrine of economic pragmatism. Job search assistance and retraining are not inconsequential aspects of procedural fairness, but the writer believes that they do not provide alternatives to the other aspects of procedural fairness discussed above.

V: CRITICISMS OF THE DICHOTOMY

In recent years a number of judges and adjudicators have criticised the substantive justification/procedural fairness dichotomy as unhelpful.[90] The Court of

85 See, for example, his Honour's judgement in *Bilderbeck*, supra at note 1.

86 Ibid, 260.

87 The ILO's 1981 Report, supra at note 63, at 87, observes that in a number of countries there has been a growing emphasis on providing assistance to workers in finding new work. However, this may mean no more than the instigation of a procedure whereby employers give prior notification to employment services of impending workforce reductions.

88 Supra at note 44, at 56.

89 Ibid, 184.

90 See Chief Judge Goddard in *Unkovich*, supra at note 65; *Hale*, supra at note 20; Judge Palmer in *Schindler Lifts*, infra at note 142.

Appeal in *Bilderbeck* was divided over the value of the dichotomy's continued application. President Cooke stated that "[t]here is no sharp dividing line. For instance, the appropriate length of notice can be classified as either a substantive or a procedural matter."[91] In contrast, Richardson J maintained the conventional position of a strict dichotomy which he had advanced in *Hale*.

When the substantive/procedural dichotomy first rose to prominence it reflected the expanded personal grievance procedure, since procedural fairness was novel to the common law. However, the creation and acceptance of the dichotomy limited the development of unjustifiable dismissal jurisprudence to the parameters of the two-step test. To "expand" the scope of unjustifiable dismissal further, and at the same time avoid criticisms of flagrant judicial activism, it became necessary to question the applicability and utility of the dichotomy. In the writer's opinion, this is what has happened in the cases discussed above. What then, is left to fill the void created by the obsolescence of the dichotomy?

The remainder of this article considers the growing support in the Employment Court and Court of Appeal for a broader concept of "unjustifiable dismissal".

VI: THE DEVELOPMENT OF "FAIR DEALING"

1. The 1985 Cases

Two 1985 Court of Appeal decisions, *Woolworths*[92] and *Goulden*,[93] both delivered by Cooke J, as he then was, form the basis of the development of a new understanding of "unjustifiable dismissal".

In *Woolworths*, the primary issue was whether in the context of the Industrial Relations Act 1973, the term "dismissal" covered cases where technically the employee had resigned. The judgment referred in some detail to a number of English cases which developed a general fairness duty.

One case referred to was *Woods v WM Car Services (Peterborough) Ltd*, where the English Employment Appeal Tribunal stated:[94]

> In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ....

91 Supra at note 1, at 255.

92 Supra at note 33.

93 Supra at note 34.

94 [1981] ICR 666, 670; cited in *Woolworths*, supra at note 33, at 375.

On appeal, Lord Denning MR took a different conceptual view of the duty:[95]

> It is the duty of the employer to be good and considerate to his servants. Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them .... Just as a servant must be good and faithful, so an employer must be good and considerate.

As Cooke J noted, the other two judges in the *Woods* appeal applied different tests. Lord Justice Watkins formulated the test to be whether the employer had committed any breach of contract, express or implied, which justified the employee in resigning.[96] Lord Justice Fox used the test of repudiation.[97]

After considering the English jurisprudence, Cooke J seemed to prefer the formulation given by the Employment Appeal Tribunal over Lord Denning's more "nebulous" conception of the duty:[98]

> It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity ....

In *Goulden*, notwithstanding statutory provisions empowering the Harbour Board to appoint and remove its officers, the Court of Appeal held that the Board had a duty to act fairly and observe the principles of natural justice when contemplating the dismissal of an officer.

Justice Cooke observed that in New Zealand:[99]

> [T]here are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever .... Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in a contract of service.

2. Recent Developments

Justice Cooke echoed the above views in a 1986 extra-judicial statement:[100]

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95 [1982] ICR 693, 698; cited in *Woolworths*, ibid, 376.

96 Ibid, 703

97 This was the test employed by Lord Denning in the pre-*Woods* case of *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The test of repudiation is whether or not the employer was guilty of a significant breach going to the root of the contract, or conduct going to show that the employer no longer intended to be bound by one or more of its essential terms: supra at note 33, at 376 per Cooke J.

98 Ibid.

99 Supra at note 34, at 383.

100 Cooke, "The Struggle for Simplicity in Administrative Law" in Taggart (ed), *Judicial Review of Administrative Action in the 1980's* (1986) 12.

> [The New Zealand Courts] have been moving towards the view that duties of fair and reasonable treatment, like confidence and trust, are normal incidents of the relationship of employer and employee. On this view there is a prima facie right to more than procedural fairness ... and only the plainest statutory or contractual language can exclude the right.

His Honour's desire to see further expansion of the duty of procedural fairness was evident in *BP Oil NZ Ltd v Northern Distribution Workers Union*,[101] where, after referring to the substantive/procedural dichotomy, he restated the test: "The question is essentially what is open to a reasonable and fair employer to do in the particular circumstances." A number of cases since *BP Oil* have effectively substituted the *Woods* test[102] for the substantive/procedural dichotomy.[103]

3. Development of the Fair Dealing Duty in Redundancy Cases

While the emerging duty of fairness and reasonableness has affected various areas of employment law,[104] it has perhaps most widely impacted on the law of redundancy. This is most evident in the development of a doctrine requiring redundant employees to be paid compensation in certain circumstances, notwithstanding the employment contract's silence on the matter.

(a) The Labour Court's second judgment in Hale

While the Court of Appeal in *Hale* made only passing reference to *Woolworths* and *Goulden*, these cases form the basis of Chief Judge Goddard's finding that the employee should have received redundancy compensation. The Chief Judge observed:[105]

> So the question for the Court is whether the obligation of fair treatment – recognised by the judgments of the Court of Appeal in cases such as *Goulden* and *Woolworths* ... in the circumstances of this award and this employment under it, called for payment of compensation.

It is suggested that his Honour overlooked the tentative nature of the Court of Appeal's statements in the two 1985 cases. The Chief Judge suggested that all the

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101 Supra at note 24.

102 See text, supra at note 98.

103 See, for example, *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUW (Inc)* [1994] 2 NZLR 415 per Cooke P; and *Pitolua v Auckland City Council Municipal Abattoir* [1992] 1 ERNZ 693 per Hardie Boys J.

104 For example, since *Woolworths* it has proved integral to the doctrine of constructive dismissal. See *New Zealand Engineering IUW v Ritchies Transport Limited* [1991] 2 ERNZ 267; *Matthes v NZ Post Ltd* (No 3) [1992] 3 ERNZ 853.

105 Supra at note 20.

judgments in the Court of Appeal's decision in *Hale*, except that of Casey J, endorsed the above proposition. However, Richardson J only discussed fairness in conceptual terms, and Cooke P only seemed to say that an offer to pay redundancy will be in the employer's favour when assessing the justification of its actions. Only the statements of Bisson and Somers JJ lend direct support to the Chief Judge's proposition.

Having established that fairness may dictate payment of redundancy compensation, the Chief Judge outlined some factors which go to requiring compensation. These included:[106]

(i) whether the redundancy was part of a cost-saving measure;[107]
(ii) whether the employer was able to pay compensation;[108]
(iii) whether there had been prior consultation with the employee over alternatives;
(iv) whether there has been an unexplained failure to explore alternatives (apart from consultation);
(v) the length of service of the employee; and
(vi) the length of the notice period.

To understand how and why the Chief Judge equated fairness with the payment of redundancy compensation, it is necessary to look at the perceived role of such compensation. The following discussion surveys various rationales,[109] which although implicit in the decisions, are rarely referred to.

(b) Traditional views of redundancy compensation: job security versus the right to manage

Rex Jones, Engineers' Union Secretary, has stated that redundancy payments "are to compensate for lost benefits and entitlements that workers have built up by their labour over the years".[110] In stark contrast, the Honourable Bill Birch has described redundancy payments to state sector employees as "'hush money' to

106 Ibid.

107 If it was, Chief Judge Goddard stated, "it is not unreasonable that [the employer] should be required to mitigate the worker's losses by sharing with him to some extent the savings which it plans to make as a result of his dismissal": ibid, 95,316.

108 Note also that when *Hale* was returned to the Labour Court, ibid, Chief Judge Goddard treated the employer's offer to pay compensation as an admission that fairness dictated that it ought to be paid. This is a shift from Cooke P's suggestion in *Hale*, supra at note 3, that the offer contributed positively to the employer's task of proving that its conduct was fair and reasonable.

109 See Heynes, "Treatment of Redundancy Payments in New Zealand – 1992", unpublished paper, University of Auckland (1993).

110 *New Zealand Herald*, 11 May 1992, section 1, 17.

minimise protest against the upheavals of restructuring".[111] These two statements raise the conflicting principles of job security and the right to manage.

The Courts, however, have adverted to alternative rationales. In *Wellington Caretakers Union v General Motors New Zealand Ltd* the Chief Judge stated:[112]

> Termination of employment for redundancy has ... serious consequences which can properly be the subject of compensation. The loss of the job, including the satisfaction that it provides, is one item. The loss of income is another. Uncertainty and anxiety as to the future are obviously elements that the parties would have had in contemplation. But the main item, as was explained in the *Wellington Hospital Board* case in 1983 by the Court of Appeal, is to provide some cushioning for the employees displaced during the period for which they are likely to be unemployed.

The debate between job security and the right to manage is outlined below. In order to briefly raise the pertinent issues, the discussion focuses on the disparate views of Collins and Wallis.[113]

(c) Pragmatic arguments against the protection of job security

Wallis observes that the principal argument favouring managerial prerogative is that efficiency and productivity are maximised since the manager's authority is unfettered. "Mass redundancies and plant closures are seen as part of the allocation of efficient resources. To interfere with such redundancies and plant closings will interfere with the 'market's magic'".[114] Collins argues that "the market would cease to function efficiently if employers were not permitted to enter and to terminate contracts of employment at their discretion in the light of market conditions".[115]

The second argument Wallis refers to is that job security is a disincentive to work, and that "absolute managerial discretion keeps the worker on his or her guard".[116] A third argument, which Wallis attributes to Posner,[117] contends that the costs to a redundant employee are not high. This argument is based on the premise of a "free employment market",[118] where the demand for labour meets its supply, and redundant employees can immediately find new employment.

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111 *PSA Journal*, April 1992, 1. This statement is reminiscent of the Minister of Labour's speech at the introduction of the Industrial Conciliation and Arbitration Amendment Act 1970. See supra at note 10 and accompanying text.

112 [1990] 2 NZILR 797, 824.

113 Wallis, "The Protection of Job Security: The case for Property Rights in One's Job" (1992) 7 Otago LR 640.

114 Ibid, 645.

115 Supra at note 44, at 10.

116 Supra at note 113, at 645.

117 Posner, "Hegel and Employment at Will: A Comment" (1989) 10 Cardozo LRev 1625.

118 Supra at note 113, at 646.

(d) Arguments in favour of protecting job security

Wallis cites five arguments in favour of the protection and promotion of job security. First, certain studies indicate that productivity is greater when employees feel secure in their positions.[119] Second, the cost to employees of redundancy and unemployment is greater than that estimated by management. Third, managerial prerogative should not be treated as an institution beyond reproach; the right to manage is subject to the demands of social justice. Fourth, Wallis rejects the reverence paid to freedom of contract, since it is based on the "myth of consent".[120] When the supply of employees exceeds demand, unemployed workers have few options other than to sign the employment contract put in front of them.[121]

Fifth, without job security, employers wield too much power in the workplace. Collins accepts this final argument to a degree. As noted above, Collins considers that the principle of democratic participation vindicates the application of rules of procedural fairness to redundancy situations. Further, Collins believes that an individual's dignity and autonomy justify compulsory protection of job security, "even at the expense of risking a diminution of general welfare".[122] However, Collins asserts the test for whether an employee's dignity has been respected is whether the employer has acted rationally. For instance, genuine redundancy involves no disrespect towards the individual.[123]

(e) The property in employment debate

While Collins is a strong advocate of the right of employers to manage their businesses as they see fit, he recognises the value of employment to the employee. A similar understanding of the importance of employment has induced Courts on occasion to recognise that employees have property rights in their jobs. For example, in the English case *Wynes v Southrepps Hall Broiler Farm Ltd*, it was stated:[124]

> A redundancy payment is compensation for loss of a right which a long-term employee has in his job. Just as a property owner has a right in his property and when he is deprived he is entitled to compensation, so a long-term employee is considered to have a right analogous to a right of property in his job, he has a right to security, and his rights gain in value with the years ...

119 Wallis, ibid, 647, refering to Bahrami, "Productivity Improvement Through Cooperation of Employees and Employers" (1988) Labour Law Journal.

120 Taken from Singer, "The Reliance Interest in Property" (1988) 40 Stan LR 611, 645.

121 As John Stuart Mill stated, "freedom of contract is but another name for freedom of coercion": Principles of Political Economy, V, xi.

122 Supra at note 44, at 16.

123 Ibid, 17.

124 [1968] 3 ITR 407, 407 (IT).

A recent decision of Judge Simpson in the Pukekohe District Court showed sympathy for this view.[125] In dismissing a trespass charge, the Judge held that for the purposes of the proceedings before her, a job could be classified as personal property.

(f) Justifications for property in employment

Wallis discusses the traditional natural law justification for property rights in jobs. The natural law justification is based on John Locke's theory that a claim to property can be made on the basis that one has invested one's labour in an enterprise.[126] The application of this proposition to employment can be criticised since employees are paid a wage for their labour. However, as Wallis notes, wages may not equate with the value of the labour and do not compensate for the goodwill obtained by the business as a result of the employee's work.[127]

The alternative justification favoured by Wallis is based on the assumption that property rights are almost always shared, as they are created in the context of relationships. Thus Wallis views property as a set of social relations.[128] An example Wallis refers to is matrimonial property which the law treats as commonly acquired and owned property. This relational approach "does not see the owner as absolute but as part of a common enterprise".[129] Moreover, Wallis envisages it as determining, and when appropriate redressing, the balance of power within a relationship.

(g) Fairness based on a duty of care

Collins believes that a stronger argument can be based on Honore's moral principle of *necessite oblige*,[130] which "holds that where one individual is heavily dependent upon another for his or her welfare, that other owes a duty of care for the vulnerable individual."[131] Collins adds:[132]

> Because the employee's income, social status, and way of fulfilling his or her life through work is so heavily dependent upon his or her employer, that employer owes a duty of care. Breach of this duty of care by economic dismissals entitles the individual employee to compensation equivalent to fulfilment of the duty.

125 *Police v O'Dea*, referred to in the *New Zealand Herald*, 26 October 1994, section 1, 2.
126 Supra at note 113, at 651.
127 Ibid.
128 Ibid, 652.
129 Ibid.
130 Honore, "Necessite Oblige" in Honore, *Making Laws Bind* (1987).
131 Supra at note 44, at 150.
132 Ibid.

This theory appears to have found favour with Cooke P:[133]

> [C]onceivably the prospect is gradually emerging of something in the nature of a general duty of fairness to persons sufficiently closely affected by one's actions, having some affinity with the *Donoghue v Stevenson* principle and influenced by the same permeating ideas ....

Obvious difficulties arise in applying the good neighbour principle to the employment relationship. With the enactment of the ECA, New Zealand employment law has increasingly embraced contract law principles. The imposition of tortious concepts by way of the good neighbour principle would be contrary to these recent developments. Collins also questions whether employees are as dependent on employers as some commentators suggest. Further, he contends that if the duty is to be invoked it must be limited to what the employer can afford.[134]

(h) Fairness based on distributive justice

Distributive justice may also be a basis for the duty of general fairness in redundancy situations:[135]

> When an employer improves productivity by reducing labour costs through economic dismissals, then it may be argued that those workers who have sacrificed their jobs should partake of some of the benefits to general welfare derived from superior productivity.

Collins expresses incredulity at the assumption that economic dismissals improve the profits of the business. In cases of plant closures, for example, the dismissals may merely serve to reduce the employer's losses.[136] Collins is also concerned that where economic dismissals do improve profits, employers will be deterred from making such economically rational decisions when the resulting profits are shared with redundant employees. Obviously, one's view of distributive justice in employment is shaped by that individual's view of social priorities.

(i) An amalgamation of compensation rationales

A recent article by Judge Finnigan demonstrates how the judiciary tends not to distinguish between the various factors supporting job security:[137]

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133 Supra at note 100, at 12.

134 Supra at note 44, at 152.

135 Ibid, 157.

136 Ibid.

137 Finnigan, "Equity and equality in employment, with particular reference to New Zealand" [1993] NZLJ 402, 403.

> There are some who perceive, for example, that in obtaining and holding a job an employee acquires a right like a property right. Behind most employees there are dependants. Relying on the employment the employee may have borrowed money, for example, to buy a home. Employment, a career, a 'living' may be one's life, even one's identity.

This passage combines the notions of property in employment, reliance, and autonomy. Elsewhere, when talking about the importance of the protection of the right to work and of equality in employment, the Judge states:[138]

> Ultimately success is achieved whenever there is full workplace recognition of the dignity of one human person by the other human persons there. In employment it is ultimately and always a matter of mutual respect between employees, between employers, and between employees and employers.

Further, Judge Finnigan appears to be sympathetic to the introduction of the good neighbour principle:[139]

> My own thoughts about equity and equality in employment have developed a lot during the seven years on the industrial Court. I have become more aware during that time of the Christian tradition. Who is my neighbour?

Despite these factors indicating that "there is an enforceable right to work",[140] his Honour stresses that the right to work is subordinate to the employer's right to disestablish surplus positions. However, employees may "acquire certain other rights which have been developed by the Courts, such as the right to be consulted about pending redundancy and a right to redundancy compensation".[141]

(j) Compensation cases following the Labour Court's second decision in Hale

Following the Court of Appeal's decision in *Hale*, the courts have taken into account the various property and fairness rationales which, although seldomly expressed, lend strong support to the proposition that the dismissal of an employee for redundancy will require reasonable compensation to be justified.

Adopting the Court of Appeal's test in *Hale*, both the Employment Court and Tribunal, in a "genuine" redundancy situation, have held that redundancy compen-

138 Ibid.
139 Ibid, 402.
140 Ibid, 404.
141 Ibid, 405.

sation should have been paid despite the silence of the employment contract on that point.[142]

Bilderbeck and *Johnston v Jones Schindler Lifts Ltd*,[143] two cases which were eventually heard by the Court of Appeal, provide good examples of the way in which the Court of Appeal's test in *Hale* has been strictly followed. In focusing on the element of "cost saving", the Tribunal in *Schindler Lifts a*ppeared to say that whenever an employer dismisses a worker in order to make a cost saving, and a saving is made as a consequence, the worker should receive a share of that saving.[144] Thus, what was a factor in Chief Judge Goddard's equation, is transformed into a rule in *Schindler Lifts*. As with all the Court and Tribunal cases following *Hale*, this transformation is not supported by any discussion on the meaning and importance of job security.

At the Employment Court level, Judge Palmer rejected the Tribunal's "presumption", holding that the existence of a cost saving is only one element in the analysis of whether fairness requires compensation.[145] However, Judge Palmer agreed with the Tribunal that the circumstances called for a compensation payment to be made.

The issue of cost savings also played a significant part in *Bilderbeck*. In the Employment Court, Chief Judge Goddard quantified the cost savings resulting from the redundancies and compared them to the compensation offered by the employer: "The redundancy compensation which it paid was in the order of $12,000, or 4 percent of only the first year's saving."[146] The Chief Judge held that this amount was plainly inadequate.

VII: CRITICISM OF THE COMPENSATION DEVELOPMENT

The development of the obligation to pay compensation even when the contract is silent on the issue, has been criticised by commentators and judges on the grounds that it contradicts the intention of Parliament, violates the sanctity of contract, and does not comply with the rules pertaining to implied terms.

1. Intention of Parliament

A number of commentators suggest that requiring the employer to pay com-

142 Although, note that the Employment Tribunal in *Johnston v Jones Schindler Lifts Ltd*, 17 September 1992, CT91/92, 14-15, was of the opinion that the ECA prohibited compensation being paid in these circumstances.

143 [1995] 1 NZLR 190.

144 Supra at note 142, at 10.

145 [1993] 2 ERNZ 300, 317.

146 Supra at note 81.

pensation when it is not provided for in the employment contract is acting against the intention of Parliament.[147] A common view is that:[148]

> The whole scheme of the Employment Contracts Act is predicated on the basis that parties to contracts of employment ... should only have such rights and obligations as are freely negotiated by them, within the framework of the legislation.

The intention of parliament is seen as expressed in provisions such as the long title and ss 9, 43 and 46 of the ECA. In *Bilderbeck*, Richardson J considered that ss 9(b) and 43(a)[149] indicated that Parliament had clearly intended to confer autonomy on the employment contract. Those who believe the Tribunal and Employment Court are impugning the intention of Parliament most frequently invoke s 46(3) which states:

> [W]here a provision of any contract deals with the issue of redundancy but does not specify either the level of redundancy compensation payable or a formula for fixing that compensation, neither the Tribunal nor the Court shall have the jurisdiction to fix that compensation or specify a formula for fixing that compensation.

The initial response to the enactment of these provisions in the ECA was that it seemed "to point to a requirement that any rights to compensation payments in particular must spring from the negotiated agreement between the parties".[150] However, following this initial response, several commentators argued that the application of s 46(3) should be restricted to the context of disputes procedures, the Part of the Act in which the provision is found.[151]

The fact that there is no corresponding section in Part III of the Act, which deals with personal grievances, led Adzoxornu to conclude:[152]

> Under the personal grievance procedures, the Tribunal or Court has a much wider discretion than under the disputes procedures .... the appropriate enquiry in a personal grievance application is 'what is open to a reasonable and fair employer to do in particular circumstances.' As a result of this, the Tribunal or the Court is not restricted to the express terms of the employment contract although these are not entirely insignificant.

In this way s 46(3) has been used to support the Chief Judge's second decision

147 See, for example, Ferguson, "Personal Grievances Arising from Redundancy: Life after *Hale* and the Employment Contracts Act 1991" (1992) 17 NZ Journal of Industrial Relations 371.

148 Johnston, "Redundancy ... Again" (1992) ILB 82, 82.

149 Section 9(b) states that the employment contract is a matter for negotiation in each case. Section 43(a) provides that the object of Part IV of the Act relating to enforcement is to establish that "employment contracts create enforceable rights and obligations".

150 Supra at note 147, at 376.

151 McBride in "Correspondence" (1992) ILB 63; Adzoxornu, "Jurisdiction to Fix Quantum of Redundancy Compensation under the EC Act" (1992) ILB 83.

152 Ibid, 85.

in *Hale*. Since Parliament addressed the issue of the Tribunal and Court fixing compensation in the context of disputes when enacting the ECA, Parliament arguably would have enacted a corresponding provision in Part III of the Act if it wanted to prevent those institutions from following *Hale*. The implication is that Parliament was content with the decision in *Hale* which had been delivered some months before. This argument was adopted by Cooke P in *Bilderbeck*. He asserted that s 26(d),[153] which sets out the objects of Part III of the ECA, is much less restrictive than s 46(3).[154] Justice Richardson rejected the argument that the legislature had endorsed *Hale*, stating that the 190 pages of Hansard on the Employment Contracts Bill contained no reference to *Hale*.[155]

Another view is that while s 46(3) does not apply specifically to personal grievances, it throws light on Parliament's general intentions within the Act. The Chief Judge himself has stated in the context of s 46:[156]

> [I]t was plainly the intention of Parliament that any provision for redundancy should be agreed upon between the parties and not imposed [on] them by the Tribunal or the Court by means of a broad construction of a vague or general provision in an employment contract.

In a press statement in September 1992, the Minister of Labour made the Government's position clear:[157]

> Redundancy has always been a matter of negotiation between employers and employees under both previous industrial relations law and the Employment Contracts Act.

A compromise seems to have been reached by the adjudicator in *Bilderbeck*. Although the adjudicator saw s 46(3) as being suggestive of Parliament's general intention as regards compensation, he did not believe Parliament intended to repeal the obligation on the employer to act fairly and reasonably. For instance, s 40(1) contains remedies for the failure to comply with that obligation. However, even accepting that s 46(3) is applicable to personal grievances, the adjudicator believed that the provision is not being breached because the tribunal or court is not awarding redundancy compensation per se, but in effect compensation for not receiving compensation. On this point, the writer agrees with Gault J, who suggested in *Bilderbeck* that the Tribunal was in all practical terms simply awarding redundancy compensation.

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153 Section 26(d) states that the remedy for personal grievance is determined by the circumstance of each case. Also in Part III, ss 40 and 41 provide for flexible remedies.

154 Supra at note 1, at 265-266.

155 Ibid, 266.

156 Goddard, "Recent Employment Court Decisions and their Impact on the ECA" IIR Conference 26 March 1992.

157 Supra at note 147, at 383.

2. Sanctity of Contract

That contract forms the basis of the employment relationship appears to be generally accepted by the employment institutions.[158]

Critics of the courts' intervention when employment contracts are "silent" as to redundancy compensation, argue that the ECA supports holding parties to the terms they have negotiated. It is in this context that the expression "sanctity of contract" is frequently touted. For example, the *National Business Review* stated:[159]

> The intention of the Employment Contracts Act was to keep judges' noses out of redundancy settlements, leaving the level of severance pay (if any) to be decided by the parties when drawing up employment contracts. But the Employment Court couldn't live with this free-market approach and decided to challenge the sanctity of contract.

Justice Richardson's dissent in *Bilderbeck* agreed with at least the sentiment of this comment. His Honour considered that if the parties agree to redundancy compensation, it will be included as an express term of the contract. Such a provision, he reasoned, is part of the package of express terms (including also for example, hours of work, holidays, leave, and fringe benefits) which together make up the employment relationship.[160] His Honour believed, therefore, that it is commercially unrealistic to suggest that when the contract is silent on the issue of compensation the parties have not turned their minds to it.

In support, Richardson J referred to the Arbitration Court decision in *Canterbury Health IUW v Fabiola Fashions Ltd*[161] which held that in the absence of any express obligation on the employer under an award to pay redundancy compensation, a refusal to do so could not render a dismissal unjustifiable.

3. Implied Terms

Justice Richardson argued against implying a term requiring the employer to pay redundancy compensation. Justice Richardson saw the recent Court of Appeal decision in *Attorney-General v NZ Post-Primary Teachers' Association*[162] as prohibitive of such an implication. In that case Gault J, delivering the Court's judgment, made the following observations:[163]

158 See, for example, Chief Judge Goddard in *Unkovich*, supra at note 65, at 560-561.
159 Supra at note 2, at 15.
160 Supra at note 1, at 258.
161 [1981] ACJ 439.
162 [1992] 2 NZLR 209.
163 Ibid, 213.

> It can be said immediately that the nature of employment contracts will affect the content of implied terms (such as duties of fairness, confidence and trust) but that does not call for any different test for implication in such contracts .... There is no established basis for the implication into employment contracts of terms that the parties have not agreed should be binding conditions of engagement for the reason simply that it would be reasonable to do so.

The following five criteria, set out in *BP Refinery Ltd v Hastings Shire Council*,[164] form the commonly used test which must be met for a term to be implied into a contract. The term must:

(i) be reasonable and equitable;
(ii) be necessary to give business efficacy to the contract;
(iii) be so obvious that "it goes without saying";
(iv) be capable of clear expression; and
(v) not contradict any express term of the contract.

Justice Richardson would probably consider that an implied term making redundancy compensation mandatory would fail to meet criteria (i) to (iv). However, both dissenting judges in *Bilderbeck* realised that the majority's decision, and that of the Employment Court, did not rest on simply implying a redundancy compensation term into employment contracts on a case by case basis.[165]

Justice Richardson recognised the alternative proposition but tersely dismissed it:[166]

> A requirement for compensation ... could not satisfy the standard tests for implication of terms in contracts. Nor can I see any basis for converting the mutual obligations of confidence, trust and fair dealing in the employment relationship into a specific variation of the contractual arrangement so as to impose redundancy obligations which the parties did not agree to undertake.

Justice Gault bluntly disapproved of applying "abstract concepts and implied terms evolved through complex judgments" to employment law.[167] While he realised that the term the majority implied into the employment contract was not an obligation to pay compensation, but an obligation of fair dealing, he asserted that if this obligation of fair dealing was extended to "whatever the Court or Tribunal considers to be fair or reasonable", it would be inconsistent with the law as stated in the *New Zealand Post-Primary Teachers' Association* case.[168] President Cooke articulated the implied term of fair dealing using the exact words of the Employ-

164 (1978) 52 ALJR 20, 26.

165 Although as noted by Chauvel, *Frustrated Fairness: Aspects of the Law Relating to Compensation for Redundancy in New Zealand*, unpublished thesis, University of Auckland (1994) 123, in *Schindler Lifts* Judge Palmer relied on an implied term entitling employees to redundancy compensation, rather than the implied term of fair dealing.

166 Supra at note 1, at 266.

167 Ibid, 270.

168 Ibid, 271.

ment Appeal Tribunal in *Woods*:[169]

> [T]here is implied in a contract of employment a term that the employers will not, without reasonable and probable cause, conduct themselves in a manner calculated to destroy or seriously damage the relationship of trust and confidence between employer and employee.

Justice Casey expressed the term as simply "the implied obligation to preserve the relationship of trust and confidence".[170]

The implied contractual term is integral to the tribunal or court's ability to compensate a redundant employee, notwithstanding the silence of the particular employment contract. While critics of the *Hale* and *Bilderbeck* decisions may be correct in saying that those decisions infringe the intention of Parliament and, at the very least, the "sanctity" of contract, the writer does not believe that the decisions are applications of social justice without foundation.

VIII: THE POSITION OF THE COURT OF APPEAL MAJORITY IN BILDERBECK

The majority followed a relatively simple three step approach:

(i) the employment relationship involves the elements of mutual confidence, trust and fair dealing;
(ii) there is an implied term in every employment contract that the employer will preserve (Casey J) or not damage (Cooke P) these elements of the relationship; and
(iii) depending on the circumstances of each case, this implied term may be breached by the employer if it fails to pay adequate compensation.

This procedure is sourced in, and supported by, the whole background of the personal grievance regime. Authority supporting the first step has already been reviewed, and is cited by Cooke P in his judgment. However, the authoritative *coup de grace* by the President was a passage from Richardson J's judgment in *Telecom South Ltd v Post Office Union (Inc)*, which stated:[171]

> The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing.

169 Ibid, 252.
170 Ibid, 269.
171 [1992] 1 NZLR 275, 285; cited in *Bilderbeck*, ibid, 254.

Step two merely puts the features of the employment relationship into a contractual form in order to protect them. If the mutual obligation of fair dealing is ignored, the offending is in breach of the employment contract and consequently liable to the sanctions which accompany such a breach. It is the third step which will continue to be controversial. Technically, the judges are not implying a compensation term into employment contracts. Instead, they are telling employers that where the parties do not come to an express agreement over compensation, the court or tribunal may decide that fairness requires compensation to be paid. It is perhaps not surprising that there has been considerable criticism of this state of the law, which allows decisions to be made on the grounds of "whatever the Court or Tribunal considers to be fair or reasonable".[172]

However, the whole evolution of the personal grievance procedure contradicts this criticism, because its genesis lay in the perceived inadequacy of the common law of wrongful dismissal. The watershed case of *Hennessey* defined "unjustifiable" as meaning that which is not done in accordance with justice and fairness. Thus, Court of Appeal authority from as early as 1982 reinforces the position which Gault J believed to be untenable.

The writer suggests that since 1982 the law of unjustifiable dismissal, particularly in the field of redundancy, has developed in line with the requirements of justice and fairness. The courts have imported these requirements to balance the concessions made to the concept of managerial prerogative. To this effect, Cooke P in *Bilderbeck* stated "it would not be going too far to say that the appellant employer in *Hale* procured a favourable decision partly by representing that the employee would still have rights to fair treatment".[173]

Initially, the dictates of fairness and justice were entrenched into either the categories of substantive justification or procedural fairness. However, this article suggests that these two categories have been increasingly perceived as obsolete because of the courts' more open pursuit of the requirements of fairness and justice.

This transition is evidenced in the position taken by the majority of the Court of Appeal in *Bilderbeck*. Their Honours approached the case by asking simply whether the employer had acted fairly in dismissing the employee upon the ground of redundancy. The answer in this particular case was no, and accordingly the employer was ordered to compensate the employee.

IX: CONCLUSION

It is not a different understanding of the law which divides the Court of Appeal in *Bilderbeck*, but the requirements of fairness in the redundancy situation.

Justice Richardson has stated that the fair employer should act with the under-

172 Ibid, 271 per Gault J.
173 Ibid, 253.

standing that employees have an investment in their jobs. Yet, his Honour did not believe that fairness in the case before him should extend to consulting over the commercial situation of the business, dismissal selection criteria, or redeployment options. As regards the requirement that compensation ought to have been offered, his Honour was adamant that the imposition of such an "extra-statutory concept of social justice" was not open to the Court.[174]

In disagreeing, the majority of the Court of Appeal relied on and affirmed the implied obligation of mutual fairness extant in every employment relationship. The majority were of the opinion that this obligation extends to the payment of redundancy compensation where none has been provided for in the employment contract. This extension has had the overwhelming support of the Employment Court and the Employment Tribunal.

In 1981,[175] the Arbitration Court had rejected the possibility that it could order the payment of compensation, when the parties had not provided for redundancy compensation in the employment contract. However, in *Bilderbeck*, Casey J candidly accepted that the Employment Court and the Court of Appeal had changed the law in this regard. The extension of fairness has led to the setting aside of the *Fabiola* decision.[176]

This leads to the inevitable question with which this article must conclude, whither the law relating to redundancy? In *Bilderbeck* the President stated that:[177]

> If the contract contains an express provision and formula for redundancy compensation or (less likely) an express provision that there shall be no such compensation, no doubt it will govern, save possibly in very exceptional circumstances.

Thus, Cooke P hints at the possibility of the courts imposing a "special compensation" payment. Perhaps the Employment Courts and Tribunal will refrain from opening this door, as Chief Judge Goddard did in the case of "special notice". Perhaps another door will be opened in the form of an expanded reading of s 57 of the ECA, which pertains to harsh and oppressive contracts. For example, the court might find that because of the inequality in bargaining power, a contract in which no compensation was payable was harsh and oppressive when entered into (s 57(1)(b)).

Whatever the approach, it is the opinion of this writer that the pendulum has not yet begun to swing against the development of fairness in employment law. The notion of fairness will continue to play a major role in the evolution of the law relating to redundancy.

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174 Ibid, 258.

175 Supra at note 161.

176 See ibid and accompanying text.

177 Supra at note 1, at 255.