

## ARTICLES

### Procedural fairness and unjustified dismissal.

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*The decision of the Court of Appeal in The Auckland City Council v Hennessey (1982)<sup>1</sup> has emphasised that a dismissal that is otherwise justified may be held to be unjustified if the procedures leading up to the dismissal were unfair or unjust. This paper examines the decision in Hennessey and discusses two aspects of procedural unfairness; the failure to follow an agreed procedure and the failure to allow the worker an opportunity to offer an explanation. This discussion places particular emphasis on developments since Hennessey.*

Since the Arbitration Court was given jurisdiction to settle grievances over unjustified dismissal by section 117 of the *Industrial Relations Act 1973*, it has been prepared to take some account of procedural fairness in determining whether or not a dismissal was unjustified. Hughes (1981), in a review of the Court's decisions, points out that possible grounds for a finding of unjustified dismissal have included the unwarranted reference to a worker's past conduct, the failure by an employer to warn a worker that their conduct or performance is unsatisfactory and the failure to allow a worker the chance to offer an explanation for alleged misconduct.

The correctness of the Court's approach to procedural fairness has now been upheld by the Court of Appeal decision in *The Auckland City Council v Hennessey (1982)* where the Court rejected the employer's argument that the word "unjustifiable" relates to the fact of the dismissal and does not extend to any procedure adopted by the employer in reaching the decision to dismiss.

This paper examines the decision in *Hennessey* and then looks at two particular aspects of procedural fairness; the failure to follow an agreed procedure and the failure to allow an opportunity to offer an explanation. Both aspects relate to fairness at the time of dismissal and not fairness in the longer term such as the need to give warning of unsatisfactory work. It will be suggested that the Court's approach to procedural fairness has not always been consistent or satisfactory but that, since the *Hennessey* decision, a more consistent and coherent approach has begun to emerge.

#### Why procedural fairness?

Section 117 envisages that a claim of unjustified dismissal will be dealt with by the worker's union taking the grievance to a grievance committee, and, if no settlement is reached, to the Arbitration Court. These two forums provide a reasonable guarantee that any grievance will be fairly and impartially dealt with. While this is more or less self-evident in the Court, it is also ensured at the grievance committee by requiring that both parties agree or that (as is often the practice) an independent chairman is given the power to make

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1 Full case citations are in the list of cases at the end of the article. Most cases are referred to by only the name of the complainant in the main text.

a binding decision. The worker is given further protection by subsection 3A of section 117 which allows the worker to seek leave to take his grievance directly to the Court should his union fail to act. It is clear that an improper or unfair refusal by the union to act will result in the Court granting leave (Anderson, 1982, pp. 62-63).

The post-dismissal procedures are however not fully satisfactory in ensuring that an unjustifiably dismissed worker's interests are protected. The inevitable delay between dismissal and a hearing (which can vary from a few days to several months – depending on the parties and on the procedure followed) will cause considerable short-term problems for a worker. It is in the interests of justice that these be avoided if possible. The requirement of a degree of natural justice, or procedural fairness, at the time of a proposed dismissal is one method of helping to achieve this.

The seriousness of the consequences will of necessity vary, but in many cases considerable hardship can be incurred. This was illustrated by *Holtz* (1980) which is one of the few cases where the Court has explicitly dealt with the consequences of dismissal. Hughes (1981, p. 169) points out that a dismissal for misconduct may delay access to unemployment benefits and, of course, a dismissal for misconduct can increase the difficulty in obtaining new employment. The recognition of such factors in an award of compensation is usually only of limited satisfaction and does nothing to alleviate the intermediate problem.

A further argument for measures which increase protection at the time of dismissal is that a delay in settlement reduces the prospect of reinstatement. This was illustrated in *McHardy* (1976). The overseas literature shows that this may be a widespread trend, although there is not complete agreement on the reasons (Lewis, 1981; Dickens, *et al* 1981).

The point that procedural fairness at the time of dismissal is good industrial relations practice is reinforced by provisions dealing with it in such documents as the ILO Convention and Recommendation Concerning Termination of Employment (adopted 1982) and in the British industrial relations Code of Practice.

### The Hennessey decision

The Court of Appeal's decision in *Hennessey* approves the approach that the Arbitration Court has adopted since the first cases it decided under section 117; ie. that a dismissal may be unjustifiable because of the lack of procedural fairness. The *Hennessey* case arose out of a decision by the Arbitration Court that a dismissal was unjustified (at least in part) because of the failure of the employer to allow the worker the chance to defend or explain his actions before a decision was made to dismiss him. The employer appealed to the Court of Appeal by way of case stated under section 62A of the *Industrial Relations Act 1973*. The case stated for the opinion of the Court of Appeal contained several questions but the two relevant to procedural fairness were:

- a) Does an employee have the right to be heard before an employer can lawfully terminate his employment?
- b) Were we correct in our view that a failure to give an employee an opportunity to be heard before he is dismissed amounts to a ground upon which a finding of unjustified dismissal can be based within section 117 of the *Industrial Relations Act 1973*.

The Court of Appeal, in answering these questions, was reluctant to lay down firm rules or to give answers to absolute terms which "could be mistakenly applied to cases of very different facts". The Court's decision on the interpretation of "unjustifiable" as used in section 117 was however, sufficiently broad to encompass procedural failures. The Court held:

the word "unjustified" should have its ordinary accepted meaning. Its integral feature is the word unjust- that is to say not in accordance with justice or fairness.

It follows that a dismissal may be held unjustifiable where the circumstances are such that the employee should have an opportunity, which he has not been afforded, of stating his case. Whether such circumstances exist will depend upon the facts of the particular case including such matters as the nature of the employment and the occurrence that gives rise to the dismissal.

The Court of Appeal in reaching this decision seemed particularly mindful of the "special jurisdiction of the Arbitration Court". This was seen not only in the Court's not making general statements as to when an opportunity to explain should be afforded, but also in a reluctance to rely on overseas precedent because of the "different legislative climate". The only reference to case law was a quote from Sir John Donaldson's decision in *Earl v Slater and Wheeler (Airlyne) Ltd* (1973) in the UK National Industrial Relations Court to the effect that: ". . . . good industrial relations depend upon management not only acting fairly but being manifestly seen to act fairly". On the case stated, the Court of Appeal was content to dismiss the appeal by saying "we can see no error of law in the approach of the Arbitration Court . . . .".

The Court of Appeal decision, although based on cautious reasoning and avoiding general statements, does seem to have endorsed the Arbitration Court's approach to procedural fairness and makes it clear that a dismissal may be unjustified if the procedure is unfair. It will still remain for the Arbitration Court to continue to develop guidelines as to when a case based on procedural unfairness is likely to succeed. The Arbitration Court has, however, been reluctant to develop general guidelines and prefers to decide cases on their own facts and merits.

Nevertheless general principles have emerged from the cases to date. The remainder of this paper concentrates on two aspects of these.

#### Failure to follow an agreed procedure

While all awards and agreements must contain the section 117 procedures or an alternative, it is not usual for awards or agreements to go beyond this to include pre-dismissal procedures (Anderson, 1978, pp. 16-21). Pre-dismissal procedures would seem to be most common in single employer agreements, composite agreements and house agreements, the last of which are not always registered. The major industry awards such as the clerical workers' award, shop assistants' award and the drivers' award do not contain such clauses.

A further complication follows from the fact that many such procedures are either incomplete or ambiguous. The procedure in *Epps* (1982), which was contained in a voluntary collective agreement, failed to cover certain classes of serious misconduct. The Air New Zealand Ltd Cabin Crew Members (International) Award, which arose for consideration in *Meredith* (1981), was somewhat unclear on the relation between clauses on summary dismissal for misconduct and clauses concerning union representation and enquiries concerning workers.

In a few cases reaching the Court, the pre-dismissal procedures contained in an instrument have not been followed. The Court has generally taken the attitude that the failure to follow an agreed procedure will render the dismissal unjustified. In *Drabble* (1979), the Court, in brief decision, made this point clear. It held:

The existence of the agreement was known to (the employer) and he had read its terms. He acknowledged that he was rusty about the terms and had not followed the agreed procedures. We must therefore regard the dismissal as unjustified in the circumstances.

In an earlier case, *McHardy*, a breach of agreed procedure was said to "deserve some consideration in approaching the matter". The failure in this case was twofold; the worker was not notified of a formal complaint (although he was aware of a detailed "informal" complaint, to which the formal complaint added little) and a request for union representation at a meeting (where he was dismissed) was avoided by the employer telling the union that the meeting was only an "informal chat".

These two cases indicate that the failure to follow a procedure may be a significant factor influencing the Court's decision. One case, *Meredith*, however would seem to indicate that this may not always be so and instead the Court seemed to go out of its way to avoid the procedural point.

*Meredith* concerned a worker (airline steward) who mistakenly brought a parcel containing a rifle (without its firing mechanism) onto an aircraft thinking it contained a camera tripod. It was accepted that this action was completely innocent. A month after the incident (during which time the worker continued normal flight duties) the worker was called to a meeting, on one hour's notice, and dismissed. The decision seems to indicate that the dismissal was decided on at, or after, the meeting and that the reason for dismissal was the worker's attitude to the gravity of the incident rather than the actual incident itself.

The decision also indicates that, although the worker was given one hour's notice of the meeting, he was not made aware of the reason for it or its possible significance. An attempt by the employer to contact the union (in the one hour period?) was unsuccessful.

The award contained several clauses relevant to dismissal and disciplinary action. The relevant ones were clause 22 (b) which required an adverse report affecting a worker to be communicated to the worker and clause 22 (c) which provided "that at any enquiry held by the company concerning any cabin crew member . . . the member may invite a union representative to be present". Clause 21 (c), in a proviso, allowed summary dismissal for "intoxication while on duty or in uniform or misconduct".

The majority of the Court held that, because the dismissal was a summary dismissal for misconduct, clause 22 (b) did not apply. The employer was not therefore bound to disclose reports that had been prepared on the incident. The majority also made little mention of the absence of union representation except to say that the lack of it did "not . . . vitiate the procedures adopted by the company". The attitude seemed to be (although this is unclear) that it was up to the worker to invite a representative.

The majority decision in *Meredith* is unfortunate and inadequate for several reasons. The first is that, as Mr Jacobs in a dissenting opinion pointed out, the right to invite union representation requires that the worker be able to make a considered decision, which requires knowledge that the enquiry concerns himself, his right to invite representation, and an opportunity to arrange for representation. It seems that the worker was unaware of the nature of the meeting to which he was called and probably he would have had no more luck in contacting the union than the employer. It is significant that the employer considered the meeting sufficiently serious to attempt to contact the union.

The second disturbing feature is the majority decision that a summary dismissal overrides procedural safeguards. This was applied to the need to communicate adverse reports, but probably could have been equally applied to the union representation right. This argument may have validity in the context of a dismissal that immediately follows the misconduct, but it is difficult to see why it should be applied to a dismissal decided on at an enquiry held a month after the incident. The characterisation of such a dismissal as summary would, in addition, stretch the concept of summary dismissal well beyond its normal meaning. When this reasoning is used to deny a worker the benefit of award safeguards it would seem to be completely mistaken.

The fact that the dismissal was not because of the worker's conduct, but his attitude to it, makes the decision even less understandable. Mr Jacobs suggests that "talking at cross-purposes" may well have explained the dismissal as the worker was defending his conduct (which seems to have been not only innocent but reasonable in the circumstances) rather than considering the security aspects and hypothetical consequences of the conduct. If this was so, it would seem that access to the reports on the incident and union representation at the enquiry may well have avoided the dismissal.

It is to be hoped that *Meredith* was an exception arising from what seems to be the majority's concern with the security implications of the case. It was however a case where the Court could and, probably should, have taken a much firmer attitude to procedural

safeguards in the award. To allow procedural safeguards to be overridden on the basis of the reasoning used by the Court in the circumstances of the case would seem to defeat the whole object of the safeguards. If the Court was concerned with the worker's attitude or suitability it could have expressed this in any remedy awarded.

### Failure to allow an opportunity of explanation

While the Court has been somewhat ambivalent over the failure to follow proper procedure, its attitude to the failure to allow an opportunity to explain alleged misconduct is much clearer. In a number of cases, the dismissing of a worker without such an opportunity has been criticised and has formed a major part of a finding of unjustified dismissal. This is particularly so where the employer dismisses with little or no warning being given.

In *Popham* (1979), a worker turned up at work to find that a decision had been made to dismiss him in respect of an incident that occurred on earlier shift. The Court stated: "We regard it as a most serious matter that Mr Popham was given no opportunity to offer an explanation" before it went on to consider matters that may have emerged as relevant if such an opportunity had been given. A similar attitude was adopted in other similar cases such as *Boswell* (1977) and *Clement* (1981).

The Court has given several reasons for insisting on the need for an opportunity to explain. The most significant is that of natural justice: "Some opportunity of giving an explanation prior to the making of a dismissal is highly desirable in the interests of natural justice" (*Marsh*, 1981). It is this reasoning that was also found attractive by the Court of Appeal in *Hennessey* when it said that:

It follows that a dismissal may be held unjustifiable where the circumstances are such that the employee should have an opportunity, which he has not been afforded, of stating his case.

Abstract justice can be allied to practical fairness, as a decision to dismiss without a hearing can be unfair, as the employer may not be in a position to know all the facts. This was the approach taken in *Clement*:

We consider that the general manager was at fault in making such a decision without first interviewing Mr Clement. There was no good reason for such a hasty decision and the general manager could not possibly have been in a position to know the full facts which would have enabled him to make a proper assessment and decision.

The need to allow an opportunity to explain presupposes that the opportunity must be one that will result in due weight being given to the explanation. In *Holtz*, the worker was called in and told he was dismissed and then asked if he wished to make an explanation. Both the worker and the Court took the view that any such explanation would have been pointless. The weight the Court gave to this factor in the decision is unclear as the dismissal was regarded as clearly unjustified on the facts.

In *Epps* the Court noted that: "an opportunity to explain must be a real opportunity rather than a merely nominal one and that any explanation offered must be given proper consideration". The nature of the opportunity to be given is less clear. In some cases it is possible that no opportunity need be given, although this is likely to be rare. The type of incident described in *Manning* (1980), where abuse was directed by the worker to his supervisor (who had the power to, and did, dismiss him) is illustrative of such a situation. Where, however, the employer or person responsible for the dismissal is not directly involved, or where the facts are ambiguous, an opportunity to explain would almost always seem to be required.

It is clear from the cases that the opportunity need not amount to a formal hearing, and that a worker need not necessarily be given advance notice of a complaint. It would also seem that there is no right to have a union or other representatives present. In *Epps*, the Court said:

We think that normally no advance notice of a complaint is required. In most cases, if an employee is told the nature of and details of a complaint against him, he may fairly be asked for an explanation at that point.

The Court did however go on to concede that, in some cases, notice may be required. The *Epps* case was such a situation because a less serious complaint, which the worker had been warned about, had turned into one of a much more serious nature on further investigation. The Court felt that in, those circumstances, some advance notice of the changed situation was required.

It is not clear from other cases when notice of a complaint would be required. Such matters as the seriousness of the allegation, the time since its occurrence and the worker's knowledge of the possibility of a complaint may well be factors the Court would consider relevant.

It is possible, although not yet decided, that a hearing or opportunity of explanation in an environment that confuses or intimidates a worker could also be unfair. The type of situation in *Holtz*, where the worker was called before three managerial staff, including a director and a senior executive, is possibly one where the environment could well be oppressive to the worker. The situation in *Holley* (1979) is also an illustration of possible problems that may arise. In that case, the worker was dismissed for attempted theft on the basis of a police statement that there was sufficient evidence to support a criminal charge. The employer was criticised by the Court for relying on the police opinion and not making their own inquiries. It would seem pointless however for the employer to have sought an explanation from a worker who, before, during and after the dismissal, was in police "custody".

The Court has also indicated that the opportunity to provide an explanation need not be formally made as long as some opportunity is in fact given. In *Marsh*, the completion of an accident claim form for insurance purposes was held to be sufficient. In other situations, a higher standard has been indicated as desirable, particularly where the charge is a serious one. In *Keir* (1981) the Court said:

The ground for Mr Keir's dismissal is a most serious one and the nature of the misconduct alleged is such that there are grave consequences for his reputation and future. Hence the misconduct must be established by evidence which is sufficient to justify a decision so serious.

While it is difficult to identify trends from Court decisions there does seem to be some movement towards a firmer attitude to the failure to afford the opportunity of an explanation. The Court of Appeal decision in *Hennessey* in particular would seem to have given the Arbitration Court greater confidence.

In a case decided shortly after the *Hennessey* decision became available (*Gould*, 1982) the Court laid particular emphasis on *Hennessey*, which it described as a "new and important development" and went on to hold a dismissal was unjustified because:

the employer should have provided an opportunity for Mrs Gould to state her case fully and there should have been an attempt by the employer to resolve the differences between the two women . . . Justice and fairness demanded such an opportunity. This the employer did not provide. For that reason we hold Mrs Gould's dismissal to be unjustified.

Recently, in *Organ* (1982), a dismissal has been held to be "procedurally unjustified" because no explanation of reported misconduct was asked for. The sparse facts given indicate that, apart from the failure to allow an explanation, the dismissal may have been justified. In earlier days, before the emphasis on procedural fairness, it may well have been held to be justified.

The most significant case on procedural fairness since *Hennessey* was decided is *Epps*. This case received some publicity because it involved sexual harassment<sup>2</sup>. In outline, the facts were that Epps put his hand on the bottom of a female worker who made it clear that she resented this conduct and complained to both her union and the employer.

2 For the sequel to this case see *Broadsheet* No. 105, December 1981.

The person to whom the complaint was made dealt with the matter by telling Epps to "watch whose bottom he pinched in future". The woman concerned was less than satisfied with this result and took the complaint up with her husband, her solicitor, the police and senior management. At this stage, the complaint also became more serious as it involved suggestions of indecent assault. Following further investigation by management, Epps was called to a meeting and the woman's written statement given to him. He denied the allegations but shortly afterwards, and following an inconclusive discussion, he was dismissed. It later emerged that Epps had been involved in at least three similar incidents although these were not known to management at the time of the dismissal. The Court however made it clear that this subsequent knowledge could not be used to justify the dismissal and expressly disapproved the common law decisions in wrongful dismissal cases that were to this effect.

The Court concluded that the dismissal was unjustified on procedural grounds for three reasons. The first was that the complaint had changed in nature from one of minor misconduct to one of serious misconduct justifying dismissal. The Court felt that Epps should have been given "some reasonable warning" of this change. It is worth noting that the governing agreement contained a warning procedure for misconduct but no procedure for alleged serious misconduct.

The second reason was that the person making the decision did not interview the woman complainant when Epps denied her allegation. The Court stated: "If he was to make a decision on credibility, we think that he was obliged . . . to interview Mrs Lang himself". The third ground of unfairness was the management taking account of a rumour relating to Epps which was regarded by the Court as a "piece of gossip".

The interesting feature of the *Epps* case is the strong emphasis on procedural fairness. It may have been that, if the previous incidents of harassment, which emerged later, had been known at the time of the dismissal, the dismissal would have been factually justified. The Court, in fact, refused reinstatement because of these incidents. While the Court did not state whether the incidents taken together would justify dismissal, it seems likely that this would have been the case. The Court did say that an incident of serious misconduct, such as indecent assault on a fellow worker, may well justify summary dismissal and the Court did explicitly state that the dismissal was "unjustified because of procedural unfairness".

### Theft and procedural fairness

While it is not intended to deal in detail with cases of theft (on which see Hughes, 1980) these cases, particularly where criminal proceedings are involved or likely to be involved, can complicate the issue of procedural fairness. *Holley* (1979) makes it clear that the employer cannot accept the police decision to prosecute or police advice that there is sufficient evidence for a charge as the sole justification for dismissal. It would seem therefore that there must be some enquiry by the employer, although what this might involve is unclear. What is obvious, is that a number of difficulties can arise in such a situation. These include the problems of holding an investigation in tandem with police inquiries and the difficulty in coping with the possible conflict or confusion that may exist for the worker.

As a matter of practice, an employer may be best to separate the situation where the police are involved from one where they are not. In the former case, the correct procedure may be suspension until the criminal charge is disposed of. This seems to have been accepted as good practice by the Court in *Hapeta & Others* (1977). This case was also mentioned by the Court in *Holley* "for general information".

If the police are not to be involved, then it is reasonable that an explanation should be sought from the worker and a decision made on the basis of the explanation and other necessary inquiries. A complicating factor, of course, is that an employer may seek an explanation for the dual purpose of deciding whether to dismiss and whether to call in the police. If this is the case, it may well be wise to adopt the suspension procedure if a decision is made to call the police.

What would seem clear is that the employer is entitled to seek an explanation, and failing a satisfactory explanation, to dismiss the worker. In *Greer* (1981), the Court upheld a dismissal based on the refusal to provide a reasonable explanation although this refusal was in accordance with union advice. The Court did however suggest the advice was "questionable" and criticised the vigour of the union official's defence of his member. The worker was however placed in a difficult position and it seems unfair to penalise a worker for relying on the only disinterested advice available. A worker accused of theft is in no position to evaluate what advice a Court will later consider reasonable.

*Holley* also is illustrative of difficulties that could arise. The worker in question had, prior to dismissal, been under some pressure by the police and would seem to have been taken to the employer en route to the police station. Any attempt to seek an explanation in such circumstances would seem both pointless and unwise. The same comment could probably be applied to any inquiry by an employer, particularly if credibility of witnesses is involved. Both cases provide good arguments for suspension until the criminal aspect is disposed of. In both *Greer* and *Holley* the workers were in fact acquitted.

It should be noted that the above points apply only where the conduct or facts are ambiguous. If an employer has good reason to suspect theft, it may be possible to justify the dismissal on those grounds alone, remembering the warning in *Keir* regarding serious allegations. The Court in *Loau* (1981) seems to have accepted this point, but it was also indicated in that case that the employers belief must be sustainable and that a belief in dishonesty does not preclude the need to seek an explanation from the worker.

Lesser grounds such as unauthorised possession of the employer's property, a failure to follow till procedures or procedures relating to the removal of property may also justify dismissal independently of alleged theft. The procedural problems that arise for an employer in the type of case mentioned above have not been resolved by the Court and it is an area where firm guidelines from the Court could be of benefit. The *Loau* case does discuss the type of problem that can arise but comes to few firm conclusions.

### Other aspects of fairness

While this paper has concentrated on fairness as the time of dismissal, it should be noted that the Court has also insisted on fairness prior to the actual dismissal, particularly where the dismissal is based on a course of conduct such as unsatisfactory work or minor disciplinary problems. The policy of the Court, in such cases, has been to insist on some warning of the unsatisfactory work or conduct and a chance to remedy the problem before a dismissal will be held justified. A related aspect of fairness is the reluctance of the Court to allow *ex-post-facto* justification of a dismissal, but rather to insist on the dismissal being justified on the grounds given at the time or on the actual reasons. *Baker* (1978) illustrates both these points and, in particular, the tendency for a range of minor complaints to be raised to attempt to justify an otherwise unjustifiable dismissal.

### Procedural unfairness and compensation

The seemingly increased willingness of the Court to place greater emphasis on procedural fairness may, in part, be due to an increasing realisation that a finding of unjustified dismissal may, where the worker is at fault, be balanced by the level of compensation awarded. The reduction of compensation by the Court because of misconduct is by no means a new feature, rather it has always been a feature of unjustified dismissal cases. It may be, however, that there is an emerging realisation that the Court is able to find a dismissal unjustified procedurally, even if it may have been factually justified, but to reflect the misconduct in a low or nil award of compensation. The benefit of such an approach is that the two issues can be clearly separated and dealt with independently.

The Court has taken this approach in both *Organ* and *Epps*. In *Organ*, the workers conduct was stated as the reason for a low award, an award that may have been even lower



if the employer had not also been at fault. In *Epps*, the Court refused reinstatement on the basis of the incident complained of and the later discovered incidents and compensation was also "heavily discounted", although the award was nevertheless \$3 800. If this approach has also been adopted in *Meredith*, a much more satisfactory decision may have been reached.

The ability to reduce or refuse compensation in cases of procedurally unjustified dismissal may also aid the Court in solving the problem of formulating a test for when procedural unfairness can be discounted. This would seem to have been the approach adopted in the United Kingdom (Anderman, 1978, pp. 81-89). although recently it seems that the Courts may be placing less emphasis on procedural fairness (Collins, 1982, pp. 174-175). It is one that leaves a large degree of discretion to the Court while, at the same time, allowing an insistence on a reasonably strict compliance with procedural fairness.

The Court has, however, not yet attempted to develop a test on this issue and its statements to date provide no real clues as to a possible attitude. In *McHardy* it said: "we cannot go so far as to say that there was no possibility (of a different decision) happening". In *Epps*, however, the Court, in putting some blame on the employer for the escalation of the incident, noted that the dismissal "would probably not" have occurred but for the mishandling of the initial complaint. In *Popham*, the Court pointed out that there were "matters which (the employer) ought to have considered".

While these statements do not provide a reasonable guideline on what effect the procedural failure must have before the Court will discount it, it is possible that such a development may come in future cases. This is more likely if, as is argued, there is an increasing emphasis on procedural fairness.

### Conclusion

The *Hennessey* decision has now made it clear that section 117 will allow a dismissal to be found unjustifiable if an unfair procedure is adopted by the employer in carrying out the dismissal. The cases decided since *Hennessey* indicate that the Court may be prepared to adopt a stronger line towards procedural fairness and that, in future, an employer will need to ensure that some minimal standard of fairness is adhered to. It is unlikely however that the standard required will be unduly onerous. In *Epps*, the Court noted that the employers' representative "was a factory manager and not a judicial officer". The Court did nevertheless go on to emphasise the importance of the decision that had to be made when it stated that: "it is unlikely that any other decision (the employer) had to make that day would have consequences so serious". Another possible trend in some recent cases such as *Holtz* and *Epps* is a more explicit recognition by the Court of the serious consequences that dismissal may have on a worker. Thus, while not expecting a judicial level of inquiry, the Court could well be prepared to look for a high standard of fairness which ensures that the worker's interests receive a proper degree of protection, although the standard sought will probably vary with the circumstances of each case.

Many agreements already contain procedures to ensure a fairness prior to a decision to dismiss being made although, as has been noted, these are still uncommon in major awards. It may be that unions and employers may give some attention to these matters in future award rounds and not rely exclusively on the statutory procedure to provide grievance clauses.

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