A Right of Fair Dismissal: Enforcing a Statutory Guarantee

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ENFORCING A STATUTORY GUARANTEE

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Support for the concept that employees should be protected against wrongful dismissal continues to grow in this country.¹ Yet, many advocates of protection have thus far refrained from venturing into the legislative arena. Even though the movement to achieve this protection is still at an early stage, it is not too soon to focus on specific proposals designed to translate ideals into protections. By failing to coalesce behind a single proposal, supporters have retarded the progress of the movement. Without a proposal for specific legislation, supporters lack a rallying point and legislators have nothing concrete to debate. This Article attempts to meet this need by providing a proposal which not only satisfies the criteria of those advocating protection, but also responds to the concerns of those opposing such a right.

The United States' position on unfair dismissal is out of step with the world standards reflected in the new Convention of the International Labour Organisation ("ILO") on termination of employment.² This Convention sets forth basic minimum protections which every nation should afford its working people — protections supported by most major industrial nations, but which American workers do not yet possess. The need for the United States to take action to comply with world standards on unfair dismissal serves as a further impetus to action.³

Critics have asserted that comprehensive protection against wrongful dismissal cannot be implemented in the United States without creating an expensive bureaucracy and disrupting existing arbitration

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2. 1982 Convention Concerning Termination of Employment at the Initiative of the Employer, reprinted in International Labour Conference, Provisional Record of Sixty-eighth Session No. 30A (June 21, 1982) [hereinafter cited as Convention].
arrangements. Nevertheless, other major industrialized nations, such as Great Britain, have implemented unfair-dismissal protection without erecting expensive bureaucracies. Many of these practices can be implemented by the individual states; indeed, this Article will show that the machinery for implementing this right is already in place in every state. This Article proposes the state-by-state adoption of a simple statutory guarantee of protection from unjust discharge. This protection would be enforced through the same procedures presently used for state unemployment compensation claims. The advantageous features of this proposal are its low cost, comprehensive coverage, and ease of implementation; features which make its timely adoption feasible.

Before setting out the proposed system, it will be useful to describe the evolution and status of world standards on unfair dismissal and how those standards can be implemented in a major industrialized nation. Part I discusses the ILO Convention and its substantive and procedural requirements. Part II describes how these ILO standards have been implemented in Great Britain, a country with a labor law history and practice quite similar to that found in the United States, and highlights those practices capable of imitation. Part III explains how every state can implement ILO unfair-dismissal standards and British practices through existing state mechanisms. A description of the Pennsylvania unemployment claims procedure will illustrate that existing systems require only minor modification to accommodate the proposed statutory goal. This Article concludes that such a statutory guarantee, implemented at the state level through existing procedures, is both timely and feasible.

I. WORLD STANDARDS ON UNFAIR DISMISSAL

The United States stands virtually alone among Western industrialized countries in failing to provide a remedy for employees wrongfully dismissed. Presently, there is no federal or state statutory protection against unfair dismissal. Notwithstanding much discussion on the erosion of the employment-at-will doctrine, most state courts remain unwilling to entertain suits claiming that a discharge breached the employment contract unless the employee can prove that some contract term, express promise, or formal employer policy supports the claim. Because

5. For a brief survey of recent federal and state bills which have not been enacted, see The Employment-At-Will Issue, 111 Lab. Rel. Rep. (BNA) No. 23, at 9-12 (Nov. 22, 1982) [hereinafter cited as BNA Report].
7. See BNA Report, supra note 5, at 33-65 (survey of state court decisions).
few Americans have entered into written employment contracts and many companies lack formal disciplinary standards, the available avenues of legal redress are effectively closed to most discharged persons.  

Protection against unfair dismissal need not come from governmental sources; for instance, ILO standards could be met by using voluntary arbitration where the arbitrator has the authority to award an effective remedy. Those Americans working under collective bargaining agreements have adequate protection against unfair discharge because of the use of certain voluntary procedures. Yet, a mere twenty-five percent of the work force is protected in this fashion; for the remaining seventy-five percent, non-governmental protection is virtually nonexistent. Persons in this latter group seem to content themselves with filing for unemployment compensation when they are dismissed, knowing that they may be qualified for benefits so long as they were not discharged for willful misconduct. The dearth of cases on wrongful dismissal indicates that very few in this group file suit. This may be because they are aware there is no legal right to be discharged for a valid reason, or perhaps because the idea of undertaking the expense of litigation cannot be realistically entertained by most persons who have suddenly and unexpectedly become unemployed.

In any event, the American practice of not guaranteeing workers a right of fair dismissal diverges from that of other industrialized countries. Indeed, the American position on whether employees should be protected against wrongful dismissal is in a class by itself based on


9. According to the Bureau of National Affairs survey of 400 major collective bargaining agreements, 99% of the contracts include voluntary grievance procedures. 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. (BNA) 51:1 (1979) [hereinafter cited as BNA SURVEY].

10. About 21% of the labor force belongs to unions or employee associations. U.S. BUREAU OF LABOR STATISTICS, BULL. No. 2000, HANDBOOK OF LABOR STATISTICS 1978, at 507 (1979). Because collective bargaining agreements cover everyone in a bargaining unit, it is reasonable to assume that some nonunion members are also covered by the protection against unjust discharge found almost universally in collective agreements.

11. BNA REPORT, supra note 5, at 3. The civilian labor force fluctuates in size but currently includes about 110 million persons.

12. A review of many of the reported wrongful-dismissal cases brought in the last decade reveals that most plaintiffs were managers, supervisors, or administrators. The person who typified the average American employee (that is, one who had been employed in a job earning the median salary received by a full-time employed male ($379/week) or female ($248/week), see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, RELEASE No. 83-42, EARNINGS OF WORKERS AND THEIR FAMILIES: FOURTH QUARTER 1982, Table 4 (1982)), was grossly underrepresented.
the official United States position at the 1982 Conference of the ILO.\textsuperscript{13} Representatives from 126 countries voted in June 1982 on whether a Convention, "Termination of Employment at the Initiative of the Employer," should be adopted.\textsuperscript{14} Representatives from only seven countries voted against adoption of such a Convention,\textsuperscript{15} with the negative vote cast solely by the employers' representatives in six of these. The United States was the only country in the world whose government representative voted against the Convention.

ILO standards undoubtedly have the widest effect in determining what is good industrial relations practice. Embodied in Conventions and Recommendations, these standards are deemed to be pronouncements simply of what is acceptable, not of what is best practice.\textsuperscript{16} The ILO follows this policy of setting standards of minimum acceptable behavior and of permitting flexible means of achieving the desired behavior because this is viewed as the only practical method of encouraging member nations to respond voluntarily to the call for improvements in employment practices.\textsuperscript{17} Hence, a country which fails to comply with ILO standards is not merely falling below some theoretical ideal: it is failing to come up to the minimum level of acceptable behavior.

\textsuperscript{13} The International Labour Organisation was proposed in 1919 by a commission composed of representatives of employers, workers, and governments. Their proposal was included in a series of treaties following World War I. Surviving the demise of the League of Nations, the ILO became a specialized agency of the United Nations in 1946 according to the principles set forth in the Declaration of Philadelphia, adopted May 10, 1944. On April 20, 1948, enough ratifications and acceptances had been registered to bring the present constitution into effect. All nations represented at the United Nations may belong to the ILO if they subscribe to the principles of freedom of expression and association. The ILO has a permanent office in Geneva, and a permanent secretariat. Each year, in June, delegates from the member nations meet and conduct business. This is called the International Labour Conference. See A. Peaslee, 2 International Governmental Organizations: Constitutional Documents 990-92 (rev. 3d ed. 1974).

\textsuperscript{14} The final record vote on the Convention is found in the minutes of the June 22, 1982 morning session. See International Labour Conference, Provisional Rec. of the Sixty-Eighth Session No. 36 (Thirty-first Sitting), at 14-16 (June 23, 1982) [hereinafter cited as Sixty-Eighth Session].

\textsuperscript{15} These countries were Brazil, Chile, Fiji, Grenada, Swaziland, Switzerland, and the United States. Id. at 16.

\textsuperscript{16} At the annual meeting of the International Labour Conference, decisions in the form of conventions, recommendations, or resolutions may be taken. Two-thirds of the delegates present and voting must support a proposed convention for it to be adopted. International Labour Organisation Const., art. 19(2). Each country has four voting delegates: two representing the government, and one each representing employers and working people. Id. art. 3, para. 1.

\textsuperscript{17} Once a convention has been adopted, all members are required to submit it to the appropriate national authority for the enactment of legislation or other action within one year. If the national legislature consents to the ratification of the convention, the nation's formal ratification of the convention is communicated to the Director-General of the ILO. Signatory nations assume an obligation to ensure that national law and practice comply with the provisions of the ratified convention. The ILO has no enforcement mechanism with which it can compel signatory nations to implement a convention. Periodically, the International Labour Office issues reports on compliance with a given convention. The information in these reports is, for the most part, supplied by the member nations. See id. art. 19, para. 5.
A. The ILO Convention

The ILO Convention Concerning Termination of Employment at the Initiative of the Employer ("Convention") had its genesis in an ILO Recommendation on Termination of Employment adopted in 1963. Developments in national law and changes in national practice over the intervening twenty years prompted the International Labour Conference to re-examine the 1963 Recommendation. It was felt that the advancement of worker rights in countries throughout the world made it an appropriate time to consider a Convention on the subject. On June 22, 1982, the Sixty-eighth Conference approved both a Convention and a Recommendation on termination of employment. Only the provisions of the Convention will be analyzed because it is the general concept of employment protection embodied in the Convention, not the specific Recommendation details, which is relevant to this discussion.

1. Scope of protection—As its title indicates, the Convention covers not only individual discharge but also permanent layoffs affecting groups of workers. Consequently, only Parts I and II, dealing with individual discharge, will be discussed in this Article. It should be noted, however, that much of the controversy over the adoption of this Convention stemmed from employer resistance to protections granted under Part III which deals with termination of employment for economic, technological, or corporate structural reasons.
Article I allows for alternative methods of giving effect to the Convention, including legislation. Whatever the method chosen, it must offer the comprehensive coverage required by Article 2 which states: "This Convention applies to all branches of economic activity and to all employed persons." The exceptions permitted under Article 2 are quite narrow, and do not encompass the common exclusions in American employment law such as public sector employees, those employed in small businesses, supervisors, and managers.

2. Substantive reasons for fair discharge—The keystone of the Convention appears in Article 4 which provides that "[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service." This simple but forceful statement grants working people a guarantee of elemental fairness at the workplace. The employer may terminate employment, but not arbitrarily or capriciously. The enactment of such a fundamental employee right would undermine the employment-at-will doctrine so widely used in the United States. This was explicitly recognized by the American government and employers' representatives who consistently opposed the adoption of Article 4.

85-129 (1981) (listing questions on the proposed Convention and government replies) [hereinafter cited as REPORT VIII(2)]. The resistance of employers from certain countries, such as Britain, would be difficult to understand unless this fact is known because the home countries already complied completely with the unfair dismissal sections of the Convention.

22. Under Article 1, ratifying nations are not required to enact legislation to implement the Convention. Only if the protections specified are not already applicable by means of collective agreements, arbitration awards, court decisions, or other national practices must the ratifying nation enact legislation or promulgate regulations. See Convention, supra note 2, art. 1.

23. Id. art. 2(1).

24. Under Article 2, persons on fixed-term contracts can be excluded, id. art. 2(2)(a), but ratifying nations are directed to ensure that this exclusion is not abused, id. art. 2(3). Persons serving a probationary period at the beginning of employment may also be excluded from certain parts of the Convention's protection. Id. art. 2(2)(b).

It has been claimed that American employers won the right to have managers excluded from the coverage of the Convention. See BNA REPORT, supra note 5, at 15 (quoting Paul Weinberg, member of the American employers' delegation). Such an interpretation overstates the exclusion permitted by Article 2 that member nations may exclude "other limited categories" of employees where "special problems of a substantial nature" occur because of "particular conditions of employment" or the size or nature of the employer. Convention, supra note 2, art. 2(3).

25. For example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980), applies only to private sector employees and "employee" is defined by the Act to exclude supervisors, farm workers, and domestics, id. § 152(3). Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1976 & Supp. IV 1980), dealing with equal employment opportunity, does not extend protection to those employed by employers having fewer than 15 employees, id. § 2000e(b).

26. Convention, supra note 2, art. 4.

27. For instance, in 1982 the American government suggested that the clause be moved from the Convention to the Recommendation. See Report of the Committee on Termination of Employment, SIXTY-EIGHTH SESSION, supra note 14, No. 30, at 4 (June 19, 1982). The American employers' representative supported this amendment. Id. The United States ultimately abstained in the voting
The drafters were aware that this guarantee of just cause for discharge might be diluted by narrow interpretations given to the phrase "valid reasons for termination" in Article 4. To avoid this pitfall, they included Article 5 which lists several reasons ratifying nations should not accept as a valid basis for termination. Among these were dismissal based on union activity or filing complaints against the employers with governmental bodies, or because of a worker's race, color, sex, national origin, or religion. When the United States government was asked for its opinion in 1980 on this list of invalid reasons for termination, it did not quibble with any item on the list; it even suggested adding "handicap" to the list. During the debates on the Convention, neither the American government nor the employers' representative objected to any specific item in the list. In addition, both argued that Article 4 should be deleted because Article 5 was, on its own, a sufficient guarantee against arbitrary discharges.

This acquiescence and cooperation on the part of the American government and American employers' representatives was surprising because the list of reasons in Article 5, taken in conjunction with Article 4's fundamental guarantee, covers items not yet found in American law. The Convention thus would provide significantly greater protection than that currently afforded American workers. For instance, although the substantive protection afforded by Article 5(a) and (b) is covered by section 8(a) of the National Labor Relations Act, the NLRA extends only to the private sector and only to that portion of the workforce defined as "employees" for the purposes of the Act. Admittedly, certain federal regulatory statutes protect those filing on the Recommendation. See id. No. 36 (Thirty-second Sitting), at 21. The primary spokesman for the American employers' group on this issue, Paul Weinberg of American Express, stated in the final debate preceding the vote that employers opposed the Convention, "basically because its very concept . . . erodes the principle of termination at will." Id. No. 35 (Twenty-ninth Sitting), at 4 (June 22, 1982).

28. The following, inter alia, shall not constitute valid reasons for termination:
   (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
   (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
   (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
   (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
   (e) absence from work during maternity leave.

Convention, supra note 2, art. 5.

29. See REPORT VIII(2), supra note 21, at 37.

charges against their employer under the statute, but this protection is hardly comprehensive.\footnote{31}{See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976 & Supp. IV 1980); see also National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1976 & Supp. IV 1980).} In addition, like Article 5(d) of the Convention, Title VII of the Civil Rights Act of 1964 protects most American employees against discharge based on race, color, sex, pregnancy, religion, or national extraction.\footnote{32}{See 42 U.S.C. § 2000e-2.} Title VII, however, does not extend to discharge based on social origin (class), political opinion, family responsibilities, or marital status.\footnote{33}{This assumes that the employer's policies are sex-blind, for instance that married women and men with children are treated similarly. See, e.g., Yuhas v. Libby-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (finding valid a company rule prohibiting employment of a married couple as long as couple given choice of which person should leave).} Finally, women absent from employment after childbirth are protected only to the extent that their absence is caused by a physical inability to return to work and then only if their employer's policy on absence due to sickness includes such an absence. If the United States would implement Article 5 these wide gaps in the present protection afforded American workers would be filled.

The Convention also addresses the important disciplinary issue of temporary absence from work because of injury or illness. Under Article 6, such absences do not constitute a valid reason for termination.\footnote{34}{Constitution, supra note 2, art. 6(1).} Article 6 refrains, however, from stipulating how long an employer must keep a job open for an ill employee; rather, the Convention leaves it to each ratifying nation to take into account national law and practice in deciding how this protection should be applied.\footnote{35}{Id. art. 6(2).} If the United States were to comply with Article 6, an area of substantial uncertainty would be settled. Although it is generally accepted in the United States that a temporary absence should not give rise to discharge, there apparently exist no guidelines on employer practice in this area.\footnote{36}{In response to a 1980 ILO survey, the United States agreed with the principle that temporary absence due to illness or injury should not be grounds for discharge. See REPORT VIII(2), supra note 21, at 39.} In seeking to ascertain how long a job will be kept open for an ill employee, research reveals that there are no set rules, or even strong employer norms.\footnote{37}{See BNA SURVEY, supra note 9, 62:6-7, 62:901 (discussing variations in sick-leave contract provisions).} The decision thus remains a unilateral determination by the employer, with non-union employees usually having no means of challenging a discharge based on absence.
employee's conduct or performance should not take effect until the employee has had an opportunity to respond to the allegations, "unless the employer cannot reasonably be expected to provide this opportunity." 38 This can be seen as merely good personnel management practice. Yet, at present, there is no right to a pre-discharge disciplinary interview in the United States. 39 Besides preventing baseless discharges, Article 7 has another attraction: it alerts the employee to the reason for discharge, thereby permitting a defense to be prepared more easily.

A critical aspect of the Convention's guarantee is contained in Article 8 which provides that workers who believe they have been unfairly discharged should be able to challenge their discharge before an "impartial body" such as a court, tribunal, or arbitrator. 40 Although Article 8 does not expressly mandate a hearing, the requirement that employees have a right to challenge their dismissal before an impartial body strongly implies that some type of hearing is contemplated. The United States government opposed any hearing requirement. It was displeased even with the moderately worded final form of Article 8 because it believed that reliance on private dispute resolution mechanisms was preferable. 41

The Convention also mitigates the difficult position in which the discharged worker is placed at a hearing by modifying the burden of proof. Article 9 bolsters the position of the employee by providing alternatives "[i]n order for the worker not to have to bear alone the burden of proving that the termination was not justified." 42 The ratifying nation may either place the burden on the employer to come forward with a valid reason for the discharge, or require that the impartial body reach a conclusion based on the evidence, 43 thereby placing the burden of proof on neither party. 44 Far from being a matter

38. Convention, supra note 2, art. 7.
39. See, e.g., Brown, Limiting Your Risks in the New Russian Roulette—Discharging Employees, 8 Employee Rel. L.J. 380 (Winter 1982-83). In unionized companies, summary discharge is rare except in instances of egregious misconduct. In such companies, the practice of a pre-discharge investigation and interview may reflect employer awareness that arbitrators often take into account whether an employer gave a warning or conducted a pre-discharge investigation in determining whether the discharge was fair.
40. Convention, supra note 2, art. 8(1).
42. Convention, supra note 2, art. 9(2).
43. Id.
44. The original draft of the proposed Convention had placed the burden of proof on the employer. See International Labour Conference, 68th Session, 1982: Report V(2) — Termination of Employment At the Initiative of the Employer [Fifth Item on the Agenda] 70 (proposed text). The employers' representatives vigorously opposed this, and the Committee on Termination of Employment devised the compromise which appears in the adopted Convention. See BNA Report, supra note 5, at 15 (statement of Paul Weinberg).
of mere procedure, this requirement amounts to an important substantive protection in itself: employees are no longer placed in the difficult position of proving that the employer's reason for discharge was invalid, a task usually requiring employees to prove that their work record was spotless. Article 9 thus creates further support for the fundamental guarantee. Employers should have a valid reason for dismissal; therefore, it is not unduly onerous to require employers to specify that reason.

Preferring voluntary, private arrangements to mandatory unfair-dismissal procedures, the United States government proposed that the requirements of Articles 8 and 9 be placed in the non-binding Recommendation, rather than in the Convention, to provide nations with "considerable flexibility" in the means of implementing the Convention. The Article 9 provision that the employer be required to come forward with a valid reason for an employee's dismissal was specifically criticized by an American employers' advisor as one of the major areas in which the Convention severely curtailed the flexibility employers believe they must have to control their operations.

B. American Position on the ILO Convention

An examination of the voting on the Convention reveals the isolation of the United States from other highly industrialized, free countries. The Convention's strongest supporters were countries whose government, employers' and workers' representatives all voted in favor of the Convention, such as Canada, West Germany, France, and Japan. Strong support also came from countries such as the United Kingdom and the Netherlands where, though the employers' representatives abstained to signal disapproval with Part III of the Convention, support for the unfair-dismissal parts was nevertheless total. In only three Western, highly industrialized countries, did support for unfair-dismissal protection fall below the level of strong support: Australia, Switzerland, and the United States. Not surprisingly, workers' representatives from all three countries voted in favor of the Convention. Both the Australian government representatives and employers' representative abstained. The Swiss government representatives voted in favor, while the employers' representative voted against. The American government representative and employers' representative both voted against the Con-

45. SIXTY-SEVENTH SESSION, supra note 41 at 24.
46. Id. (statement of Mr. Weinberg).
47. See SIXTY-EIGHTH SESSION, supra note 14, No. 36, at 14-16. Other industrialized countries in this group were Belgium, Ireland, Italy, Spain, Norway, and Sweden. Id.
48. See id. at 16. Other Western industrialized countries voting similarly were Austria, Denmark, Greece, Luxembourg, and Portugal. Id.
vention. No other country in the world displayed such official rejection of the Convention.49

The American government's reasons for voting against the Convention are noteworthy. As mentioned, many of the employers' representatives, who otherwise approved of much of the Convention, voted against its adoption or abstained because of the proposed restraints on the employer's ability to dismiss workers incident to a plant closure or manpower reduction.50 The United States, however, was the only major nation opposing the Convention to take an official position during the debates which struck at the Convention's essential core concept of just cause for discharge.51 It objected to the Convention because of the mandatory nature of certain substantive provisions, because employers were required to have a valid reason for discharging an employee, and because of the required post-dismissal appeal to an impartial body with the employer asked to put forward some reason for discharge.52

Although ILO Conventions cannot be legally enforced against member nations, most Western, industrialized nations do take seriously their obligations as ratifying nations.53 Moreover, developing countries often look to ILO Conventions when attempting to upgrade national industrial relations practices and employment standards. These factors may have prompted American employers to take a more vigorous stance in opposing this Convention which they knew would not be ratified by the United States.54 Apparently, many American companies did not want to be required by law to behave at home as they must abroad. The presence of unfair-dismissal legislation, however, does not seem to be a disincentive to corporate investment. For instance, more American companies operate in Great Britain than in any other foreign country, yet British law on unfair dismissal completely complies with the requirements of

49. See id.
50. See supra note 21 and accompanying text.
51. The United States has ratified only seven Conventions, all dealing with maritime matters. The American government has taken the position that the federal legislature is without the power to bind the states in matters covered by Conventions. This has not, however, prevented the United States from supporting Conventions and voting in favor of their adoption; hence, the vigorous opposition of the United States to the Convention is significant.
52. See SIXTY-EIGHTH SESSION, supra note 14, No. 35, at 4-5; see also U.S. Council, Termination of Employment, INT'L LAB. AFF. REP., 1982, No. 3, at 5.
53. For example, the United Kingdom has ratified more than 80 ILO conventions and most European nations have ratified more than 50. The United States has ratified only seven.
54. See, e.g., U.S. Council, supra note 52, at 4-6 (U.S. Council for International Business urging its member companies to notify their overseas subsidiaries about the content of the new Convention so that an appropriate lobbying effort at national level can be made); BNA REPORT, supra note 5, at 14 (quoting a letter from Paul Weinberg, lead American employers' advisor on the Convention, to the chairman of the industrial relations committee of the U.S. Council for International Business, citing the potential impact on overseas subsidiaries as a major reason for making every effort to block the adoption of a Convention).
II. BRITISH LAW AND PRACTICE

When a country has gone without any protection against unfair dismissal for a considerable period of time, the reasons why it decides to grant a right of fair dismissal, particularly in light of the cost of enforcing such a right, are illuminating. In Britain's case, there were two major reasons. First, it was accepted that Britain should take action to comply with the standards promulgated by the ILO.\(^{55}\) Second, it was widely believed that the lack of peaceful dispute-resolution mechanisms in discharge cases led to work stoppages.\(^{56}\) Because both views commanded non-partisan support, it was not surprising that Parliament promptly acted on the idea of granting a right to fair dismissal. The process was expedited by tacking unfair-dismissal provisions onto major, comprehensive industrial relations legislation already proposed.

Effective enforcement of this new protection was easily guaranteed through the use of a special system of tribunals set up to provide accessible, inexpensive, and quick resolution to discharge cases. This would free the regular court system from the potential clogging effect of an unfair-dismissal caseload. Furthermore, it would relieve complaints about the burden of utilizing regular court procedures, an expensive and time-consuming process likely to daunt discharged workers. Uniformity in the development of the law would be provided by appellate courts.

A. Pressures for Legislative Action

Britain did not enact legislation on unfair dismissal until 1971. American workers today would be familiar with the situation prevailing in Britain prior to that time. There was no statutory or judicially created right to fair dismissal. Neither were there any governmentally supported procedures enabling employees to protest their dismissal.\(^{57}\) An employee who was dismissed could sue for breach of contract in the regular civil courts, but without an express contractual clause on fair treatment, such litigation was unlikely to be successful. Employers were required to provide each employee with a written employment contract containing terms covering specified items, such as the notice

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55. See WHITE PAPER ON INTERNATIONAL LABOUR CONFERENCE, CMD. No. 2548, at 6-8 (1964).
56. See infra note 61 and accompanying text.
57. For example, there was no government mediation service.
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period under the Contracts of Employment Act of 1963. This "protection," however, did not significantly improve the position of employees. Most employees worked under a contract with an indefinite term, and an employer wishing to dismiss such an employee merely had to give proper notice of termination for the dismissal to be lawful. No reason for terminating the contract was required for these dismissals.

Private methods of resolving disagreements in discharge cases were unusual. Although the rate of unionization was much higher in Britain than in the United States, and despite the fact that the union movement was very strong, arbitration as a means of resolving disagreements over the validity of individual dismissals had not developed to any measurable extent. If the discharged person's co-workers were sufficiently dissatisfied with the basis for the discharge, the shop steward would approach management in an effort to work out a satisfactory solution. If these efforts failed, workers would typically threaten, and if necessary, actually engage in, an immediate work stoppage. To persuade the strikers to resume working, management would often enter into some form of negotiation and take some action to resolve the crisis. This method of resolving discharge disputes accorded great weight to the work group's sense of fairness and solidarity, and it undoubtedly offered very prompt remedial action without government intervention. Aside from these positive features, however, there were some distinct disadvantages to this method of dispute resolution. Short, unannounced work stoppages by small groups of workers caused not only an immediate loss of production but also a decline in the overall reputation of British firms for timely performance. In addition, if the discharged person's work group lacked strike power, there was, for all practical purposes, no way to challenge the discharge.

58. Ch. 49. This was significantly amended by the Contracts of Employment Act, 1972, ch. 53. The written statement had to be given to the employee within the first 13 weeks of employment. Id.

59. At present, the notice period varies from one to 12 weeks depending upon the employee's length of service with the company. See Employment Protection (Consolidation) Act, 1978, ch. 44, § 49(1). The statute sets the minimum notice; the contract may increase the notice period. An employer wishing to terminate an employee immediately can fulfill its contractual obligations by paying the employee the amount the employee would have earned during the notice period. Id. §§ 50-51 & Sched. 3.

60. It has been estimated that in 1970, 38% of white-collar employees and 52.7% of blue-collar employees in Great Britain were union members. See Bain & Price, Union Growth and Employment Trends in the U.K., 1964-1970, 10 BRIT. J. INDUS. REL. 366, 378 (1972). In the United States, 27.3% of the nonagricultural labor force were union members in 1970. The figure went up to 30% if persons belonging to associations, such as the National Educational Association, were counted as members. U.S. BUREAU OF LABOR STATISTICS, BULL. 2079, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1979-59 (1980). See also Freeman & Medoff, New Estimates of Private Sector Unionism in the United States, 32 INDUS. & LAB. REL. REV. 143 (1979).

This state of affairs changed in 1964 when the British government announced that it had accepted and would conform to the 1963 Recommendation on Termination of Employment that had been adopted by the ILO the previous year. The government then formally consulted employers' and employees' groups on how to provide effective safeguards against unfair dismissal. A committee of the Minister of Labour's National Joint Advisory Council studied existing practices and issued its report in 1967. The committee's findings depicted a situation similar to that now existing in the United States. The report noted that, in general, employees had no legal protection against dismissal for bad reasons or for no reason at all. The committee found that formal personnel policies covering dismissal procedures were not widespread, with those in existence found mostly in larger firms. In unionized companies, disputes procedures were agreed upon and could be utilized in discharge disputes, but the committee observed that their comprehensiveness and effectiveness varied greatly.

While this committee was studying the issue of protection against unfair dismissal, another government committee was touching upon the same topic as part of a wide-ranging inquiry. In 1965, the Royal Commission on Trade Unions and Employers' Associations, commonly called the Donovan Commission, was established to consider the whole field of labor-management relations with a particular focus on the law affecting labor relations. The work of the Donovan Commission received substantial publicity and, unlike the National Joint Advisory Committee's report, its recommendations were designed for legislative implementation.

In its 1968 Report, the Donovan Commission found unsatisfactory the then-existing situation whereby protection against unfair dismissal existed only at the employer's discretion. Whereas the National Joint Advisory Committee had refrained from recommending statutory protection against unfair dismissal, a majority of the Donovan Commis-

62. See supra note 55 and accompanying text.
63. See MINISTRY OF LABOUR, DISMISSAL PROCEDURES (H.M.S.O. 1967).
64. Id. para. 13.
65. Id. paras. 69, 72.
66. Id. para. 72.
67. The establishment of the Donovan Commission was prompted by the conviction that the government should act to improve the system of industrial relations then generally perceived to be in trouble. Whether this public perception was accurate has been disputed. Compare McCarthy, supra note 61, at 235-36 (arguing that there was a substantial problem), with Turner, Is Britain Really Strike Prone?: A Review of the Incidence, Character and Costs of Industrial Conflict, Occasional Paper No. 20 (Cambridge Univ. Press May 1969) (claiming that the strike problem was exaggerated), cited in McCarthy, supra note 61, at 224 n.1. After a thorough examination of the statistical evidence, one author concluded that Lord McCarthy was correct. See Silver, Recent British Strike Trends: A Factual Analysis, 11 BRIT. J. INDUS. REL. 66, 94-98 (1973).
68. ROYAL COMM’N ON TRADE UNIONS AND EMPLOYERS’ ASS’NS 1965-1968, REPORT, CMD. No. 3623, para. 526 (1968).
sion concluded that statutory protection was the desirable response to this situation. To support their conclusion, the Commission observed: "[i]f statutory protection is to be afforded against arbitrary dismissal when the reason for it happens to be race or colour, then protection should be afforded against dismissal for other no less arbitrary reason." The primary advantage of a statutory guarantee, in the Commission's opinion, was "an immediate raising of standards to a much more satisfactory level."

B. Implementing Statutory Protection

The Donovan Report generated intense controversy; both the Labour Party and the Conservative Party proposed remedial labor legislation varying on most major issues. The sole exception was protection against unfair dismissal which was quickly implemented in the Industrial Relations Act, 1971. Section 22 of that Act declared: "[i]n every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer." Reflecting the volatility of British labor relations, labor legislation in Britain since 1971 has not been stable. Acts have been passed, then repealed, and the repealing legislation itself has been extensively amended. This notwithstanding, the unfair-dismissal protection, now codified in the Employment Protection (Consolidation) Act, 1978, stands unchanged after twelve years, a tribute to its enduring popularity and effectiveness.

The British legislation set forth in Part V of the Employment Protection (Consolidation) Act provides Americans with a practical lesson

69. See id. paras. 533-544. The minority believed that voluntary procedures should be improved. This same difference of opinion had caused the representatives from the Confederation of British Industry and those from the Trades Union Congress to deadlock a year earlier. See id. ¶ 531.
70. Id. para. 543.
71. Id. para. 539.
72. Ch. 72.
73. Id. ¶ 22. In Britain, the term "wrongful dismissal" means that an employee has been dismissed by an employer who has failed to comply in some way with the terms of the employment contract. The term "unfair dismissal" covers a much broader spectrum of employer conduct. In alleging unfair dismissal, employees need not base their arguments on a clause in the employment contract. See Engineering Employers' Federation, Industrial Relations Bill: Questions and Answers for Management 8 (Mar. 1971).
74. The Industrial Relations Act, 1971, ch. 72, enacted under a Conservative government, was repealed by the Labour government with the Trade Union and Labour Relations Act, 1974, ch. 52. The subsequent Conservative government has extensively amended the latter statute with the Employment Act, 1980, ch. 42, and the Employment Act, 1982, ch. 46.
75. Ch. 44. Parts of statutes which dealt with employment protection matters, such as unfair dismissal, maternity benefit, and redundancy payments, were consolidated into one statute. Most of the 1978 Act was taken from the Employment Protection Act, 1975, ch. 71.
76. When the Industrial Relations Act, 1971, was repealed by the incoming Labour government in 1974, only the sections on unfair dismissal were re-enacted. See Trade Union and Labour Relations Act, 1974, ch. 52, sched. I, pt. II.
in implementing safeguards against unfair dismissal. An affirmatively stated employee right, appropriately limited grounds for discharge, comprehensive coverage, a burden of proof not placed exclusively on the employee, and impartial appeal tribunals all combine to render the British legislation in compliance with the new ILO Convention on Termination of Employment.  

1. The guarantee—After guaranteeing the employee a right not to be dismissed unfairly, the statute specifies valid reasons for discharge. Section 57(2) states that the reason must be related to the employee's conduct, qualifications, or capability to perform the work, or that there must be "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Section 57 lists the generally applicable considerations in a discharge case. Other sections deal with dismissals relating to union membership, union activism, pregnancy, and maternity leave. Dismissal based on race and sex are outlawed by other, specialized statutes, but are mentioned in Part V of the Employment Protection (Consolidation) Act so that the issue of compensation in a discrimination case can be considered.

2. Burden of proof—Although technically a matter of procedure, the placement of the burden of proof in a discharge case fundamentally affects the substantive guarantee provided employees in unfair-dismissal legislation. Amended several times, the current burden of proof section requires the tribunal, in deciding whether the dismissal was fair, to consider the reason given by the employer for the discharge. Tribunals must decide whether the employer acted reasonably in treating

77. This statement refers only to Parts I and II of the Convention. See supra note 21 and accompanying text.
78. Employment Protection (Consolidation) Act, 1978, ch. 44, § 57(2)(a), (b). Subsection (c) deals with redundancy.
79. Id. § 57(1)(b).
80. For each of these reasons, there is a qualifying period an employee must have served before a claim can be made. Some attach immediately, such as race and sex discrimination. The all-purpose claim, under section 57, however, requires the longest qualifying period. See id. § 64.
81. See id. § 76.
82. It is generally thought that placing the burden of proof on the employer makes it easier for employees to win claims. Hence, Labour governments have favored placing the entire burden on the employer while Conservative governments have opposed this.

[T]he determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.
the proffered reason as sufficient grounds for discharge. 84

Employers previously were required to satisfy the tribunal that they had acted reasonably. 85 Now, the burden on the employer is something less than the conventional burden of proof, yet the burden is not shifted to the employee to prove that the dismissal was unfair. 86 In this regard, the British legislation remains in compliance with the ILO Convention. 87 Importantly, the employer is still required to come forward at the hearing with the reason for the discharge. The British practice, therefore, places discharged persons in a very different and less onerous position than their American counterparts who must, as plaintiffs, prove that the employer breached the employment contract.

3. Coverage— Protection under the British statute is comprehensive; nearly all full-time employees are protected against unfair dismissal once with a company for some requisite period — generally, one year of service. 88 In firms with less than twenty employees, employees are not protected until they have accumulated two years of service with the company. 89 Probationary periods of employment are thus accepted, and until they expire and statutory protection vests, employers retain the right to dismiss new employees at will. 90 Persons employed under fixed-term contracts may also be protected, depending on the term of their contracts. When the contract of a person employed for a fixed term expires without being renewed, that person can complain of unfair dismissal only if the contractual term was for more than one year. 91

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84. If there was more than one reason that motivated the employer to dismiss the claimant, the tribunal decides whether the principal reason was sufficient. See id. § 57(1).
85. The 1978 Act imposed this requirement. See id. It was amended by the 1980 Act. See supra note 83.
86. See supra note 83.
87. See Convention, supra note 2, art. 9.
88. Employment Protection (Consolidation) Act, 1978, ch. 44, § 64. The requisite period had been 26 weeks since 1974. See Trade Union and Labour Relations Act, 1974, ch. 52, sched. I, pt. II, para. 10. It was lengthened by the Conservative government in 1979 to limit the numbers of dismissed workers who could make a claim. See Unfair Dismissal (Variation of Qualifying Period) Order, 1979 STAT. INST. No. 959. Part-time employees are those who usually work less than 16 hours per week.
90. Both political parties accept the validity of a probationary period but differ on how long this period should be. It has been asserted that many workers in high turnover industries are effectively excluded from protection by a one-year probationary period. See R. LEWIS & B. SIMPSON, STRIKING A BALANCE? EMPLOYMENT LAW AFTER THE 1980 ACT 27 (1981). See also infra note 81 and accompanying text.
91. See Employment Protection (Consolidation) Act, 1978, ch. 44, §§ 55(2)(b), 142(1), amended by Employment Act, 1980, ch. 42, § 8(2). In some European countries, such as France, it is common for certain employees, such as secretaries, to be employed for years under short-term contracts which automatically renew unless either party gives notice. Because this practice is not common in Britain, these statutory sections have not been subject to frequent use. In addition, British employers have not attempted to circumvent the unfair dismissal protections by placing employees on short, fixed-term contracts.
Aside from these service requirements, the exclusions from coverage are quite narrow. There is no public sector/private sector distinction, nor is there any general exemption for small employers. Persons who normally work outside Great Britain and those employed by their spouse are not protected. Finally, persons over normal retirement age are not covered by the statute.

4. Remedies—In formulating remedies, the British adopted a pragmatic approach. The intent was not to inflict serious pecuniary damage on companies, but solely to compensate employees fairly for their loss and to provide a sufficient financial disincentive to employers. The remedy for unfair dismissal is either reinstatement or re-employment, if the complainant so desires and the tribunal believes it is appropriate, or a damages award. Reinstatement to the former position or re-employment in another job with the same employer, though permitted under the statute, is not common. In most cases, compensation is the remedy. This may result from the widely held belief that persons who have been discharged will not easily fit back in their former workplace and that, in most instances, new employment elsewhere is better for all concerned. In this regard, it should be noted that seniority is not nearly as important a factor in British employment as it is in the United States.

The damages award has two components: a "basic" award and a "compensatory" award. The basic award is computed according to a statutory formula which takes into account the complainant's length of service, weekly pay, and age. The statute places a maximum limit on the basic award, which, in effect, is a liquidated damages provision.
Section 74 states that the compensatory award 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 so far as that loss is attributable to action taken by the employer." 103 In deciding whether to make a compensatory award, and what amount to award, 104 the tribunal may take into account the extent to which the complainant caused or contributed to the loss. 105 The compensatory award is designed to cover expenses, financial loss, and other items. Where appropriate, emotional distress and injury to feelings may be compensated. The compensatory award, however, was not designed to be a windfall. When enacted, the statutory maximum amount allowed as a compensatory award was pegged at the average yearly salary of the full-time male industrial worker. 106

5. Complaints procedure—One of the most attractive features of the British legislation is a complaints procedure designed to minimize legalistic formality and to resolve cases with finality at the earliest possible stage. Persons who believe that they have been unfairly dismissed may file a complaint under the statute. Complaint forms, which are available at local offices of the Department of Employment, must be filed within three months of the discharge. 107 After the complaint is filed, an employee of the independent government agency, the Advisory, Conciliation and Arbitration Service ("ACAS"), will meet with the complainant and the employer and attempt to secure agreement to a conciliated settlement. The efforts of the ACAS conciliation officer are an integral part of the statutory plan. 108 On average, about sixty percent of complaints are disposed of at the conciliation stage, either because a conciliated settlement was reached or because the complainant withdrew the claim. 109 The remaining forty percent of claims pro-

award possible at £3000 and the maximum compensatory award (in normal dismissal claims under section 57) at £5200. See id. §§ 73-75, sched. 14, sec. 8(1). The maximum award has recently been increased to £7500. See 1982 STAT. INST. No. 1868.


104. The compensatory award must be reduced by the amount the complainant has earned or would have earned had the complainant taken reasonable efforts to mitigate the loss. Id. § 74(4).


106. Using this formula and supplying U.S. figures, the U.S. equivalent would be about $19,700, based on weekly median earnings of $379 for full-time employed men. See BUREAU OF LABOR STATISTICS, supra note 12, Table 4.


108. In 1979, the Conservative government further emphasized this role by introducing a pre-hearing assessment stage. R. LEWIS & B. SIMPSON, supra note 90, at 58.

109. See Hoffman, Mediation of Unfair Dismissal Grievances: The British Example, 32 PROC. ANN. MEETING INDUS. REL. RESEARCH ASSOC. 171, 173-74 (1979). The figures are approximate; an average would be misleading because the qualifying service period changed from two years to 26 weeks to one year during the 1970's. During the period when protection attached after six months on the job, the number of claims and the number of claimants withdrawing cases rose significantly. For 1980 statistics, see Lewis, Ten Years of unfair dismissal legislation in Great Britain, 121 INT'L LAB. REV. 713, 716 (1982).
ceed to a hearing.\textsuperscript{110}

C. Unfair-Dismissal Hearings

Unfair-dismissal complaints are heard by industrial tribunals, which are tripartite bodies functioning as labor courts.\textsuperscript{111} The chairman is an experienced barrister or solicitor.\textsuperscript{112} One wingman comes from the ranks of employers' associations, the other from the unions.\textsuperscript{113} The two wingmen are not expected to act as advocates for their side; rather, they serve as independent, uncommitted lay judges experienced in industrial relations matters.\textsuperscript{114}

Hearings before industrial tribunals are designed to be informal, and the chairman is expected to assist persons unfamiliar with the process. Representation by lawyers is not typical at these hearings, though some larger companies routinely use lawyers to represent them. Employers are often represented by a personnel manager. Complainants may bring along a shop steward or other union officer, or a friend. Tribunal hearings are short, with most lasting one day or less. Pre-hearing briefs are not known as such, although a written statement of one or two pages is sometimes submitted to clarify the issues in a complicated case. Post-hearing briefs are unknown. In keeping with the public policy of resolving dismissal cases quickly and cheaply, decisions of industrial tribunals tend to be short. Attempts to move the system into a more formal, legalistic mode have been resisted.\textsuperscript{115}

I. Appeals—The losing party may appeal the decision of an in-

\textsuperscript{110} See Hoffman, supra note 109, at 173-74.

\textsuperscript{111} See id. at 173. See generally K. WEDDERBURN & P. DAVIES, EMPLOYMENT GRIEVANCES AND DISPUTES PROCEDURES IN BRITAIN 243-57 (1969).

\textsuperscript{112} The law profession in Great Britain is bifurcated. Broadly speaking, barristers practice exclusively as litigators and appellate advocates. Barristers receive their "brief" from solicitors, lawyers who practice outside the courtroom. The demarcation line has blurred recently, with both groups permitted to appear before tribunals and the lowest level of criminal court.

\textsuperscript{113} Non-lawyers are selected to serve on industrial tribunals by the Secretary of State for Employment from lists of names submitted by various groups, such as employers' associations and trade unions. These lay persons do not receive full-time appointments. See K. WEDDERBURN & P. DAVIES, supra note 111, at 247-49.

\textsuperscript{114} The complainant and respondent in a given case have no control over the composition of their particular panel. That is determined as an administrative task by the Central Office of Industrial Tribunals. Assignments to hear particular cases are made on a random basis; no effort is made to match up the industry background of the wingmen with the industrial setting of the case. Overall this has a beneficial effect because it ensures that general workplace norms are applied in determining fairness rather than notions specific to one industry.

\textsuperscript{115} See, e.g., Retarded Children's Aid Soc'y Ltd. v. Day, 1978 Indus. Cas. R. 437 (declining to overturn a tribunal decision even though a determination on a relevant issue did not appear in the decision). In his separate opinion, Lord Russell of Killowen emphasized that "care must be taken to avoid concluding that an experienced industrial tribunal by not expressly mentioning some point or breach has overlooked it." Id. at 444. See generally K. WEDDERBURN & P. DAVIES, supra note 111, at 258-75. The process may be becoming more formalized, however,
Industrial tribunal to the Employment Appeal Tribunal. Approximately four percent of industrial tribunal decisions are appealed. Divisions (panels) of the Employment Appeal Tribunal are also tripartite bodies, with the chairman a High Court judge. The Employment Appeal Tribunal reviews only questions of law, though there is some debate as to whether the main issue in unfair-dismissal cases is a question of law or fact. The Employment Appeal Tribunal, in the interest of having industrial tribunals throughout the country apply uniform standards, has indicated that it believes the issue of whether an employer acted reasonably in dismissing is a question of law. For instance, the fairness of dismissal for any given offense, such as repeated tardiness due to transportation difficulties, is considered a question of law, not fact. How these general standards of fairness apply to a given case, however, is a question of fact.

Although a judgment of the Employment Appeal Tribunal may be appealed to the Court of Appeal, and from there to the House of Lords, higher appeals are unusual. This may stem from the posture of the Court of Appeal which has tended to back the decisions of industrial tribunals quite strongly, to the point of insulating them from review by the Employment Appeal Tribunal. It has done so in the belief "that Parliament intended industrial tribunals to resolve dismissal disputes in a quick, cheap and informal manner, without resort to legal refinements, and this policy will be undermined if tribunal decisions are too closely scrutinised." Current American experience certainly supports the Court of Appeal's view that time-consuming, multi-stage appeals add little to the determination of the initial factfinder and greatly detract from the efficacy of the eventual remedy to the employee.

2. Interpretation of the guarantee—Any guarantee of fair dismissal requires the trier of fact to determine what standards of fairness should control. In determining whether the employer acted fairly in discharging the complainant, tribunals take into consideration the rulings of appellate courts and the factors mentioned in the Industrial Relations Act simply because legal representation is becoming more common. See Lewis, supra note 109, at 722-23.

116. Under the Industrial Relations Act, 1971, ch. 72, appeal was made to the National Industrial Relations Court. When this court was abolished by the Trade Union and Labour Relations Act, 1974, ch. 52, appeal was made to the High Court. The Employment Appeal Tribunal was substituted by the Employment Protection Act, 1975, ch. 71.


119. One High Court judge has noted that "it needs to be remembered that cases of dismissal can be categorised, and that the controversial questions soon become familiar." Phillips, supra note 117, at 139.

120. Hoffman, supra note 109, at 174.

121. Elias, supra note 118, at 209 & n.40 (citing cases).
Code of Practice and the ACAS Code of Practice on Disciplinary Practice and Procedures.\textsuperscript{122} In addition to explaining the meaning of the statutory guarantee in a practical way, these Codes discuss what constitutes good industrial relations practice; for instance, that a warning normally should be given prior to discharge. Not surprisingly, this general advice has not been sufficient to answer the numerous, recurring questions which arise in dismissal cases.

To avoid having tribunal members asking how they would have acted in the circumstances, the House of Lords has emphasized that the tribunal must determine whether the employer acted reasonably in light of the circumstances as they appeared to that employer at the time of the dismissal.\textsuperscript{123} In making this determination, British tribunals and courts take the attitude that the statute obliges the employer to act as the reasonable employer would have acted in the circumstances. As a result, the decisions of tribunals have become a body of law detailing the bounds of fairness in disciplinary situations.

The British tribunal approaches the issue of whether an employer acted fairly somewhat differently than an American arbitrator in a union setting approaches the question of whether an employer had just cause to discharge.\textsuperscript{124} In Britain, the limitations on the employer's right to discharge flow from the Employment Protection (Consolidation) Act which applies equally to all employers in all industries. Consequently, greater weight is accorded societal norms relating to the reasonableness of a given disciplinary response than is given to the actual fairness of the respondent employer, who may consistently apply more stringent discipline than the norm.\textsuperscript{125} The British experience should therefore caution the drafters of any American legislation on unfair dismissal to take into account the orientation of the trier of fact in deciding the issue of fairness. The attitudes of American labor arbitrators, reflecting the context of very individualized bargaining on discipline, should not color the application of any generalized American guarantee of fair dismissal; otherwise, the guarantee itself will be diluted.\textsuperscript{126}

\textsuperscript{122} Although not statutes, codes of practice are approved by Parliament and may be introduced in court proceedings as evidence of good industrial relations practice. See P. Elias, B. Napier & P. Wallington, Labour Law: Cases and Materials 20-21 (1980).

\textsuperscript{123} W. Devis & Sons Ltd. v. Atkins, [1977] A.C. 931.

\textsuperscript{124} The American employer's rights in such cases flow from the collective agreement, a bargain with the union under which the employer retains certain discharge rights. One union may willingly submit to more stringent discipline than another union. See Koretz & Raobin, Arbitration & Individual Rights, in The Future of Labor Arbitration in America 113, 117 (1976).

\textsuperscript{125} One commentator has observed that the concept of fairness is norm-reflecting rather than norm-setting. Elias, supra note 118, at 212-13.

\textsuperscript{126} Labor arbitrators seek to determine what the union has been able to wrest from the employer's unilateral control. Under a fair-dismissal statute, the power of employees to compel the employer to concede certain disciplinary issues is irrelevant.
D. Accommodating Private Dispute-Resolution Agreements

Under the British legislation, private dispute-resolution arrangements can be substituted for the statutory provisions if the private procedures meet certain requirements. Such arrangements are permitted because both the Labour Party and Conservative Party believe that voluntary private dispute-resolution mechanisms should be encouraged. Thus, they are allowed to co-exist alongside the public complaints procedure with its hearing before a neutral tribunal.

Under section 65 of the Employment Protection (Consolidation) Act, the employer and union(s) who are signatories to the dispute-resolution agreement may jointly seek an order allowing their privately established procedures to substitute for the statutory provisions. If the order is granted, the statutory provisions will not apply and those covered by the dispute-resolution agreement will be denied access to the industrial tribunals. The private agreement must clearly state who is covered and what procedures will be followed in discharge cases. The procedures must be available “without discrimination” to all covered employees.

Because of the requirements imposed on these substituted private arrangements, the British government has not defaulted on its obligation under the ILO standards to guarantee all employees protection against unfair dismissal. For instance, there are two major hurdles most private agreements fail to surmount. First, the remedies afforded by the private agreement must be “on the whole as beneficial as (but not necessarily identical with) those provided” by the statute. Second, the private agreement must “include a right of arbitration or adjudication by an independent referee, or by a tribunal or other independent body” in cases where “a decision cannot otherwise be reached.”

In 1971, the rate of unionization in Britain was much higher than in the United States, yet highly developed grievance/arbitration procedures were rare. Most private agreements consisted merely of a grievance procedure, and even these were rarely formalized. Arbitration by a neutral outsider was extremely uncommon. As a result, when the statute took effect there was no rush by unions and employers to have their private agreements certified as substitutes for the statutory provisions, for it was clear that nearly all private agreements fell short.

128. Id. § 65(1)(c). In Britain, there is no concept of exclusive representation with the corollary obligation that the union represent all workers in the bargaining unit fairly regardless of whether an individual belongs to the union. Cf. Vaca v. Sipes, 386 U.S. 171 (1967) (American unions, as exclusive representatives, have the duty to represent their members fairly). Traditionally, British unions have been seen as representing only their own members. Thus, section 65(c) has the effect of imposing a limited duty of fair representation.
129. Id. § 65(d).
130. Id. § 65(e).
of the requirements of section 65. To some extent, this parallels the prevailing American situation. Although non-union companies may have formal personnel procedures permitting employees to complain that their discharge was unfair, almost none of these procedures include any element of impartial review.

Compliance with ILO standards does not require a system of governmental tribunals. Conceivably, a government could meet its ILO obligations by mandating the use of private arbitration to settle discharge disputes. Most governments in democratic, capitalist countries, however, would find such a method an unacceptable intrusion into the workings of the private sector. To provide comprehensive protection against unfair dismissal, a capitalist government must therefore enact statutory procedures and then include exemptions for private arbitration, with the expectation that private parties will be motivated to develop their own arrangements. The British experience, however, indicates that such expectations are not realistic. Neither the statutory provisions nor the possibility of exemptions for private agreements spurred the further development of private agreements which fell a bit short of the section 65 requirements. It seems that once the statutory protection was available, the need for private arbitration was no longer evident. Even if employees and employers had wanted to experiment with private arbitration, the expense involved was seen as too great a disincentive.

Since the passage of the legislation, British unions and employee-staff associations have become actively involved with employers in determining when conduct warrants discipline. Internal grievance procedures on discipline matters have also become much more refined. Whether the failure of private parties to use section 65 is a cause for disappointment is thus not clear because the legislation has had the effect of persuading employers to collaborate voluntarily with their employees on the setting of disciplinary standards. 132

E. Impact of Britain's Statutory Guarantee

Since 1971, unfair-dismissal legislation has been strongly supported by all political parties in Britain. Although there have been political

131. It is not definite whether section 65(e) requires that every discharged person have the right to go to arbitration if the matter is not settled in the grievance stages. Some commentators believe that the statute does not require that the union invoked arbitration for every grievant whose case cannot be settled, as long as the refusal to go to arbitration is based on non-discriminatory grounds. See, e.g., S. Anderman, supra note 105, at 288-93. Because there have been very few applications under section 65, there is no body of case law authoritatively interpreting the meaning of section 65(e).

132. Subsequent to the Donovan Report, both major political parties published proposals for labor legislation. On this issue, the Labour government opined: "[o]ne effect of legislation will undoubtedly be to encourage the development of clear rules as to the circumstances in which
differences over the length of service that workers should have with a company before they qualify for protection under the statute, the main guarantees and remedies have remained untouched. The cost of government has been a controversial topic in Britain under the present Conservative government, but the system of industrial tribunals has never been a target in a cost-cutting campaign.

Perhaps the greatest change wrought by the introduction of protection against unfair dismissal has been in personnel practices. Aware that they would be liable for unfair dismissal, companies of all sizes reviewed their procedures on discipline and discharge. In so doing, procedures were written down and personnel managers and supervisors were instructed on their use. Unions and other employee groups became involved in the process of formulating disciplinary rules. Employees became much better informed as to what conduct would warrant discipline and with what severity. In addition, selection procedures and on-the-job training practices were improved to avoid employing persons who would not fit in with the employer's needs. Overall, the legislation has motivated employers to arrange their personnel practices so that the likelihood of imposing arbitrary, inconsistent, or unfair discipline is greatly reduced. Not only does it grant relief to those unfairly dismissed; it has also minimized employees' chances of being unfairly dismissed.

III. A Statutory Guarantee for the United States

In the past ten years the number of persons advocating that American employees be protected against unfair dismissal has notably increased. Some supporters of this protection have argued that the courts should recognize an implied term in the contract of employment, while others

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employees may be dismissed and for what reasons, and the improvement of voluntary procedures.

SECRETARY OF STATE FOR EMPLOYMENT, IN PLACE OF STRIFE, CMD. NO. 3888, para. 103 (1969). These expectations have been fulfilled only in part. See Lewis, supra note 109, at 718.

133. See supra note 88. When the qualifying period was raised from 26 weeks to one year by the Conservative government in 1979, unfair dismissal applications decreased by 20%. P. ELIAS, B. NAPIER & P. WALLINGTON, supra note 122, at 21 n.1.

134. See supra notes 74-76 and accompanying text.

135. Handling about 46,000 applications in 1978, the unfair dismissal system as a whole cost about £5 million (about $10 million). Hoffman, supra note 109, at 173.

136. One result has been professionalization of the personnel management field. Many companies now require or strongly prefer that their personnel managers have passed the examinations of the Institute of Personnel Management, the national professional association. A knowledge of unfair dismissal law and good disciplinary practice is necessary to pass the written examination.

137. See, e.g., Blackburn, supra note 8, at 491-92 (supporting the view that common law theories, tort as well as contract, should be developed because legislation is unlikely at this time); Note, Challenging the Employment-At-Will Doctrine Through Modern Contract Theory., 16 U. MICH. J.L. REF. 449 (1983) (supporting the view that contract principles should be developed).
have preferred that legislation, usually federal, be enacted. Both positions, however, have drawbacks.

Having state courts adopt the principle of fair dismissal would, besides proceeding at a slow rate, result in a lack of uniformity to the extent each state defined the doctrine differently. Some states might define the scope of the protection so narrowly as to offer a remedy to only a small proportion of those unfairly dismissed. Multi-state employers would have to keep track of varying state developments, thus undermining the practice of standard personnel policies. In addition, protection enforced only by a lawsuit inevitably means expensive, time-consuming litigation. While upper-level employees might pursue their remedies through a lawsuit, the rest of the workforce most likely would find the expense and doubtful outcome of protracted litigation a daunting prospect. Relying on the courts to enforce a right of fair dismissal would mean that a significant number of unfairly dismissed persons might never attempt to vindicate their rights.

Federal legislation would certainly apply uniformly throughout the nation and it might offer comprehensive protection, depending upon the enforcement mechanism chosen. Its main practical disadvantage, however, is the improbability that federal legislation on this issue will be passed in the foreseeable future.

Given the drawbacks in state judicial or federal legislative proposals, the best solution would be to make state legislation the vehicle for granting protection against unfair dismissal. The challenge is to devise a state-based system which will provide a modicum of uniformity throughout the nation and can be administered at modest cost. This Article proposes that this can be done by having each state enact a statutory guarantee against unfair dismissal that would be enforced through the same procedures presently used for unemployment compensation claims. Under this proposal, costs will be contained, no additional government bureaucracy need be created, and state courts will not be flooded with new cases.

Uniformity in this proposed system would be provided by the use

138. See, e.g., Summers, supra note 8 (favoring legislation); see also Stieber, Protection Against Unfair Dismissal: A Comparative View, 3 COMP. LAB. L. 229 (1980) (favoring federal legislation); Note, supra note 6 (advocating state legislation).

139. The division of the labor force refers to those below the median wage rate. The median weekly earnings for full-time employed males are $379; for full-time employed females, the median weekly earnings are $248. See supra note 12. Unless legal aid is available, it is unlikely that persons earning less than $20,000 per year who have been recently discharged will retain private counsel.

140. It is assumed that a fairly high percentage of those discharged from employment presently file for unemployment compensation benefits. Most employees are aware that persons can sometimes be qualified to receive benefits even after a discharge. There are no reported statistics or reliable estimates on the number of persons who do not even file a claim because they are aware they would be disqualified on the grounds of willful misconduct.
of existing unemployment insurance programs. All states have unemploy-
ment insurance statutes which conform to the requirements of the federal
participatory program. All states have an agency administering their
unemployment compensation system. The state systems typically re-
quire that a complaint be filed at a local office and all provide for
a hearing before an agency hearing officer if the claimant is deter-
mined to be disqualified. All state systems channel appeals into the
regular state court system. Finally, the grounds for disqualifying per-
sons from receiving unemployment compensation benefits are substan-
tially similar in all states. This remarkable uniformity in state prac-
tice seems from the way in which unemployment protection first arose
in the United States.

A. Uniformity in the State Systems

In 1933, the United States was one of the few industrialized nations
without any form of unemployment insurance and only five states had
any such program of their own. With unemployment at unprecedented
levels, momentum built up in support of an unemployment insurance
program which culminated in the passage of the Social Security Act
in 1935. By 1937, all forty-eight states, the District of Columbia,
Alaska, and Hawaii had enacted unemployment insurance statutes which
qualified for participation in the new program. Because of the ex-

141. See National Comm’n on Unemployment Compensation, Unemployment Compensa-
142. Id. sec. 7.0.
143. Id. sec. 7.3.
144. Id.
145. Id. sec. 4.4.
146. For an exhaustive review of then-existing programs, see A. Epstein, Insecurity: A
Challenge to America (2d rev. ed. 1938).
ing administration of President Franklin D. Roosevelt acted quickly to meet this pressing need.
On June 29, 1934, President Roosevelt established the Committee on Economic Security, chaired
by Frances Perkins, Secretary of Labor. A. Epstein, supra note 146, at 672. After extensive
hearings, the committee issued its final report on January 17, 1935, a report which contained
the main elements of the social security legislation that would be passed within the year. See generality id. at 684-96.
Because of the urgency of the unemployment situation, Part IX dealing with unemployment
grew into effect immediately on January 1, 1936. See I. Broden, Law of Social Security and
Unemployment Insurance § 1.04, at 10 (1962).
148. See I. Broden, supra note 147, § 8.01, at 312-13. Under the Social Security Act of
1935, the unemployment insurance program is a participatory federal scheme. Essentially, it is
a federally aided, state-administered program; the states have great autonomy over their pro-
grams. See id. at 311-12. Federal coordination and control are injected into the system, however,
because the Secretary of Labor must determine that a state program is qualified under the Social
Security Act before any provision of federal funds to the state can be authorized. See 42 U.S.C.
treme rapidity with which the Social Security bill went through Con­gress and with which the states enacted their own legislation to qualify for participation in the unemployment insurance program, substantial reliance was necessarily placed on the recommendations included in the final report of the Committee on Economic Security.149 Moved by the need to act quickly, the states simply incorporated the suggested factors into their own statutes. As a result, even though each state has its own legislation, there is great uniformity in the reasons for disqualification.

The general premise underlying the unemployment compensation pro­gram is that persons who are unemployed through no fault of their own should be provided with government financial assistance to tide them over until they can find new employment.150 To be eligible, the unemployed person must be able and available for work. Generally, workers are disqualified from receiving benefits if they refuse suitable work, voluntarily left work without good cause, were discharged for misconduct, or are out of work because of a labor dispute.151 Every state disqualifies persons unemployed because they were discharged for work-related misconduct, usually for a wanton or willful disregard of the employer’s interests.152

1. State unemployment compensation procedures— This Article’s proposal for a statutory guarantee of fair dismissal is designed to incorporate those procedures already utilized by the states in unemployment compensation cases. By having certain procedures serve a dual function, costs would be contained and the procedural requirements placed on dismissed workers would be streamlined. A survey of the current unemployment compensation claims procedure as it operates in Pennsylvania reveals how such a state agency can be made to serve more than one purpose.153

Presently, an employee dismissed in Pennsylvania files for unemploy­ment compensation at the local office of the Bureau of Employment Security. In so doing, claimants fill out a form giving information concerning their last employment and the reasons for the cessation of that employment. Claimants are directed to check one of the following as the reasons for their separation from work: quit, discharged, laid-off, other. Following the filing of the claim, the employer is sent a

149. See A. Epstein, supra note 146, at 732-45.
150. The phrase “through no fault of their own” appears in many state statutes. See, e.g., Pa. Stat. Ann. tit. 43, § 752 (Purdon 1964). Because the program was designed to provide short-term relief only, unemployment benefits terminate at a certain point regardless of whether the claimant has managed to find a new job.
151. See I. Broden, supra note 147, § 8.01, at 312-13.
152. See id. § 12.01, at 468 n.1 (citing cases).
form requesting information such as the claimant’s employment dates, job position, and wages. On this form the employer is asked the reason for the claimant’s separation from employment. When the local Bureau of Employment Security office receives the employer’s form, a telephone follow-up is made if the employer’s information does not correspond with that given by the claimant. For instance, the employer may have stated that the claimant quit voluntarily and was not discharged, or that the claimant was discharged for willful misconduct rather than that there was no work for the claimant.

At this point the local office of the Bureau of Employment Security makes a determination of the claimant’s eligibility for unemployment compensation. A notice setting forth the eligibility finding is then mailed to the parties. If the claimant is disqualified, the Bureau must cite some reason from the disqualification section of the unemployment compensation statute. In discharge cases, the usual reason is the willful misconduct of the employee.

If disqualified, the claimant may file a notice of appeal. The time between the filing of the notice and a hearing is relatively short, usually three weeks. Hearings are conducted by referees of the Unemployment Compensation Board of Review at the Board offices. The hearings are informal, and the proceedings are tape recorded. The hearings take place in small conference rooms, with the referee at the head of the table and the parties on the opposite sides of the table. Although parties are sometimes represented by lawyers, this is not standard. Companies, especially small employers, are often represented by a personnel manager, sometimes accompanied by a supervisor. Claimants may come alone, be accompanied by a friend, or be represented by a paralegal from Community Legal Services. Although claimants are permitted to have private counsel, most appear at the hearing without counsel.

The referee’s decision is issued quickly, often within ten days of the hearing. The losing party may appeal to the Unemployment Compensation Board of Review. In filing a notice of appeal, no reason for appeal need be given. After the notice is filed, a transcript of the proceedings is made from the tape recording. The parties receive a copy of the transcript free of charge. The parties file written briefs which are important because oral argument before the Board of Review is

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154. The list of statutory reasons can be found at id. § 802.
155. Willful misconduct is behavior which evidences (1) wanton and willful disregard of the employer’s interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which an employer can reasonably expect from an employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer’s interests or the employee’s duties and obligations. Frick v. Unemployment Comp. Bd. of Review, 31 Pa. Commw. 198, 375 A.2d 879 (1977).
156. PA. STAT. ANN. tit. 43, § 822 (Purdon 1964).
rare. The Board normally makes its decision on the basis of the record and the briefs.157

Either party can appeal to Pennsylvania’s Commonwealth Court within thirty days of receiving the Board of Review’s decision.158 The court’s scope of review is limited to two questions: whether the Board of Review’s decision was supported by evidence in the record and whether the Board’s decision was within its statutory authority.159 Decisions of the Commonwealth Court may be appealed to the Pennsylvania Supreme Court but appeals in discharge cases are rare.

2. Issues raised in unemployment cases—Before turning to a discussion of how unemployment claims procedures can accommodate the administration of state legislative protection against unfair dismissal, it is important to consider the issues referees are called upon to decide in discharge cases. Because the courts have distinguished a valid basis for discharge by an employer from willful misconduct which disqualifies a claimant from receiving unemployment compensation, it might be inferred that labor arbitrators and unemployment compensation referees are accustomed to approaching discharge cases in very different ways.160 This is not, however, the case; referees applying the standards of the unemployment compensation statute frequently employ the same method of analysis as that used by arbitrators deciding whether an employer had just cause to discharge under a collective bargaining agreement.161

A few examples can illustrate this point. Arbitrators often find that discharge was unjust because the seriousness of the offense did not warrant such severe discipline. Similarly, a single act of serious misconduct may constitute willful misconduct disqualifying the claimant from benefits,162 but a single, minor, and casual act of negligence or carelessness may not.163 Foreknowledge of the consequences of an act is a factor considered by arbitrators in determining whether a discharge was just. Similarly, an employee may not be found to have engaged

157. The Board of Review may remand for more testimony if a relevant issue was not addressed at the hearing. Id. § 824.
158. Id. § 830.1.
159. Id.
160. Theoretically, in determining whether the discharge should be upheld, arbitrators ask only whether the employer had just cause for discharge. Under this approach, the willfulness of the employee behavior is irrelevant; only the effect of the misconduct is important.
161. Professor Clyde Summers has noted that there is a broad consensus among arbitrators on the underlying principles that should be applied in discipline and discharge cases. See Summers, supra note 8, at 501. See also Stieber, supra note 138, at 237-38.
in willful misconduct when there was no warning about the consequences of the act and the seriousness of the offense was not readily apparent.\textsuperscript{164} Arbitrators will apply elementary notions of fairness in determining whether a discharge was just, such as asking whether discipline was evenly imposed or whether the employer's policy on discipline could be viewed as rational. Similarly, courts have refused to find willful misconduct disqualifying when employers were inconsistent in their application of discipline\textsuperscript{165} or when their disciplinary policy punished someone innocent of misconduct.\textsuperscript{166} The reasonableness of a supervisor's order and the reasonableness of the employee's refusal to obey that order are issues considered by both arbitrators and referees.\textsuperscript{167} The approach of arbitrators and referees is also similar when the employer's asserted reason for discharge, an admitted act of misconduct, appears to be mere pretext.\textsuperscript{168}

Over the range of discharge cases, unemployment compensation referees are applying many of the concepts of fairness developed by labor arbitrators under the just cause standard. There is one type of case, however, where the standards applied by referees and arbitrators are quite different. This occurs when an employee, though acting in good faith, cannot perform assigned tasks in a satisfactory manner. This may be due to mental or physical inability, or to factors such as transportation difficulties and family responsibilities which prevent the employee from regularly appearing at work on time. Arbitrators in these cases would find that the employer had just cause for discharge. Unemployment compensation referees, however, would find that the employee's discharge had not stemmed from willful misconduct and would therefore allow compensation.

\textsuperscript{164} See, e.g., O'Keefe v. Commonwealth Unemployment Comp. Bd. of Review, 18 Pa. Commw. 151, 333 A.2d 815 (1975) (employees did not realize they were not allowed to eat stale pastries).


\textsuperscript{166} In Paige v. Commonwealth Unemployment Comp. Bd. of Review, 39 Pa. Commw. 141, 394 A.2d 1318 (1978), the employer discharged both persons engaged in a fight after work in the employee washroom. The court refused to disqualify the claimant from receiving benefits, because the unrebutted evidence indicated that the claimant was not the aggressor and could not have avoided the aggressor. \textit{Id.} at 1319.

\textsuperscript{167} See, e.g., Robertson v. Commonwealth Unemployment Comp. Bd. of Review, 53 Pa. Commw. 307, 417 A.2d 293 (1980) (holding that a blanket refusal by employee to work overtime was unreasonable and constituted willful misconduct); cf. Horace W. Longacre, Inc. v. Commonwealth Unemployment Comp. Bd. of Review, 12 Pa. Commw. 176, 316 A.2d 110 (1974) (holding that employee who was going off on break time and refused order to return to work was reasonable in doing so and not disqualified).

\textsuperscript{168} See, e.g., Panaro v. Commonwealth Unemployment Comp. Bd. of Review, 51 Pa. Commw. 19, 413 A.2d 772 (1980) (employee misconduct was so removed in time from the date of discharge as to cast doubt on the employer's assertion that the discharge was based on the misconduct).
B. Defining the Statutory Guarantee

The core element of this Article's proposal is a statute enacted in every state which provides simply that "every employee has the right to be dismissed fairly and for just cause." No complex statutory formula is required to provide effective protection against unfair dismissal, as several decades of experience in the unionized sector demonstrate. Indeed, thousands of collective bargaining agreements in the United States contain a clause which states simply that the employer has the right to discharge "for just cause."\(^{169}\) When an employee covered by a collective agreement is discharged, the union may challenge the management action by asserting that the employer lacked just cause to discharge the employee. In applying the just cause standard, arbitrators ask not only whether the employer had a substantively valid basis for the discharge, but also whether the employer followed fair procedures in the circumstances.\(^{170}\)

One attractive feature of the just cause standard is its straightforward and non-technical nature. By understanding the substantive standard, those closest to the discharge (the supervisor, the employee, the union representative) can readily apply the standard to the circumstances and gauge the likelihood that an arbitrator will uphold the discharge. In many instances, the employee and the union will realize they have no substantial case against the employer and will not process the grievance through to arbitration, thereby not burdening the system or incurring unnecessary costs. This self-assessment of the merits of the case is a vitally important feature of the easily comprehensible standard. Not only does it reduce the caseload of arbitrators, it does so without sacrificing the confidence of employees in that process established to enforce their rights. Therefore, drafters of state legislation should avoid unnecessarily legalistic language. Rather, they should ensure that the phrasing of the statutory guarantee is easily understood by those it is designed to protect.

1. Complaints procedure—Any claim of unfair dismissal under the state statute should be filed within ten weeks of termination, unless the claimant works under a collective bargaining agreement. As will be discussed, the filing deadline should be extended for those in this latter category.\(^{171}\) The most efficient system in terms of cost to the state and burden on the claimant would be to have complaints of un-

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169. Estimates vary but the lowest estimate is that at least 80% of collective agreements provide that the employer can discharge only "for just cause" or "for cause." 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. (BNA) 40:1 (1979).

170. For a brief discussion of the principles of procedural fairness applied by arbitrators, see Summers, supra note 8, at 503-04.

171. See infra text following note 185.
fair dismissal made at the same time the discharged person files for unemployment compensation at the local office of the state agency. When claimants check off "discharged" on the claim form as the reason for their separation from work, the agency employee should ask whether they will also be claiming that they have been unfairly discharged. An explanation of the right to be dismissed fairly and for just cause should be provided at that time, either by the agency employee or by providing claimants with a pamphlet containing the relevant information. This explanation might include the names of specialized agencies empowered to deal with complaints that a discharge was based, for example, on union activity or race discrimination.

In many cases involving alleged misconduct, the claimant will be found guilty of misconduct and thus ineligible for unemployment compensation benefits, with the case proceeding to a hearing only if the claimant wishes to press the matter. If an employee is claiming unfair dismissal, on the other hand, the case must proceed to a hearing so that the referee can decide the fairness issue and determine an appropriate remedy. Hence, it is essential that a local-office employee explain to claimants in these cases that their claim has two distinct aspects with different procedures for each.

2. Application of the guarantee—When a claim for unemployment compensation from a discharged employee is filed, state unemployment compensation referees currently must scrutinize the employer's reason for discharging the claimant. In nearly all cases, the conduct of the employee is at issue. If the referee determines that the employee was discharged for willful misconduct, the employee will be denied unemployment compensation. The inconsistency between current unemployment compensation standards and the arbitral just cause standard mainly arises when an employer has good reason to discharge an employee not guilty of willful misconduct. For example, consider a case where a mother frequently is absent from work because of a sick child and alternative child-care arrangements cannot be made. An employer is certainly entitled to discharge a person who is repeatedly absent from work because the needs of the business demand that the job be performed. It is equally clear, however, that the woman has not acted willfully to destroy the employment relationship. Accordingly, the state referee would determine that the woman is entitled to unemployment benefits for there is no reason to deny her the safety net of unemployment compensation. Nevertheless, the employer did have just cause to discharge the woman.

This factual situation illustrates that state unemployment compensation referees will need to make two separate inquiries in discharge

172. See supra text accompanying notes 152-58.
cases: first, whether the employee caused his or her own discharge through willful misconduct, and, second, whether the employer acted fairly and had just cause for discharge. Referees are already skilled in making the first determination. The standards used in making the second determination are not alien to referees, though many referees may not be entirely familiar with them. A short course on the just cause standard should be more than sufficient to acquaint referees, already familiar with discharge cases, with the nuances of the new standard. Some states may choose to have only a portion of their referees trained to decide unfair-dismissal cases. With less than a full complement of referees specializing in unfair-dismissal cases, the cost of these training seminars can be minimized.

Courses designed to educate unemployment compensation referees on the just cause standard should be easy to develop. Arbitrator training programs have already devised course materials and several excellent text references are currently on the market. Thus, the cost of developing courses and course materials should be modest. States could instead commission experienced arbitrators on a fixed-fee basis to hear unfair-dismissal cases, thereby obviating the need for training any referees.

3. Remedies—Effective remedies are essential to the success of any system seeking to provide comprehensive and speedy protection against unfair dismissal. In labor arbitration, reinstatement is the standard remedy. There is no damages award, but reinstated employees may receive backpay for the time they were out of work. Under this Article's proposed state statute, reinstatement to the former job or re-employment with the same employer in another job should be permitted, but only in those instances where the claimant and the employer accept it as a remedy and the hearing referee determines that it would be appropriate in the circumstances. In reinstatement cases the claimant should receive backpay for the period between the date of discharge and the date of re-employment.

173. In most cases of willful misconduct, it will be found that the employer had just cause to discharge. There may be cases, however, where certain misconduct typically has been ignored at the workplace. It would be unfair for an employer to discharge an employee for an offense usually overlooked. Even under the willful misconduct standard it has been held that an employee could not have intended to commit an offense punishable by discharge in such circumstances and thus was qualified to receive unemployment compensation benefits. See Woodson v. Commonwealth Unemployment Comp. Bd. of Review, 461 Pa. 439, 336 A.2d 867 (1975).

174. The Labor and Employment Section of the American Bar Association has a pilot arbitrator-training program. The New York State School of Industrial Relations at Cornell University has a similar program. Both are designed for persons with little or no arbitration experience. Many business and law schools offer courses on arbitration.


176. See F. ELKOURI & E. ELKOURI, supra note 175, at 648.
Although reinstatement is the standard remedy in labor arbitration, it should be used sparingly in non-union settings. Even for unionized employees, reinstatement should not be the automatic remedy. Employees who have been discharged and had their union support their grievance can expect the union's solidarity to provide them organized support once they are back on the job. A worker in a non-union setting, however, may find the former workplace a hostile environment, with co-workers wary of siding with someone so clearly out of favor as to be fired. Even a unionized employee, especially in white-collar settings, may find it difficult to resume employment if the atmosphere at the workplace is similar to that preceding the discharge. Hence, referees must be aware that a short period of re-employment is rarely an effective remedy. It is usually preferable to award damages and have the claimant start afresh in a new job.

The standard remedy under this Article's proposed statutory system would be a monetary award, paid by the employer directly to the employee. This award would have two components, a basic award and a compensatory award. All workers found to have been unfairly dismissed would receive a basic award calculated according to a statutory formula. The statutory formula would provide for an amount based on length of service, perhaps one week's pay for each year of service, with a minimum award of one month's pay. The compensatory award would be awarded only at the referee's discretion and would compensate the employee for any actual loss suffered, but only to the extent that the basic award is considered inadequate compensation. The referee should take into account factors such as loss of pension rights, impact of loss of seniority in taking a new job, emotional distress, and similar items. The referee should also take into account whether the basic award is too small an amount to restrain employers from discharging unfairly. This might be a problem with newer employees because employers may find it worthwhile to discharge them arbitrarily if the only cost is payment of a small basic award. There should be a statutory ceiling on the compensatory award, perhaps one year's salary or an amount equaling the national median salary of a full-time employee.\(^{177}\)

Whether any compensatory award would be appropriate for a reinstated claimant would be a matter for each state to decide. In cases where the unfairly discharged employee suffered substantial emotional distress, for example, after being accused of an offense such as theft or drug usage, reinstatement with backpay is hardly an adequate remedy.

\(^{177}\) Because claimants must state what their wages were at the time of separation when filing for unemployment compensation and employers verify this information, there should be no difficulty in using the employee's wages in making these calculations. If a national median figure were used, the monthly information issued by the Bureau of Labor Statistics of the U.S. Department of Labor could be used as an update.
and compensatory awards should be permitted. Similarly, the state may decide that receipt of both the basic award and unemployment compensation benefits would be double-dipping, and modify the benefits period to exclude the initial period of unemployment that the basic award is designed to cover. 178

Although the amounts provided under the proposed system do not match those some juries might award in particularly emotionally appealing cases, discharged employees as a group should prefer the predictability of the award and the prompt, inexpensive resolution of their complaint. Because the aim of the statute is to guarantee protection against unfair dismissal, the amounts suggested should provide a financial disincentive sufficient to dissuade employers from terminating employees without cause. In addition, the amounts suggested would in most cases provide adequate compensation for actual loss suffered, assuming that most discharged persons can find another job within a year. Finally, it is not unreasonable to exclude the possibility of excessive, windfall jury awards. To do otherwise and permit resort to the courts could undermine the uniformity, comprehensiveness, and predictability of the proposed statutory system.

4. Coverage—In keeping with the basic premise of the ILO Convention that a government should guarantee protection for all workers, no category of employees should be excluded unless it has been guaranteed equivalent protection under another statute. In particular, lower- and middle-level managers responsible for devising and implementing the employer's policies should not be excluded on grounds that they are agents of the employer. The belief that managers need no protection is outdated, as any survey of cases challenging the employment-at-will doctrine reveals. This broad protection readily blends into the framework of the statutory proposal, because the coverage already required by the federal unemployment compensation participatory program is extremely broad, with agricultural workers the main category likely to be excluded. 179

States may wish to exclude from coverage those persons who have been with the employer for only a short time. In effect, such an exclusion is a realistic acknowledgment that a new worker may not fit as planned into the organization. Because this usually becomes apparent within six months to a year, the exclusion should not be extended to

178. If a person is unemployed for a long period of time, unemployment benefits may run out. The state may therefore wish to tack an equivalent period on to the end of the benefits period. For example, if a person has been employed for 10 years and is unfairly dismissed, the basic award would be the equivalent of 10 weeks of pay. The state might require that the claimant return the unemployment compensation benefits received for the first 10 weeks of unemployment. In calculating the claimant's eligibility for benefits, the state would thus count the person's eleventh week of unemployment as week one.

179. See National Comm'n on Unemployment Compensation, supra note 141, sec. 3.0.
employees with more than one year of service. Without this exclusion, protection would attach from the first day and some employers might hesitate to hire a new worker unless they were certain they would be satisfied with the applicant's performance. To encourage employers to hire, it may therefore be necessary to give employers some leeway to discharge during the first few months of employment; however, care should be taken that this right to discharge at will is not abused.\footnote{180}

An exclusion for low-service employees effectively leaves workers in high turnover and seasonal industries without protection. Because employees in these industries are often poorly paid, they are unlikely to be able to fight effectively against unfair or discriminatory discharge.\footnote{181} Hence, any exclusionary clause based on length of service should be carefully scrutinized to determine if it will exclude those most in need of protection.

C. Interface with Arbitration

The states should exclude from the benefit of the statutory system only those persons who have access to a private dispute-resolution system which on the whole is as favorable as, though not necessarily identical to, the state system. To so qualify, the private system must guarantee the discharged worker three things: first, the right to be dismissed fairly and for just cause; second, the right to a hearing before a neutral arbitrator;\footnote{182} and third, the right to receive adequate remedies, such as reinstatement with backpay. If these criteria are met, the state can certify the private system as an alternative forum for the resolution of discharge cases.

Most often mentioned in this regard is the system of labor arbitration whereby employers having unionized employees agree that disputes over discipline and discharge may be resolved through a grievance and arbitration procedure.\footnote{183} Arbitration is an approved method of dispute

\footnote{180. The probationary period need not be as long as one year. State legislatures may find six months sufficient. The British practice indicates that a shorter probationary period compelled employers to consider their needs and the aptitude of the job applicants more carefully, thus improving hiring policies.}

\footnote{181. See, e.g., Heason, Laboring: At fast-food chains, the help is low-priced, too, Philadelphia Inquirer, Jan. 17, 1983, at 1 (noting fast-food industry turnover of 300% a year).}

\footnote{182. To be neutral, the arbitrator must be an outsider to the company, and must be selected by both the employer and the employee. Arbitrators paid by one side only would not be considered neutral. Although presently rare, this does occur when a nonunion company voluntarily chooses to have an outsider arbitrate a dispute.}

\footnote{183. Most agreements have a multi-step procedure whereby the grievance is considered by union and management representatives, starting at the lowest level and working upwards. Arbitration is the final step and usually the union must invoke that step in writing. Not all grievances are arbitrable, depending upon the scope of the arbitration clause in the contract. For a concise description of the operation of the grievance procedure, see A. Cox, D. Bok & R. Gorman, Labor Law: Cases and Materials 513-53 (9th ed. 1981).}
resolution under the ILO Convention, but only if the arbitration procedure provides for a guaranteed right to a hearing. 184 Most grievance/arbitration procedures in collective bargaining agreements fail to meet this requirement. A hearing only occurs when the union invokes the last stage of the arbitration process; however, the union has discretion to decide not to take a case to arbitration if the chances of winning appear to be low. 185

Recognizing that grievance/arbitration procedures are part of the fabric of the labor-management relationship, state statutes should provide that persons who can utilize such a procedure not be allowed to file under the state system until the private procedure has been completed. If the grievance procedure has been completed and the discharged person's case has not gone to arbitration, the discharged person should then be allowed to file a claim with the state system. This filing should be required to be made within one month of the completion of the last step of the grievance procedure.

This accommodation between the private labor-arbitration system and the state unfair-dismissal system should satisfy employers who object to employees getting "two bites at the apple." In addition, unions should not be unduly worried that the state system will somehow diminish the attractiveness of unionization to the average employee. First, private arbitration will be preserved and, in most instances, will probably offer justice more closely tailored to the standards of the individual workplace. Second, should a case not go to arbitration, employees may seek the assistance of their union at the hearing before the unemployment compensation referee. In Britain, having the union provide someone to represent the member at the tribunal hearing is seen as an important benefit of union membership.

From a union's viewpoint, providing the union member with a lawyer at the state hearing, rather than taking the case to arbitration, is the less expensive alternative. 186 A union which loses a fair representation suit may be liable for a portion of the damages awarded the discharged worker, even where the employer is solely responsible for the discharge and where the union acted in good faith. 187 A union confronted by a weak discharge case faces a dilemma: either it accepts the expense of going to an arbitration it will probably lose or it risks a potentially costly fair representation suit. The decision to utilize the state system would probably protect a union that fails to invoke arbitration from allegations by its members that the union breached its duty of fair

184. See Convention, supra note 2, art. 8(1).
185. See Vaca v. Sipes, 386 U.S. 171, 191-93 (1967) (noting that this is accepted practice).
186. In a typical arbitration, for instance, the union must pay not only for its lawyer's time, it must also pay one-half of the arbitrator's fee.
187. See Bowen v. U.S. Postal Serv., 103 S. Ct. 588 (1983); see also infra note 189.
This would mean that the employer alone would bear the cost of unfairly dismissing an employee, something not found in present law.

D. Potential Impact of an American Statutory Guarantee

In view of American employer resistance to the erosion of the employment-at-will doctrine, one might conclude that a statutory guarantee of fair dismissal was somehow detrimental to business. Yet, it is difficult to envision how such a guarantee could harm companies. If, as commonly claimed, most employers already use fair personnel practices, the enactment of a fair-dismissal statutory guarantee should have no impact whatever because a finding of unfair dismissal would be a rarity. Some employers may not intend to dismiss unfairly but lack sound personnel policies designed for consistent application; hence, discipline may be meted out unevenly and, therefore, unfairly. In these circumstances, referees might hold that the employer dismissed unfairly under the statutory guarantee and award damages according to the statutory formula. Such determinations should persuade these employers to re-evaluate their personnel policies and codify their fair practices into a statement of official personnel policy. Both employees and supervisors would then have guidance on disciplinary standards and there should be fewer instances of unfair dismissal.

Of course, a few employers may wish to control their workforce in an autocratic fashion, and retain the right to fire their workers regardless of the absence of valid grounds for discharge. Considerations of equity demand that such situations be rectified. Yet, equity need not be gained at the expense of efficiency for it is highly unlikely that such employers run a cost-efficient operation. A workforce subject to erratic and arbitrary discharge is almost certain to have a poor productivity and quality-control record. Employers who hire workers

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189. Bowen v. U.S. Postal Serv., 103 S.Ct. 588 (1983). In Bowen, an employee was dismissed after an altercation at work. The union processed his grievance through the steps of the procedure, but the national union failed to take the case to arbitration. The Supreme Court held that a union could be held liable for the part of the employee’s backpay even though the employer was solely responsible for the unfair dismissal. Id. at 595. For a discussion of the practical impact of this case, see When a Union Fails to Push a Grievance, Bus. Wk., Feb. 14, 1983, at 130E.

190. Current interest in Japanese management practices has led some American employers to introduce personnel programs, such as quality circles, as part of a policy of upgrading productivity and quality control through improving employee morale. Building an employer-employee
casually and then fire those who were erroneously hired unnecessarily incur all the costs associated with employee turnover. The enactment of a statutory guarantee could have a positive impact on such employers by influencing them to adopt rational disciplinary standards.

CONCLUSION

The United States should act now to conform to world standards on unfair dismissal, standards that other highly industrialized nations have managed to implement. The experience of Great Britain demonstrates that establishing a statutory guarantee and creating a system to enforce that right need not disrupt labor-management relations, nor must it be expensive and highly legalistic to be effective. Moreover, the British legislation has had the salutary effect of encouraging employers to improve their disciplinary policies and procedures.

This Article has proposed a system, in many ways similar to the British system, that would conform to world standards on unfair dismissal and provide a modicum of uniformity throughout the nation, while placing control firmly at the state level. The proposed system would use existing state unemployment compensation procedures, thus providing comprehensive coverage at modest additional cost. This modest cost and worker familiarity with hearing procedures should encourage a high proportion of those unfairly dismissed to avail themselves of the opportunity to challenge their dismissal. In addition, the right to be dismissed fairly and for just cause is a guarantee already familiar to labor relations practitioners and readily understood by employees.

Those criticizing the enactment of statutory protection against unfair dismissal often focus on the difficulties of guaranteeing such a right — especially the cost. Although cost estimates are not given, these critics assume costs will be unacceptably high, whatever the figure. Supporters of a statutory guarantee assert that a democratic society should not tolerate fundamental inequity merely because of the cost of eliminating the injustice. Although this latter position has merit, it fails to respond to an issue of critical concern to legislators: the feasibility of new fiscal expenditure in a decade of cutbacks in public service.

One of the most important features of this Article's proposed statutory system is its modest additional cost to the public. It would not require a new bureaucracy, nor would it demand the hiring of many new employees to cope with an increased caseload. Rather, it would make additional use of an existing state agency, requiring certain employees relationship based on fair treatment is seen as essential to the success of such efforts. See generally B. Fisher, Remarks at the Meeting of the Philadelphia Chapter of the Industrial Relations Research Association (Oct. 13, 1981), reprinted in 108 Lab. Rel. Rep. (BNA) 168 (1981).
to perform one new task, at little extra cost. Finally, although enactment of federal legislation on unfair dismissal in the current political atmosphere is highly unlikely, this Article proposes that a high degree of national uniformity can still be achieved merely by requiring each state to enact legislation guaranteeing the same right and providing for enforcement of the right through the same agency in each state.

The pro-business political climate arising out of the current recession should not be hostile to such legislation. Some critics claim that the cost of complying with employment protection legislation, when no similar burden is placed on employers in other countries, is one reason why American business is uncompetitive. Even if somewhat valid in other contexts, this criticism certainly does not apply here. The protection against unfair dismissal typically granted in nearly all advanced industrial societies far exceeds the protection currently afforded American workers. Thus, if fair-dismissal legislation were enacted, American employers would not be operating at a competitive disadvantage in this area. That American multinational corporations routinely comply with these standards in their overseas operations indicates that imposing such standards on employers in this country would not harm American business.