

Remedies for Dismissal: The Common Law and Statutory Law Approach with Reference to Selected Countries

by

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1. Introduction

Security of tenure in employment is so important that the courts in Malaysia have equated it to a 'property right'¹. Furthermore, the courts have given a liberal interpretation to the phrase 'right to life' in Article 5(1) and Article 8(1) of the Federal Constitution to include a 'right to livelihood'². Unfortunately, this right has now been lost by the decision of the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*³, which had adopted a literal and narrow interpretation to above provisions. This illustrates the importance in the security of tenure in employment, a message that the courts have tried to put through in dealing with a worker's right in the continuation of his employment.

The importance of job security can be seen from the fact that remedies for its encroachment can be enforced whether through the common law tort of wrongful dismissal or the statutory provision against unfair or unjustifiable dismissal. This article will focus on the above two concepts of dismissal, and more importantly, their remedies, as these are the only modes of enforcing workers security of tenure in employment. The writer will make reference to the law and practice in selected jurisdictions such as England, Canada, Australia,

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¹ See, for example *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan and Anor.* [1996] 1 MLJ 481, 509-510 (CA); *Ang Beng Teik v Pan Global Textile Bhd., Penang* [1996] 4 CLJ 313, 323 (CA); *Malayan Banking Bhd. v Mohd Bahari bin Mohd Jamli @ Mohd Jamal* (unreported) (O.M. No. R1-25-134-94 (High Court Kuala Lumpur) (Abdul Kadir Sulaiman J.).

² See, for example *R. Rama Chandran v The Industrial Court of Malaysia and Anor.* [1997] 1 MLJ 145, 190 (FC); *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan Ibid.*; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan and Anor.* [1996] 2 CLJ 771 (CA); and *Harris Solid State (M) Sdn. Bhd. and Anor v Bruno Gentil Pereira and Ors.* [1996] 4 CLJ 747 (CA).

³ [2002] 4 CLJ 105 (FC).

New Zealand and Malaysia. The inclusion and discussion of the law and practice in the above jurisdictions will provide a transparent approach of the common law and statutory law in relation to workers 'property right' in employment.

This article is further intends to ponder the recent proposal by the Minister of Human Resources and Manpower to bar those employees who earn more than RM5000 a month from referring disputes to the Industrial Relations Department. According to the Minister the move is intended to be one of the several long-term solutions to reduce the number of cases handled by the department. He added that the bar was fair because those earning above RM5000 have the capacity to appoint lawyers and to pursue cases in the civil courts. He further added that 'we have been handling many cases that we should not have handled, including those involving chief executive officers in dispute with their companies due to retrenchments. These groups of people should be able to appoint their own lawyers and take on their cases outside the department'⁴.

Therefore, an analysis of the remedies for dismissal in this article would explain why the proposed move by the Minister, to limit categories of workers that may refer their representation under s.20(1) of the Industrial Relations Act, 1967, is unfavourable to these workers.

2. The Common Law Approach of Worker's Security of Tenure in Employment

2.1 Common Law Tort of Wrongful Dismissal

At common law, the employer-employee relationship is contractual; the employer may terminate the contract of employment by serving appropriate notice, as expressed in the contract or implied reasonable notice. Wrongful dismissal occurs when the employee is dismissed without notice or with inadequate notice⁵. The rationale of giving notice is to offer the affected party time, either

⁴ 'Move to reduce IRD backlog' New Straits Times, 26 August 2004, at p. 6.

⁵ The Common law wrongful dismissal arises when the employer breach the contract by failing to give the dismissed employee appropriate notice, expressed or implied. See, for example *Wallace v United Grain Growers Ltd.* (1998) 152 D.L.R. (4th) 1, 39 (SC) (Canada).

to search for alternative employment or for the replacement of an employee, respectively⁶. The parties, when entering into the contract of employment, may have agreed on the requirement of notice of termination of the contract.

Therefore, once notice is properly communicated, the employer is free to dismiss the employee on any ground with no obligation to reveal the reason for the dismissal⁷. The employer may rely on any reasons for dismissal discovered subsequent to the dismissal, whenever there is impending litigation⁸. The remedy for wrongful dismissal does not include aggravated damages, which is quasi-punitive in nature⁹ nor does it include exemplary or punitive damages. Furthermore, no damages can be recovered for mental distress following from the manner of the dismissal, or for injured feelings, as it would be punitive in nature¹⁰.

⁶ See, for example, *Morrison v Abernethy School Board* (1876) 3 Sess Cas R. 945, 950; *Matthews v Coles Myes Ltd.* (1993) 47 I.R. 229; *Grout v Gunnedah Shire Council* [1995] 125 A.L.R. 335, 364.

⁷ If an employer gives a week's pay in lieu of notice and dismisses the worker summarily, this will discharge the employer's obligation. However, if the workers are neither given due notice or paid in lieu of notice, they have an action for wrongful dismissal, unless there was just cause for the dismissal. In *Re African Association Ltd. and Allen* [1910] 1 K.B. 396, 400, the contract of employment for a term of two years provided that the employers might at any time at their absolute discretion terminate the engagement at any earlier date than specified. This according to Bray J. 'that seems to me to give an option in favour of the employers, which option can, however, only be exercised by them on the usual and implied term of giving reasonable notice of their intention to exercise it'. See, also *Ridge v Baldwin* [1964] A.C. 40, 65; *Vasudevan Pillai v Singapore City Council* [1968] 1 W.L.R. 1278, 1284; *Malloch v Aberdeen Corp.* [1971] 1 W.L.R. 1578, 1581 (HL); *Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v Lee Eng Kiat & Anor.* [1981] 1 MLJ 238.

⁸ In *Cyril Leonard and Co. v Simo Securities Trust Ltd.* [1971] 3 All .R. 1313, 1321, Sachs L.J. stated that where 'an employee has in fact been guilty of uncondoned misconduct so grave that it justifies instant dismissal, the employer can rely on that misconduct in defence of any action for wrongful dismissal even if at the date of the dismissal the action was not known to him'.

⁹ See, for example, United Kingdom's Law Commission Report 'Aggravated, Exemplary and Restitution Damages (1993) Consultation Paper No 132 para 3.29 where it was stated: 'Aggravated damages...serve to increase the damages that could otherwise be awarded, and they increase award because of the defendant's conduct. This looks like punishment'.

¹⁰ See, for example, the benchmark case of *Addis v Gramophone Company Ltd.* [1909] A.C. 488, 491 (HL).

2.2 Notice of Termination of the Contract of Employment

(i) *The binding effect of an agreed length of notice of termination*

Coming back to the requirement of notice for termination of the contract of employment, the agreed length of the notice provision in the contract binds the parties. In these circumstances, a term requiring reasonable notice will not be implied. Whether the contract was read and explained to the employee, or whether there was an implied term that continued employment would afford greater notice other than originally agreed, is immaterial. Failure to comply with the express provision may give rise to a claim for damages representing the period of notice agreed and not served on the other party. It is a pre-estimate of damages payable if the contract is unduly broken and the party affected is not bound to give credit for any actual or imputed earning – there is no duty to mitigate loss¹¹.

In fact, a worker exposed to the ‘harsh termination provision’ cannot be relieved by equity on such grounds as inequality of bargaining power, absence of consensus *ad idem*, unconsciounability, and change of circumstances removing the substructure¹². By way of illustration reference may be made to the Canadian case of *Wallace v Toronto-Dominion Bank*¹³. In this case, the plaintiff began his career with the defendant as a Systems Research Analyst in 1970. He was initially given a probationary period of three months. Before the probationary term ended, at the request of the Bank, he was transferred to the Inspection Department. He was subsequently made a permanent employee of the Bank with an increase in salary. The contract of employment provided that either party could terminate the contract by giving four weeks notice. However, if the employer initiated the termination of the contract, he would be bound to

¹¹ See, for example, *Hartley v Harman* (1840) 11 Ad.E. 798; 113 E.R. 617; *French v Brookes* (1830) 6 Bing. 354; 130 E.R. 1316; *Fewings v Tisdal* (1847) 1 Exch. 295; 154 E.R. 125; *Goodman v Pocock* (1850) 15 Q.B. 576; 117 E.R. 577; *Rex Steward Jefferies Parker Ginsberg Ltd. v Parker* [1988] I.R.L.R. 483 (CA); *Abrahams v Performing Right Society Ltd.* [1995] I.C.R. 1028 (CA).

¹² In *O'Connor v Hart* [1985] 1 N.Z.L.R. 159, 166, the Privy Council hearing appeal from the Court of Appeal of New Zealand, observed that: ‘equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing’.

¹³ (1983) 145 D.L.R. (3d) 431 (Ont.CA).

pay all the salary owed for time already worked plus salary for an additional four weeks.

After four years of satisfactory performance the plaintiff was transferred, at his request, to the General Banking Stream. He underwent training, which the employer expected to take a period of 12-18 months, but the plaintiff took 24 months to complete the training. Although the longer period for completion was beyond his control, this was to the bank's dissatisfaction. Upon completion, he was assigned as Assistant Manager in one of the branches, with the original provision on notice being preserved in the contract of employment. His salary was at a rate higher than normal for someone in his position because he had carried over his rate from his previous position.

As his performance was deemed to be unsatisfactory, he was constructively dismissed in 1978. The trial court upheld the constructive dismissal, but disapproved of the express provision on notice in the contract of employment, and held that, under the circumstances, he was entitled to 12 month's notice. On appeal, the Court of Appeal upheld the finding of constructive dismissal by the lower court, but, by a majority, held that the employment contract was still binding, entitling the plaintiff to only four week's notice. Robins JA, for the majority, noted that the inequality of bargaining power inherent in the employment hiring context would not, by itself, be enough to render such harsh notice provisions unenforceable. According to His Lordship, the terms relating to notice to terminate the contract 'were not hidden in a maze of fine print but were set forth clearly and understandably on the evidence'. He further added that there was no 'attempt to take advantage of the plaintiff or to exert influence over him so as to procure a contract that otherwise would not have been made, and nothing that transpired can be treated as being oppression of him or as constituting the type of coercion that may vitiate consent'¹⁴.

In the above case, although the contract of employment between the parties lasted approximately eight years, the Court upheld the express provision on notice, which stipulated four weeks notice to end the relationship. Based on the above case, it is quite clear that, at common law, an express term on notice

¹⁴ *Ibid.*, at p. 450.

will be effective, regardless of any unfavourable circumstances, simply because it was agreed at the very beginning and the terms formed the essence of a contract.

It may, however, be argued that the express provision on notice might have been reasonable in the early stages of employment, but after a substantial period of employment, coupled with an increase in responsibilities after promotion, such a clause appears to be rather harsh and unfair. In light of the earlier mentioned case, where there is an express term on notice of termination, very rarely, if at all, will equity intervene to circumvent the agreed term.

(ii) *Reasonable notice of termination*

In the absence of an express provision, the period of notice will be determined either by the custom of the trade or industry or what is reasonable in the circumstances of the case. In the English case of *Richardson v Koeford*¹⁵, Lord Denning MR noted that, ‘in the absence of express stipulation, the rule is that every contract of service is determinable by reasonable notice’. The factors that constitute reasonable notice are determined objectively with reference to the facts and the surrounding circumstances of each case.

There is no formula that can be derived leading to a certain result since the facts will vary from one case to another. Many factors are taken into consideration and this includes, *inter alia*, the age of the employee, seniority in employment, nature of the work and the availability of similar alternative employment. The Supreme Court of Canada in *Wallace v Toronto-Dominion Bank*¹⁶ added the manner of the dismissal, as another factor for computing the period of notice. It is worthwhile reproducing the commentary by Kroft JA in *Wiebe v Central Transport Refrigeration (Man.) Ltd.*¹⁷ - a Canadian case:

‘...The determination of reasonable notice is a question with which lawyers and judges often grapple. Yet, there seems to be no single approach or philosophy, which has met with general acceptance or satisfaction. The most that can be said with any degree of

¹⁵ [1969] 3 All E.R. 1264 (CA).

¹⁶ (1983) 145 D.L.R. (3d) 431 (Ont.CA).

¹⁷ [1994] 6 W.W.R. 305, 315 (Man.CA).

certainty is that the ‘pigeon-hole’ or ‘catalogue method’ is not the answer. The endeavour of going through a list of similar fact categories with dollar value attached in order to find the items best fits, is endless, arbitrary and of little value...’

In another Canadian case, *Bardal v Globe and Mail Ltd.*¹⁸, McRuer CJ observed that:

‘...There could be no catalogue laid down as to what was reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case having regards to the character of the employment, the length of service, the age of the servant and the availability of similar employment, having regards to experience, training and qualification of the servant...’

Nevertheless, the following are some of the important factors that have been considered by the courts in common law jurisdictions in computing reasonable notice:

- (a) Age of the worker: Generally, permanent employment does not imply a contractual right to a freehold tenure of the post or employment for life¹⁹. In the absence of grounds justifying early termination of the contract of employment, the employee is subject to a compulsory retirement age, ranging between 55 and 65 years²⁰. Senior employees who have been dismissed may have difficulty in finding alternative employment. If an

¹⁸ (1960) 24 D.L.R. (2d) 140, 145. See also *Speakman v City of Calgary* [1908] 9 W.L.R. 264, 265; *Whelan v Waitaki Meats* [1991] 2 N.Z.L.R. 74, 80.

¹⁹ In the absence of the clearest language in contracts of employment offering lifelong employment, the law would be slow to hold that a ‘servant’ is bound to give lifelong service or a ‘master’ to offer lifelong employment. See, for example *McClelland v Northern Ireland General Health Services Board* [1957] 2 All E.R. 129, 133 and 135 (HL); *Salt v Power Plant Co. Ltd.* [1936] 3 All E.R. 322.

²⁰ Many reasons has been forwarded to explain the compulsory retirement age such as ageing which affects physical capacity of the workers, senior workers tend to be overpaid, human capital where younger employees will have a longer term potential than older employees, to mention but a few.

employee is dismissed from age 45 years onwards, he will certainly find difficulty in seeking other employment for it is generally accepted that the productivity of an employee reduces as his age increases. This statement may be qualified against those engaged in their professional capacities, who may find little effect from the increase in their age.

- (b) Length of loyal service: Long-term employment carries weight in the assessment of the notice period. An employee who has devoted a large part of his working life to a particular position of employment, working his way up through the ranks, developing expertise and knowledge in the affairs of his employer and enjoying the rewards of his efforts, would be placed in an extremely difficult position if suddenly released onto the labour market. Thus, long-term employees would certainly require a longer period of notice when they are wrongfully dismissed.

In exceptional circumstances, however, a worker with a short employment history may equally be awarded a long period of notice. It may be illustrative to refer to the New Zealand case of *Brandt v Nixdorf Computer Ltd.*²¹ In this case, the termination took place at the very onset with the plaintiff's employment with the defendant lasting less than two months. The Court, however, awarded the plaintiff twelve months as reasonable notice.

The brief facts of the case are that the plaintiff had been successfully running a computer consultancy office. He was persuaded to give up his profession to join the defendant. He was assured of good prospects in the defendant's company, which he joined on the 1st June 1987, and was paid a substantial salary. The defendant had high expectations for the plaintiff to play an important role in the expansion of the company and it was expected that his skill, knowledge and reputation would be of considerable benefit to the company. He was however, summarily dismissed on the 9th July 1987 after a series of misunderstandings. The High Court held that the purported summary dismissal was unjustified and awarded twelve months as reasonable notice of termination.

²¹ [1991] 3 N.Z.L.R. 750.

- (c) Nature and character of employment: An employee whose expertise is gained through experience, and whose knowledge is highly specialised, may find it extremely difficult to obtain other suitable employment. Thus manual workers generally receive a shorter notice period than one who is in the managerial or professional category. For example the chief executive officer of a large corporation would be likely to have less opportunity for similar alternative employment than a manual labourer. Therefore, the former would be entitled to longer notice than the latter.
- (d) Manner of dismissal from employment: Manner of dismissal was only recently recognised as a factor in computing reasonable notice. It was introduced by the Supreme Court of Canada in *Wallace v United Grain Growers Ltd.*²². In this case, the Court recognised the existence of inequality in bargaining power in an employment contract where employees are usually the more vulnerable group. Therefore, the employer's prerogative of hire and fire must be qualified, and they 'should refrain from engaging in conduct that is unfair or is bad faith by being, for example, untruthful, misleading or unduly insensitive'²³. The Court concluded that: '...[W]hen termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period...'

These are some of the factors, although not exhaustive, that would be considered in computing the reasonable notice of termination. Other factors that may be considered include the importance of the position held, the size of the worker's salary, what the worker had given up to come to be employed with the employer, and economic crisis or recession.

Once the factors applicable in each particular case have been decided, the computation of the length of notice required is a matter of discretion for

²² (1998) 152 D.L.R. (4th) 1, 31 (SCC).

²³ Per Iacobucci J. *Ibid.*, Para 98.

which there will be different opinions. Furthermore the length of notice required is not the sum of the period fixed for each of the relevant factors, but a single period of time fixed with regard to all of the factors²⁴. Therefore, case law merely serves as an illustration and each case must be decided on its own facts.

(iii) *Length of reasonable notice*

Below are reported cases where the courts, under the prescribed circumstances, have considered a suitable reasonable notice period. The comparison provides some assistance with respect to the general level of awards of damages for wrongful dismissal. (Note: the particulars in the diagrams that are left blank did not appear in the judgement of the court of that particular case).

(A) England

(1) Engaged in Managerial Position

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
1.Chief Officer of Passenger Steamer ²⁵	-	-	12
2.Newspaper Editor ²⁶	-	-	6 - 12
3. Sub-editor ²⁷	-	-	6
4.Chartered Engineer ²⁸	63	35	6
5.Cinema controller ²⁹	-	-	6
6.Manager of a bookmaker's credit department ³⁰	-	-	3
7.Company director of a small firm ³¹	-	-	3
8. Specialist Salesman ³²	-	-	3

²⁴ See, for example, *Whiting v Winnipeg River Brokenhead Community Futures Development Corp.* (1998) 159 D.L.R. (4th) 18, 34 (Man. CA).

²⁵ See, for example, *Savage v British India Steam Navigation Co. Ltd.* (1930) 46 T.L.R. 294.

²⁶ See, for example, *Fox-Bourne v Vernon and Co. Ltd.* (1864) 10 T.L.R. 647; *Grunday v Sun Printing and Publishing Association* (1916) 33 T.L.R. 77 (CA).

²⁷ See, for example, *Chamberlain v Benneth* (1892) 8 T.L.R. 234. However, a journalist/editor of a minor newspaper was awarded three months notice in *Baker v Mandeville* (1867) 13 T.L.R. 71; *Hutton Ex Parte Allpas* 1867) 17 L.T. 179; *Landa v Green Berg* (1908) 24 T.L.R. 44, 52 S.J. 354.

²⁸ See, for example, *Hill v C.A. Parsons Co. Ltd.* [1971] 3 All E.R. 1345.

²⁹ See, for example, *Adams v Union Cinemas Ltd.* [1939] 3 All E.R. 136.

³⁰ See, for example, *S.W. Strange Ltd. v Mann* [1965] 1 All E.R. 1069.

³¹ See, for example, *H.W. Smith (Cabinets) Ltd. v Brindle* [1973] I.C.R. 12.

³² See, for example, *Fisher v W.B. Dick and Co. Ltd.* [1938] 4 All E.R. 467.

(2) Engaged in Non-Managerial Position

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
1. Traveller in Woollen Trade ³³	-	-	1
12. Clerk in Telegraph Office ³⁴	-	-	1
13. Menial Servants ³⁵	-	-	1
14. Head gardener ³⁶	-	-	1 weeks
15. Milk carrier ³⁷	-	-	1 weeks
16. Foremen ³⁸	-	-	1 weeks

(B) Canada

(1) Engaged in the Managerial Position

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
General manager ³⁹	-	10	16
Chief Operating Officer ⁴⁰	-	26	21
Professional Engineer ⁴¹	-	-	12
Branch Manager ⁴²	-	27	12
Managing Editor ⁴³	-	38	21
Senior Officer ⁴⁴	61	37	24
Human Resources Manager ⁴⁵	52	8	12
Divisional Manager ⁴⁶	47	11	15
Sales Manager ⁴⁷	61	31	24
Regional Manager with only grade II education ⁴⁸	56	28	24
Executive ⁴⁹	-	-	15
Professional Administrator ⁵⁰	55	19	20
Accountant supervisor ⁵¹	55	37	18
Supervisor of Human Resources, Shipping, Warehousing and quality assurance ⁵²	54	34	18

³³ See, for example, *Parker v Ibbetson* (1858) C.B. (NS) 346.

³⁴ See, for example, *Vibert v Eastern Telegraph Co.* (1883) Cab. & El. 17.

³⁵ See, for example, *Pearch v Lansdowne* (1893) 69 L.T. 316.

³⁶ See, for example, *Nowlan v Ablett* (1835) 2 Cr.M. & R. 54.

³⁷ See, for example, *Evans v Ware* [1892] 3 Ch.D. 502; *Wilson v Ucelli* (1929) 45 T.L.R. 395.

³⁸ See, for example, *Evans v Roe* (1872) 7 C.P. 138.

³⁹ See, for example, *Anderson v Haakon Industries (Canada) Ltd.* (1988) 48 D.L.R. (4th) 235.

⁴⁰ See, for example, *Douglas v Sandwell and Co. Ltd.* (1977) 81 D.L.R. (3d) 508.

(2) Engaged in Non Managerial Position

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
Store Assistant ⁵³	-	10	9
Laundryman ⁵⁴	56	40	6
Salesman ⁵⁵	56	36	12
Commission salesman ⁵⁶	39	10	6
Supervisor ⁵⁷	56	31	14
Mutual Funds Administrator ⁵⁸	50	12	9

(C) Australia

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
Senior Executive ⁵⁹	59	30	12
Executive (assured employment for at least 10 years) ⁶⁰	59	2	12
General Manager ⁶¹	-	14	3

⁴¹ See, for example, *Woodlock v Novacorp International* (1990) 72 D.L.R. (4th) 347.
⁴² See, for example, *Duncan v Cockshutt Farm Equipment Ltd.* [1956] 19 W.W.R. 554 (Man. QB).
⁴³ See, for example, *Stevens v Globe and Mail et.al.* (1992) 86 D.L.R. (4th) 204.
⁴⁴ See, for example, *Sorel v Tomenson Saunders Whitehead et.al.*(1987) 39 D.L.R (4th) 460. See *Iso Suttie v Metro Transit Operating Co.* (1985) 28 D.L.R. (4th) 36.
⁴⁵ See, for example, *Spooner v Ridley Terminals Inc.*[1992] 2 W.W.R. 30.
⁴⁶ See, for example, *David Raynor Landry v Canadian Forest Products Ltd.* [1992] 5 W.W.R. 81.
⁴⁷ See, for example, *Philip Leonard Graceffo v Alitalia* [1995] 2 W.W.R. 351.
⁴⁸ See, for example, *Chorny v Freightliner of Canada Ltd.* [1995] 4 W.W.R. 706.
⁴⁹ See, for example, *Carey v F. Drexel Ltd.* [1974] 4 W.W.R. 492.
⁵⁰ See, for example, *Ossie Sylvester v R. in Right of British Columbia* [1995] 6 W.W.R. 537.
⁵¹ See, for example, *Hughes v Crown Cork and Seal Canada Inc.*[1994] 7 W.W.R. 534.
⁵² See, for example, *Girling v Crown Cork and Seal Canada Inc.* (1994) 106 D.L.R. (4th) 747.
⁵³ See, for example, *Meriless v Sears Canada Inc.*(1988) 49 D.L.R. (4th) 453.
⁵⁴ See, for example, *Wright v Board of Calgary Hospital* [1971] 1 W.W.R. 532.
⁵⁵ See, for example, *McHugh v City Motors (Nfld) Ltd.* (1989) 58 D.L.R. (4th.) 753.
⁵⁶ See, for example, *Laudence Dash v Hudson Bay Co.* [1995] 5 W.W.R. 501.
⁵⁷ See, for example, *Naster Shuya v Azon Canada Inc.*[1995] 8 W.W.R. 156.
⁵⁸ See, for example, *Laila Datarдина v Royal Trust Corp. of Canada* [1995] 6 W.W.R. 531.
⁵⁹ See, for example, *Burton v Litton Business System Pty. Ltd.* [1977] 16 S.A.S.R. 162.
⁶⁰ See, for example, *Quinn v Jack Chia (Australia) Ltd.* [1992] 1 V.R. 567.
⁶¹ See, for example, *Brookton Holdings Pty. Ltd. No. V and Ors. v Kara Kar Holdings Pty. Ltd. and Anor.* (1994) 57 I.R. 288.

(D) New Zealand

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
General Manager ⁶²	57	29	12
Senior Executive Director (reporting to Foreign Directors in New York) ⁶³	46	21	18
Managing Director ⁶⁴	-	8	12
Consultant ⁶⁵	49	2 month	12
A middle Manager ⁶⁶	51	12 ½	6

(E) Malaysia

Profession	Age	Length of Service (Years)	Reasonable Notice (Months)
Production Manager @ Factory Chemist ⁶⁷	-	2 ½	3
Secretary of Local Council ⁶⁸	-	19	6
Process Technician ⁶⁹	-	13	3
Chief Clerk ⁷⁰	-	5 – 8	3
Legal Clark ⁷¹	-	9 months	3

⁶² See, for example, *Whelan v Waitaki Meat Ltd.* [1991] 2 N.Z.L.R. 74.

⁶³ See, for example, *Ogilvy and Mather (New Zealand) Ltd. v Martyn Gregory Turner* [1993] 2 E.R.N.Z. 799 (CA).

⁶⁴ See, for example, *North Island Wholesale Groceries Ltd. v Hewin* [1982] 2 N.Z.L.R. 176.

⁶⁵ See, for example, *Brandt v Nixdorf Computer Ltd.* [1991] 3 N.Z.L.R. 750.

⁶⁶ See, for example, *Stuart v Armourguard Security Ltd; Stuart v Farmer* [1996] 1 N.Z.L.R. 484.

⁶⁷ See, for example, *K.V. Pillai v Power Foam Rubber Production (MFG) Co. Ltd.* (1963) 29 MLJ 268 (HC).

⁶⁸ See, for example, *Quek Chek Yen v Majlis Daerah Kulai* [1986] 2 MLJ 290 (SC).

⁶⁹ See, for example, *Subramanian v Esso Malaysia Bhd.* [1990] 3 MLJ 118. In the above case, the claimant was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 for two years. The employer terminated the contract on grounds of frustration. The High Court held that the inability to report for duty was not self imposed and that the purported termination by the employer was wrong. The claimant was awarded three months pay in lieu as reasonable notice. Compare with the recent High Court decision in *Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn. Bhd.* [1998] 1 MLJ 740 where the facts were identical and the High Court held that the detention had itself frustrated the contract.

⁷⁰ See, for example, *D'Cruz v Seafield Amalgamated Rubber Co. Ltd.* [1963] MLJ 154.

⁷¹ See, for example, *Abdul Majid Hj. Nazardin and Ors. v Paari Perumal* [2002] 3 CLJ 133 (CA); [2000] 4 CLJ 127 (HC).

(iv) *Circumstances where the requirement of notice of termination may be waived*

At common law, an employer may dismiss a worker from employment without notice when the employee has committed gross misconduct, such as immorality at the work place, insolence and insubordination, criminal conduct, or any conduct inconsistent with the relationship of an employer-employee. The conduct that justifies summary dismissal must, however, be so serious that it entitles the injured or innocent party to terminate the contract and that the continuation of the employment would not be consistent with a proper relationship between the parties. On deciding whether the conduct justifies summary dismissal, the courts will generally have regard to: (i) the nature and degree of the alleged misbehaviour; (ii) its significance in relation to the employer and to the position held by the employee; (iii) its effect on the confidential relationship between them as against the severe consequence of dismissal; and (iv) the misbehaviour must be such that it goes to the heart or root of the contract between the parties⁷².

Thus, to justify a summary or instant dismissal as opposed to a dismissal on notice, expressed or implied, it must be shown that the worker has been guilty of serious misconduct, of such gravity as to render the further continuation of the employment relationship impossible⁷³. The burden of proving misconduct justifying summary dismissal lies with the employer, who has to establish such conduct on the balance of probabilities.

3. Specific Performance of a Contract of Employment

When the employer breaches the employment contract, the requirement of mutual obligations of confidence and trust that is supposed to exist between the parties are thereby infringed and, as a result, the remedy of specific

⁷² See for example, *Sinclair v Neighbour* [1967] 2 Q.B. 279.

⁷³ Following are some examples of instances which may justify instant dismissal; (a) failure to satisfy the duties in a justifiable manner; (b) conduct incompatible with his duties or prejudicial to the employer's business; (c) wilful disobedience of the employer's order in a matter of substance; and (d) misconduct inconsistent with the fulfilment of the express or implied conditions of service.

performance becomes somewhat impracticable. The common law courts are usually reluctant to grant an equitable remedy by way of specific performance for various reasons. This includes, *inter alia*, the fact that contracts of employment are personal⁷⁴, they involve mutual obligations of confidence and trust⁷⁵, and the effect would likely be seen as imposing ‘forced labour’ and reminiscent of serfdom⁷⁶. Furthermore the enforcement of the remedy would be considered a futile exercise⁷⁷. As noted earlier, at common law workers do not have security of tenure and in the event of wrongful dismissal, damages are, by far, the sole remedy available. Since contracts of employment are personal in nature, the courts are fully aware of the impracticability of an order of specific performance against someone who is unwilling to maintain a continuous relationship, and will therefore not make such an order.

⁷⁴ See, for example, *Philp v Expo 86 Corp.* (1988) 45 D.L.R. (4th) 449, 459-460 where Lambert L.A. noted that: ‘the courts will not normally enforce a contract of employment by an order for specific performance. It is not consistent with our respect for human dignity and freedom of choice to enforce an employment relationship against the wishes of one of the parties’. This is a matter of public policy, which states that it would be improper to compel a person to serve another against his will, as this would unduly interfere with personal liberty.

⁷⁵ The close personal relationship between the parties implies that the parties should have a relationship of mutual confidence, common endeavour and reciprocal obligations. If one of the parties lacks good faith, honesty, integrity or loyalty, then forcing either to serve or employ is likely to lead to a catastrophic relationship. In *G.H. Giles and Co. Ltd. v Morris* [1972] All E.R. 960, 969-970, Megarry J. stated: ‘The reason why the court is reluctant to decree specific performance of a contract for personal service (and I regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or restored to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon; for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made’.

⁷⁶ In *De Francesco v Barnum* (1890) 45 Ch.D. 430, 438, Fry J. stated that: ‘I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner’.

⁷⁷ See, for example, *Medcraft v Federated Engine Drivers and Firemen’s Association of Australia* (1984) 8 I.R. 211, 220.

While the common law courts are generally reluctant to grant specific performance in cases of personal contract, it must be stated that, apart from in Malaysia, there is no rule that such contracts cannot be specifically enforced. In Malaysia, section 20(1)(b) of the Specific Relief Act 1950, provides that a contract cannot be specifically enforced where ‘a contract... is so dependent on the personal qualifications or volition of the parties ... that the courts cannot enforce specific performance of its material terms’. The illustrations to the above section provide that ‘A contract to render personal service to B or a contract to employ B on a personal service cannot be specifically enforced’. It must be noted that although the illustration is not part of the section, it is very helpful in the application of the statute and therefore, it is relevant and useful for the interpretation of the statute⁷⁸.

In other common law jurisdictions, the question of whether or not to award specific performance of contracts of service is not a matter of right for the party seeking relief but is at the discretion of the court, which is guided by established principles, rather than by intuition. Each case is to be decided on its own facts and only when such an order, if given, would result in an unworkable relationship, or when the inconvenience or mischief in decreeing specific performance would greatly outweigh the advantages, that specific performance will be declined. Megarry J. in *CH Giles and Co. Ltd. v Morris*⁷⁹ - an English case, observed that;

‘...But I do not think that it should be assumed that as soon as any element of personal service or continuous service can be discerned in a contract the court will, without more, refuse specific performance. Of course, a requirement for the continuous performance of services has the disadvantage that repeated breaches may endanger repeated application to the court for enforcement. But so many injunctions; and the prospects of repetition, although an important consideration, ought not to be allowed to negate a right. As is so often the case in equity, the

⁷⁸ As aptly noted by Lord Shaw in *Mohamed Syedol Ariffin v Yeoh Ooi Gark* (1916) 1 M.C. 165, 169 (PC) ‘the great usefulness of the illustration, which have, although not part of the section, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be thus impaired’.

⁷⁹ *Supra* at note 75, at p. 70.

matter is one of balance of advantage and disadvantage in relation to the particular obligations in question; and the fact that the balance will usually lie on one side does not turn this probability into a rule...'

Specific performance of a contract of employment has been awarded in two situations, and may be broadly examined under following headings:

(1) *Mutuality of obligation not infringed*

This is where the mutual confidence between the parties is still in existence, such that there still exists the loyalty, trust and confidence for the employment to continue effectively. The existence, or otherwise, of mutual confidence is examined from the surrounding circumstances, such as nature of the work, the people with whom the work must be done, past history of employment, and the direct relationship of the employee with the employer, or with other employees. Any allegation that such an obligation is non-existent must be established on genuine grounds, and not based on mere assertion. For instance, in *Hill v CA Parsons and Co. Ltd.*⁸⁰, the plaintiff aged 63, had been an employee of the defendant's organisation for 35 years. As a result of his failure to join a trade union, and under pressure from the union, the defendant purported to terminate the plaintiff's contract of employment with one month's notice. An order was made to compel the defendant to continue to employ the plaintiff as the confidence between the parties was still intact and that the dismissal was the result of union pressure.

(2) *Execution of Service Agreement.*

Where the parties have entered into a contract of employment, which lays down the procedure for dismissal, a purported dismissal in defiance of the agreed procedure would be nullified. For example, where there is a collective agreement or individual contracts laying down a certain procedure to be complied with prior to the termination of the contract, a failure to observe the procedure may render the dismissal ineffective. Therefore, an order of specific performance might be granted to compel the employer to retain the employee

⁸⁰ [1973] 3 All E. R. 1345.

⁸¹ See, for example, *Irani v Southampton and West Hampshire Health Authority* [1985] I.C.R. 590. See also *Robb v Hammersmith and Fulham London Borough Council* [1991] I.C.R. 514.

until that procedure has been properly complied with⁸¹. As noted by Lord Cairn LC in *Doherty v Allmen*⁸² - an English case:

‘...If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, by the Court, of the negative bargain which the parties have made, with their eyes open, between themselves...’

For example, in *GH Giles and Co. Ltd. v Morris and Ors*⁸³ - an English case, there was an agreement dated the 6th November 1970, which contained terms and conditions, one of which specified that the defendants would ensure that the plaintiff be appointed under a service agreement as Managing Director of Invincible Policies Ltd, for a term of five years. However, due to disagreements prevailing among the defendants, the plaintiff was not appointed to the above position, which led the plaintiff to file a writ in court, claiming for the specific performance of the contract.

The defendants initially consented to the specific performance order before a Master. However, they failed to honour the order because the plaintiff lacked appropriate experience in the field of insurance and the earlier order of the Master had been procured due to improper advice. A committal order was made for the disobedience of the order of the Master. It was held that although the court would not usually decree specific performance of a contract for personal service, all that the decree required in the present case was the procuring of a single act, i.e. the execution of the service agreement.

From the above, the general belief that specific performance will not be ordered in employment contracts could be qualified, as exceptions do exist.

⁸² (1878) 3 App.Cas. 709, 720 (HL).

⁸³ *Supra* at note 75.

Surely a long serving faithful employee who has contributed much to the company will be allowed specific performance, if on investigation it is shown he was dismissed, not due to breakdown of employer-employee relationship, but due to trade union pressure or race, to mention but two. Such a dismissal does not tarnish the mutual trust and confidence between the employer and employee. For such a person, damages may be most inappropriate, as he may have put his life and soul into being sincere and faithful to his job. Therefore, for such a person, specific performance should rightfully be granted.

Specific performance may still be granted even if this would require constant supervision by the courts. However, the main obstacle in awarding such a decree is that the employer may still end the employment relationship by serving appropriate notice following the order of specific performance. Thus, it is questionable whether all the effort taken, money spent and time wasted for the sake of acquiring an order of specific performance, is really worth it.

4. Mitigation of Loss

At common law, a worker whose contract of employment has been wrongfully terminated is bound to make reasonable exertion and show diligence in endeavouring to procure alternative employment. Any amount received from the substituted employment would be taken into account to reduce the damages⁸⁴. All that the worker is required to do is that he try to obtain reasonable alternative employment. The reasonableness of such alternative employment is based on the geographical location, the nature of the work, including pay, status and responsibility, and the workers' personal status in life.

In the Canadian case of *Bohemier v Strowal International Inc.*⁸⁵ the

⁸⁴ See, for example, the English case of *Stocks v Magma Merchants Ltd.* [1973] I.C.R. 530, 531 where Arnold J. stated that: 'the proper measure of damages for wrongful dismissal is the amount of the loss suffered by the plaintiff and that this falls to be determined by taking the gross amount of the remuneration which the plaintiff would have earned during the remainder of his period of service less any amount which he has or ought to have earned elsewhere, and by deducting therefrom the diminution which the gross would have suffered if he had, in fact, earned it'.

⁸⁵ (1982) 142 D.L.R. (3d) 8.

worker who responded to an advertisement published by the manpower office was regarded as having attempted to mitigate his loss. However, the worker is not required to travel across the whole country, probably at his own expense, simply to lessen the damages to which he would otherwise be entitled or even accept employment at a lower rate of pay or status. In *Bohemier's* case it was noted that the worker was not under any obligation to take a significant demotion in a new job as compared to his former job, or accepting a lower salary or by going back to the employer who fired him. Steps such as searching for another job or even undertaking training to learn new technology would be considered as sufficient⁸⁶.

Failure to accept suitable alternative employment or take reasonable steps to procure the same would result in a deduction from the total amount recoverable calculated on a sum representing the amount the employee might have earned during the period. It is for the employer to establish on the balance of probabilities that the aggrieved worker failed to mitigate damage⁸⁷. In *Brace v Calder and Ors.*⁸⁸ - an English case, the defendants were a partnership consisting of four members. The plaintiff was employed as manager of a branch of their business for a certain period. Before the period expired, two of the partners retired and the business was transferred to, and carried on by, the other two partners. The continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period but he declined to serve them. The court held that the dissolution of the partnership operated as a wrongful dismissal but, since the plaintiff failed to mitigate damages by accepting the employment, the plaintiff was entitled only to nominal damages.

From the foregoing it can be seen that, at common law, workers may be hired and fired at the will of their employer, subject however, to the employer honouring the notice of termination clause expressed in the contract of employment, or reasonable notice implied into such contract. Recently the

⁸⁶ See, for example, *Ross v Pender* [1974] I.R. 352.

⁸⁷ See, for example, *Edward v Society of Graphical and Allied Trades* [1971] Ch. 354; *London and South of England Building Society v Stone* [1983] 1 W.L.R. 1242, 1262; *Red Deer College v Michaels* (1975) 57 D.L.R. (3d) 386, 391.

⁸⁸ [1895] 2 Q.B. 253 (CA).

common law courts have been 'intruding' into the contract of employment by implying terms much to the advantage of the workers and this includes the recently recognised implied term of 'trust and confidence', which was endorsed recently by the House of Lords 'as a sound development'⁸⁹.

The above implied term now features in every contract of employment, its violation being a fundamental breach going to the root of the contract thereby amounting to a repudiation of the contract at the initiative of the employer⁹⁰. It may lead to an employee resigning and claiming constructive dismissal⁹¹. The type of behaviour that infringes upon the implied term of trust and confidence is a question of fact which is left to the courts to determine⁹².

It must be emphasised that the above term does not, however, imply that the employer's right to abort the employment relationship is curtailed. The common law courts have refused to imply the obligation of good faith in the discharge of workers by their employer. For example, in *Wallace v United Grain Growers Ltd.*⁹³, the Supreme Court of Canada noted that 'the Court

⁸⁹ See, for example, *Malik v Bank of Credit and Commerce International S.A. (in Liquidation) and Mahmud v Bank of Credit and Commerce International S.A. (in Liquidation)* [1997] 3 All E.R. 1, at p. 16 (HC).

⁹⁰ See, for example, *Western Excavating (ECC) Ltd. v Sharp* [1978] I.C.R. 221, 229; *Courtaulds Northern Textiles Ltd. v Andrew* [1979] I.R.L.R. 84.

⁹¹ Constructive dismissal occurs when an employer breaches the contract of employment unilaterally and such breach was not accepted by an employee. An example is when the employer unilaterally changed the terms in a contract of employment by demoting the employee and thereby reducing his wages. The distinction between termination by mutual agreement and constructive dismissal was illustrated by the Employment Appeal Tribunal in *L. Lipton Ltd. v Marlborough* [1979] I.R.L.R. 179, 181; '[I]n the first case the employee says 'please may I go?' and the employer says 'yes'. In the second case the employee says 'you have treated me in such a way as I'm going without a 'by your leave' '. The Court of Appeal in *Western Excavating (EEC) Ltd. v Sharp* [1978] 1 All E.R. 713 laid down conditions that must be complied with before a constructive dismissal can be justified. This includes, (i) that the employee must show that the employer no longer intends to be bound by one or more of the essential terms of the agreement; (ii) the employee must leave the employment immediately for reason of employer's breach and for no other cause; (iii) the employer's breach must be a significant one, going to the root of the contract, entitling the employee to terminate it without notice, and (iv) the worker had not terminated the contract before the employer's breach.

⁹² Viscount Simonds (Eds.), *Halsbury's Laws of England* 4th ed. Vol 16 (London: Butterworths, 1992) p.46.

⁹³ [1997] 3 S.C.R. 701.

should not imply into the employment contract a term that the employee would not be fired except for cause or legitimate business reasons. The law has long recognized the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary. A requirement of 'good faith' reasons for dismissal would be overly intrusive and inconsistent with established principles of employment law'.

5. Statutory Unfair or Unjustifiable Dismissal

5.1 The ILO Promoted 'Unjustifiable Dismissal from Employment'

The drawbacks at common law paved the way for statutory reforms of minimum protective legislation against unfair or unjustifiable dismissals⁹⁴. The International Labour Organisation Conference initiated the minimum protective legislation in 1963 by adopting Recommendation No. 119. In 1982, it adopted Convention No. 158 and associated with it Recommendation No. 166, which was an expansion of the 1963 Recommendation.

The above Convention and Recommendations have had significant influence on many legislatures in the member States, as it provided that any termination should be with valid justification. The 1982 Convention adopted the term 'unjustifiable dismissal'. Thus, many countries in the world offer statutory protection against an unjustified dismissal in one form or the other. In England, the term used is 'unfair dismissal'⁹⁵; in New Zealand 'unjustifiable dismissal'⁹⁶;

⁹⁴ The *laissez-faire* doctrine permits maximum freedom to the parties to design their own relationship through contract, which generally suppresses the working class who are generally in a weaker bargaining position. The employer, being in a superior position enjoys unrestricted licence to victimise the employee. This doctrine is now subject to restrictions imposed by legislation and collective agreements with a view to redressing the disparity of bargaining power between the weak and strong.

⁹⁵ See Employment Rights Act 1996, section 94 (1) The unfair dismissal provision was first introduced under the Industrial Relations Act 1971, section 27 to 30. The above provision was inserted because of the recommendation by the Royal Commission on Trade Unions and Employers Associations 1965–1968 (*Donovan Commission*) (London: Her Majesty's Stationary Office, 1968).

⁹⁶ See Employment Relations Act 2000, section 103.

⁹⁷ See Industrial Relations Act 1967, section 20(1).

in Malaysia ‘dismissal without just cause or excuse’⁹⁷; in Canada ‘unjust dismissal’⁹⁸ and in Australia, the term used is ‘harsh, unjust and unreasonable’⁹⁹.

5.2 Unfair or Unjustifiable Dismissal: The Definition

The term ‘unfair’ denotes an action correct in strict legal interpretation, complying with the letter of the law, but morally discreditable. The term ‘unjust’ also carries the same meaning as ‘unfair’. A cause of action is unjustified when that which is done cannot be shown to be in accordance with justice or fairness. It follows that a dismissal must be substantively justified and procedurally fair.

(a) *Substantive justification*

The employer must establish a substantive justification for the dismissal, on the balance of probabilities. In relation to this, Part Two of ILO Convention No. 158 deals with justification for termination. It provides that an employee cannot be terminated unless there is a valid reason, which is connected to the capacity or conduct of the worker or based on the operational requirement of the undertaking, establishment or service. For example, disobedience to the lawful and reasonable instructions of the employer would justify dismissal, although this might ultimately depend on the nature of the disobedience and the reasons for the dismissal.

The mere fact that there has been disobedience may not substantively justify the dismissal. The wilful disobedience must be of such a nature that it deeply impairs, or is destructive of, the basic element of confidence or trust that is essential in an employment contract. Similarly, an honest and reasonable belief may justify a dismissal on grounds of misconduct. The employer is not required to establish an employee’s misconduct beyond reasonable doubt. All that an employer is required to do is to act fairly in considering the interests of the business and the employee’s interest in retaining the employee. In some instance, serious misconduct may justify summary dismissal. In other situations, an explanation by the employee may not be fully satisfactory but is sufficient to

⁹⁸ See Canadian Labour Code R.S.C. 1985 (C.L.2), section 240(1).

⁹⁹ See Workplace Relations Act 1996 (Cth.), section 170 CE(1)(a).

require further consideration and possible investigation. Under such circumstances, it would be appropriate to suspend the employee pending investigation.

(b) *Procedural Justification*

Procedural justification implies that before the start of any action relating to the dismissal of an employee, the employer must furnish him with the full particulars of the allegations that have been made. He should then be given the opportunity to present his own version of the facts and events that have occurred. The employer is under an obligation to conduct an enquiry into the allegation that has been made and must also listen to the explanation put forward by his employee, so that he can then form a balanced opinion on the matter at hand. This is subject to the condition that in doing so, the employer must be impartial and observe the rules of natural justice. If the employer finds that the employee in question has been at fault then he can only impose a penalty which is fair and appropriate, having regard to the circumstances surrounding the case, failing which such punishment might be quashed on the grounds of harshness or undue severity.

(c) *Application in Selected Countries*

The rule of natural justice - a great humanising principal intended to invest law with fairness - has been enforced in many countries with common law jurisdictions. For example, in England, before the House of Lords set its views in *Polkey v AE Dayton Services Ltd.*¹⁰⁰, the approach adopted by the English courts was that a dismissal might be fair despite a defect in procedure, provided that the employer could establish, on the balance of probabilities, that he or she would have arrived at the same decision had the correct procedure been followed¹⁰¹. However, in *Polkey's* case, the House of Lords emphasised on the importance of procedure and substantive requirement. As noted aptly by Lord Bridge:

‘... Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in

¹⁰⁰ [1988] I.C.R. 142 (HL).

¹⁰¹ See, for example, *British Labour Pump Co. Ltd. v Byrne* [1979] I.C.R. 347.

the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation...'¹⁰²

The Employment Rights Act 1996 of England, provides that an employee has the right not to be unfairly dismissed¹⁰³. It requires that a dismissal must be substantively and procedurally justified. Examples of substantive justification are; (a) it relates to the capacity or qualification of the employee for performing work of the kind which he was employed to do by the employer; or (b) that the employee was redundant; or (c) that it related to conduct of the employee; or (d) that the employee could not continue to work in the position, which he held without contravention either on his part or that of his employer, of a duty or restriction imposed by or under an enactment¹⁰⁴.

If the employer has established the substantive justification for a dismissal, the Industrial Tribunal will then have to decide whether the dismissal of an employee was fair or unfair. It will have regard to whether, under the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and will apply the rule of equity and natural justice to determine such issue¹⁰⁵.

In New Zealand, the courts have recognised the implied term of fairness in contracts of employment. In *Tupu v Romano's Pizzas (Wellington) Ltd.*¹⁰⁶,

¹⁰² *Supra* at note 100, at pp. 162-163 (HL).

¹⁰³ See Employment Rights Act 1996, section 94.

¹⁰⁴ *Ibid.*, section 98(1) and (2).

¹⁰⁵ *Ibid.*, section 98(4)(a) and (b).

¹⁰⁶ [1995] 2 E.R.N.Z. 266.

Chief Judge Goddard noted that ‘the law of the land is that every employee has a right not to be dismissed unjustly and no one, no matter how important or powerful, may take that right away’. This subsequently led Justice Cooke, the President of the Court of Appeal, to state that the implied term of fairness has ‘become a staple of New Zealand industrial law’¹⁰⁷.

Earlier, in *Marlborough Harbour Board v Goulden*¹⁰⁸, His Lordship stated that ‘there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty’. His Lordship further stated that ‘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’. Currently, the Employment Relations Act 2000, section 102, provides that an employee who believes that he or she has a personal grievance may pursue that grievance under the Act¹⁰⁹. Similarly, in Canada¹¹⁰, Australia¹¹¹ and Malaysia¹¹² substantive and procedural fairness is also essential in a dismissal under the relevant statutory provisions.

¹⁰⁷ See, for example, *Brighouse Ltd. v Bilderbeck* [1994] 2 E.R.N.Z.. 243, 252 (CA).

¹⁰⁸ [1985] 2 N.Z.L.R. 378, 383 (CA).

¹⁰⁹ What constitutes personal grievance is specified in the Employment Relations Act 2000, section 103(1) namely; (a) the employee has been unfairly dismissed; or (b) where the employee’s employment or one or more conditions of the employee’s employment (including condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action of the employer; or (c) where the employee has been discriminated against; or (d) has been sexually harassed; or (e) racially harassed; or (e) been subject to duress in the employee’s employment in relation to membership or non-membership of a union or employees’ organisation.

¹¹⁰ See Canadian Labour Code 1985, section 240(1).

¹¹¹ See Workplace Relations Act 1996, section 170CG(3) (Cth.).

¹¹² In *Lim Sim Tiong v Palm Beach Hotel Sdn. Bhd.* (Award No. 48 of 1974) the Industrial Court noted that: ‘...[A]s a court of equity and good conscience, it will interfere not only where there has been victimisation but also where it is of the opinion that upon the substantial merits of the case the action taken by management was perverse, baseless or unnecessarily harsh or was not just or fair; or where there has been a violation of the principles of natural justice, or where there has been unfair labour practice or other *mala fide* action on the part of the management in the exercise of its power...’. Section 14 of the Employment Act, 1955 provide for statutory right to ‘due inquiry’ by his employer. Further, Clause 42 of the Code of Conduct for Industrial Harmony provides the procedure for disciplinary action. It must be noted that the Code - which is in fact based on the ILO’s Recommendation No. 119 of 1963 - gave the Court, pursuant to s.30(5A) of the IRA, the statutory basis for taking cognisance of the agreed practices. Thus, the Code could be turned into legal reference for the courts if the Government, employers’ and employees’ unions consent to it with signatories and bind themselves to it.

It must however be noted that to set out in detail the principles and rules on justifiable and unjustifiable dismissal is not possible. Whether or not a dismissal is substantively justifiable and procedurally fair will depend on the circumstances surrounding each particular case. The writer is of the view that a slight or immaterial deviation from procedural fairness ought not render a dismissal unfair or unjustifiable. This is mainly because an employer's inquiry into an allegation is not to be put under a microscope and be the subject of pedantic scrutiny.

Further, employer's are not required to comply with stringent procedural requirements before dismissing a worker from employment. The Federal Court in *Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn. Bhd.*¹¹³ – a case involving an employee who was denied the opportunity to make a plea in mitigation before the domestic inquiry – held that 'it would have been a useless formality to have accorded the Employee the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised'. In other words, the denial of an opportunity to be heard seemed to occasion no prejudice to the affected party since the employer would have no discretion but to dismiss. In particular, the Court observed:

'In the present case, the misconduct proved against the Employee, was very grave indeed, involving the element of dishonesty and a high degree of premeditation and preparation. The Employee must have been aware, that in the event of an adverse finding on the issue of liability, dismissal would be a mandatory sequel. Indeed, no other punishment was possible, given the circumstances of the case.

Therefore, it is submitted that the least expected of an employer is that, at the time of dismissal, the employer has reasons for the said dismissal and the effected workers was given the necessary opportunity to refute any allegation made against him.

¹¹³ [1997] 1 CLJ 646 (FC).

5.3 An Overview of Wrongful Dismissal and Unfair or Unjustifiable Dismissal

Thus the comparison between common law tort of wrongful dismissal and the statutory provisions against unfair or unjustifiable dismissal reveals a big difference especially in matters related to remedies. In statutory unfair or unjustifiable dismissal, the protected classes have remedies against a lawful dismissal. However, for the common law tort of wrongful dismissal, no remedies are made available if the dismissal was lawful *albeit* it may be unjust. The statutory provisions have proven to be much more preferable. Therefore, the common law rules and authorities on wrongful dismissal are irrelevant where there is are statutory provisions on point, which have created an entirely new cause of action¹¹⁴.

6. The Remedies for Unfair or Unjustifiable Dismissal

The primary remedy of an employee who alleges that his dismissal is unfairly or unjustifiable is reinstatement or re-engagement, if it is practicable to so order. The alternative remedies include compensation *in lieu* of reinstatement and/or redundancy compensation in the event of reorganisation or restructuring of the company.

6.1 Reinstatement or Re-engagement:

Many countries have incorporated reinstatement or re-engagement as the primary remedy into their statutes, in line with Article 10 of the International Labour Organisation Convention No. 158 of 1982. For example, in England, it has been the practice of the Industrial Tribunal to state the various remedies available to a complainant claiming to be unfairly dismissed, so that he can choose the remedy which he prefers against his employer¹¹⁵. However, ultimately it is for the Tribunal to decide the most suitable remedy with regard to the circumstances surrounding each particular case and these circumstances include: (a) the complainant's wishes; (b) the practicality of compliance by the employer; and (c) whether it was the complainant's conduct that gave rise to

¹¹⁴ See, for example, *Norton Tool Co. Ltd. v Tewson* [1973] 1 W.L.R. 45, 48 (NIRC).

¹¹⁵ See Employment Rights Act 1996, section 112 (2) (a) & (b).

the dismissal¹¹⁶. In recommending a re-engagement, in addition to the above, the Tribunal, may also consider the practicability of such recommendation with the employer, the employer's successor or his associate¹¹⁷.

Similarly, in Malaysia, reinstatement is the primary remedy in cases of dismissal without just cause or excuse and the aggrieved workman has to specifically pray for a order of reinstatement¹¹⁸. The decision as to whether or not to order reinstatement will depend on the practicability of issuing such an order. The same reinstatement rule applies in Australia, as well as in the majority of its constituent territories¹¹⁹, New Zealand¹²⁰ and Canada¹²¹. However, if the making of such an order proves to be impracticable, then compensation might be ordered *in lieu* thereof.

Thus, theoretically at least, the inclusion of reinstatement or re-engagement as the primary remedy tends to suggest that the legislature recognises employees' security in employment on the same footing as a person who has a 'property right' in the land, in that he can deal with it as he desires. In practice however, reinstatement orders are seldom granted for various reasons.

6.2 Compensation:

Unlike at common law, where the breach of a contract of employment usually gives rise to a claim for damages, equivalent to the period of the notice of termination, express or implied in the contract of employment, under the statutory provision, for example, the Employment Rights Act, 1996 (England), an unfairly dismissed employee may be awarded (a) a basic award¹²²; (b) a compensatory

¹¹⁶ *Ibid.*, section 116(1).

¹¹⁷ *Ibid.*, section 115 (1).

¹¹⁸ See Industrial Relations Act 1967, section 20(1).

¹¹⁹ See Workplace Relations Act 1996 (Cth.), section 170EE; Industrial Relations Act 1991 (NSW), 250; Industrial Relations Act 1979, section 23A (Western Australia); Industrial and Employee Relations Act 1994, section 108 (South Australia).

¹²⁰ See Employment Relations Act 2000, section 123(a).

¹²¹ See Canadian Labour Code R.S.C. 1985 (C.L.2), section 242(3).

¹²² The following matters are taken into consideration, namely, the complainant's age and the length of his continuous employment up to the effective date of termination. See Employment Rights Act 1996, section 119. Section 119(2) provides that the amount of basic award shall not be less than 2770 pounds.

award¹²³; and (c) an additional or special award¹²⁴.

The general principle governing the calculation of the compensatory award is relatively straight forward. It is that it: ‘shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as the loss is attributable to action taken by the employer’¹²⁵. The award is primarily aimed at redressing the financial loss of the employee and not to punish the employer¹²⁶. Subsection 1 of s.123 of the Employment Rights Act 1996, further provides that the Industrial Tribunal, when deciding what compensation will be just and equitable, will have regard to the loss sustained by the employee as a result of the dismissal.

Similarly, in Malaysia, whenever reinstatement is impracticable, the Industrial Court will award the complainant compensation *in lieu* of reinstatement, which is given at the usual rate of one month’s salary for each completed years of service. The Industrial Court has the discretion to award a greater amount having regard to the particular facts, circumstances and substantial merits of the case, based on equity and good conscience under s.30 (5) of the Industrial Relations Act, 1967. Further, the Court may award back wages from the date of the dismissal to the date of conclusion of the hearing, subject to a maximum of 24 months.

In New Zealand, in addition to the reimbursement of wages and compensatory awards, which include ‘loss of anticipated earning’, the Employment Tribunal is empowered to award compensation for humiliation, loss of dignity and injury to feelings and the loss of any benefit, whether of a

¹²³ All expenses reasonably incurred and the benefit that the employee can reasonably be expected to have had but for the dismissal, come within the compensatory award. The loss must be actual or real and this includes immediate loss of wages, future loss of wages; manner of dismissal; loss of pensions rights and so on, subject to maximum sum of 11300 pounds.

¹²⁴ Special award or an additional award is normally made against an employer who fails to comply with the reinstatement or re-engagement order which is calculated at one weeks pay multiplied by 156 or 20,600 pounds, whichever is the greater.

¹²⁵ See Employment Rights Act 1996, section 123(1).

¹²⁶ See, for example, *Clarkson International Tools Ltd. v Short* [1973] I.C.R. 191, 196; *British United Shoe Machinery Co. Ltd. v Clarke* [1978] I.C.R. 70, 73 (EAT).

monetary kind or not, which the worker might have reasonably been expected to obtain had the personal grievance not arisen¹²⁷. However, the Tribunal may reduce the remedy, which would otherwise have been awarded in a situation where the employee has contributed towards his dismissal¹²⁸.

Finally, in Canada, the Canadian Labour Code RSC 1985 CL 2 Part III Division XIV, deals with unjust dismissal from employment. Where an adjudicator to whom a complaint has been referred considers the dismissal of the person who made the complaint as unjust, he may order the employer to compensate the employee a sum not exceeding the remuneration that would have been paid, reinstate the person in his employ, and do any other like thing that it is equitable to require the employer to do in order to remedy or counteract the consequence of the dismissal¹²⁹.

However, if the reinstatement order is not practicable the adjudicator may order compensation. The following elements are taken into consideration when the adjudicator calculates the amount a complaint is entitled to, namely, the age, position, responsibility and experience of the worker, length of service, employee's clean discipline record, harsh and unfair manner in which dismissal took place, effect of the dismissal on employee's career development and prospect for alternative employment. If the unjust dismissal unnecessarily imposed a severe hardship on the employee, the award may be higher than normal.

The common law principles on mitigation of damages apply equally to an unfairly dismissed employee. If the employee failed to make reasonable efforts to find other employment while awaiting the decision of the court, the court may reduce the size of the award. For example, in England, in ascertaining the losses of an unfairly dismissed employee, the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applied to damages recoverable under the common law of England and Wales, or Scotland, as the case may be¹³⁰. Failure to mitigate damage by seeking alternative employment

¹²⁷ See Employment Relations Act 2000, section 123(c)(i).

¹²⁸ *Ibid.*, section 124.

¹²⁹ See Canadian Labour Code 1985, section 242(3).

¹³⁰ See Employment Rights Act 1996, section 123(4).

implies that damages, which might otherwise be recoverable, will be reduced. In *Gardiner-Hill v Roland Berger Technics Ltd.*¹³¹, Brown Wilkinson J. stated that:

‘...In fixing the amount to be deducted for failure to mitigate, it is necessary for the Tribunal to identify what steps should have been taken; the date on which that step would have produced an alternative income and, thereafter, to reduce the amount of compensation by the amount of the alternative income which would have been earned...’

The rule on mitigation of damages by seeking alternative employment applies equally in Malaysia¹³², and Canada¹³³.

6.3 Redundancy Compensation:

As employers have the responsibility of ensuring the smooth running of their business ventures, they are therefore endowed with the capacity to declare redundancies whenever necessary in the interests of such business, no matter how demeaning this might prove in practice. Redundancy is an act of removing a worker from an organisation due to certain circumstances and the worker involved will be paid a ‘redundancy compensation’.

A redundancy payment is compensation paid to a dismissed employee, is based on the length of his service with his former employer, such that he is provided with the necessary means to sustain him until he finds a suitable employment elsewhere. It is not extra wages or wages *in lieu* of notice, nor it is superannuation but compensation for the loss of a job through its disestablishment or superfluousness¹³⁴. Even if the employee gets another job straight away, he nevertheless is entitled to full redundancy payment. It is, in a real sense, compensation for long service¹³⁵. The move to award redundancy compensation

¹³¹ [1982] I.R.L.R. 498, 500.

¹³² See, for example, *Dr. James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd. (Sabah) and Anor.* [2001] 3 CLJ 541, 545 (FC).

¹³³ See Canadian Labour Code 1985, section 243(1).

¹³⁴ See, for example, *Wynes v Southrepps Hall Broiler Farm Ltd.* [1968] I.T.R. 407, at pp. 407-408.

¹³⁵ See, for example, *Lloyd v Brassey* [1968] 2 All E.R. 1226.

to a retrenched worker was initiated by Article 12 of the International Labour Organisation Convention No. 158 of 1982.

In England, the obligation of an employer to compensate an employee made redundant is provided under Part XI of the Employment Rights Act, 1996. It is calculated on the basis of the employee's (a) age; (b) length of continuous service; and (c) weekly pay. The qualifying period is two years continuous service. In Malaysia, the Employment (Termination and Layoff Benefits) Regulation 1980 deals with termination benefits. Employees' who have been in continuous employment for 12 months or more will be entitled for both termination and layoff benefits¹³⁶. Similarly, section 235(1) of the Canadian Labour Code 1985, provides for severance payment to a retrenched worker who has completed twelve months of continuous employment.

In New Zealand, however, there is no provision in the Employment Relations Act 2000 for a redundancy payment to an employee. Therefore, whether or not an employee is entitled to a redundancy payment will depend on whether or not his individual or collective contract of employment provides for such payment¹³⁷. It must be emphasised here that redundancy legislation does not save a job but merely makes losing it more bearable and less traumatic. It reduces resistance to dismissal in the cutting down of the workforce so as to facilitate labour adjustments¹³⁸.

¹³⁶ The minimum an employee is entitled to is provided by regulation 6:
Years of Service Entitlement

- (i) If employed less than 2 years 10 days wages for each year of service
- (ii) Employed more than 2 but less than 5 years 15 days wages for each year of service
- (iii) Employed more than 5 years 20 days wages for each year of service.

Note: The 1980 Regulation is only applicable to certain categories of 'employees' covered by the Employment Act, 1955. This Regulation is not applicable in the states of Sabah and Sarawak which are governed by their respective Labour Ordinances, which do not provide retrenchment benefits to an employee laid-off due to redundancy.

¹³⁷ In *Aoraki Corporation Ltd. v McGavin* [1998] 3 N.Z.L.R. 276 the Court of Appeal overruled their earlier decision in *Brighouse Ltd. v Bilderbeck* [1994] 2 E.R.N.Z. 243. In the latter case, the majority of the Court of Appeal judges held that redundancy payment was available even in the absence of an express agreement between the parties. The employers must make such a payment, which is implied by the trust and confidence term. However, in the former case, the Court unanimously concluded that in the absence of an express agreement for such a payment, there is no obligation on the part of the employer to make such compensation.

¹³⁸ See, for example, Cyril Grunfeld, *The Law of Redundancy* 3rd ed. (London: Sweet and

7. Conclusion

From the discussion above, it is noted that at common law, workers are subject to the 'at-will' employment, where an employer retains the prerogative to terminate the employment relationship by appropriate notice, as expressed in the contract or implied by reasonable notice. When the appropriate notice is served on the worker, the employment relationship will come to an end at the expiry of the notice period. The employer is neither bound to warn the employee nor is he bound to give any reason for the dismissal. Nor are they bound to adhere to the rule of fairness. The burden of proof is on the employee to establish, on the balance of probabilities, that the dismissal was wrongful.

The primary remedy of a worker wrongfully dismissed from employment is damages representing the notice period, although in exceptional circumstances, as enumerated earlier, specific performance may be granted. Damages are awarded with a view to put the employee in the position that he should have been, had proper notice of termination been awarded. The employer cannot be made liable for more damages simply because he does not have a good reason for dismissing the employee¹³⁹. However, if the grounds for the dismissal are set out in the contract of employment, the employee cannot be dismissed on other grounds¹⁴⁰.

Unlike the common law approach, the statutory provisions against unfair or unjustifiable dismissal provide that a purported dismissal must be substantively justified and procedurally fair. The very fact that such a statute exists spells out clearly that a worker's security in employment, akin to a 'property right' in land, does exist. The affected employee must be given a fair chance to rebut any allegation made against him. It rules out unjustified termination and, in the unfortunate event of redundancy, provisions for compensation have to be addressed. The intention of the legislature that the primary remedy for unjustifiable dismissal shall be reinstatement goes to show the importance of

Maxwell, 1989) 2; H. Collins, 'The meaning of Job Security' (1991) 20 *Industrial Law Journal* 227, 233.

¹³⁹ See, for example, *Baker v The Denker Ashanti Mining Corp. Ltd.* (1903-04) 20 T.L.R. 37.

¹⁴⁰ See, for example, in *McLelland v Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594.

job security. Only when reinstatement is impracticable is the court to turn its attention to the remedy of compensation.

One may therefore wonder whether the Minister's proposal to bar employees earning RM\$5000 and above, is for their benefit or for the benefit of clearing a backlog of cases. It would appear that more importance is being placed on getting rid of the backlog than the plea of the employees. The essence of the Industrial Relations Department is to solve disputes speedily, returning the parties to their normal lives as soon as possible and, if unable to do so, refer the matter the Industrial Court for adjudication. The welfare of the worker should be given the utmost concern. As seen in this article, due to the loopholes in the common law, statute had come up with better avenues for the protection of job security and remedies for dismissal, irrespective of a person's earning capacity and these protections are much more adequate than what the common law courts have to offer. Therefore, one might say that the Ministry's proposal is actually discrimination against these employees. To solve the backlog of case is important, but there are other ways to do so, for example, to increase the number of conciliation officers and chairmen of the Industrial Relations Department and Industrial Court respectively, among others. Meanwhile, it is necessary not to lose sight of the plight of the workers who come to the system to seek justice for the injustice that has been done to them.

Festival of Rights of the Child

Saturday 11 December 2004

This year's Festival of Rights will celebrate the rights of the child – with special focus on the rights of the disabled and dispossessed child.

The Festival, to be held in Penang, will comprise a day-time Forum, pro-active games and activities for children as well as an evening concert featuring music, poetry, dance and drama.

The Forum and children's carnival will take place at the Ramakrishna Ashrama and the evening cultural concert at the Spastic Children's Association.

The keynote speaker at the Forum will be Ms. Gaye Phillips of UNICEF. Other speakers include Ms. Carolin Verma of UNHCR, Supt. Chong Mun Ping, Dr. Mary J. Marrett, Prof. Dr. Chiam Heng Keng of SUHAKAM and Yasmeen Shariff of the Bar Council.

The cultural concert will feature local pop idol Amir Yusoff, Malik Intiaz Sarwar, dances from the children of Ramakrishna Orphanage and the Penang Cerebral Palsy Association, comedy from the Sons of Sinha, etc.

Festival of Rights 2004 is co-organised by the Malaysian Bar and HAKAM (National Human Rights Society of Malaysia).

For more information please phone Dominic at 03-20313762.