

# A COMPARATIVE ANALYSIS OF THE TERMINATION-AT-WILL DOCTRINE IN THE UNITED STATES AND GREAT BRITAIN

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## *Resumen*

*Este estudio compara las instituciones jurídicas usadas en los Estados Unidos y en Inglaterra con respecto al despido extra-judicial de un empleado. Este estudio también discutirá las ventajas de un sistema uniforme para el despido injusto. Finalmente este estudio contrastará la eficiencia y efectividad de costos sociales del Tribunal Industrial de Inglaterra con el largo y costoso litigio característico de las cortes de los Estados Unidos.*

## INTRODUCTION

In the early years of the twentieth century, Great Britain and the United States followed a similar laissez-faire<sup>1</sup> approach to the termination of an at-will employee.<sup>2</sup> This laissez-faire approach was characterized by an attitude which disfavored the employee protected by neither a trade union contract nor a civil service statute. As a result the at-will employee was forced to seek redress for an unfair discharge amid a patchwork of hostile common law. By the early 1970's, both countries began to change their approach to the terms of employment and discharge of an at-will employee. The two countries have, however, effectuated this change using radically different methods. In the United States, judge-created remedies predominate. State judiciaries have independently carved out exceptions to policies which support the employer's absolute right to terminate an at-will employee. In Great Britain, where the judiciary is more restrained, legislative

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1. The philosophy of laissez-faire was popularized in A. SMITH, AN INQUIRY INTO THE WEALTH OF NATIONS (1776). Smith stressed minimal government control over the economy and suggested that individuals pursuing independent economic interests would best benefit the economy.

2. An employee unprotected by a labor agreement or contract is termed an "at will" employee and may generally be discharged for any or no cause by the employer.

remedies predominate. In 1971, Parliament began formulating the comprehensive scheme, which now protects the vast majority of at-will employees from unfair discharge.

Changes in the law of termination-at-will have proceeded along a rather tortuous course. One reason for the general reluctance of the legislatures and courts to change the law is the historically recent appearance of the at-will doctrine. The concepts which structure the termination-at-will doctrine are derived from the laissez-faire philosophy of industrialization. Before the industrial revolution, English and American common law courts presumed that an at-will hiring was for at least one year. This presumption was later displaced by the termination-at-will rule<sup>3</sup> adopted in both Great Britain and the United States.

The persistence of the termination-at-will doctrine may also be attributed to the lack of any special interest group advocating legislative change. During the New Deal<sup>4</sup> and Fair Deal,<sup>5</sup> there was little done on behalf of job security for non-unionized employees. The situation for unorganized laborers in Great Britain was much the same. The reason being that labor unions had nothing to gain and much to lose by advocating job security for unorganized laborers. In any case, Parliament had, therefore, maintained a "hands off" position on the at-will doctrine, in compliance with the policies of both major parties.<sup>6</sup>

During the 1970's, a drastic change in attitude toward termination-at-will occurred in both countries. In *Frampton v. Central Ind. Gas Co.*,<sup>7</sup> an Indiana court carved out the first major exception to termination-at-will. The exception was based on the right to assert a workmen's compensation claim without fear of retaliatory discharge.<sup>8</sup> The following year in *Monge v. Beebe Rubber Co.*,<sup>9</sup> a New Hampshire court ruled that an employer could no longer terminate an employee in bad faith. In *Fortune v. National Cash Register Co.*,<sup>10</sup> a Massachusetts court concluded that employment contracts were subject to an

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3. See *infra* notes 22-24 and accompanying text.

4. The "New Deal" is an expression dating from Franklin Roosevelt's acceptance speech at the 1932 Democratic Convention. The implementation of the New Deal continued until January 1939. D. A. SHANNON, TWENTIETH CENTURY AMERICA 355 (1963).

5. The "Fair Deal" was Harry Truman's attempt to continue Roosevelt's social and economic program, e.g., increased minimum wage and social security benefits.

6. See CRONIN AND GRIME, LABOUR LAW 117 (1970) (describing the lack of legislation as "inexplicable").

7. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973).

8. *Id.*

9. 114 N.H. 130, 316 A.2d 549 (1974).

10. 373 Mass. 96, 364 N.E.2d 1251 (1977).

implied-at-law covenant of good faith and fair dealing. By 1989, all but three states had either carved out explicit exceptions to the termination-at-will doctrine, or had indicated they might make exceptions if the opportunity arose.

The increased willingness of the courts to reconsider the at-will doctrine resulted in a 15 fold increase in litigation between 1975 and 1985.<sup>11</sup> There has likewise been a corresponding increase in the amount awarded an injured plaintiff. In California, for example, the average award is estimated at about \$400,000 to \$500,000.<sup>12</sup> These large financial verdicts are usually well publicized while reversals of the awards go almost unnoticed. In *Rawson v. Sears Roebuck & Co.*,<sup>13</sup> for example, the jury awarded \$19,000,000 to an employee victim of age discrimination. The tenth circuit later reversed this ruling, finding that the Colorado statute did not provide a private cause of action in cases of age discrimination.<sup>14</sup>

Though jury awards may be large, the amount of cash actually received by a plaintiff may be rather modest. In one case a plaintiff was awarded \$650,000 but received only \$30,000.<sup>15</sup> Meanwhile, attorneys average approximately \$80,000 per case.<sup>16</sup> Litigation delays can be long and vexatious, adding to the frustrations of all parties involved.<sup>17</sup>

Great Britain on the other hand has devised a system for settling wrongful discharge disputes that minimizes delays and excessive litigation costs.<sup>18</sup> The British system has been the result of legislative planning and foresight. It functions smoothly, efficiently and generally imparts a belief in the fairness of its procedures to all involved. For these reasons a comparative examination of the American and British systems may be beneficial to those interested in the development of current labor law.

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11. Note, *Erosion of the Employment-at-Will Doctrine: Choosing a Legal Theory for Wrongful Discharge*, 14 CAP. U.L. REV. 461, 462 (1985).

12. CALIFORNIA CONTINUING EDUCATION OF THE BAR (CEB), ADVISING CALIFORNIA EMPLOYERS 8 (1988).

The Rand Corporation concluded that, although initial awards for wrongful termination, between 1980 and 1986, averaged \$650,000.00, the employee typically had to pay contingency fees of 40% and, after the award was reduced an average of 50% on appeal, received less than 30% of the initial award. J. DERTOUZOS, E. HOLLAND, & P. EBENER, *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* vii-ix (1988) [hereinafter CONSEQUENCES].

13. 615 F. Supp. 1546 (D. Colo. 1985).

14. *Rawson v. Sears Roebuck & Co.*, 822 F.2d 908, 920 (10th Cir. 1987).

15. See CONSEQUENCES, *supra* note 12, at viii.

16. *Id.* at ix.

17. See, e.g., *Rawson v. Sears Roebuck & Co.*, 530 F. Supp. 776 (D.C. Colo. 1982).

18. See CONSEQUENCES, *supra* note 12, at ix.

## EVOLUTION OF THE TERMINATION-AT-WILL DOCTRINE

*United States*

Until the late nineteenth century, American courts followed British common law traditions which presumed that an at-will hiring was for a year. Under the common law, an employer who terminated an employee before the end of a year without good cause would be liable for a breach of contract.<sup>19</sup>

Horace Wood is generally credited with the formulation of the modern termination-at-will doctrine.<sup>20</sup> In *A Treatise on the Law of Master and Servant*,<sup>21</sup> Wood stated that, "[w]ith us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."

In a relatively short time the "Wood's Rule" became accepted doctrine in most American courts. What had started out as a rebuttable presumption became embodied as a rule of substantive law. Freedom to contract "soon [became] confused and contorted so that the rule's true foundation became the freedom of employers to manage their business as they wished."<sup>22</sup>

Those jurisdictions which preserve termination-at-will justify their position as deference to *stare decisis* and principles of judicial restraint.

19. See generally 2 J. KENT, COMMENTARIES ON AMERICAN LAW 258-266 (1827).

20. *Magnan v. Anaconda Industries, Inc.*, 193 Conn. 558, 562 n.8, 479 A.2d 781, 783 n.8 (1984).

21. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). There were decisions favoring termination-at-will before Wood. See, e.g., *Hathaway v. Bennett*, 10 N.Y. 108 (1854).

22. *Green v. Oliver Realty, Inc.*, 363 Pa. Super. Ct. 534, 566 A.2d 1192 (1987). Within a short time after Wood, the following remarks were well-accepted in American jurisprudence:

May I not dismiss my domestic servant for dueling, or even visiting, where I forbid? And if my domestic why not my farmhand, or my mechanic, or teamster? . . . All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.

*Payne v. Western Atlantic R.R. Co.*, 81 Tenn. 507, 518-20 (1884) (overruled on other grounds by *Hutton v. Winters*, 132 Tenn. 527, 179 S.W. 134, 137-138 (1915)). Also typical by the early twentieth century was the following conclusion:

The preponderance of American authority in favor of the doctrine that an indefinite hiring is presumptively a hiring at will is so great that it is now scarcely open to criticism.

*Hogle v. DeLong Hook & Eye Co.*, 248 Pa. 471, 473, 94 A. 190, 194 (1915). Occasionally, a statute codified Wood's Rule. See, e.g., CAL. LAB. CODE § 2922 (West 1971); N.D. CENT. CODE § 34-03-01 (1971). However, it is uncontroverted that Wood miscited authority to support his conclusions.

In *Murphy v. American Home Products Corp.*,<sup>23</sup> the court denied a remedy when the plaintiff alleged age discrimination and retaliation for whistle blowing.

This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature . . . [which] has infinitely greater resources and procedural means to discern the public will to examine the variety of pertinent consideration . . . .<sup>24</sup>

The employer thus continued to have "an unfettered right to terminate the employment at any time [in accordance with] our long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason."<sup>25</sup>

### Great Britain

The dissolution of the monasteries under King Henry VIII helped generate a fear that the now uncared for poor, would become a burden on society. As a result, the Elizabethan poor laws forbade the hiring of a laborer for less than one year.<sup>26</sup> Since then, the problem had generally been in fixing the time of employment. As Blackstone noted "If the hiring be general without any particular time limit, the law constitutes it to be a hiring for a year, . . . but the contract may be made for any longer or smaller term."<sup>27</sup>

Treatment of the at-will employee remained generally unchanged during most of the nineteenth century. The comments of Chief Justice Best in *Beeston v. Collyer* are fairly representative of British attitudes. Justice Best stated, "If a master hire a servant, without mention of time, that is a general hiring for a year . . . ."<sup>28</sup>

It was not until *De Stempel v. Dunkels*<sup>29</sup> that the presumption of

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23. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). See also *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 514 N.Y.S.2d 209, 506 N.E.2d 919 (1987).

24. *Murphy*, 58 N.Y.2d at 297, 302, 448 N.E.2d at 87, 89-90, 461 N.Y.S.2d at 233, 236.

25. *Id.* at 304, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

26. 5 Eliz., ch. 4, §§ 2-5, 20 Geo. 2, ch. 19 (1562-63). The statutes were repealed by 53 Geo. 3, ch. 40 (1813) and 54 Geo. 3, ch. 96 (1814). See CRONIN AND GRIME, *supra* note 6, at 73 n.4.

27. 1 W. BLACKSTONE, COMMENTARIES \*425.

28. [1827] 130 Eng. Rep. 786 (P.C.).

29. [1938] 1 All E.R. 238 (C.A.), *aff'd sub. non*, *Dunkels v. DeStempel* [1939] 55 T.L.R. 655 (H.L.).

a yearly hire was rebuked. It was held "unreasonable to suppose that either the employer or the engineer contemplated, when they entered into their agreement, that the agreement should be determined other than by reasonable notice."<sup>30</sup> By the mid-1960's, Lord Reid's remarks may be considered typical of the change in British attitudes. Lord Reid stated:

The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.<sup>31</sup>

By the mid-twentieth century the at-will employee was at the mercy of the employer, who could fire him for a good cause, bad cause or no cause at all.

## DECLINE OF THE WOOD'S DOCTRINE

### *The United States*

The erosion of the Wood's Doctrine in the United States has been a slow, irregular process. The forces which set the process of erosion in motion can be traced to statutory provisions which prohibit the termination of an at-will employee for certain reasons. During the 1930's, organized labor received legal protection from retaliatory discharges in addition to protection of the right to organize and strike. Legislation such as the Norris-LaGuardia Act (1932)<sup>32</sup> and later the National Labor Relations Act (1947)<sup>33</sup> fortified the legal protections extended to union affiliated at-will employees. By the 1950's, collective bargaining agreements had drastically reduced the authority of management to terminate an employee outside of agreed-upon procedures. The decisions of grievance arbitrators are now enforced by the courts with few exceptions.<sup>34</sup>

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30. *Id.*

31. *Ridge v. Baldwin*, [1963] 2 All E.R. 66, 71 (H.L.).

32. Ch. 90, §§ 1-15, 47 Stat. 70-73 (1932) (current version at 29 U.S.C. §§ 101-115 (1982)).

33. Ch. 372, §§ 1-19, 49 Stat. 449-457 (1947) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

34. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). See also the "Steelworker's trilogy:" *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

In the next several decades, an activist federal judiciary expanded the interpretation of post-Civil War legislation in order to protect the rights of blacks in the workplace and other areas.<sup>35</sup> At the same time, federal legislators began restricting the right to terminate an at-will employee. Employers were prohibited from terminating employees because of age,<sup>36</sup> sex,<sup>37</sup> religion,<sup>38</sup> race,<sup>39</sup> pregnancy,<sup>40</sup> or the presence of a handicap.<sup>41</sup> Other prohibited reasons include a history of bankruptcy,<sup>42</sup> a single garnishment of wages.<sup>43</sup>

Many states<sup>44</sup> have also enacted statutes that expressly allow an employee a cause of action if it is alleged that a termination was based on filing a workmen's compensation claim, refusal to take a polygraph test or because of race, religion, age and any other like discriminatory factors. Several states have recently passed "whistleblower" acts, which protect employees who inform governmental authorities or company representatives of suspected illegal activities.<sup>45</sup>

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35. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 458-460 (1975) (Civil Rights Act of 1866). See also *Marsh v. Digital Equip. Corp.*, 675 F. Supp. 1186 (D. Ariz. 1988); *Hunter v. Allis-Chalmers*, 797 F.2d 1417 (7th Cir. 1986).

36. E.g., the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602-608 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982)), which protects individuals over 40. Within Great Britain there is no protection of workers over 40. In fact, the government may put an upper age limit, such as 45, for hiring and simultaneously claim it is an equal opportunity employer. *The Times* (London), Oct. 1, 1987, at 39, col. 1.

37. E.g., the Equal Pay Act of 1963, Pub. L. 88-38, § 3, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (1982)); the Civil Rights Act of 1964, Pub. L. 88-352, tit. VII, §§ 701-718, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1982)).

38. *Id.*

39. *Id.*

40. E.g., the Pregnancy Discrimination Act, Pub. L. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

41. E.g., the Rehabilitation Act of 1973, Pub. L. 93-112, tit. V, § 503, 87 Stat. 393 (1973) (codified as amended at 29 U.S.C. § 793 (1982)).

42. An employee may not be discharged solely for filing bankruptcy. Pub. L. 98-353, tit. III, § 309, 98 Stat. 354 (1984) (codified at 11 U.S.C. § 525(b) (1988)). If an employee filing bankruptcy is terminated, he has made a prima facie case of discriminatory discharge and the employer must establish a legitimate, non-discriminatory reason. *Bell v. Sanford-Corbett-Bruker, Inc.*, 2 I.E.R. Cases 914 (S.D. Ga. 1987); *Stockhouse v. Hines Motor Supply*, 2 I.E.R. Cases 487 (D.C. Wyo. 1987). An employee may also not be transferred to different duties because of having filed bankruptcy. *In re Hicks*, 65 Bankr. 980 (W.D. Ark. 1986).

43. Consumer Credit Protection Act of 1968, Pub. L. 90-321, tit. III, § 304, 82 Stat. 163 (1968) (codified at 15 U.S.C. § 1674(a) (1982)) (prohibits discharge because of "garnishment for any one indebtedness").

44. Cities have also restricted reasons for termination, e.g., D.C. CODE ANN. § 1-2512 (1981) (prohibiting an employee from being discharged for matriculating in school).

45. See, e.g., MICH. COMP. LAWS § 15.362 (1981); MICH. STAT. ANN. § 17.428(2); CONN. GEN. STAT. ANN. § 31-51m (West 1987). For a list of the 32 states that have passed whistleblower acts, see Cooper & Covey, *Whistle-Blower Protection Acts Broaden Rights to Employees*, *The National Law Journal*, July 3, 1989, at 32-33, col. 1.

Though these laws protect employees from a termination for a prohibited reason, they offer no protection from arbitrary termination. Two-thirds of all employees in the United States are at-will employees subject to termination on the impulse of their employer.<sup>46</sup> Outside of federal or state statute and some collective bargaining agreements, the employer is free to terminate an employee for a good reason, bad reason, or no reason at all, as long as the reason is not one prohibited by law.<sup>47</sup>

In its development of the law of termination of at-will, the United States has often been out of step with other major industrial nations of the world.<sup>48</sup> For example, at the 1982 Conference of the International Labor Organizations, the United States was the only nation, out of 126 present, to vote against the adoption of the Convention, "Termination of Employment at the Initiative of the Employer."<sup>49</sup> The Convention states that non-probationary employees should be fired only for "a valid reason."<sup>50</sup> As a result, the American judiciary has shown increasing concern that the United States is one of the few remaining industrial countries not providing protection from unjust dismissals.

### Current Status of the Termination-at-will Doctrine

The 1970's witnessed a significant change in judicial attitudes toward the termination-at-will doctrine.<sup>51</sup> The more liberal position taken by other industrial nations, and the recommendation of the International Labor Organization are not wholly responsible for this change in attitude. Within the American judiciary itself, there was a growing realization that, not only was the termination-at-will doctrine judicially created, but it was based upon a faulty and dated analysis.<sup>52</sup> There has been a growing sensitivity in the legislatures and in the

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46. *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 590, *aff'd* 408 N.W.2d 569 (Minn. 1987).

47. *Dickeson v. Daw Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987).

48. Heshizer & Okocha, *Wrongful Discharge in Britain: Lessons for the United States*, 41 ARB J. 34, 40 (1986).

49. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207, 210 (1983).

50. *See id.* at 212.

51. *See, e.g., Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). *See also* *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (Meyer, J., dissenting).

52. *See* *Thompson v. American Motor Inns, Inc.*, 623 F. Supp. 409, 413 (D.C. Va. 1985) (employment at will is an "anachronistic" and "antiquated" doctrine).

courts to the unfairness of this policy to an employee who is in a position of unequal bargaining power with the employer.<sup>53</sup>

Because the at-will doctrine was created by the judiciary and not the legislature, the judiciary may properly extend or limit the scope of the doctrine.<sup>54</sup> Since 1970, the direction has been one of limiting rather than expanding the doctrine.<sup>55</sup>

The first serious restrictions made in the at-will doctrine occurred in 1973 in *Frampton v. Central Indiana Gas Company*.<sup>56</sup> In *Frampton*, the Indiana Supreme Court concluded that an employee could not be discharged in retaliation for filing a workmen's compensation claim.<sup>57</sup> The following year the New Hampshire Supreme Court in *Monge v. Beebe Rubber Company*,<sup>58</sup> expanded the *Frampton* holding by including a cause of action that was not based on a statutory or a constitutional remedy.<sup>59</sup> In *Monge*, the married plaintiff claimed she was terminated for having refused to date her foreman.<sup>60</sup> The court affirmed a lower court decision in favor of the employee and emphasized "that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."<sup>61</sup> Unlike *Frampton*,<sup>62</sup> the decision was based on public policy considerations and bad faith.<sup>63</sup>

Some state legislatures have also limited the at-will doctrine. For example, in 1987, the Montana legislature formally abolished Wood's rule. It passed a statute which limits the employer's right to terminate a non-probationary employee.<sup>64</sup> A termination without just cause or

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53. The disparity in bargaining power between the employee and the employer becomes even greater as employees move into upper levels of employment because managerial and professional employees are rarely protected by union contracts. See *Boyle v. Vista Eyeware, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985). See also *Bellace*, *supra* note 49, at 209 (most dismissed plaintiffs between 1973 and 1983 were managers, supervisors or administrators).

54. *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588 (Minn. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987); *Sides v. Duke*, 74 N.C. App. 331, 328 S.E.2d 818 (N.C. Ct. App. 1985), *review denied*, 314 N.C. 331, 335 S.E.2d 13 (N.C. 1985).

55. *But see* *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 526 A.2d 1192 (Pa. Super. Ct. 1987) (defending the policy behind termination at will).

56. 260 Ind. 249, 297 N.E.2d 425 (1973).

57. *Id.*

58. 114 N.H. 130, 316 A.2d 549 (1974).

59. *Id.*

60. *Id.*

61. *Id.* at 133, 316 A.2d at 551.

62. 260 Ind. 249, 297 N.E.2d 425 (1973).

63. 114 N.H. 130, 133, 316 A.2d 549, 551.

64. Wrongful Discharge from Employment Act, MONT. CODE ANN. 39-2-901 to -914 (1988). In *Meech v. Hillhaven West Corp.*, 776 P.2d 488 (Mont. 1989), the statute's constitutionality was upheld.

in retaliation for exercising legal rights is forbidden. Likewise, a termination that involves a violation of express provisions in an employment manual is prohibited.

In the states which still adhere to the termination-at-will doctrine, there is often a strong minority urging certain exceptions.<sup>65</sup> Even those individual judges who oppose the change often do so reluctantly. In *Hoffman-LaRoche v. Campbell*,<sup>66</sup> the Alabama Supreme Court, while giving token recognition to termination at will, all but abandoned the doctrine by upholding the implied in-contract manual exception.<sup>67</sup> In a dissent, Judge Maddox, stressed the importance of stare decisis, but demonstrated an ambivalent state of mind on the key issue:

As I have already pointed out, the termination-at-will doctrine has been severely criticized, and several jurisdictions admittedly follow the new rule announced by this Court today when there is an employee handbook or manual, and maybe I should join the majority in this case and determine that the old termination-at-will doctrine, and the requirement of mutuality of contract in employer-employee relationships should no longer be followed, but I cannot do so in this case.<sup>68</sup>

### *Great Britain*

The departure from termination at will in the United States has been primarily the result of judge-made law; in Great Britain the departure was the result of Parliamentary legislation. This legislation was designed to curb industrial unrest during the 1960's, and though initiated by the Labor Party, the Conservative Party willingly conceded some degree of job security to the at-will employee.

During the depression years, Great Britain saw no employee-oriented reforms equivalent to the National Labor Relations Act<sup>69</sup> in the United States. Reasons for the slower pace of labor reform in Great Britain relate to the stronghold of the Conservative Party in Parliament and the less severe effects of the Great Depression on the economy of Great Britain.

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65. *Mr. B's Oil Company, Inc. v. Register*, 181 Ga. App. 166, 351 S.E.2d 533 (Ga. Ct. App. 1986).

66. 512 So. 2d 725 (Ala. 1987).

67. *Id.* at 728.

68. *Id.* at 752.

69. *See supra* note 33 and accompanying text.

Prior to the 1970's, British trade unions had periodically borne the brunt of anti-government legislation.<sup>70</sup> Generally though, the British trade unions have been on a more secure legal footing than their counterparts in the United States. This was largely because of Parliamentary legislation. The Trade Union Act of 1871<sup>71</sup> was considered "the charter of incorporation" for the labor unions.<sup>72</sup> The Conspiracy and Protection of Property Act of 1875<sup>73</sup> in effect legalized collective bargaining and peaceful picketing. The Trade Disputes Act of 1906<sup>74</sup> virtually immunized trade unions from tort damages during strikes.

The British Parliament was convinced by the early 1960's that more drastic statutory change was necessary in order to reduce employee discontent and both major parties were forced to concede some protection against unjust dismissal. The "wildcat" strikes during the 1960's were a significant force behind this change in attitude.<sup>75</sup> Based on the recommendations of the *Industrial Associations Report by the Regal Commission on Trade Unions*, (1968) (Donovan Commission), the Industrial Relations Act of 1971 was passed by Parliament.<sup>76</sup> Unfair dismissal statutes were further supplemented by the Employment Protection Act of 1975,<sup>77</sup> the Employment Protection (Consolidation) Act of 1978<sup>78</sup>, the Employment Act of 1980,<sup>79</sup> and the Employment Act of 1982.<sup>80</sup> The Industrial Relations Code of Practice supplements British employment law.<sup>81</sup>

British law, unlike the law of the United States, is essentially uniform. British judges are far less willing than their American

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70. The General Strike of 1926 was organized by union leaders and temporarily brought economic activity to a standstill. After its failure, the Government passed anti-union legislation but generally did not attempt to enforce those laws.

71. Trade Unions Act, 1871, 34 & 35 Vict. 6, ch. 35.

72. *Amalgamated Society of Railway Servants v. Osborne*, 1910 A.C. 87, 92.

73. Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. 10, ch. 86.

74. Trade Disputes Act, 1906, 6 Edw. 7, ch. 47.

75. Bellace, *supra* note 49, at 219.

76. Industrial Relations Act, 1971, ch. 72. This act was repealed by the Trade Union/Labor Relations Act, 1974, ch. 52, but it reenacted provisions relating to unfair dismissal.

77. Industrial Relations Act, 1975, ch. 71.

78. Employment Protection (Consolidation) Act, 1978, ch. 71.

79. Employment Act, 1980, ch. 42.

80. Employment Act, 1982, ch. 46.

81. While these codes prepared by ACAS are voluntary, they must be utilized in unfair dismissal proceedings when industrial tribunals find they are relevant. Morgan, *No Difference for Dismissal?*, 132 (pt. 1) SOL. J. 242 (1988).

counterparts to interpret statutory law.<sup>82</sup> It is virtually impossible for the British judiciary to overturn the law of Parliament, as the United States Supreme Court does when it interprets the constitutionality of Congressional acts. British law, however, may be influenced by European Court of Justice decisions<sup>83</sup> which mandate equal employment treatment of the sexes.<sup>84</sup>

The major accomplishment of the Donovan Commission was the increased utilization of industrial tribunals, which "are independent judicial bodies."<sup>85</sup> Each tribunal consists of an employer representative, an employee (usually a union representative), and a lawyer (either a full-time or part-time solicitor or a barrister of seven years' experience). Members are not expected to be advocacy arbitrators,<sup>86</sup> and only 5% of the decisions lack unanimity, with the lawyer occasionally in the minority.<sup>87</sup> There must, be a genuine dispute

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82. There is a trend, however, away from strict construction of a statute. In reviewing an Employment Appeal Tribunal (EAT) decision, Lord Denning emphasized that the EAT adopted:

. . . the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach". . . . In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose underlying the provision". It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it—by reading words in, if necessary—so as to do what Parliament would have done had they had the situation in mind.

Nothman v. Barnett London Borough Council, [1978] 1 All E.R. 1243, 1246.

83. The European court, upon the party's request, can give opinions on questions arising out of British cases under article 177 on the interpretation of the Treaty of Rome, its regulations or its directives. British courts may make references to the European court if they wish. Alternatively, a previous decision by the European court may be used by the British court to aid interpretation of a particular provision, e.g., Rainey v. Greater Glasgow Health Board, [1987] 1 ALL E.R. 65 (H.L.) (1986).

84. See *id.* ("the decision of the European Court on article 119 must be accepted as authoritative"); Commission of the European Communities v. The United Kingdom, [1984] 1 All E.R. 353, I.C.R. 192 (1983) (government to eliminate "private" exceptions (e.g., under 5 employees) to sex discrimination).

85. The Times (London), Mar. 1, 1985, at 5, col. 1.

86. "In all my years as a member of the industrial tribunal I have only come across one biased member." Interview with Benjamin Baker, Esq., in London (Dec. 28, 1987).

87. Rico, *Implications from British Experience*, 8 INDUS. REL. L.J., 547, 553 (1986). 95% of all Tribunal decisions are unanimous. Heshizer & Okocha, *supra* note 48, at 28.

brought before the tribunal. Requests for advisory opinions are usually considered an abuse of procedure.<sup>88</sup>

### Current Status of the Termination-at-will Doctrine

The industrial tribunals are layperson-dominated tribunals rendering swift decisions which deemphasize legal technicalities. The industrial tribunals create an atmosphere in which fairness and predictability are essential. The procedure is designed to establish an opportunity to be heard and facilitation of immediate bench decisions.

The hearing procedure is similar to an American grievance arbitration. It is conducted under oath and allows cross examination and questions from tribunal members. The employer usually presents his case first; then the employee is given a like opportunity to respond.<sup>89</sup> The tribunal renders an immediate or "summary" decision after a private discussion of the case. Decisions may be appealed only on legal issues and not on questions of fact.<sup>90</sup> Findings of fact by an industrial tribunal are rarely disturbed, "either by the appeal tribunal or the Court of Appeal."<sup>91</sup> It may not be argued on appeal that a dismissal on technical grounds which bars an employer from "defending the proceedings was out of proportion to the gravity of the default."<sup>92</sup> An appealed decision is referred to the Employment Appeal Tribunal (EAT). The EAT is "a specialist court of great expertise,"<sup>93</sup> which consists of a judge and senior lay members. An

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88. See, e.g., *Baker and Others v. Superite Tools Ltd.*, [1986] I.C.R. 189 (1985), reprinted in *The Times* (London), July 19, 1985, at 26, col. 7. (request for an authoritative decision as to whether applicants were self-employed or employees rejected).

89. The employer must state the reason for the dismissal and show that it is statutorily acceptable. Should the employer deny there was a dismissal, then the employee would have the burden of proof. The industrial tribunal will attempt to insure that the party's case is heard if the party appears in proper person. The Employment Act, 1980, ch. 42, removed the statutory requirement of the employer to prove the fairness of the dismissal. Free legal aid is unavailable to applicants, but often they are assisted by Bar Students, "free representation unit." *Croyden Health Authority v. Jaufurally*, 1986 I.C.R. 5.

90. *Neale v. Hereford and Worcester County Council*, 1986 I.C.R. 471, 1986 I.R.L.R. 168, reprinted in *The Times* (London), Feb. 21, 1986, at 4, col. 7 (EAT should disturb factual decisions only if the findings are clearly erroneous). In 1985, tribunals were allowed to issue "decisions in summary form" which with other technical changes minimized "legal jargon." *The Times* (London), Mar. 1, 1985, at 5, col. 1.

91. *Automatic Switching Ltd. v. Brunet*, 1986 I.C.R. 542.

92. *Medallion Holidays Ltd. v. Birch*, 1985 I.C.R. 578, 1985 I.R.L.R. 406, reprinted in *The Times* (London), May 15, 1985, at 16, col. 6.

93. *West Midlands Co-operative Soc. Ltd. v. Tipton*, [1986] 1 All E.R. 513, 516.

appeal from the EAT, if allowed, goes to the Court of Appeal (Court of Sessions in Scotland) and ultimately to the House of Lords. Industrial tribunal decisions have no precedential value. A litigant, who so desires, may instead appeal to the European Economic Community Court of Justice.<sup>94</sup>

Employees under age 65 who have been continuously employed by the same employer for two years are generally covered by the British Act.<sup>95</sup> In assessing what constitutes "continuous" employment, the courts have liberally interpreted aggregation of hours and employers.<sup>96</sup>

Agreements not to be bound by tribunal decisions are unenforceable, as are all settlement agreements which would deprive the tribunal of jurisdiction. An exception to employer liability occurs when the employee has "unclean hands." For example in *Hyland v. J.H. Barker (Northwest) Ltd.*<sup>97</sup> the acceptance of an illegal payment from an employer for four weeks broke the continuity of employment requirement and eliminated the jurisdictional cause of action even though the employee had worked 16 years for the employer. Similarly, a tribunal would not decide a case in which an employee "bouncer" had received "recognized perks and undisclosed expenses" which made his "contract of employment illegal."<sup>98</sup> Should a greedy employee desire both the settlement and an unjust dismissal hearing by way of a legal loophole, no award will be given, since it would be considered neither just nor equitable.<sup>99</sup> An employer may not evade the dismissal issue by having an employee on a leave of absence agree that the contract of employment will terminate unless there is a return to work by a certain date.<sup>100</sup>

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94. See *supra* note 83 and accompanying text.

95. This two-year period for all employees was effective June 1, 1985 and decreased unfair dismissal hearings by 25%. Neal, *Recent Developments in Unfair Dismissal*, 135 (pt. 1) NEW L.J. 640, 640 (1985).

96. Aggregation of hours and employers has been generally interpreted on behalf of the employee. *But see* *Surrey County v. Lewis*, [1987] 3 All E.R. 641 (H.L.) (teacher could neither add the hours of work nor the periods of employment under one contract to those of a concurrent contract in order to establish the prerequisite period for continuous employment); *Sillars v. Charrington Fuels Ltd.*, 1989 I.R.L.R. 152 (1988), *reprinted in* *The Times* (London), Mar. 12, 1988, at 35, col. 4 (strictly interpreting "a temporary cessation of work" pursuant to par. 9(1)(b) of schedule 13 to the Employment Protection (Consolidation) Act (1978)).

97. 1985 I.C.R. 861, *reprinted in* *The Times* (London), July 5, 1985, at 24, col. 5.

98. *The Times* (London), Dec. 18, 1985, at 3, col. 1 (contracts illegal in formation are unenforceable). *But see* *Newland v. Simons and Wiler*, 1981 I.C.R. 521 (the innocent party may enforce a contract illegal in performance).

99. *Courage Take Home Trade Ltd. v. Keys*, 1986 I.C.R. 874, 1986 I.R.L.R. 427.

100. See *Igbo v. Johnson Matthey Chemicals Ltd.*, 1986 I.C.R. 505, 1986 I.R.L.R. 215, *reprinted in* *The Times* (London), May 3, 1986, at 32, col. 6.

Only about 35% of unfair dismissal cases actually appear before the industrial tribunal.<sup>101</sup> This is largely due to the efforts of the Advisory Conciliation and Arbitration Service<sup>102</sup> which settles many cases outside of the tribunal. Only about 1/3 of the actual claims by an employee are upheld by the tribunal.<sup>103</sup>

A great advantage of the industrial tribunals is their rendering of a decision based on the record.<sup>104</sup> Industrial tribunal proceedings are meant to encourage "swift and not technical" decisions.<sup>105</sup> Immediate bench decisions are encouraged and "second thoughts" by an industrial tribunal are discouraged.<sup>106</sup>

In industrial tribunal procedures, the evidentiary rules are relaxed.<sup>107</sup> In fact, inadmissible statements by police before a crown court criminal trial could be relied on by an employer as the sole basis of justifying the dismissal of an employee. In *Dhaliwal and Others v. British Airways Board*,<sup>108</sup> the EAT concluded that "parliament had based the statutory criteria of fairness upon reasonableness."<sup>109</sup>

Time constraints are strictly enforced by the tribunals in order to bring about swift results. In *O'Shea v. Immediate Sound Service Ltd.*,<sup>110</sup> the applicant requested a continuance in January for purposes of negotiations.<sup>111</sup> On July 2nd, he was ordered to show cause why his

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101. Rico, *supra* note 87, at 554.

102. The ACAS was established by the Employment Protection Act, 1975, ch. 71; for information on the ACAS, see Levinson, *Let Conciliation Thrive*, 85 (pt. 2) L. SOCIETY'S GAZ. 20 (1988).

103. See, e.g., *The Times* (London), Dec. 21, 1985, at 23, col. 2 (31% of the cases went on to an industrial tribunal).

104. The industrial tribunal should not use "failure to decide issues of fact" as a "refuge for anyone who found it difficult to make up his mind." *Morris v. London Iron and Steel Co. Ltd.*, [1988] 1 Q.B. 493, [1987] 3 W.L.R. 836, [1987] 2 All E.R. 496, 1987 I.C.R. 8555, 1987 I.R.L.R. 182 (1987), *reprinted in* *The Times* (London), Mar. 10, 1987, at 9, col. 1.

105. *O'Shea v. Immediate Sound Services Ltd.*, 1986 I.C.R. 598.

106. *Lamont v. Fry's Metals Ltd.*, 1985 I.C.R. 566, 1985 I.R.L.R. 465 (C.A.), *reprinted in* *The Times* (London), Mar. 14, 1985, at 10, col. 6. Industrial tribunals may rehear a case only in very unusual circumstances, e.g., when there is newly discovered evidence which was not foreseeable, and any appeal for review by the industrial tribunal must be made within fourteen days of its decision.

New regulations pursuant to 1984 procedures affect 90% of the cases and allow industrial tribunals to issue summary decisions as long as invidious discrimination is not involved, e.g., trade union membership. *The Times* (London), Mar. 1, 1985, at 5, col. 1.

107. Sara, *Industrial Tribunals and Court Proceedings*, 84 (pt. 3) L. SOCIETY'S GAZ. 3243 (1987).

108. 1985 I.C.R. 513.

109. *Id.*

110. 1986 I.C.R. 598.

111. *Id.*

case should not be dismissed, and within two weeks it was dismissed.<sup>112</sup> On appeal, the EAT expressly emphasized the importance of swift proceedings before the industrial tribunal, which, unlike the High Court, did not tolerate relatively long delays.<sup>113</sup> Procedurally, the time periods, such as the three-month limitation, are strictly construed. This generally works against the employee. If an employee is terminated and then exhausts the employer's internal appeal mechanism, the three-month limitation period runs from the date of termination and not from the date of exhaustion of the unsuccessful appeal.<sup>114</sup> The time limit runs from the date of immediate termination, even if it were later resolved that the date was in breach of the employee's contract rights.<sup>115</sup>

Tribunal procedures are both efficient and cost effective. A complainant pays the cost of these procedures only if the complaint is viewed as frivolous, vexatious or if the complainant acted unreasonably during the course of the proceedings, or appealed on an issue of fact.<sup>116</sup> The tribunal's function is to establish findings of fact and not to analyze law. Aside from time deadlines, the Act is to be interpreted "so that legal technicalities shall not prevail against industrial realities and common sense. An unreasonable employer [or employee] who tried to insist on the strict legal rights will get no comfort from the Act."<sup>117</sup> Cases uniformly stress that "The proceedings before an industrial tribunal are informal—and long may they remain so. That was Parliamentary intention."<sup>118</sup>

Unfortunately, as the *O'Shea* court<sup>119</sup> admitted, the informality and wide discretion might lead to harsh results. Tribunals will often

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112. *Id.*

113. *Id.*

114. *Batchelor v. British Railways Board*, 1987 I.R.L.R. 136 (the time limit for serving the notice of appeal, pursuant to Order 59, Rule 4(1) of the Rules of the Supreme Court, was four weeks from the date of the EAT decision and not four weeks from the date of the tribunal's refusal of a grant of leave to appeal).

115. *But see* *Machine Tool Industry Research Association v. Simpson*, 1988 I.C.R. 558, 1988 I.R.L.R. 212 (an employee was allowed to file a complaint with the industrial tribunal which was three days late because it was not "reasonably practical" for her to have submitted the complaint on time since she had not yet been informed of the real reason for her termination).

116. *Ravelin v. Bournemouth Borough*, 1985 I.R.L.R. 97; *Johnson v. Baxter*, 1984 I.C.R. 675, 1985 I.R.L.R. 96 (1984) ("The terms of rule 11 were so stringent that there were few occasions when a party could expect an order for costs even if he won.").

117. *West Midlands Cooperative Society Ltd. v. Tipton*, [1986] 1 A.C. 513, 544 (H.L.) (there is no degree of unfair dismissal which affects the amount of the award); *Morris v. Acco Company Ltd.*, 1984 I.C.R. 306 (appeal from the employer's contention that there was only an immaterial misunderstanding).

118. *Hotson v. Wisbech Conservative Club*, 1984 I.C.R. 859, 1984 I.R.L.R. 422.

119. *O'Shea v. Immediate Sound Services Ltd.*, 1986 I.C.R. 598.

encourage the parties to reach an agreement as to the amount of the award. In *Scottish and Newcastle Breweries plc v. Halliday*,<sup>120</sup> the tribunal suggested a compromise figure "rather than waste time and effort in another hearing."<sup>121</sup> Rarely will a tribunal order reinstatement or reengagement.<sup>122</sup> Instead, the tribunal will allow the maximum award.<sup>123</sup> Any amount might be reduced by a finding of contributory negligence or failure to mitigate damages on the part of the employee.<sup>124</sup> There is little likelihood of contributory negligence if there is a constructive dismissal.<sup>125</sup> There is a split in authority as to whether any amount paid by the employer in lieu of notice should be deducted from awarded compensation.<sup>126</sup>

Jurisprudence in both countries has recognized a common law cause of action for wrongful termination of an at-will employee. In Great Britain, the aggrieved employee was viewed as having a cause of action for wrongful discharge under contract theory alone.<sup>127</sup> In the United States, the claim could be based on either contract or tort theories of law. In Britain, an aggrieved employee may file a complaint in regular courts and in the industrial tribunal and seek damages while pursuing an appeal with the industrial tribunal.<sup>128</sup> To continue in both places, a litigant must allege the employment contract is broken yet still exists. Litigants must elect a remedy no later than when the employer loses his case before the tribunal.<sup>129</sup> A tribunal decision to deny a postponement pending a civil litigation was upheld despite the possibility that the tribunal determination could have a *res judicata* effect on the civil matter.

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120. 1986 I.R.L.R. 291. *See also* *Hotson v. Wisbeck Conservative Club*, 1984 I.R.L.R. 422.

121. *Halliday*, 1986 I.R.L.R. 291.

122. In theory, reinstatement may be ordered, but it is unenforceable, and the recalcitrant employer may then be assessed additional monies.

123. As of April 1987, £21,456 was the maximum award.

124. *Halliday*, 1986 I.R.L.R. 291.

125. *Holroyd v. Gravure Cylinders Ltd.*, 1984 I.R.L.R. 259.

126. *Compare* *Addison v. Babcock Fata Ltd.*, 1987 I.C.R. 45 (1986) *and* *Finnie v. Top Hat Frozen Foods*, 1985 I.R.L.R. 365 *with* *TBA Industrial Products Ltd. v. Locke*, 1984 I.R.L.R. 48.

127. Occasionally, this distinction between wrongful and unfair dismissal can lead to absurd results. In *BSC Sports and Social Club v. Morgan*, 1987 I.R.L.R. 391, the EAT concluded that an employee who was summarily dismissed without legal notice would have had a cause of action for wrongful dismissal, but not for unjust dismissal, since the employer's decision to dismiss was reasonable. *Id.* A wrongful discharge would result when the mandatory notice requirement was deficient.

128. *See* *James v. Thomas H. Kent and Company Ltd.*, [1951] 1 K.B. 551, 556 (per Denning, L.J.).

129. *Shook v. London Borough of Ealing*, 1986 I.R.L.R. 46.

The British system emphasizes non-technical, reasonable procedures which allow an aggrieved employee an opportunity to be heard. The tribunals stress compromise, strict compliance with time limits, and a coherent approach to the affected at-will employee throughout Great Britain.

## TRENDS IN TERMINATION-AT-WILL DOCTRINE

### *Patterns of Law in the United States*

The United States remains the only major industrial nation that does not have a coherent, unified approach to the termination of an at-will employee. Though most state judiciaries continue to maintain a token adherence to the termination-at-will doctrine, their commitment to full enforcement of its terms is at best ambivalent. As *Martin v. Capital Cities Media, Inc.*<sup>130</sup> explained, "taking a nationwide view of the law in this area, it is apparent that what once was the *corpus juris* of employment relations has lately become an amorphous mass of confusion replete with holdings that defy reconciliation from one jurisdiction to the next."<sup>131</sup> The status of the law on wrongful discharge is so unstable that there can be little reliance on precedent.

Widely divergent attitudes toward exceptions to termination at will are evident in decisions concerning promises of lifetime or permanent employment. In *Green v. Oliver Realty, Inc.*,<sup>132</sup> a Pennsylvania court found "clear" evidence to overcome the presumption that a promise of lifetime or permanent employment was not terminable at will.<sup>133</sup> In *K-Mart Corp. v. Ponsock*,<sup>134</sup> the court decided that an employee hired "until retirement" and for "as long as economically possible" pursuant to a manual provision was a tenured rather than an at-will employee.<sup>135</sup>

To complicate matters even further, some states require a plaintiff to prove a retaliatory discharge claim by clear and convincing evidence instead of the usual preponderance of the evidence test.<sup>136</sup> Appellate courts are in hopeless contradiction regarding the parameters of

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130. 354 Pa. Super. 199, 511 A.2d 830 (1986), *appeal denied*, 514 Pa. 643, 523 A.2d 1132 (1987).

131. *Id.* at 208, 511 A.2d at 834.

132. 363 Pa. Super. 534, 526 A.2d 1192 (1987).

133. *Id.* at 555, 526 A.2d at 1202.

134. *K-Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364 (1987).

135. *Id.* at 42, 732 P.2d at 1366.

136. *See, e.g., Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988).

termination-at-will dismissals. As recently as December of 1988, the California Supreme Court in *Foley v. Interactive Data Corp.*,<sup>137</sup> decided that the so-called tortious covenant of good faith and fair dealing was inapplicable in an employment setting. *Foley* drastically limited any cause of action based on the public policy exception.<sup>138</sup>

This lack of a coherent standard is further aggravated by the unique judicial system of the United States which often allows a plaintiff to state a wrongful discharge claim in either federal or state court and in some cases to seek relief under both state and federal laws. Often a plaintiff in a wrongful discharge action will attach pendent state claims such as a violation of public policy to a federal claim of sex discrimination. The federal court may exercise its discretionary authority over both types of claims.<sup>139</sup> In so doing, the federal court must often try to decide how the state supreme court would apply the law. Federal courts are, at times, called upon to decide issues of state policy that have not been definitively addressed in the state court system itself.<sup>140</sup>

Federal courts have different approaches to the resolution of wrongful discharge claims. The vast majority of jurisdictions allow one or more of the following exceptions to termination at will: (1) where the employer commits a violation of a clearly mandated public policy; (2) a violation of the implied-in-fact promises of an employment manual<sup>141</sup> (3) breach of the implied-at-law covenant of good faith and fair dealing in employment contracts. These three exceptions to termination at will are not mutually exclusive.

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137. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). See also *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 772 P.2d 1059, 250 Cal. Rptr. 592 (1989) (applying *Foley* retroactively to all cases not final as of January 30, 1989).

138. Until the *Foley* decision, appellate courts had disagreed as to whether an employee could be terminated in bad faith, irrespective of longevity of employment or protection stemming from rights in the employee's handbook manual. Compare *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) and *Khana v. Microdata Corp.*, 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985) with *Foley v. Interactive Data Corp.*, 205 Cal. App. 3d 344, 219 Cal. Rptr. 866 (1985).

139. *Savage v. Holiday Inn Corp.*, 603 F. Supp. 311 (D. Nev. 1985).

140. *Lucas v. Brown and Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984). *Lucas* is significant because the federal court decided the public policy issue after affirming the dismissal of the federal cause of action. But cf. *Brainard v. Imperial Mfg. Co.*, 571 F. Supp. 37, 40 (D.R.I. 1983) ("A plaintiff who invokes the diversity jurisdiction of the federal court is in a peculiarly poor position to assert a common law cause of action not previously recognized by the state courts.").

141. This is usually found in either oral representations or an employment manual containing assurances of no termination without good cause or an internal appeals process or "permanent" employment.

## The Public Policy Exception to the Termination-at-will Doctrine

Authorities have struggled to develop classifications for public policy wrongful discharge. Basically, this policy is divided in two ways: (1) termination of the employee where the employee was ordered not to exercise a statutory right, such as filing a workmen's compensation claim or refusing to violate the law by committing perjury and (2) termination in retaliation for informing governmental authorities of an illegal act, known as "whistleblowing."

Certain jurisdictions have allowed only the narrowest exceptions to termination at will.<sup>142</sup> The most narrow public policy exception to termination at will is found in *Heller v. Dover Warehouse Market, Inc.*<sup>143</sup> *Heller* recognized a cause of action based on the implied right of an employee to refuse to take a polygraph test.<sup>144</sup> Although no express statutory right was involved, *Heller* relied on precedent which allowed a cause of action for a wrongful termination only if based on an express statutory provision.<sup>145</sup> The most frequent exception, and the one followed by the vast majority of American jurisdictions, allows a cause of action based on public policy when a plaintiff alleges a firing in retaliation for filing a workmen's compensation claim.<sup>146</sup>

The rationale most favored in recent cases concerning narrow exceptions to termination at will is found in *Brockmeyer v. Dun & Bradstreet*.<sup>147</sup> In *Brockmeyer*, the Wisconsin Supreme Court concluded that a public policy exception should be adopted in Wisconsin only if the discharge "is contrary to a fundamental and well-defined public

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142. See, e.g., *Heller v. Dover Warehouse Market, Inc.*, 515 A.2d 178 (Del. Super. Ct. 1986); *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978); *Tyrna v. Adamo, Inc.*, 152 Mich. App. 592, 407 N.W.2d 47 (1987); *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986); *Ambroz v. Cornhusker Square, Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987); *Coman v. Thomas Mfg. Co.*, 91 N.C. App. 327, 371 S.E.2d 731 (1988); *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985); *Miller v. Sevamp, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987).

Three states have specifically rejected the public policy exception. See New York: *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 497 N.E.2d 708, 506 N.Y.S.2d 209 (1987); Georgia: *Evans v. Bibb Co.*, 178 Ga. App. 139, 342 S.E.2d 484 (1986); and Florida: *McConnell v. Eastern Airlines, Inc.*, 499 So. 2d 68 (Fla. Dist. Ct. App. 1986).

143. 515 A.2d 178, 181 (Del. Super. Ct. 1986).

144. *Id.*

145. *Id.*

146. See, e.g., *Moore v. McDermott, Inc.*, 481 So. 2d 602 (La. 1986); *Clanton v. Cain Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); *Springer v. Weeks & Leo Co., Inc.*, 429 N.W.2d 558 (Iowa 1988); *Hardley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1330 (Dist. Ct. App. 1985); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

147. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

policy as evidenced by existing law through a constitutional or statutory provision.”<sup>148</sup> *Brockmeyer* allowed a remedy only for breach of contract because Wisconsin wrongful discharge statutes only permit “reinstatements and back pay, [which are] contractual remedy concepts.”<sup>149</sup>

Most jurisdictions allowing public policy exceptions have developed a more liberal interpretation of the scope of such policies. Decisions in Washington, Vermont, Arkansas, Arizona and Hawaii are typical of the more expansive interpretations of public policy.<sup>150</sup>

In *Thompson v. St. Regis Paper Co.*,<sup>151</sup> Washington allowed a cause of action for a discharged employee who alleged his accurate accounting record would have frustrated bribery of foreign officials in accordance with the Foreign Corrupt Practice Act of 1977. In *Payne v. Rozendaal*,<sup>152</sup> Vermont allowed a wrongful discharge claim where plaintiffs alleged they were terminated for age discrimination. The Vermont court reasoned that discrimination based solely on age “is a practice so contrary to our society’s concern for providing equity and justice that there is a clear and compelling public policy against it.”<sup>153</sup> In *Lucas v. Brown and Root, Inc.*,<sup>154</sup> the federal court, anticipating the decision of the Arkansas Supreme Court, concluded that the employee had stated a cause of action when she alleged she was terminated for having rejected her foreman’s demand for intimacy.<sup>155</sup> The *Lucas* court concluded the employee was asked to commit, in effect, the crime of prostitution; and therefore, her cause of action was based on the public policy exception to the at-will doctrine.<sup>156</sup>

In *Parnar v. American Hotels, Inc.*,<sup>157</sup> the court followed the “wise and progressive social (public) policy” and allowed the plaintiff a cause of action for a termination designed to force her to leave the jurisdiction and thus prevented her from testifying before the grand jury.<sup>158</sup>

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148. *Id.* at 573, 335 N.W.2d at 840.

149. *Id.* at 575, 335 N.W.2d at 841. This is significant because it would eliminate punitive damages.

150. See also *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Proctor v. East Cent. Arkansas EOC*, 291 Ark. 265, 724 S.W.2d 163 (1987).

151. 102 Wash. 2d 219, 685 P.2d 1081 (1987).

152. 147 Vt. 488, 520 A.2d 586 (1986).

153. *Id.* at 494, 520 A.2d at 589.

154. 736 F.2d 1202 (8th Cir. 1984).

155. *Id.* at 1205.

156. *Id.*

157. 65 Haw. 370, 652 P.2d 625 (1982).

158. *Id.* at 379, 652 P.2d at 631.

### The Implied-in-fact Exception to the Termination-at-will Doctrine

Most states allow an exception to termination at will where there is an oral promise of a permanent or a specific period of employment. They also allow an exception if there is an implied promise in an employment manual, handbook or other company material which allows termination either for "cause" or only after specified procedural protections have been followed.<sup>159</sup>

Most of the jurisdictions that permit this exception have concluded that if an employee remains employed after the issuance of the manual, and he reasonably relies on manual promises, then the continuation of employment is sufficient consideration. The manual thus becomes part of the employment contract. These states most often cite the rationale of *Pine River State Bank v. Meitille*.<sup>160</sup> In *Pine River*, the Minnesota Supreme Court concluded that handbook provisions were enforceable if a reasonable person would have concluded a manual was to be part of the contract and "if [the handbook provisions] meet the requirements for formation of a unilateral contract."<sup>161</sup>

*Thompson v. St. Regis Paper Co.*,<sup>162</sup> also requires reliance by an employee in order to assert a viable cause of action. In *Thompson*,

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159. See, e.g., *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); *Kinoshita v. Canadian Pacific Airlines*, 68 Haw. 594, 724 P.2d 110 (1986); *Duldulao v. St. Mary of Nazareth Hosp. Center*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); *Hamby v. Genesco, Inc.*, 627 S.W.2d 373 (Tenn. Ct. App. 1981); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984).

Other jurisdictions have specifically rejected such an exception. Those jurisdictions view a company manual as simply a gratuitous unilateral expression of company policy which is not bargained for and therefore, either lacks consideration or is otherwise unenforceable. See Delaware: *Heideck v. Kent General Hospital, Inc.*, 446 A.2d 1095 (Del. Super. Ct. 1982); Florida: *Castor v. Hennessey*, 727 F.2d 1075 (11th Cir. 1984); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Georgia: *Anderberg v. Georgia Electric Membership Corp.*, 175 Ga. App. 14, 332 S.E.2d 326 (1985); and Louisiana: *Griffith v. Sollay Found. Drilling*, 373 So. 2d 979 (La. Ct. App. 1979); *Thebner v. Xerox Corp.*, 480 So. 2d 454 (La. Ct. App. 1985), *cert. denied*, 484 So. 2d 139 (La. 1986).

New York has allowed a cause of action if the handbook expressly guarantees certain rights, such as termination only for good cause. See *Weiner v. McGraw-Hill*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982), *limited*, 109 A.D.2d 714, 487 N.Y.S.2d 330 (N.Y.A.D. 1985).

160. 333 N.W.2d 622 (Minn. 1982).

161. *Id.* at 627.

162. 102 Wash. 2d 219, 685 P.2d 1081 (1984).

the employee alleged he was given no reason for his termination and that once a handbook of policy is issued the employer may not withdraw from those promises.<sup>163</sup>

[The court held] that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.<sup>164</sup>

Under *Thompson*, the handbook becomes binding on the employer based on the employee's reasonable and detrimental reliance.

A few jurisdictions have allowed recovery irrespective of any showing of detrimental reliance. The two cases most cited supporting this view are *Toussaint*,<sup>165</sup> and *Woolley v. Hoffman-LaRoche*.<sup>166</sup> Under *Woolley* and in *Toussaint*, an at-will employee need not have relied on any promise to maintain a cause of action for breach of a unilateral contract. *Toussaint*, summarized the employer's obligation after issuance of a manual:

Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.<sup>167</sup>

#### Termination in Violation of the Covenant of Good Faith and Fair Dealing

During the mid-1980's, some courts applied the concept of breach of a covenant of good faith and fair dealing to the employment setting.<sup>168</sup> Generally, however, the trend has been away from permitting tort claims in wrongful discharge actions. The following three examples serve to illustrate this point.

In *Foley v. Interactive Data Corp.*,<sup>169</sup> the California Supreme Court expressly rejected precedent which supported a good-faith remedy in

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163. *Id.* at 230, 685 P.2d at 1088.

164. *Id.*

165. 408 Mich. 579, 292 N.W.2d 880 (1980).

166. 491 A.2d 1257 (N.J. 1985).

167. *Toussaint*, 408 Mich. at 619, 292 N.W.2d at 895.

168. *K-Mart Corp. v. Ponssock*, 103 Nev. 39, 732 P.2d 1364.

169. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

an employment setting. The Alaska Supreme Court in *Arco Alaska v. Akers*,<sup>170</sup> rejected any punitive damage award where an employee was discharged in violation of a good-faith covenant. Finally, the Oklahoma Supreme Court in *Hinson v. Cameron*,<sup>171</sup> distinguished an earlier decision which recognized that an implied covenant of good faith included a duty not to use the termination-at-will doctrine in bad faith.

"Good cause" and the implied good-faith covenant significantly affect other areas of employment law. In *Dickeson v. Daw Forest Products Co.*,<sup>172</sup> the court interpreted provisions for "unjustly discharged" employees in a collective bargaining agreement to mandate good cause termination. In *Ortiz v. Bank of America*,<sup>173</sup> the court concluded that litigation based on an alleged breach of the California covenant of good faith and fair dealing was not barred by settlement of a workmen's compensation claim.

#### *Patterns of Law in Great Britain*

British courts, are generally not authorized to award punitive damages for an unjust dismissal. The focus of their inquiry is directed toward the *fairness* of the termination itself. The emphasis is not on whether the employee was discharged in bad faith, in violation of public policy or in violation of provisions in an employer's handbook as in the United States. Instead, British courts consider the fairness of the discharge process and its consistency with statutory requirements. For example, a British employer who does not draft an employee handbook may be accused of failing to provide for a fair disciplinary procedure, while the American employer who does so may only be exposing himself to litigation.

British law mandates that the burden of proof is on the employer to demonstrate a legitimate reason for the discharge.<sup>174</sup> Reasons such as lack of employee qualifications, lack of work, incompetence, misconduct or "some other substantial reason of a kind to justify" termination must be demonstrated as the basis for the discharge.<sup>175</sup> Upon request, the employee with two years employment must be

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170. 753 P.2d 1150 (Alaska 1988).

171. 742 P.2d 549, 552 (Okla. 1987).

172. 827 F.2d 627 (9th Cir. 1987).

173. 824 F.2d 692 (9th Cir. 1987), *superseded*, 852 F.2d 383 (9th Cir. 1987).

174. Employment Protection (Consolidation) Act, 1978, ch. 71.

175. Employment Act, 1980, ch. 42, eliminated the need for the employer to prove the fairness of the dismissal.

provided with written reasons for the discharge.<sup>176</sup> The purpose of this requirement "is to enable the employee to have some documentation" that can be produced in the event of unfair dismissal.<sup>177</sup> Substantial or "sufficient compliance" is acceptable, irrespective of the statutory mandate.<sup>178</sup> An internal disciplinary and appellate procedure is strongly preferred over an appeal to an external tribunal, as happens in the United States.

An employer's decision to dismiss an employee must be reasonable at the time of the decision to dismiss and also at the time of any internal appeal hearing. Subsequent information which would make the discharge appear unfair on appeal does not, however, retroactively make the decision unfair.<sup>179</sup>

During the hearing, the employer may not change the facts but may change the reason given for the discharge as long as the employee is neither evidentially nor procedurally disadvantaged.<sup>180</sup> The employer may introduce additional evidence between the time of the dismissal and the exhaustion of an internal appeal procedure only if it is "relevant to show the strength or weakness of the real reason for dismissal. . .".<sup>181</sup> If there are multiple reasons for discharge, such as incompetency and misconduct, and one of the two is disproved, it is then the employer's burden to prove that the alternate reason alone would have justified termination.<sup>182</sup>

In analyzing whether a dismissal is unfair, the industrial tribunal must take into account the size and administrative resources of the employer. It must also consider the overall fairness of the termination and whether or not the employee filed a timely complaint (within 3 months of the date of discharge) before the industrial tribunal. *Saeed v. Greater London Council (Inner London Education Authority)*<sup>183</sup> examined the reasonableness of the discharge of an employee who was

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176. Employment Protection (Consolidation) Act, *supra* note 174.

177. *Kent County Council v. Gilham and Others*, 1985 I.R.L.R. 16.

178. *Id.*

179. *Greenall Whitley plc. v. Carr*, 1985 I.R.L.R. 289.

180. *Hotson v. Wisbech Conservative Club*, 1984 I.R.L.R. 422. The EAT overturned a tribunal finding based on suspected dishonesty because allegations of dishonesty were brought out only late in the hearing, and thus the employee "was denied the opportunity of dealing with the allegations fully and of being sufficiently prepared to state her answer at the hearing." *Id.*

181. *Greenall*, 1985 I.R.L.R. 289. The *Greenall* court suggested that an initial dismissal be termed a suspension with full pay and that the dismissal itself not be final until the internal appellate process is exhausted. *Id.* See also *The Times* (London), Dec. 21, 1985, at 23, col. 2 (statement of D. Hatley).

182. *Smith v. City of Glasgow*, 1987 I.C.R. 796, 1987 I.R.L.R. 326 (H.L.).

183. 1985 I.R.L.R. 23 (Q.B.).

later acquitted of assault charges. The reasonableness of the discharge was determined by examining the basis of the employer's belief in the guilt of the employee.<sup>184</sup> Both the investigatory procedures and the substantiating evidence are reviewed. If the procedures, facts and motive have been ascertained fairly and in good faith, the employer's decision will not be sanctioned, even if later evidence revealed the discharge was not justified.<sup>185</sup>

While U.S. law concerning constructive dismissal is unclear, British law is straightforward. Employers may not force an employee to quit by making conditions intolerable. Again, the burden of proof is on the employer to show that the employee was not pressured into quitting.<sup>186</sup> Certain factors are considered *per se* unreasonable grounds for dismissal. For example, an employee could not be dismissed because his spouse was fired for theft since "a mere possibility of complicity" would be insufficient.<sup>187</sup> Nor could an employee be dismissed for preparing to compete with an employer unless the employer could show a misuse of confidential information; this would be especially true where no prior warning had been given to the employee.<sup>188</sup>

The case of Mrs. Sue Pontin illustrates the difficulty the courts may encounter in such situations. Mrs. Pontin lost her job as a sales representative because she married an employee of a rival firm. The Tribunal did not uphold her unfair dismissal claim. The chairman stated, "It is common sense that the loyalties of the applicant . . . would clash at times. The old adage that you cannot work for two masters applies in this case."<sup>189</sup>

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184. *Id.*

185. *W. Devis and Sons v. Atkins*, 1977 A.C. 931, [1977] 3 All E.R. 40, [1977] 3 W.L.R. 244, 1977 I.C.R. 622, 1977 I.R.L.R. 314 (H.L.). The employer's burden of proof may be met, if the employer concludes, after reasonable investigation, that he has a genuine belief in the employee's guilt which was based on reasonable grounds. Should an employee be imprisoned for violence, an employer need not take him back, since imprisonment frustrated the contract. *F.C. Shepherd & Co. Ltd. v. Jerrom, E.A.T. 706/83* (1984), reprinted in *The Times* (London), July 22, 1986, at 27, col. 7.

186. In *Oakley v. Labour Party*, 1988 I.C.R. 403, 1988 I.R.L.R. 34 (1987), reprinted in *The Times* (London), Oct. 16, 1987, at 36, col. 5 (dismissal of an employee was "a charade [in that the employer] had made up its mind to get rid of the employee and the restructuring was a pretext"). See also *Dobie v. Burns International Security Services (UK) Ltd.*, [1985] 1 W.L.R. 43, 45 ("as a matter of law . . . [an] offer of alternative employment at a lower wage in a different place amounted to a dismissal"). But see *Savoia v. Chiltern Herb*, 1982 I.R.L.R. 166 (constructive dismissal deemed fair).

187. *Wadley v. Eager Electrical Ltd.*, 1986 I.R.L.R. 93.

188. *Laughton and Hawley v. BAPP Industrial Supplies Ltd.*, 1986 I.R.L.R. 245. But see *Faccenda Chicken Ltd. v. Fowler*, [1986] 1 All E.R. 617 (C.A.) (discussing the implied duty of good faith or fidelity on the part of the employee).

189. *The Times* (London), Aug. 21, 1985, at 3, col. 1.

As in the United States, the failure of an employer to follow handbook procedure or other regular procedures may result in a favorable decision for the employee when the unfair procedure was outcome determinative or violative of natural justice.<sup>190</sup> If there is a finding of a serious breach of natural justice, the procedural irregularity will result in a finding of unfair dismissal.

British law regulating fair or due process-like procedures include (1) prohibitions of ex parte contacts between employers and the internal appeals adjudicators, (2) prohibitions against comingling of investigative and judicial functions in the internal appellate process, (3) avoidance of the appearance of impropriety by members of the Industrial Tribunal, (4) the opportunity to be heard before dismissal through the internal appeal process, and (5) proof of the employee's awareness of the disciplinary or internal appeal procedure. Generally, concepts of natural justice are applied flexibly.

The procedural internal appeal requirements mentioned in an employment contract must be followed regardless of the allegations or reasons for termination, unless following the procedures would be totally futile. In *West Midlands Co-Operative Society Ltd. v. Tipton*,<sup>191</sup> Lord Bridge concluded that an employee accused of absenteeism had a right to the internal appellate process. In *W. Devis and Sons Ltd. v. Atkins*,<sup>192</sup> the court concluded that all events subsequent to the discharge were immaterial in evaluating the reasonableness of the employer's behavior.

The fixity of this right to an appellate process following termination is demonstrated in *W. Brook & Son v. Skinner*.<sup>193</sup> The *Skinner* court held that an employee who allegedly became drunk at the employer's Christmas party and then left could not be immediately dismissed, irrespective of an agreement between the union and the employer providing for immediate dismissal unless the employee knew of the agreement.<sup>194</sup>

Even if an employer reserves the right to terminate an employee immediately for "gross misconduct", a hearing may still be required in accordance with the employer's disciplinary procedure.<sup>195</sup> When an employee was convicted of criminal assault during industrial warfare,

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190. *Polkey v. A.E. Dayton Services Ltd.*, [1987] 3 All E.R. 974.

191. [1986] 1 All E.R. 513, 516.

192. *W. Devis and Sons v. Atkins*, 1977 A.C. 931, [1977] 3 All E.R. 40, [1977] 3 W.L.R. 244, 1977 I.C.R. 622, 1977 I.R.L.R. 314 (H.L.).

193. 1984 I.R.L.R. 379.

194. *Id.*

195. *Dietman v. Brent London Borough Council*, 1988 I.R.L.R. 299 (C.A.).

the Court of Appeal concluded "no amount of industrial warfare could ever justify" failing to allow an opportunity to be heard before dismissal.<sup>196</sup>

The industrial tribunals have been so effective that Parliament has given them jurisdiction over dismissals based on gender or race discrimination.<sup>197</sup> Issues of sexual or racial discrimination brought before the industrial tribunal may develop along the same lines as those of unfair dismissal. For example, an employee may bring a claim of constructive discharge before the tribunal if sexually or racially harassed to the point of resigning. The industrial tribunals have also decided issues relating to pregnancy and child rearing. It is no longer permissible to refuse to employ a woman because she has children,<sup>198</sup> or to dismiss a pregnant employee if the reason is pregnancy-related.<sup>199</sup>

Discrimination need not be proven by direct evidence; inferences of discrimination are permitted.<sup>200</sup> Employers must disclose statistical information which may be relevant as to whether the employer had followed a discriminatory policy against minorities.<sup>201</sup>

Within any system there is always some danger of rulings which appear to violate both due process and common sense. Such a result occurred when blanket dismissals were permitted for the wrongful behavior of one employee. In a controversial ruling, termed "guilt by association" by *The Times*, the tribunal upheld the dismissal of four part-time employees who lost their jobs because their employer was unable to determine which particular worker was responsible for the theft.<sup>202</sup>

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196. *McLaren v. National Coal Board*, 1988 I.C.R. 370, 1988 I.R.L.R. 215 (C.A.), reprinted in *The Times* (London), Feb. 29, 1988, at 22, col. 4.

197. *The Times* (London), Sept. 17, 1987, at 3, col. 1 ("sex and race discrimination account for fewer than 3%" of the tribunal's case load in England and Wales). The two year period of continuous employment is unnecessary for dismissals based on race or sex discrimination.

198. *The Times* (London), Sept. 4, 1987, at 5, col. 4.

199. *Brown v. Stockton-On-Tees Borough Council*, 1988 I.R.L.R. 263, 1988 I.C.R. 413 (H.L.), reprinted in *The Times* (London), Apr. 22, 1988, at 40, col. 1. See also Wyvill, *A Pregnant Pause*, 132 (pt. 1) SOL. J. 170 (1988). An employer would also be well-advised not to ask a prospective female employee questions about her marital status, husband's occupation or plans for a family. See McMullen, *Job Interviews and Sex Discrimination*, 85 (pt. 3) L. SOCIETY'S GAZ. 14 (1988).

200. *North West Thames Regional Health Authority v. Noone*, 1988 I.R.L.R. 490 (C.A.), reprinted in *The Times* (London), Mar. 23, 1988, at 20, col. 5. See also *Hayward v. Cammell Laird Shipbuilders, Ltd.*, [1988] 2 All E.R. 261 (H.L.); *Pickstone v. Freemans plc.*, 1988 I.R.L.R. 357 (H.L.).

201. *West Midland's Passenger Transport Executive v. Singh*, [1988] 2 All E.R. 873, [1988] 1 W.L.R. 730, 1988 I.C.R. 614, 1988 I.R.L.R. 186, reprinted in *The Times* (London), Mar. 23, 1988, at 20, col. 4.

202. See *The Times* (London), Dec. 28, 1987, at 9, col. 1; *The Times* (London), Dec. 21, 1987, at 7, col. 5.

There is little doubt that industrial tribunals have been successful in Great Britain. As a result of this success, there are suggestions to extend the tribunal's jurisdiction to personal injury claims under £20,000.<sup>203</sup> The industrial tribunal system is fair, fast and inexpensive and leaves all concerned with the impression that they have had a hearing on the merits.

### CONCLUSION

The United States and Great Britain have chosen very different methods of dealing with the wrongful termination of an at-will employee. In the United States the policies regarding a wrongful termination have been developed on a random basis through judge-made laws. In contrast, the British Parliament has formulated and directed the policies and procedures for dealing with the wrongful discharge of an at-will employee. The British system has proven itself to be fair, fast and inexpensive. It generally leaves all concerned with the impression that they have been treated fairly. In the United States the system is fraught with inconsistencies, long delays and excessive expenses. There is, perhaps, much the United States can learn from the British system.



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203. Sara, *Personal Injuries and Industrial Tribunals*, 86 L. SOCIETY'S GAZ. 15 (June 14, 1989).

