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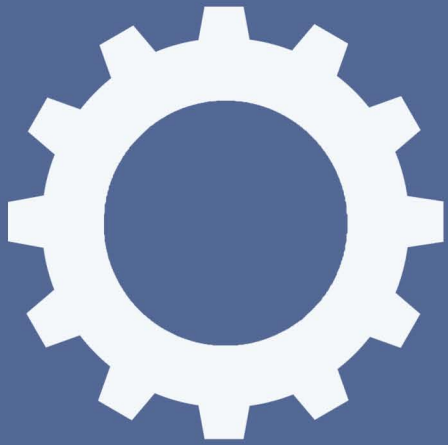
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Employment at Will versus Just Cause Dismissal: Applying the Due Process Model of Procedural Justice

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Employment at Will versus Just Cause Dismissal:

Applying the Due Process Model of Procedural Justice

Abstract

This paper critically examines the procedural justice characteristics of dismissal under the American employment-at-will (EAW) system and the New Zealand just-cause system, with regard to poor performance, misconduct, and redundancy (downsizing) situations, using a due process framework of three dimensions: adequate notice, fair hearing, and judgement based on evidence. Without any explicit proactive procedural protocol required for dismissals, EAW was found to offer limited protection to employees. Contrarily, employees in New Zealand have better protections in statute and common law, requiring employers to provide substantive justifications for dismissal and to follow procedures similar to due process. If employees are to be treated fairly and respectfully, changes to the EAW are needed, and the New Zealand system, despite some limitations identified, may be a good reference model.

Keywords

Dismissal, due process, employment-at-will, just cause, procedural fairness, termination of employment

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Introduction

Fairness, or justice, has long been seen as a sign of good organizational decision-making, because “it gives substance and meaning to human dignity”, is generally considered the right thing to do, and has broad implications for cooperative, productive interactions between employees and employers (e.g., Barnard, 1938; Davis, 1957, p. 439; Greenberg, 1990; Masterson, Lewis, Goldman, & Taylor, 2000). As Rawls (1971, p.3) once said: “justice is the first virtue of social institutions, as truth is of systems of thought.” Employees have several reasons for wanting employers to treat them fairly in any human resource decision. First, fairness often involves empowering employees to have some control over decision outcomes and so is desired for instrumental reasons (Tyler, 1987). Second, fair treatment can indicate a person’s organizational worth or value, and therefore affects self-esteem and group status (Lind & Tyler, 1988). Third, and most importantly, fairness is seen as a virtue in itself (Folger, 1998). The employee’s expectations of fairness are likely to be higher, the higher the potential impact of the employer’s decisions on the employee. Dismissals, of all organizational decisions, are probably the most impactful on employees. Job termination generally threatens self-esteem (Leana & Feldman, 1992), while layoffs, in particular, have “pernicious effects, harming the victims while undermining the morale of survivors who remain employed” (Cropanzano, Bowen, & Gilliland, 2007, p. 43).

Fairness, or justice, is of two types: procedural and distributive. Procedural justice focuses on the fairness of decision methods and procedures, whereas distributive justice focuses on the fairness of decision outcomes (Konovsky, 2000; Leventhal, Karuza, & Fry, 1980; Thibaut & Walker 1975). More specifically, procedural justice refers to the “structural

characteristics of a system”: the rules used in decision-making, including how the decision authority is determined, how information is communicated, and whether there is an opportunity for input or appeal (Folger, Konovsky, & Cropanzano, 1992, p. 143).

Research has found, for detrimental situations like dismissal, that perceptions of procedural injustice are generally a better predictor of employee legal action (e.g., lawsuits, personal grievances) than perceptions of distributive injustice (Lind, Greenberg, Scott, & Welchans, 2000; Youngblood, Trevino, & Favia, 1992). The means matter more than the ends. Why? A just process is one that is not obviously biased, arbitrary, or capricious. It typically involves listening to, and considering, both sides’ arguments and evidence. As such, a just process is one that seemingly delivers rational and legitimate outcomes. In other words, even if the outcomes are disappointing for the employee, they make some sense. They are understandable if not desirable (Wanberg, Bunce, & Gavin, 1999). If decisions are procedurally fair, unfavourable outcomes are more likely to be seen as temporary and possibly changeable (Folger, 1986). For instance, the employee can try to improve his or her performance and thereby avoid future dismissal. He or she can behave more appropriately at work and avert being fired for drunkenness or fighting or stealing, as the case may be. In such situations, a just procedure gives employees confidence that they can try again and make things right. A just procedure better prepares employees to accept the consequences of their actions (Taylor, Tracy, Renard, Harrison, & Carroll, 1995). A just procedure helps maintain employees’ confidence in management (Brockner, Konovsky, Cooper-Schneider, Folger, Martin, & Bies, 1994; Davy, Kinicki, & Scheck, 1997; Tyler & Caine, 1981) and employers, more generally (Pugh, Skarlicki, & Passell, 2003).

In this paper, we critically examine the procedural justice characteristics of the American employment-at-will (EAW) system of dismissal law and the New Zealand system of unjust dismissal law. We particularly focus on procedural fairness as it relates to poor

performance, misconduct, and redundancy (downsizing), since these are the three main reasons for dismissal. Why analyze the U.S. and New Zealand? First, as the following analysis will show, the U.S. EAW system is mostly lacking in procedural justice. In contrast, New Zealand's unjust dismissal system is, in many respects, the epitome of procedural fairness for employees. Second, despite the supposed costs of operating New Zealand's system, this hasn't dissuaded employers from hiring: the country's job creation record, from economic recovery in the early 1990s until the Lesser Depression in 2008, has been strong, with employment growth of at least two percent in nearly every year (New Zealand Department of Labour, 2011). Third, the similarities between the countries are a lot greater than the differences, and so New Zealand's experiences with unjust dismissal are likely to have important implications for the U.S. For instance, much like the U.S., New Zealand is an Anglophone, multi-ethnic, immigrant-dominated society with an English common law system and a decentralized liberal¹ market economy (LME) (Hall and Soskice, 2001). New Zealand also shares cultural similarities with the U.S.: low power distance,² high individualism, and low risk aversion (Adler, 1997; Hofstede, 1984). Moreover, New Zealand has a lot of small and medium-sized businesses, disproportionately more than the U.S. (Statistics New Zealand, 2011; U.S. Census Bureau, 2011). If it can afford procedural justice for fired employees, the U.S. should be able to as well. Why? Larger organizations can achieve economies of scale by spreading the fixed costs of just-cause dismissal procedures, associated with the hiring of specialist human resource personnel and providing specialist training to general managers, over a greater number of staff.

¹ This is liberal in the European sense, meaning free market. See Hall and Soskice (2001) for a deeper discussion of liberal market economies (LMEs) versus coordinated market economies (CMEs).

² The term 'power distance' was originally coined by Geert Hofstede (1984). It refers to the social distance between hierarchical superiors and inferiors. "This dimension expresses the degree to which the less powerful members of a society accept and expect that power is distributed unequally ... People in societies exhibiting a large degree of power distance accept a hierarchical order in which everybody has a place and which needs no further justification. In societies with low power distance, people strive to equalise the distribution of power and demand justification for inequalities of power" (<http://geert-hofstede.com/dimensions.html>).

Some might argue that New Zealand's small population³ and land area⁴ are incomparable to the U.S., making its experiences with just-cause dismissal of limited relevance. New Zealand is admittedly similar in population to an average or median U.S. state like Louisiana, South Carolina, or Oregon⁵ and similar in land area to some slightly larger than average U.S. states like Oregon, Colorado, and Nevada.⁶ It follows that, at the very least, New Zealand's experiences are pertinent to introducing just cause legislation at the state level. Montana already has a successful just-cause dismissal system, and its population, at approximately one million, is even smaller than New Zealand's.⁷ Other states have considered enacting just-cause dismissal legislation, but haven't yet done so. Clearly, individual states could learn a lot from New Zealand. In any case, New Zealand's just-cause dismissal system is, in most major respects, comparable to that of the U.K. (Corby, 2000), obviously a large, diverse country of more than 60 million people.⁸ If a just-cause system like New Zealand's can work in the U.K., it could work in the U.S. as well.

Whatever the short-term implementation issues, just-cause protection remains the right thing to do. Fairness is a universal and fundamental human virtue, which shouldn't vary across nations just because of geographic or demographic differences. Accordingly, if the New Zealand system offers fairer dismissal protection, there is no reason why it shouldn't be considered in the U.S.. Any transferability concerns are secondary.

Procedural Justice and Due Process

There have been many major developments in the area of procedural justice over the past few decades. For example, Thibaut and Walker (1975) propose a two-factor control-oriented theory for procedural justice, involving perceived process control (the opportunity

³ http://www.stats.govt.nz/tools_and_services/tools/population_clock.aspx

⁴ <http://www.tourism.org.nz/natural-environment.html>

⁵ <http://www.city-data.com/forum/general-u-s/1011848-us-state-populations-july-1-2009-a.html>

⁶ http://www.indopedia.org/index.php?title=List_of_U.S._states_by_area

⁷ <http://www.city-data.com/forum/general-u-s/1011848-us-state-populations-july-1-2009-a.html>

⁸ http://en.wikipedia.org/wiki/United_Kingdom

the employee thinks he/she has to voice his/her views about the situation) and decision control (the amount of influence the employee believes he/she has on the decision outcome). The higher the levels of process and decision control, the higher the perceived procedural fairness. Similarly, Leventhal and colleagues (e.g., Leventhal et al., 1980) claim that the following six criteria determine perceptions of organizational procedural fairness: consistency (in applying decision rules), bias suppression (in the decision-making), accuracy (in the information used to make decisions), decision 'correctability' (the opportunity to appeal an erroneous decision), representation (of the relevant parties' interests), and ethicality (meeting moral standards). Somewhat similar procedural fairness characteristics have been identified by Folgers and Bies (1989) for managerial responsibilities in decision making, which include: giving adequate consideration to employees' viewpoints, bias suppression, consistent application of decision criteria, timely feedback, providing justifications for decisions, truthfulness in communication, and courteous/civil treatment of employees.

The various elements of procedural justice described above are systematically combined in the due process model for studying performance appraisal (Folger, et al., 1992). Inspiration for the model comes from due process at law, just as "... much of the empirical work on procedural justice was originally stimulated by investigations concerning the psychology of law" (Folger & Bies, 1989, p. 87). In fact, Posthuma (2003) notes that the legal notion of due process and the psychological notion of procedural justice in the workplace share similar dimensions and the same underlying rationale, and so well-developed conceptions of the former can be used to better understand the latter. The model is comprised of three basic dimensions: adequate notice, fair hearing, and judgement based on evidence (Forkosch, 1958). These three dimensions are useful for analysing and comparing the procedural fairness not only of management decisions, but also of laws. They are especially applicable in complex situations where there are conflicting interests and value

judgements based on a weighing of the parties' claims (Folger, et al., 1992; Thibaut & Walker, 1978). Dismissals certainly fit well with this type of complex situation.

The first dimension of the model, 'adequate notice', relates to "the publication, distribution, and explanation of the standards for decisions" by the employer (Folger et al., 1992, p. 143). It covers the employer's communication of rules for employee conduct, minimum expectations for employee performance, and disciplinary procedures and outcomes for rule violation and/or unsatisfactory performance. Adequate notice also requires that employees be given an opportunity to influence the formulating of rules and standards (Folger et al., 1992), and that such rules and standards be reasonable and consistently communicated and applied (Ewing, 1977). The central premise here is that it is unfair/ unjust to hold workers responsible for behaving badly or performing poorly when they don't reasonably know what the employer expects and/ or understand the probable disciplinary consequences of their actions (Velasquez, 1982). Adequate notice also provides guidance to managers, charged with disciplining the badly behaving or poor performing, and to the potential victims of employee misconduct, who need to know how, when, and to whom to make a complaint (Ewing, 1977). In the specific case of poor performance, adequate notice also involves giving employees timely feedback on sub-par performance (Cropanzano et al., 2007; Folger et al., 1992), training, coaching, mentoring and other help, and a reasonable length of time to meet the standards.

Empirical evidence confirms that adequate notice is important to employee perceptions of procedural justice. For example, Dipboye and de Pontbriand (1981) found that discussions of plans/objectives and the use of relevant (reasonable) criteria in performance assessment directly affected employees' opinions of the appraisal itself as well as the overall appraisal system. Consistency in applying decision criteria and rules has also been found to

be a major determinant of procedural fairness in both performance appraisal (Greenberg, 1986) and resource allocation settings (Barrett-Howard & Tyler, 1986).

‘Fair hearing’ is the second ingredient in the due process model. The basic idea is that the employer should not decide to dismiss the employee without first having a hearing. A fair hearing helps ensure that the dismissal decision reflects the facts of the case, the objective reality of the situation, rather than prejudices towards, and presuppositions about, the employee. A fair hearing has three principal characteristics. First, prior to the hearing, the employee should be notified of any proposed redundancies or concerns the employer may have about the employee’s performance or conduct and the possibility of follow-up disciplinary action. This enables the employee to seek advice, obtain representation (e.g., a lawyer), prepare arguments, and collect supporting evidence. Second, at the hearing, the employee should have the opportunity to be heard in a timely fashion: the chance to present his or her own arguments and evidence, and contest the arguments and evidence presented by the employer (e.g., cross-examine the employer’s witnesses) (Ewing, 1989; Golding, 1975; Posthuma, 2003; Selzick, 1969). In other words, employees should have a ‘voice’ in testing the accuracy of any evidence, and integrity of any arguments, made by the employer. Finally, employees should have a formal right to appeal: any employee adversely affected by a disciplinary decision should be able to have it reviewed by a neutral third party with knowledge of the law, and the applicable rules and standards (Folger et al., 1992; Posthuma, 2003). The ‘fair hearing’ dimension combines the elements of process control, as outlined by Thibaut and Walker (1975), as well as various elements, such as adequate consideration of employee’s viewpoint, respectful treatment, ‘correctability’, and employee representation that others have suggested are crucial to procedural justice (Folger & Bies, 1989; Leventhal et al., 1980).

Empirical findings strongly support the importance of fair hearing in perceptions of procedural justice. In particular, the opportunity to express one's views and otherwise be heard generally increases perceptions of fairness (Folger, 1977; Lind, Walker, Kurtz, Musante, & Thibaut, 1980). Moreover, having a voice is valued for itself, regardless of whether it actually produces better outcomes. For instance, Cawley, Keeping, and Levy (1998) found that, in performance appraisal situations, having a voice gave rise to better perceptions of fairness, more satisfaction and greater motivation to perform, even with no apparent change in appraisal ratings.

'Judgement based on the evidence' is the third component of the due process model. Its straightforward premise is that the legitimacy of disciplinary decisions critically depends on whether they are seen as unbiased, impersonal, and objective (Selnick, 1969). This means two things. First, each disciplinary decision should be justified by reasons explained to the employee, proving that the decision was not arbitrarily made (Shapiro, Buttner, & Barry 1994). Second, part of the justification should involve an explicit appeal to facts, figures, observations, and any other evidence which substantiate the reasons for the decision. Decisions should involve "a reasoned weighing of the interests involved and a reasoned attempt to reconcile them or adjust them" (Pound, 1943, p. 35.). This component of the due process is in line with the decision control aspect outlined by Thibaut and Walker (1975). It also addresses procedural justice characteristics like bias suppression, accuracy, justification provision, truthful communication and ethicality (Folger & Bies, 1989; Leventhal et al., 1980).

Empirical studies show that explanations and evidence for management decisions are important to employees' fairness perceptions and subsequent actions. For example, Wanberg et al. (1999, p. 59) found that, when given explanations for why and how layoff decisions were made, terminated employees had "higher perceived fairness of the layoff, higher

willingness to endorse the terminating organization, and less desire to sue that organization ...” Similarly, Brockner, DeWitt, Grover, and Reed (1990) showed that explanations for layoffs brought more positive reactions from survivors, employees who were not laid off. Shapiro, Trevino, and Victor (1995) more specifically found that the frequency of theft, a retaliatory behaviour, decreased when layoffs were explained. However, employees are unlikely to accept every sort of explanation for an organizational decision. Indeed, Bies, Shapiro, and Cummings (1988) found that, in conflict situations where superiors had denied an employee request, it was not sufficient to simply announce a decision and give some mitigating circumstances as explanations. Only when explanations were perceived to have adequate reasoning and communicated with sincerity were subordinates likely to see them as fair and react in a less negative way.

In sum, there are many commonalities between the concepts of procedural justice, as used in organizational studies, and due process, as used in legal discourse. As described above, the three basic due process components - adequate notice, fair hearing, and judgment based on evidence (Folger, et al., 1992) - cover the important elements of organizational procedural justice. Hence, the due process is a simple, yet sufficiently comprehensive model to use in analyzing dismissal situations. Besides, these law-based procedures may add objectivity and legitimacy to an organization’s decisions (Garrett & Klonoski, 1986; Rubin, 2007).

United States

Since the mid-19th century, the overwhelming majority of American workers in the non-union, private-sector have worked under a modified form of employment-at-will (EAW), where the employment relationship may be terminated at any time by either side for a good reason, a bad reason, no reason, or even a morally unjust reason, other than for a few identified illegitimate exceptions as discussed below (Bennett-Alexander & Hartman, 2009;

Eger, 2004; Grenig, 1991; McCall, 2003). The United States remains the last major industrialized country without comprehensive just cause protections against arbitrary dismissal (Grenig, 1991).

Defenses of EAW, summarized in McCall (2003) and described further below, centre on two main types of argument: economic and rights-based. The economic arguments can be further subdivided into practical management concerns and logical deductions based on an idealized market. First, in terms of practical management concerns, EAW is viewed as being easier and cheaper to administer than just-cause, because it doesn't involve complex procedures for hearings, investigations, performance measurement, and behaviour monitoring. Admittedly, just-cause does involve some administrative costs, but a modified EAW system, with its complexity, unpredictability, and potentially high litigation costs, also involves a significant administrative burden (Dannin, 2007). EAW is also claimed to motivate higher performance through the fear of being fired, whereas just-cause allegedly promotes laziness and apathy by protecting all but the very lowest performers from dismissal. However, motivating through fear is only likely to encourage rule compliance and surface conformity, neither of which is essential to competitive advantage. "Threatened workers may produce but they are also likely to be further alienated, to be risk averse, and to identify at only the most superficial levels with corporate goals" (McCall, 2003, p. 155). In contrast, the job security available under just-cause affords opportunities to invest in firm-specific skills (Harcourt & Wood, 2007), build commitment, and encourage behaviours and thinking (e.g., innovation) more consistent with a longer-term view of the employment relationship (Harcourt, Wood, & Roper, 2007).

The other main economic arguments for EAW, based on the idealized market, originate with law and economics academics, many of them at the University of Chicago (e.g., Epstein, 1984; Posner, 1992), and libertarians (e.g., Nozick, 1974). One contention is

that just-cause is unnecessary because market forces already punish employers who unfairly fire employees without cause. Why? Abusive, arbitrary employers supposedly suffer ‘reputational losses’, which impede their ability to attract and retain good workers, unless they pay a costly wage premium. However, in the real world, employees often have limited information about current and future employers, especially the dismissal practices of specific managers or departments, and limited options, given high unemployment, to quit or hold out for a better job. Another contention is that just-cause *must* be economically inefficient, because employers and employees appear to prefer EAW over just-cause when negotiating their employment contracts. In reality, Kim’s survey (1999) of U.S. workers suggests that the overwhelming majority believe they already have just-cause protection, and so wouldn’t know that it needed to be negotiated. Even if known, few workers have the power to individually negotiate just-cause rules, but, once unionized, just-cause would typically be one of their very first demands (Rock & Wachter, 1996). Perhaps most importantly, negotiating over dismissal rules entails a classic market failure. Just-cause protection may be in the interests of employers collectively, as it may generate employee loyalty and commitment, but employers, individually, might rationally refrain from offering it for fear of attracting everyone else’s so-called ‘lemons’ (Akerlof, 1970), other employers’ poor performers and wrongdoers. Likewise, individual employees might rationally refrain from demanding just-cause dismissal, fearing that it will signal that they are poor performers or wrongdoers most in need of protection (Kamiat, 1996). However, if just-cause is a legislated requirement for all employers, these concerns would be nullified.

Rights-based justifications of EAW ordinarily focus on freedom of contract and property rights (Dannin, 2007; Werhane, 1985; Werhane and Radin, 1999). Freedom of contract is the idea that employers and employees are free to negotiate whatever they want in their contracts. Utility is increased by enabling workers to negotiate terms which best suit

their wants and needs, and autonomy promoted by giving workers contractual control over their working lives. The contrary, and more compelling, counter-argument is that EAW reduces autonomy and utility by making the worker more vulnerable to the financial and social stresses of unemployment, without any compensating wage premium (McCall, 2003). Property rights are rights “to control goods, to benefit from them, to exclude others from them etc.” (McCall, 2003, p. 164). Property rights allegedly further an owner’s autonomy by “... providing a secure base of material possessions...” free from “... over-reliance on the decisions of others”, fairness by allowing owners to reap rewards from their investments, and overall utility by giving incentives to invest and take risks (McCall, 2003, p. 164). Just-cause rules also promote autonomy, through the security of a job and labour income; fairness, with the emphasis on due process and just cause; and utility, through incentives to invest in firm-specific skills, all without materially affecting the owner’s property rights (McCall, 2003).

Despite the lack of unequivocal evidence for the superiority of EAW and the rise of advocacy for just-cause rules, EAW remains “alive and well” as the dismissal default system for non-union private-sector employees in the U.S., with legislatures and courts trying to reduce the practice of arbitrary and unfair dismissals through “narrowly carved out exceptions” (Radin & Werhane, 2003, p.116). Dismissal law in the US has developed to recognize certain basic employee rights (Bennett-Alexander & Hartman, 2009, pp. 31-32). For instance, courts began to fashion exceptions to the at-will doctrine, following court cases in which employees alleged that they had been ‘wronged’ in the dismissal process. As a result, the at-will doctrine gradually evolved on a state-by-state basis, with changes to at-will employment varying considerably across the U.S. In some states, the at-will doctrine remains virtually unchanged, while in others the courts have created exceptions, and in still others the state has passed laws providing legislative exceptions to at-will employment.

There are four main exceptions to EAW, which provide some employment protection in limited circumstances. The first, and most important of these, involves federal anti-discrimination legislation, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. These statutes are legally binding in all 50 states and are designed to protect employees from termination based on any of the protected classes, including: race, colour, religion, sex, national origin, disability and age.⁹

Since the 1970s, an increasing number of states have recognized three additional exceptions to the EAW doctrine (Bennett-Alexander & Harman, 2009; Eger, 2004), with each state defining the specifics of each exception in its own terms. Some of these have been defined principally or entirely by the common law courts, but in some cases through state statute. The public policy exception protects employees from being dismissed for upholding, supporting, enforcing, or complying with either the laws or public policies of the state. For instance, this exception prevents the employer from wrongfully discharging an employee who lodges a health and safety complaint, files a workers' compensation claim, or refuses to violate a regulation. The implied contract exception commits employers to written or oral statements they have made promising job security or to follow certain procedures in the event of a dismissal (Bennett-Alexander & Harman, 2009; Eger, 2004; Muhl, 2001; Selden, 2006). The last exception, the covenant of good faith and fair dealing, is the most significant departure from EAW doctrine (Muhl, 2001). It requires the parties to act in good faith in fulfilling each party's contractual obligations. Muhl states that "... this exception...reads a covenant of good faith and fair dealing into *every* employment relationship. It has been interpreted to mean either that employer personnel decisions are subject to a 'just cause'

⁹ For the purposes of this paper, discrimination is treated as one of four major exceptions to the EAW doctrine.

standard or that terminations made in bad faith or motivated by malice are prohibited” (2001, p. 10).

Forty three states have the public policy exception, 42 the implied contract exception, and 20 the good faith and fair dealing exception. Three states, Florida, Georgia and Rhode Island, make no allowance for any exceptions.¹⁰

In the late 1970s and 1980s, ten state legislatures introduced bills which would have required just cause firing (Krueger, 1991, p. 650). Krueger states that these laws were generally proposed following well-publicized and costly rulings against employers. However, to date, only Montana’s 1987 Wrongful Discharge from Employment Act has been successfully passed into law (Krueger, 1991; Selden, 2006). For all other states, EAW remains the default rule in the non-union, private sector. EAW makes virtually no provision for due process in the case of employee termination. Although some employers have voluntarily adopted elements of due process in their discharge processes, employees are still left with few avenues in which to pursue redress for a wrongful termination claim.

Adequate notice: poor performance

Adequate notice of the expected standards of performance is a fundamental aspect of the due process model (Folger et al., 1992, 144-146). Exceptions aside, EAW permits the employer to terminate the employment relationship for good reasons, bad reasons, or even no reason. As a result, employees may be dismissed whatever their performance level: high, low, or average; acceptable or unacceptable. Performance standards are irrelevant. In principle, high performers are as vulnerable to termination as those whose performance is very low. For example, Ronald Kratz II was terminated from his employment at BAE Systems after 16 years. Company officials claimed that his weight (680 pounds) prevented

¹⁰ <http://www.ncsl.org/issues-research/employment-working-families/at-will-employment-exceptions-by-state.aspx>

him from effectively performing his tasks. Kratz contested these allegations, arguing that he had received two promotions and consistently high performance ratings. Kratz even offered to take a demotion to keep his job, but the company refused (Sixel, 2011).

EAW doesn't require companies to identify and communicate performance standards or provide reasonable time, coaching, training, or feedback to help employees achieve such standards. Employees have no right to participate in designing and carrying out performance appraisals, even for themselves. An employer might still use a performance appraisal system, but the standards need not be reasonable, reflecting what the great majority of employees can realistically achieve. Furthermore, according to McCall (2003), a performance demand isn't necessarily reasonable, just because employees do meet it most of the time. "For a demand to be reasonable, it must be one that can be met, not at any cost, but at a reasonable cost" (p. 168).

Whatever the law allows, actual practice is somewhat less capricious and arbitrary. Many, especially larger, employers do have performance appraisal systems and associated performance measures and standards (Addison & Belfield, 2008, p. 523; Longnecker & Ludwig, 1990, p. 961). Performance appraisal is often a key part of an individualistic U.S. workplace culture, in which each person is, at least in principle, rewarded or punished in accordance with his or her work output (Hofstede, 1993). A lot of appraisal schemes might lack validity, but the general intention is to reward and punish in a meritocratic way. Most firms refrain from using dismissal except to rid themselves of all but their worst performers. Sacking higher performing staff risks damaging employee confidence in an appraisal system and any positive motivational benefits it might have.

U.S. employers also use performance improvement plans to inoculate themselves against wrongful termination claims, as, for example, with allegations of discrimination. Under such plans, employees are afforded notice that their performance fails to meet some

minimum standard, and must be rectified within a particular time-frame to maintain employment (Nielson, 1999; Selden, 2006). How long is, of course, at the employer's discretion. In the case of a pharmaceutical company, Nielsen (1999) described the "incremental discipline process" as one designed to "...provide the problem employee with notice about the inadequacy of her performance, sufficient time and resources to ensure that the expectations placed on her by the company are clear and realizable, and a fair chance for the employee to rehabilitate her performance ..." within what for new employees was a six-month probationary period (p. 261).

Adequate notice: Misconduct

As stated already, EAW generally allows employers to discharge employees for good reasons, bad reasons, or even no reason. It follows that employees may be let go for bad conduct, good conduct, or no conduct in particular. What constitutes misconduct is irrelevant: being the model of obedience, loyalty, honesty, and civility doesn't protect an employee from dismissal. Law in the United States does not, in other words, require employers to have codes of conduct, defining the types of misconduct and warning of potential punishments, culminating in dismissal. Even if there is a code of conduct, the punishment doesn't have to be reasonable. Minor infractions, like coming to work five minutes late on one occasion, may be treated as major offences, warranting dismissal. Radin and Werhane (2003, p. 115) explain that "EAW supports inconsistent, even irrational, management behaviour by permitting arbitrary, not-work-related, treatment of employees...". There is also no obligation to be consistent in administering punishments: what was permitted yesterday may be prohibited today. For example, in one high profile case, Juan Williams was fired by the NPR radio station for having made allegedly derogatory remarks about Muslims on Fox News talk show "The O'Reilly Factor". NPR claimed that Williams' comments were inconsistent with its editorial standards and practices, but some analysts

claimed that termination was really punishment for his continued presence on Fox News (Folkenflik, 2010). Since Williams had been employed simultaneously at NPR and Fox News for many years, this sudden allegation of misconduct after (at least) tacit support of his two positions was unexpected. There were certainly some indications that NPR was inconsistent in its treatment of Williams, even if he deserved to be fired for his anti-Islamic comments.

Despite the EAW's permissiveness, a 2005 survey of U.S. employers revealed that 86% had written standards of conduct (Ethics Resource Center, 2005). This suggests that most U.S. employers do try to codify (if only in generalities) their behavioural expectations of employees. Some degree of rigidity in defining what's acceptable or unacceptable is considered desirable for establishing an orderly workplace, even if this might be idiosyncratic at times. No doubt, the risk of a lawsuit under any of the EAW exceptions also motivates many employees to fire 'for cause' linked to a code of conduct, even if this cause isn't necessarily 'just' (Colvin, 2006, p. 75). If, for example, an employer can prove minor misconduct (e.g., the employee came five minutes late for work), that is still sufficient to demonstrate that the employee wasn't fired for discriminatory reasons (e.g., being African American and/ or female) or for upholding/ enforcing the public policy/ laws of the United States (e.g., whistle-blowing in a health and safety case).

Adequate notice: redundancy

'Adequate notice' is not relevant to procedural justice in redundancy cases. The reason is simple. 'Adequate notice' in the due process model is fundamentally about telling employees the 'rules of the game' in advance so that they can then perform or behave more appropriately to avoid dismissal. Redundancies, by definition, involve eliminating positions and that inevitably means that employees have to be laid off, irrespective of their behaviour or performance. The key point is that employees are not at fault, and little, if anything, they

could have known in advance would have helped them to personally escape redundancy.

In the U.S. the Worker Adjustment and Retraining Notification Act (WARN Act) makes provision for notice requirements of impending mass layoffs or plant closings, but this is more relevant to mitigating the adverse effects on employees, an issue of distributive rather than procedural justice.

Fair hearing: poor performance and misconduct

Since employees may be fired for bad reasons or even no reason, EAW doesn't provide a process, involving a hearing, for challenging the fairness of management decisions. Employees may be summarily dismissed, without further discussion, and escorted out of the building by a security guard or guards within minutes of learning they have been fired.

There is a limited right to appeal and obtain redress through the courts under one of the four exceptions, including discrimination, but this can be slow and expensive. For instance, discrimination cases may be pursued through the Equal Employment Opportunity Commission (EEOC), but it has a significant backlog of cases. Employees may opt out of the EEOC process to pursue litigation directly, but this requires substantial attorney fees associated with prolonged litigation (Nielsen, 1999). Furthermore, under the EAW system, the employee bears the initial burden of establishing that discharge occurred for one of the prohibited reasons (McCall, 2003, p. 151).

Fear of litigation has driven an increasing number of U.S. employers to offer internal dispute resolution procedures as a potentially less costly, less time-intensive way of resolving dismissal cases, despite the absence of any explicit legal obligation (Colvin, 2006; Colvin, Klaas, & Mahony, 2006; Nielsen, 1999). More than half of U.S. organizations now have a formal dispute resolution procedure for nonunion staff (Colvin et al., 2006). Many have turned to alternative dispute resolution (ADR) processes like mediation, arbitration, ombudspersons, and peer review (Colvin et al., 2006). To some extent, these processes offer

some elements of a fair hearing, especially a chance to be heard. The problem is that neither their procedures nor their outcomes may be reviewed by either a tribunal or a court. As McCall (2003) explains, “(w)hile quite a number of large US corporations have adopted internal appeals mechanisms and have promised workers that they will be dismissed only for cause, those systems are voluntary and without easily accessible external appeals mechanisms...” (p. 152). Management still retains ultimate control over how these processes operate and the outcomes they produce. Even a seemingly neutral, outside mediator or arbitrator is to some extent beholden to the employer, since such individuals are typically hired, paid, and fired by the employer. In some cases, the employer intervenes more directly, with the CEO or senior human resources manager retaining the final verdict on whether to fire the employee (Colvin, 2003, p. 714).

Fair hearing: redundancy

Under EAW, an employer is under no obligation to consult with employees prior to making them redundant. Furthermore, the absence of a legal duty is reflected in actual practice. For instance, Eby and Buch (1998) found that very few organizations engage in an ethical approach to downsizing, failing in most cases to provide advance warning of job loss and effective communication of the job loss by the manager (the news was often delivered by human resources instead). In redundancy cases, employers are less fearful of litigation under one of the exceptions. Why? The employer need only show it had a business plan to restructure to prove an employee’s job was truly redundant.

Judgment based on the evidence: poor performance

The due process model also requires that any dismissal involves judgment based on evidence. Once again, EAW allows dismissals for good reasons, bad reasons, or no reason. The employer is not therefore obliged to explain or prove that the employee was a poor performer. No investigation into the facts of a case is required. Nevertheless, many

employers do collect performance data through an appraisal system, and frequently base promotions, pay increases, and discipline on such data. Many also document low levels of performance against standards as a means of protecting themselves against any future lawsuit, where the employee alleged wrongful termination based on discrimination or some other EAW exception. Nevertheless, managers in the real world frequently lack the time to conduct appraisals and sometimes even the language skills to feedback performance-related information to employees (Narcisse & Harcourt, 2008). McCall (2003) argues that adopting just-cause dismissal policies, which require the systematic evaluation of employee performance, could actually encourage managers to pay more attention to individual performance appraisal, resulting in improved employee performance.

Judgement based on the evidence: misconduct

EAW certainly doesn't require that the employer gather evidence to show that the employee is guilty of any misconduct. An employee may be discharged even for good conduct. Nonetheless, misconduct is a slightly different situation from poor performance. In the U.S., employees terminated for misconduct are ineligible for unemployment insurance compensation. In addition, an employer's unemployment insurance premiums are usually experience-rated to reflect the volume of claims from its employees. If an employee fired for misconduct files for compensation, the employer thus has some incentive to challenge the claim by providing supporting documentation and clear evidence of employee misconduct.

Judgment based on the evidence: redundancy

Under EAW, an employer's decision to downsize doesn't have to be justified to employees. Managers are relatively unrestricted in managing their organizations (and employees) as they see fit. However, in their efforts to reduce labour costs, employers frequently target older employees for redundancy, because they tend to have higher seniority-related pay (Noe, Hollenbeck, Gerhart, & Wright, 2010, p. 111). Older, redundant employees

are therefore often well placed to claim, through the Age Discrimination in Employment Act (ADEA), that they are victims of age discrimination. These cases comprise a large percentage of complaints filed with the EEOC, with their frequency falling in market booms and rising in busts (Noe et al., 2010, p. 112). Settlements can be expensive, with reports indicating payments running from \$50,000 to \$400,000 per employee (Woo, 1992, p. B1).

The Employee Retirement Income Security Act (ERISA) also allows older, redundant employees an avenue for redress via a complaint through the Department of Labor, if they believe they have been laid off as a means of avoiding pension obligations, even when the layoffs have been at least partly motivated by business necessity (Noe et al., 2010, p. 595). To defend against age-related discrimination claims, the employer must be prepared to show, with explanations and substantiating evidence, that older employees were laid off because of factors related to organizational competitiveness rather than age.

New Zealand

Unlike the U.S., New Zealand has an unjust dismissal system which applies to virtually all public and private-sector employees. Sections 102 and 103 in the 2000 Employment Relations Act allow an employee to take a personal grievance for unjust dismissal against the employer, as the only option for redress, with the onus of proving just cause on the employer.¹¹ An employer has just cause to dismiss when there is substantive justification and when the dismissal was handled in a procedurally fair manner (Beck & Swarbrick, 2009; Kiely, 2008, Rudman, 2008). Substantive justifications are not explicitly defined in the Act, and so the common law (and sometimes the employee's contract) typically determines the grounds for dismissal (Brown, 2005). For misconduct, substantive justifications often relate to the violation of traditional common law duties: the duties of obedience, of loyalty, for example (Brown, 2005: pp. 752-766).

¹¹ Sections 102 and 103, Employment Relations Act 2000

Until recently, fair procedures for managing dismissals were also largely determined through case law. However, the 2010 amendments to section 103A have, to a limited extent, codified the common law and clarified at least some of what is expected in a procedurally fair dismissal.¹² Section 103A more generally obliges employers to act in ways consistent with “...what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action (e.g., warning) occurred.” Nevertheless, the New Zealand system continues to heavily rely on the common law for guidance, and, given the intricacies and unique conditions of particular cases, these rules are likely to be unclear to the ordinary manager.

Adequate notice: poor performance

For poor performance, the ‘adequate notice’ element in the due process model “...involves giving employees knowledge of the appraisal system and how it affects them well ahead of any formal appraisal” (Narcisse & Harcourt, 2007, p. 1154) and potential disciplinary action. It also entails providing timely feedback “... so that employees can rectify any performance deficiencies before the appraisal is conducted” (Narcisse & Harcourt, 2007, p. 1154). The essence of this approach is reflected in New Zealand common law, with *Trotter v Telecom* as the principal, precedent-setting case.¹³ Specifically, the Employment Court held that the employer must “... become dissatisfied with the employee’s performance of his or her duties..., inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance...” In furnishing feedback, the employer must provide a “... readily comprehensible... objective criticism of the work ... and statement of standards...” to be met. Moreover, there should be “... a reasonable time allowed for the attainment of those standards...” In the *Trotter* case, Telecom failed to comply with several

¹² Section 15, Employment Relations Amendment Act 2010

¹³ *Trotter v Telecom Corporation of New Zealand Limited* (1994) 4 NZELC (digest) 98,243; (1993) 659 (EC)

of these obligations. Although dissatisfaction was voiced, there was no objective criticism of the work related to any statement of clear standards. On the contrary, the new boss only told the aggrieved employee he was ‘a shallow thinker’ and ‘lacked depth’, and failed to explain such vague comments and particularly how the employee’s performance had supposedly deteriorated since his positive performance reviews under the previous boss. In addition, Telecom provided the employee just two weeks to rectify his performance (e.g., the ‘shallow thinking’), once this had been raised with him, an unreasonably short period of time to improve substantially in a demanding senior management role.

How much latitude does the employer have in setting performance standards? In some cases, the performance standards are already outlined in the contract. If not, a reasonable employer, as per section 103A, would use only valid measures of performance associated with key tasks and/or duties in the job description, over which the employee had some control. Likewise, a reasonable employer would develop minimum performance benchmarks “...with reference to established standards in the particular industry or in society generally” (Beck & Swarbrick, 2009, p. 149). Industry standards reflect what a majority of staff can consistently achieve, or what the poor performing staff member normally achieved in the past. Societal standards reflect what most people regard as common decency, civility, or consideration in the treatment of others and their property (Beck & Swarbrick, 2009).

How much time is considered reasonable in allowing an employee sufficient opportunity to meet the minimum performance standards? A reasonable period is however long it takes most people in the relevant industry or occupation to master whatever skills and knowledge are necessary to perform at or beyond the minimum standards. For instance, in the *New Zealand Meat Processors v Prestige Meats* case, the Employment Court held that two days was an unreasonably short time for a 17 year old with no experience or formal qualifications to learn how to adequately perform as a general purpose worker in a poultry

processing plant.¹⁴ In principle, what is reasonable could stretch to months or even years, reflecting the time needed to master a complex job or learn the various stages of a job with a long cycle time (e.g., project management, research).

Adequate notice: misconduct

The ‘adequate notice’ element in the due process model entails notifying employees about what constitutes misconduct, and the potential consequences of such misconduct, at the start of their employment. This is not a uniform requirement in New Zealand dismissal law. The employee is normally expected to know that a violation of a common law duty is a breach of contract and could result in dismissal (Brown, 2005, p. 754). As a result, employers are not ordinarily obliged to tell employees that, for example, disobedience, disloyalty, and theft are misconduct, because it is assumed to be obvious. ‘Adequate notice’ is not normally provided. This can be a serious injustice for some workers. Many aren’t aware of their common law duties, especially since some of these are inconsistent with more modern, democratic, and egalitarian values. Obedience is particularly problematic. Professionals often treasure their independence (from supervision) and treat their managers as colleagues rather than as superiors. Thus, a teacher’s refusal to follow his or her principal’s instructions for teaching the curriculum might be seen as a friendly disagreement between equals rather than as disobedience of a superior warranting discipline. Blue-collar workers (in subordinate positions) and white-collar workers (in supervisory ones) often wear the same clothes and call each other by first names. How can the latter expect to command the former, when power and hierarchy are no longer bolstered by the accoutrements of rank and status? Younger people no longer automatically obey older people; students no longer automatically obey teachers. Moreover, social trends towards greater egalitarianism and less

¹⁴ New Zealand Meat Processors, etc, IUOW v Prestige Meats Ltd (1988) 2 NZELC 96,213; (1988) 2 NZILR 1173

hierarchy have been reinforced by the information and communications technology (ICT) revolution. How can older managers legitimately tell their younger subordinates what to do, when increasingly they don't know best, especially about ICT?

Loyalty is also potentially an issue. A growing proportion of employees work part-time for two or more firms, and think it totally normal to apply the knowledge (e.g., the secrets!!) acquired in one firm to their work in the other. In fact, the decline of internal labour markets and associated long career paths has encouraged workers to leverage skills obtained in one firm for better employment in another (Armour, 2005). Loyalty may also conflict with other values. For instance, if a professor publicly complains about his or her incompetent vice chancellor, is this disloyalty? Is it simply freedom of expression, as exercised by one individual? Alternatively, is it a public service reflecting the professor's duty to act as the 'critic and conscience of society'? With all this potential for confusion, all employers should be required to give 'adequate notice' by clarifying and communicating what's misconduct via their internal documents and/ or the contract. A reasonable employer, acting under the auspices of section 103A, would provide this; a reasonable employee unfamiliar with the old-fashioned duties of a 'contract of service' (or servitude) would need to be informed.

In other key respects, 'adequate notice' is required in New Zealand dismissal law for misconduct cases. If misconduct warrants more severe punishment than usual because of the nature of the employer's business, this has to be articulated in a personnel manual/ handbook/ code of conduct (or the contract) and communicated to employees so that they are made aware (Brown, 2005, p. 754). Employers must also take steps to tell employees about unique or more unusual forms of misconduct they are less likely to be familiar with (Brown, 2005, p. 754). This could include, for example, failure to follow the employer's safety rules, standard operating procedures, or dress code. The employer must also communicate any major

changes in behavioural expectations, especially if contrary to industry practice or inconsistent with the employer's own previous permissiveness. For instance, an employer wanting to forbid the use of profanity on a construction site would have to define swearing as misconduct, outline appropriate punishments (e.g., a warning on a first offence), and vigorously and consistently communicate and enforce the new rule.

Adequate notice: redundancy

As explained earlier for the U.S., 'adequate notice' is not relevant to redundancy, because employees are fundamentally not at fault.

Fair hearing: poor performance and misconduct

In New Zealand, 'fair hearing' has the same meaning for poor performance and misconduct cases, and so both are discussed together. Section 103A, as amended in 2010,¹⁵ codifies requirements for a 'fair hearing' already laid out in the common law, with *NZ Food Processing Union v Unilever* the leading case.¹⁶ These mirror the due process model relatively closely. With respect to prior notice, section 103A directs the employer to "... raise the concerns that the employer had with the employee before dismissing or taking action against the employee." In other words, specific allegations of poor performance or misconduct must be articulated before the hearing, and the employee informed of any potential disciplinary consequences which might arise (e.g., dismissal or warning). "This involves fully informing the employee not only of the nature of the concern but the detail of it and basis for the concern, ie. the evidence" (Beck & Swarbrick, 2009, p. 153). It follows that it is not appropriate to invite an employee to a disciplinary meeting on false pretences so that the real purpose of the meeting comes as an unpleasant surprise.¹⁷ Any concerns raised at an early stage provide the substantive grounds or justification for later discipline, and so the

¹⁵ Section 15, Employment Relations Amendment Act 2010

¹⁶ *NZ Food Processing Union v Unilever NZ Ltd* (1990) 1 NZILR 35.

¹⁷ *Moore v Radio Bay of Plenty Ltd* (1985) ACJ 847.

employer may not substantially supplement or modify these grounds further on in the process. For instance, a Board of Trustees was not entitled to dismiss a school principal for having lied to the board, when it had not raised this as a concern at the start of the disciplinary process.¹⁸

With respect to the opportunity to be heard, section 103A directs the employer to afford "... the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee." This includes a right to be heard by the manager responsible for deciding the case, even if that manager has limited availability for a hearing and is generally busy with more onerous responsibilities.¹⁹ It also includes a right to be heard by the manager with decision-making authority, even when the police and courts have their own case against the employee proceeding in parallel, mainly because the rules of evidence and standard of proof are very different in a criminal context.²⁰ If the employee wants legal (or union) representation at the hearing, the employer is generally obliged to recognise the representative's role as an advocate. The opportunity to be heard extends to a right to comment on the appropriateness of any sanction or punishment (e.g., warning, dismissal), given the nature of the employee's misconduct or poor performance and any other relevant factors (Kiely, 2008, p. 111). For instance, the employee might argue that an unblemished employment record, provocation (e.g., fighting), or extreme stress (e.g., disobedience) diminished his or her guilt and provided a basis for a reduced penalty (e.g., dismissal replaced with a warning).

New Zealand employment law also provides employees with an effective means of challenging a disciplinary decision, again in keeping with the due process model. Section 113 permits the employee to take a personal grievance for unjustified dismissal against the

¹⁸ Batey v BOT of St. Michael's School (1993) 2 ERNZ 85

¹⁹ Quinn v Bank of New Zealand (1991) 1 ERNZ 1060.

²⁰ Moore v Commissioner of Policy (2001) ERNZ 335.

employer.²¹ Section 114 requires that the grievance be raised within 90 days of the dismissal, unless there are exceptional circumstances,²² examples of which are outlined in section 115, which justify raising the grievance after the normal time limit.²³ Employees are also entitled to free mediation assistance from the Department of Labour to help them resolve grievances with their employer.²⁴ Mediation is a confidential process²⁵ and any settlement resulting from such mediation is, if signed by the mediator, final and binding.²⁶ Mediation offers a fast, affordable, informal way of resolving disputes, which the parties retain ultimate control over to their mutual benefit. If a personal grievance remains unresolved, the employee can apply to have the matter adjudicated by the Employment Relations Authority, which is an employment tribunal run and staffed by the Department of Labour.²⁷ Mediation is generally a necessary first step before proceeding to the Authority.²⁸ If dissatisfied with the Authority's decision, either party can apply to the Employment Court for a *de novo* hearing.²⁹

Fair hearing: redundancy

New Zealand employees made redundant are also entitled to a 'fair hearing', along the lines of the due process model. In making employees redundant, section 103A obliges employers to act reasonably and, in a departure from other types of dismissal, section 4 also obliges them to act in 'good faith', with a particular emphasis on being open and transparent in sharing information about any redundancies.³⁰ More specifically, section 4(1A) "...requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment..." to provide affected employees with

²¹ Section 113, Employment Relations Act

²² Section 114, Employment Relations Act

²³ Section 115, Employment Relations Act

²⁴ Section 145, Employment Relations Act

²⁵ Section 148, Employment Relations Act

²⁶ Section 149, Employment Relations Act

²⁷ Section 157, Employment Relations Act

²⁸ Section 159, Employment Relations Act

²⁹ Section 179, Employment Relations Act

³⁰ Section 4, Employment Relations Act

“(i) access to information ... about the decision; and (ii) an opportunity to comment on the information before the decision is made.”³¹ In *Simpsons Farms*, the Employment Court established that these two requirements together mandate a real, as opposed to perfunctory, consultation process, where the first involves notification and the second an opportunity to be heard, as described below.³² Notification means that affected employees must be given reasonably precise information about any redundancies the employer is planning, including, for example, their underlying purpose, their timing, their number, and the criteria used to select people for redundancy. Employees must then be afforded a reasonable opportunity, usually at least a few working days, to consider these proposals, as well as develop and articulate a response. The response, whether presented in writing and/ or orally in person, is the employee’s opportunity to be heard. In a typical scenario, the employer and employee meet; the employee proposes alternatives to redundancy (or to various aspects of the redundancy process) and explains how they can save costs or restructure operations (e.g., cut pay, reduce hours); the employer listens to these counter-proposals, respectfully responds to some of them (e.g., with information about their potential feasibility), and agrees to at least consider the employee’s suggestions before making any final redundancy decisions.

If made redundant, the employee may appeal this decision through the personal grievance procedure, as described earlier. However, the 90 day restriction on raising a grievance is more likely to be unjust in a redundancy context. Genuine redundancies, redundancies where there is substantive justification, involve eliminations of positions, ordinarily through restructuring or downsizing (Kiely, 2008). However, one of the authors knows of at least a few larger employers that deliberately wait four or five months and then re-fill supposedly redundant positions, by which time it is too late for the employee to grieve

³¹ Section 4(1A), Employment Relations Act

³² *Simpsons Farms Ltd v Aberhart* (2006) ERNZ 825.

on the basis that his or her redundancy has not been substantively justified. No doubt, the employee could argue that exceptional circumstances are relevant, but this still requires applying to the Authority to have the 90-day time limit waived.³³ For some, the costs and delays associated with this extra bureaucratic burden are likely to dissuade them from proceeding, denying them an effective right to appeal.

Judgement based on the evidence: poor performance and misconduct

New Zealand law, despite some deficiencies, generally obliges employers to fulfil various duties related to ‘judgement based on the evidence’. These are essentially the same for poor performance and misconduct cases, and so are discussed together. Amendments in 2010 to section 103A, again codifying previous case law, require the employer to investigate “... allegations against the employee before dismissing or taking action against the employee.”³⁴ Investigating can involve interviewing the employee and/ or witnesses, observing behaviour (e.g., performance on the job), consulting records, reviewing video footage, and generally gathering evidence to obtain as true as possible a picture of what happened and why (Dunn & Kynaston, 2010). The employer must be reasonably confident, on the balance of probabilities, that the employee behaved or performed in an unacceptable way and that he or she can be held accountable, in the absence of exonerating factors, for this behaviour or performance. For instance, a reasonable employer would not assume that the employee’s levels of motivation or competence explained his or her poor performance. On the contrary, a reasonable employer would carefully scrutinize other potential explanations: inadequate equipment or machinery, poor supervision or training, incompetent co-workers, unreasonable customers, and lousy weather, to list just a few.

³³ Section 114(3), Employment Relations Act

³⁴ Section 103A(3)(a), Employment Relations Act

An investigation is likely to have two phases. The first involves discreetly researching and verifying any concerns about the employee's performance or misconduct before formally notifying the employee of these. The second involves cross-checking the veracity of arguments and evidence the employee has raised in his or her defence, and then discussing what was found in an additional meeting with the employee (Beck & Swarbrick, 2009).

A reasonable employer may subcontract the investigation role to a third-party, as long as this is limited to fact-finding and the employer retains primary responsibility for guiding the investigation and evaluating any information obtained (Dunn & Kynaston, 2010). A third-party investigation might even be essential, if the employer lacks the expertise or impartiality, or the case is sensitive (Dunn & Kynaston, 2010).

It is particularly important for the employer not to predetermine, or be seen to be predetermining, the outcome of a discipline case (Beck & Swarbrick, 2009). Investigations must first be completed, and the employee consulted and his or her explanations and evidence considered. This might require several meetings, with at least one meeting to hear the employee's version of events and one more to announce the employer's decision, following a reasonable period, typically of a few days, to ponder the various arguments and evidence (Beck & Swarbrick, 2009).

Section 120 of the Employment Relations Act entitles employees to a written statement of reasons for dismissal, if they request it within 60 days of being dismissed. Employers are obliged to provide such a statement within 14 days of receiving a request.³⁵ The reasons given must "... be the true reasons and the whole of the reasons, not just some of them," irrespective of the adequacy of such reasons.³⁶ Employees who have been

³⁵ Section 120, Employment Relations Act

³⁶ Ashton v The Shoreline Hotel (1994) 1 ERNZ 421.

disciplined, but not dismissed, have no statutory right to receive a written statement of reasons. Even dismissed employees have no automatic right to a statement of reasons at the time of dismissal. A formal request is necessary and a delay inevitable. Not knowing why they have been disciplined, at least for some time, is likely to leave many employees feeling unjustly treated. A timely, written statement of reasons is essential for defusing any sense of inequity. Why? Employees traumatized by the realization that they have just been dismissed are unlikely to be listening too closely to any verbal explanation management might have for this decision (American Psychological Association, 2011).

Judgement based on the evidence: redundancy

Redundancy is a ‘no fault’ dismissal; there is no blame of the employee. Positions are eliminated and someone simply has to go. It follows that no investigation of wrongdoing or performance is necessary or even pertinent. Employers are still obliged to provide a statement of reasons, as per section 120.³⁷ As indicated already, the ‘good faith’ provisions in section 4(1A) require employers to be open about the form and content of their redundancy decisions. In particular, employees must be informed about the redundancy selection criteria and how they were personally chosen. In *Wrigley v Vice Chancellor Massey University*, the applicants “... were provided with the selection criteria, the composition of the selection panels, who the other candidates were, feedback from the selection panel and copies of individual assessment sheets setting out the selection panel’s scoring of the applicants” (Rooney & White, 2010: 37). In addition, the Employment Relations Authority determined that those made redundant were entitled to all relevant information involving comparisons with other potentially affected staff, including: “... interview sheets ... in respect of all the other candidates ...; a candidate comparison/ summary of ratings sheet ...; panel recommendations ... containing information about the successful candidates; notes ... for the

³⁷ Section 120, Employment Relations Act

meetings with the unsuccessful candidates ...”³⁸ They were not, however, entitled to information about the views of individual panel members, given concerns about privacy.

Conclusions

In this paper, we used the due process model to analyze the procedural fairness of U.S. and New Zealand dismissal law systems. Operating mainly under the doctrine of EAW, the U.S. offers limited protection for dismissed employees or employees about to be dismissed. Employers basically can terminate employees at any time without valid reasons at all, while employee recourse is usually only available when the dismissal falls under one of the following four exceptions categories: discrimination, violation of implied contract term, public policy, and good faith covenant. The recourse actions, at best, focus on properly compensating the employee retroactively. There is nothing in the law that explicitly requires an employer to follow any proactive procedural protocol for dismissals such as adequate notice, fair hearing, or judgement based on evidence. Even though the good faith covenant exception does require employers to not act maliciously, this is not the same as demanding a due process. For example, not providing adequate notice or a hearing process, or making a judgement based on less than objective evidence are not generally sufficient to be deemed bad faith interactions, especially when the employee bears the onus of proof in establishing a prima facie case (Polackwich, 1975).

Some U.S. employers have adopted elements of the due process model. Sometimes, this simply reflects highly institutionalized common practice, as with the use of performance appraisals to assess performance adequacy. Sometimes, this is part of a high-commitment human resource management strategy, where, for example, non-union employees may seek redress through an alternative dispute resolution process. Sometimes, the employer follows due process to avoid potentially costly lawsuits under one or more of the EAW exceptions or

³⁸ Employment Relations Authority, WA 1/10, 6 January 2010.

legal actions under some other statute, such as ERISA. However, all these initiatives are discretionary and potentially only available to some workers some of the time. The degree of procedural justice can be expected to vary, depending on the litigiousness of the employees, their likelihood of qualifying for an exception, and myriad other factors. What fairness is there if employee treatment is broadly inconsistent across organizations and situations? As long as protective measures against dismissal aren't mandatory, the majority of U.S. workers remain vulnerable to being unjustifiably fired, particularly if they work in a smaller company without an established human resource system.

New Zealand, on the other hand, follows the just cause principle, which requires dismissals to be based on establishing employee fault or demonstrating operational need. Through the protection of the Employment Relations Act and the common law, employees may only be dismissed if there are substantive justifications, typically based on poor performance, misconduct, or a redundant position, using a procedure which adheres well to the three due process model criteria: adequate notice, fair hearing, and judgement on the evidence. However, no system is perfect. With respect to 'adequate notice', employees aren't always told about what constitutes misconduct: misconduct isn't defined in the Act and employers aren't generally compelled to have codes of conduct. With respect to 'fair hearing', the 90-day time restriction on filing a personal grievance can make it difficult to appeal a non-genuine redundancy, where a replacement worker has been hired four or five months after an employee was dismissed. With respect to 'judgement on the evidence', employers aren't automatically required to provide a timely written statement of reasons for a dismissal. More generally, despite the 2010 amendments to section 103, the elements of due process aren't sufficiently codified in the Act, and so employees and employers aren't always aware of what is expected.

Employees have long been recognized as an important stakeholder group in organizations, a human resource asset which can provide organizations with a competitive advantage. They invest time and effort to learn firm-specific skills, expecting a higher return in the future relationship with the employer (Becker, 1964). EAW is fundamentally misaligned with this implicit psychological contract. Workers expect a lot more from the employment relationship than EAW offers, as evidenced in Kim's (1999) study, which showed that the vast majority of employees surveyed greatly overestimated their level of employment protection. It is also worth noting that the threat of job loss under EAW drives only fear and, at best, compliance with minimum standards, and not loyalty, commitment, or innovation (McCall, 2003). Moreover, though the exceptions offer protection in some situations, the varying laws across the U.S. and the different applications of the exception rules make litigation highly unpredictable and inefficient for both employers and employees. When one also consider the sky-high potential awards, it remains doubtful whether EAW really is less costly for the employer than the just cause alternative. Therefore, EAW is neither morally right nor wise as a business decision. Fundamental changes to it are needed.

New Zealand provides a model, albeit with some limitations, which the U.S. could learn from. Its experience demonstrates that adopting just cause rules need not adversely affect employment creation or overload the courts and tribunals with cases. On the contrary, such an approach, codified in legislation, could clarify what's expected, prompt employers to do the 'right' thing, and thereby reduce the chances of dismissal litigation (Dannin, 2007). A just-cause system also accommodates the needs of the employer, in allowing legitimate dismissals 'for cause', in particular misconduct, poor performance, and redundancy. Overall, for a democratic nation like the U.S., it should not be too much to expect a due process for dismissing employees which mandates adequate notice, fair hearing,

and judgment based on evidence, one that is clearly laid out in law, and offers a level of employment protection at least similar to that in New Zealand.

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