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Michael Bennett, *Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law*, 57 MONT. L. REV. 115 (1996).

ALWD 6th ed.

Bennett, M. ., *Montana's employment protection: A comparative critique of montana's wrongful discharge from employment act in light of the united kingdom's unfair dismissal law*, 57(1) Mont. L. Rev. 115 (1996).

APA 7th ed.

Bennett, M. (1996). *Montana's employment protection: comparative critique of montana's wrongful discharge from employment act in light of the united kingdom's unfair dismissal law*. *Montana Law Review*, 57(1), 115-142.

Chicago 7th ed.

Michael Bennett, "Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law," *Montana Law Review* 57, no. 1 (Winter 1996): 115-142

McGill Guide 9th ed.

Michael Bennett, "Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law" (1996) 57:1 Mont L Rev 115.

AGLC 4th ed.

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MLA 8th ed.

Bennett, Michael. "Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law." *Montana Law Review*, vol. 57, no. 1, Winter 1996, p. 115-142. HeinOnline.

OSCOLA 4th ed.

Michael Bennett, 'Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law' (1996) 57 Mont L Rev 115

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MONTANA'S EMPLOYMENT PROTECTION: A COMPARATIVE CRITIQUE OF MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT IN LIGHT OF THE UNITED KINGDOM'S UNFAIR DISMISSAL LAW

Michael Bennett*

Editors' Note

The following article, written by Michael Bennett of the Southampton Institute in Southampton, England, demonstrates that Montana's pathbreaking Wrongful Discharge From Employment Act (WDFEA) continues to receive national and even international attention. Professor Bennett's comparative critique serves as a companion piece to another article on the WDFEA, which will follow in volume 57:2. That article, written by Don Robinson, a labor practitioner from Butte, Montana, will provide an up-to-date, annotated catalog of case law under the WDFEA since the Act's passage in 1987.

I. INTRODUCTION

In 1987 Montana passed its Wrongful Discharge From Employment Act (WDFEA).¹ From that time a substantial proportion of the working population of at least one American state has had statutory employment protection to rely on; elsewhere in the United States, a remedy for arbitrary dismissal still generally depends on finding an exception to the termination-at-will rule. The success or otherwise of the WDFEA is of interest throughout the United States, as a similar statute, the Model Employment Termination Act,² has been drafted by the National Conference of Commissioners on Uniform State Law.

The Montana experiment is of interest elsewhere as well. In Europe, countries have well-developed systems of employment protection, often guided by the International Labour Organisation's Recommendation no. 119 (1963), which states: "termination of employment should not take place unless there is

* Reader in Law, Southampton Institute. I would like to thank Judge Gordon Bennett, Professor Bill Corbett, Professor Bob Hollman, Jim Nys, LeRoy Schramm, Professor Rodney Smith, Professor Karen Vinton and the University of Montana for assisting my research in Montana.

1. MONT. CODE ANN. §§ 39-2-901 to -914 (1995) (originally enacted as sec. 1, ch. 641, Laws of 1987).

2. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. (Supp. 1995).

a valid reason . . . connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."³

In the United Kingdom, the main development came in 1971, with the introduction of the law of unfair dismissal. There was a general consensus for its introduction, but few are wholly satisfied with the way the law of unfair dismissal has developed. The law has been the subject of numerous amendments, many of which merely reflect the views of changing government policy. The United Kingdom may be on the point of radical change following a government green paper, which includes a proposal to introduce arbitration to resolve complaints of unfair dismissal.⁴ In contrast, Montana had a blank sheet on which to design its new law. Discovering how successful Montana legislators in 1987 have been will very much inform debates within the United Kingdom.

This article does not attempt a complete review of both the WDFEA and unfair dismissal law in the United Kingdom. Rather, the article examines the WDFEA in light of the United Kingdom's experience. Such a comparison is fraught with difficulties, given the legal, industrial relations, political and economic differences, but in both the United States and the United Kingdom there are similar debates as to whether increasing employee rights will have a detrimental effect on the economy. Generally, the WDFEA was introduced in Montana to relieve a perceived burden on business.⁵ In a similar way, the United Kingdom government sees competitiveness as vital and has refused to collaborate with its European partners to accelerate the development of worker rights.⁶ The article concludes that, despite these protective interests, effective statutory systems have advantages for both employees and employers, and that such systems are generally preferable to common law employment-at-will doctrines.

3. INTERNATIONAL LABOUR CONFERENCE, 1964, CMND 2548, at 6 (Eng.).

4. RESOLVING EMPLOYMENT RIGHTS DISPUTES: OPTIONS FOR REFORM, 1994, CMND 2707 (Eng.).

5. See Leroy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94 (1990).

6. In 1989 the other 11 members of the European Community agreed on the Social Charter. In 1992 the United Kingdom gained an opt-out of the Social Charter to the European Union Treaty (Maastricht).

II. BACKGROUND

Both United Kingdom and American employment law share a common root in the presumption of a yearly hiring. Blackstone stated in 1765 that:

If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity that the servant shall serve, and the master maintain him throughout all the revolutions of the respective seasons; as well when there is work to be done as where there is not; but the contract may be made for any longer or smaller term.⁷

In the United Kingdom the presumption was initially applied to agricultural workers, and was later extended to general employment in 1827 in *Beeston v. Collyer*.⁸ The rule dominated British jurisprudence throughout the 19th century, despite evidence that the growing industrial society preferred more flexible employment arrangements.⁹ The presumption of yearly hiring came to an end in 1938 in *De Stempels v. Dunkels*,¹⁰ which decided that the courts should imply terms based on the intentions of the parties.¹¹ The courts had previously recognized that employment in certain occupations was customarily terminable on notice.¹² Once the yearly hiring presumption was gone, the modern presumption of an indefinite period of employment, terminable on reasonable notice, took hold.¹³

The modern presumption requiring a notice period gave employees a cushion against unemployment; however, it was frequently a very short period, and could always be reduced by an agreement. Parliament first attempted to tackle insecurity in employment by passing the Contract of Employment Act of 1963, which introduced minimum periods of notice. Shortly thereafter, the Redundancy Payments Act of 1965 followed. This Act began

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *425 (footnotes omitted).

8. 4 Bing 309, 130 Eng. Rep. 786 (Ct.C.P. 1827).

9. See SIDNEY & BEATRICE WEBB, INDUSTRIAL DEMOCRACY ch. IX (1902); REPORTS FROM COMMITTEES: THE SELECT COMMITTEE ON MASTER AND SERVANT, 1866, ¶¶ 79-81 (testimony of G. Newton), 386-90 (testimony of A. Campbell), 576-79 (testimony of A. McDonald), 808-09 (testimony of W. Dronfield), 916-20 (testimony of J. Normansell) (Eng.).

10. 1 All E.R. 238 (Eng. C.A. 1938).

11. *Id.* at 246-47.

12. See, e.g., *Turner v. Mason*, 14 M & W 112, 116-17, 153 Eng. Rep. 411, 413 (Ex. 1845).

13. *McClelland v. Northern Ireland Gen. Health Serv. Bd.*, 1 W.L.R. 594, 599 (Eng. H.L. 1957).

treating employment as a property right, by awarding compensation when positions disappeared for economic reasons. But the most significant development in United Kingdom labor law came through the Industrial Relations Act of 1971, which introduced unfair dismissal. Although subject to many amendments, the basic structure of the law remains the same today and is largely found in the Employment Protection (Consolidation) Act of 1978 (EPCA) and the Trade Union and Labour Relations (Consolidation) Act of 1992 (TULRCA).

Under these acts in the United Kingdom, unfair dismissal is determined by an Industrial Tribunal which has a legally qualified chair. It also has two lay representatives, one from each side of industry. This tribunal is the final arbiter of fact. Appeals on points of law go to the Employment Appeals Tribunal, which is similarly constituted, except the chair is a High Court Judge. Further appeals go to the Court of Appeal (Civil Division) and House of Lords.

In the United States, cases at the end of the 19th century demonstrate that the English presumption of a yearly hiring was applied in the courts.¹⁴ Yet Horace Wood, writing in 1877, explained: "[w]ith us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."¹⁵

This view clearly took hold in a series of cases¹⁶ and was later explained to be necessary to support the effort of expanding industry.¹⁷ A contract of employment was generally treated as any other contract. Indeed, the law should not interfere with free-contracting parties, for if the employee cannot be compelled to remain in his job, the employer should not be compelled to retain an employee. This view was supported by the United States Supreme Court in *Adair v. United States*.¹⁸ The Erdman Act of 1898, which criminalized the discharge of railway employees for trade union membership, was held to be unconstitutional in attempting to compel an employer to retain the services of

14. *Adams v. Fitzpatrick*, 26 N.E. 143 (N.Y. 1891); *Bascom v. Shillito*, 37 Ohio St. 43 (1882).

15. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 283 (2d ed. 1886).

16. See *Louisville & Nashville R.R. v. Offat*, 99 Ky. 427 (1896); *Louisville & Nashville R.R. v. Harvey*, 99 Ky. 157 (1896) (listing Wood as authority for the hiring-at-will presumption).

17. *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58-59 (1943).

18. 208 U.S. 161 (1908).

another. Thus, although the British common law presumption of yearly hiring received sporadic recognition, the emerging rule in the United States during this period was at-will employment, with no specific term.

It was not until 1930 that *Adair* was reversed and statutory exemptions to the at-will rule were accepted by the United States Supreme Court.¹⁹ In 1937, a major exception was established by the Court, when it upheld the National Labor Relations (Wagner) Act²⁰ of 1935, which provided general protection for union activity.²¹ Some states also introduced fair employment practice statutes, which gave employees a right to reinstatement in the event of discriminatory dismissals.²² In spite of these statutory exceptions, the general rule remained that employment was terminable at-will. Only employees working under a collective agreement were given stronger rights. Under these rules, discharges for good cause were permitted, and this could be enforced through arbitration after the Taft-Hartley Act of 1947.²³ One commentator noted in 1964 that, although employees inside and outside collective bargaining were treated so differently, both groups shared a feeling of job ownership.²⁴

The effects of the termination-at-will doctrine were reduced through the creativity of state supreme courts, with the Montana Supreme Court taking a leading role in this movement. Leroy Schramm described how Montana created a covenant of good faith and fair dealing in contracts of employment and explained the covenant's uneven development.²⁵ The court first recognized the covenant in 1981,²⁶ and then in 1983 the Montana Supreme Court recognized the breach of the covenant as a tort action.²⁷ This opened up the possibility of punitive and emotional distress damages. Employers could then be liable for substantial damages for discharging employees. Schramm also detailed how the Mon-

19. *Texas & New Orleans R.R. Co. v. Brotherhood of Ry.*, 281 U.S. 548 (1930) (considering the Railway Labor Act of 1926).

20. Wagner Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1988)).

21. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

22. See F. MEYERS, *OWNERSHIP OF JOBS: A COMPARATIVE STUDY* 9-10 (1964).

23. Labor Management Relations Act, ch. 120, § 1, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141 (1988)).

24. MEYERS, *supra* note 22, at 15.

25. See Schramm, *supra* note 5, at 94-108.

26. *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982) (*Gates I*).

27. *Gates v. Life of Montana Ins. Co.*, 205 Mont. 304, 668 P.2d 213 (1983) (*Gates II*).

tana Supreme Court, having started the ball rolling, attempted to prevent the growth of this action by defining the covenant narrowly and establishing exceptions. This feverish judicial activity was resolved in 1987, by the Montana Legislature's passage of the WDFEA.

Unlike the special tribunals enacted in the United Kingdom, WDFEA cases are heard in the first instance by a district court as in any other civil suit. Appeals are heard by the Montana Supreme Court. Alternatively, arbitration, rather than the courts, can be used to resolve a dispute.

III. AIMS OF LEGISLATION

Essential to evaluating the success of legislation is a clear appreciation of its aims. In the United Kingdom, unfair dismissal was preceded by two major governmental investigations. In 1967, the National Joint Advisory Council on Dismissal Procedures (NJAC)²⁸ found that giving workers a greater sense of job security enhanced industrial relations.²⁹ Arbitrary dismissals led not only to industrial action, but left a trail of bitterness and distrust. The Council recommended improved internal voluntary procedures rather than a statutory scheme, arguing that such improvements would benefit management by lessening the risk of inconsistent and ill-considered decisions. Shortly after the NJAC report, the findings of a Royal Commission chaired by Lord Donovan were published.³⁰ The Commission recognized the significance of employment and jobs to British citizens. Yet, where the employee had to rely on internal procedures, the final decision was often in the hands of management, and justice was not seen to be done. However, a speedy and impartial decision on the justification of a dismissal was preferred and was likely to reduce the number of strikes. The Commission, therefore, proposed a statutory scheme intending to provide an incentive to employers for developing internal procedures. Thus, in the United Kingdom, greater worker rights were introduced with the object of not only being fair to the employee, but of improving the efficiency of business through the enhancement of industrial relations.³¹

28. DISMISSAL PROCEDURES: REPORT OF A COMMITTEE OF THE NATIONAL JOINT ADVISORY COUNCIL ON DISMISSAL PROCEDURES, 1967, at 1 (Eng.).

29. *Id.*

30. ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS ASSOCIATIONS 1965-1968, 1968, CMND 3623 (Eng.).

31. It has been suggested that one influential member of the Commission, O.

Whereas in Montana, as noted, the WDFEA came as a result of employer pressure. Employers and insurance companies were concerned with the way case law had developed, and were particularly worried by the possibility of substantial tort damages. However, employers recognized that they could not simply return Montana to the termination-at-will philosophy.³² The WDFEA acknowledges that employees do have rights not to be wrongfully discharged; at the same time, however, the WDFEA limits damages. So although the driving force behind the Act was to reduce employer liability, the pressure group recognized that to achieve this, they must concede certain rights to employees.

In the United Kingdom, although the trade union had misgivings that a statutory scheme would reduce union influence, there was considerable consensus over the introduction of unfair dismissal laws. The same cannot be said of the WDFEA, even though it was enacted by an overwhelming majority. The Montana Supreme Court confirmed the constitutionality of the statute in *Meech v. Hillhaven West, Inc.*,³³ but one dissenter, Justice Sheehy, commented on the "lack of legislative clout of unorganized workers," who probably comprised the majority of Montana workers. He concluded his judgement by saying "[t]he only basis for the Act that I can find is that as between business and workers, the legislature discriminately prefers business. That is not a constitutional basis on which to found a statute."³⁴

The majority did not address this point directly, as the constitutionality of the Act was evaluated under the rational basis test, which only requires the Act's purpose to be rationally related to a legitimate objective.³⁵ The court recognized that the Act addressed what was perceived to be a financial threat, but the benefits for employees were "not illusory."³⁶ Clearly, although the WDFEA does address employee rights, its primary aim was to reduce the potential liability of employers.

Kahn-Freund, advocated the introduction of unfair dismissal to promote more enlightened and successful management control and discipline. See Roy Lewis, *Kahn-Freund and Labour Law: An Outline Critique*, 8 INDUS. L.J. 214 (1979).

32. See Schramm, *supra* note 5, at 109.

33. 238 Mont. 21, 776 P.2d 488 (1989).

34. *Meech*, 238 Mont. at 69, 776 P.2d at 506.

35. *Id.* at 44-48, 776 P.2d at 506.

36. *Id.*

IV. EXCLUSIONS

A. *The Montana Laws*

In a comprehensive evaluation of these two laws, it is important to determine the extent to which workers are left with no rights through the employer's ability to circumvent the legislation. Both the United Kingdom's unfair dismissal law and the WDFEA apply to employees rather than independent contractors,³⁷ but otherwise they are very different approaches.

Under the WDFEA, legal redress for discharge which was "not for good cause" is only available to employees who have "completed the employer's probationary period of employment."³⁸ The Act does not define probationary employment, but the wording suggests that this is a matter for the employer and that a probationary period was clearly the intention of the legislature.³⁹ Perhaps there is a limit to this loophole, in that a court could decide that the probation is a complete sham and in fact did not exist. On the face of it, however, employers have a significant means to avoid the legislation, by keeping employees perpetually on probation.

Additionally, an employer can avoid the WDFEA entirely by hiring an employee on "a written contract of employment for a specified term."⁴⁰ Under such a contract, an employer would violate the common law if he or she terminated the worker before the specified term had lapsed or otherwise breached the contract. But the well-advised employer could simply not renew the contract, as no legal obligations would be breached.⁴¹ Thus, written contracts provide another significant loophole to the WDFEA.

Furthermore, the WDFEA excludes employees "covered by a written collective agreement."⁴² At times an employee may miss out on an effective remedy because of this provision. In *Irving v. School District No 1-1A*,⁴³ a school teacher worked under a collective agreement which did not include tenure. A majority of the

37. See MONT. CODE ANN. §§ 39-2-903(3), 39-2-904 (1995); Employment Protection (Consolidation) Act, 1978, §§ 54(1), 153(1) (Eng. 1978).

38. MONT. CODE ANN. § 39-2-904(2) (1995).

39. See Schramm, *supra* note 5, at 116.

40. MONT. CODE ANN. § 39-2-912(2) (1995).

41. See *Nordlund v. School Dist. No. 14*, 227 Mont. 402, 738 P.2d 1299 (1987); *Farris v. Hutchinson*, 254 Mont. 334, 838 P.2d 374 (1992).

42. MONT. CODE ANN. § 39-2-912(2) (1995).

43. 248 Mont. 460, 813 P.2d 417 (1991).

Supreme Court found that her discharge after 3 years did not give her rights under the collective agreement or the WDFEA. In spite of the loophole evidenced in *Irving*, employees covered by a collective bargaining agreement will generally enjoy superior employment rights. The consequential disinterest of the unions in the WDFEA may have a more profound effect overall on the status and rights of workers.

One should also note that the WDFEA cannot be used if there is a "state or federal statute that provides a procedure or remedy for contesting the dispute."⁴⁴ The statutes include "those that prohibit discharge for filing complaints, charges or claims with administrative bodies or prohibit unlawful discrimination"⁴⁵ Since a 1991 amendment, public sector workers may have a claim under the WDFEA, but many will have remedies provided elsewhere and thus will lose their claim under the Act.⁴⁶ The Montana Supreme Court decided that the exclusion does not operate just because an employee has filed charges with the National Labor Relations Board (NLRB).⁴⁷ The court recognized that there is no procedure or remedy for contesting the dispute until the NLRB has decided to enter the dispute and issue a formal complaint.⁴⁸

Under the WDFEA in Montana, an action must be brought within one year of discharge.⁴⁹ If an employer has written internal procedures enabling the employee to appeal the discharge, the employee must first initiate and exhaust these procedures.⁵⁰ For this provision to operate, the employer must give the employee written details within 7 days of discharge.⁵¹ An employee failing to comply will lose his or her action under the WDFEA. Failing to use these internal procedures includes not complying with the time limits stipulated in the procedure. Although these provisions aim to encourage the use of internal procedures and may make a discharging employer think twice, overall the internal procedure may prove to be just another hurdle for the employee seeking redress for wrongful discharge.

44. MONT. CODE ANN. § 39-2-912(1) (1995).

45. MONT. CODE ANN. § 39-2-912(1) (1995).

46. See, e.g., *Tonack v. Montana Bank*, 258 Mont. 247, 854 P.2d 326 (1993) (holding that a discharged employee's age discrimination claim precluded a WDFEA remedy).

47. *Deeds v. Decker Coal Co.*, 246 Mont. 220, 222, 805 P.2d 1270, 1271 (1990).

48. *Id.*

49. MONT. CODE ANN. § 39-2-911(1) (1995).

50. MONT. CODE ANN. § 39-2-911(2) (1995).

51. MONT. CODE ANN. § 39-2-911(3) (1995).

B. The United Kingdom Laws

In the United Kingdom, there are major exclusions regarding qualifications of employment, retirement and fixed terms.⁵² Where the employees show certain specific reasons for dismissals, e.g., dismissal for trade union membership, they immediately acquire unfair dismissal rights. In the absence of such a specific reason for dismissal, the employee must have been employed continuously for 2 years since 1985.⁵³ This requirement removes wrongful discharge rights from millions of employees who may never achieve 2 continuous years of employment with a single employer in their working lives. If viewed as a probationary period,⁵⁴ 2 years seems very long given that in most situations an employer will be able to evaluate the employee in a much shorter period. Yet for the employee there is a significant advantage in the United Kingdom approach, in that the employer does not have the ability to set the probationary period. Until recently, United Kingdom employees needed to work a minimum number of hours per week to qualify, but this hurdle for part-time workers was found to contravene the European Community's Equal Treatment Directive⁵⁵ and has been removed.⁵⁶ Thus in 1995, many part-time workers have unfair dismissal rights for the first time.

Upon attaining retirement age, employees in the United Kingdom generally lose their unfair dismissal rights.⁵⁷ If the employer has a normal retirement age, which is the same for both men and women, that is the relevant age. In all other cases, e.g., in firms without an established age, employees lose their rights at 65. Montana's employees do not face a similar hurdle; they have the advantage of age discrimination legislation.

Unlike the exception under the Montana WDFEA, United Kingdom employees working on fixed-term contracts may have

52. For other exclusions, see Employment Protection (Consolidation) Act §§ 65, 141, 144, 146A.

53. Employment Protection (Consolidation) Act § 64(1)(a); Unfair Dismissal (Variation of Qualifying Period) Order, S.I. 1985, No. 782 (Eng.).

54. This is the popularly held view, although a period of qualifying employment was introduced through fear of the tribunals being swamped and has only been justified in recent years on the basis of reducing the burden on employers. See BUILDING BUSINESSES . . . NOT BARRIERS, 1986, CMND 9794, ¶ 7.3, at 35 (Eng.).

55. R v. Secretary of State for Employment, 1994 I.R.L.R. 176 (Eng. H.L.).

56. The Employment Protection (Part-time Employees) Regulations, S.I. 1995, No. 31 (Eng.).

57. The retirement exemption does not apply to certain types of dismissal (e.g., dismissal for trade union membership).

unfair dismissal rights, similar to those employees working under indefinite contracts. In fact, non-renewal of a fixed-term contract is specifically deemed to be within the definition of dismissal.⁵⁸ This appears much more favorable to employees than the WDFEA rule, but this is often not the case. The reason is that the United Kingdom employer can take advantage of section 142 of EPCA, which permits exclusion of unfair dismissal rights where there is a fixed-term of one year or more. Although exclusion is generally not permitted, the well-advised United Kingdom employer can achieve exclusion through the use of fixed-term contracts.

In the United Kingdom, there is also nothing to prevent an employee from claiming the dismissal breached other legal rights, although the rules ensure that the employee is only compensated once for his or her loss. Where a contractual right to notice is significant and has been ignored, the employee will be advised to bring a separate contract action. The Tribunal's calculation of compensation for the unfair dismissal would in practice exclude the loss for lack of notice. If the employee is awarded a redundancy payment, such payment will be deducted from the compensation.⁵⁹ Where a claim has been made under the Sex Discrimination Act of 1975 or Race Relation Act of 1976, the Tribunal must ensure that the dismissal does not result in a double award.⁶⁰

The Montana WDFEA's exclusion of employees working under collective agreements is not mirrored in United Kingdom law. As in the United States, United Kingdom trade unions realized that a statutory scheme may undermine the attraction of trade union membership, yet the Trade Union Congress supported the introduction of unfair dismissal rights. Trade union members have the same rights under the law as other employees. Indeed, trade union officials play a key role in representing members at internal disciplinary hearings. At the Industrial Tribunal, the union generally provides representation through their own official or a legally qualified advocate. By law, one of the three members of the Industrial Tribunal is a trade union representative. In short, trade unions are key participants in the United Kingdom's unfair dismissal system. Whether this benefits unions is debatable, but it is clearly to the advantage of non-

58. Employment Protection (Consolidation) Act § 55(2)(b).

59. Employment Protection (Consolidation) Act §§ 73(9), 74(7).

60. Employment Protection (Consolidation) Act § 76(2).

union employees to have a powerful lobbying group with a vested interest in the improvement of unfair dismissal law on their side.

In the United Kingdom, employees are not required to follow their employer's internal procedures before instigating an action for unfair dismissal. However, a recent green paper proposed to change this.⁶¹ In the future, an employee might have to notify his employer in writing of his grievance, and the employer must respond within 14 days. Failure to adopt this approach may invalidate the employee's claim or impinge on issues of fairness or compensation. Whereas encouraging internal resolution of disputes is to the advantage of all parties, extra burdens on employees after dismissal may merely discourage employees from pursuing their claims. If failing to comply with these internal procedures influences the Tribunal's determination of the fairness of the discharge, this will constitute a complete departure from the jurisprudence developed by the courts and tribunals.⁶² In the past, United Kingdom case law has rejected the idea that failure to use an internal procedure should reduce damages and has acknowledged the impracticality of estimating a reduction in compensation due the employee.⁶³ This is in accord with other areas of United Kingdom law which do not require an innocent party to solicit the wrongdoer. Instead of altering the compensation due the employee, the better way seems to be for the employer to use the internal procedures to investigate and review before deciding to dismiss the employee.

V. STANDARDS FOR DISMISSAL

A. *Montana*

Section 39-2-904 of the Montana code provides that a discharge is only wrongful if:

- (1) it was retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
- (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

61. See *supra* note 4, ¶¶ 4.19-26.

62. See *infra* text accompanying note 100 (describing how in the United Kingdom the key to fairness is the standard of the employer at the time of dismissal).

63. *Lock v. Connell Estate Agents*, 1994 I.C.R. 983 (Eng. Employment Appeal Trib.).

(3) the employer violated the express provisions of its own written personnel policy.⁶⁴

The first and third types of discharge are the more specific and will be considered first.

To help interpret the first type of discharge, public policy is defined as "a policy in effect at the time of the discharge concerning the public health, safety or welfare established by constitutional provision, statute or administrative rule."⁶⁵ It is unlikely that an employee will frequently allege this type of discharge, but the supreme court has already indicated it should not be interpreted too narrowly. In *Krebs v. Ryan Oldsmobile*,⁶⁶ the district court recognized that the WDFEA protected a "good faith" whistleblower, but granted summary judgement for the employer, as the employee's reporting of drug offenses was more akin to that of an undercover agent. The supreme court disagreed and reversed the decision, holding that such a narrow interpretation could thwart the purpose of the statute.

Under the WDFEA, the third type of discharge is very specific in its requirements, yet there is no legal requirement for an employer to have a "written personnel policy." Thus, an employer might believe that the best way to avoid liability is to have no written personnel policy. Clearly this would avoid discharges under this sub-section. But the lack of internal procedures may mean an employee is more likely to resort to the courts, particularly as the statute requires employees to first exhaust any such procedures.⁶⁷ Moreover, personnel professionals recommend written employee policies that embrace a progressive discipline regime for best employer/employee relations.⁶⁸

The Montana WDFEA does not provide statutory definitions for "express terms" or "personnel policy," but these terms are wider in scope than a guarantee of an internal procedure. In *Buck v. Billings Montana Chevrolet, Inc.*,⁶⁹ an employee handbook made numerous references to job security and, in particular, one section stated: "[o]ur dealership is still growing. You are thus assured of steady employment as long as you are producing for us. We expect each of our employees to be maximum produc-

64. MONT CODE ANN § 39-2-904 (1995).

65. MONT CODE ANN § 39-2-903 (1995).

66. 255 Mont. 291, 843 P.2d 312 (1992).

67. MONT CODE ANN § 39-2-911(2) (1995).

68. JAMES A. NYS, AN EMPLOYER'S GUIDE TO AVOIDING WRONGFUL DISCHARGE (1990).

69. 248 Mont. 276, 811 P.2d 537 (1991).

ers, always doing their part in accomplishing our business objectives."⁷⁰ The Montana Supreme Court treated this as a personnel policy, explaining the jury should decide whether there was a violation.⁷¹

The second type of discharge under the Montana WDFEA, "not for good cause," appears to be the broadest, although as already noted it is not available to probationary employees. "Good cause" is defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation or other legitimate business reason."⁷²

The notion of good cause does not encompass a requirement for internal procedures. In *Cecil v. Cardinal Drilling Co.*,⁷³ the district court granted summary judgement to the employer, when a senior executive was dismissed following dramatic changes in the oil market in which the company operated. Cecil alleged that he was discharged without warning and without any indication of poor performance by himself or the company.⁷⁴ The court agreed on the lack of material issues,⁷⁵ but did not expressly address the issues of internal procedures. The court did address this issue in *Miller v. Citizens State Bank*,⁷⁶ where the employee argued that a new standard of good cause, which included industry standards of progressive discipline, should be adopted.⁷⁷ The court found this standard inappropriate in the light of the statutory definition.⁷⁸

The WDFEA's good cause definition of "failure to perform duties" and "disruptive behavior" has not been particularly problematic, but the meaning of "other legitimate business reason" was unclear, even though *Cecil* confirmed that it included economic conditions. In *Buck*, the employee had "risen from the ranks to be general manager" of the company and was well respected throughout the automobile industry.⁷⁹ The business was

70. *Id.* at 283-85, 811 P.2d at 542.

71. See Loenard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53, 71-73 (1992).

72. MONT CODE ANN § 39-2-903(5) (1995).

73. 244 Mont. 405, 797 P.2d 232 (1990).

74. *Cecil*, 244 Mont. at 407, 797 P.2d at 233.

75. *Id.* at 409, 797 P.2d at 235.

76. 252 Mont. 472, 830 P.2d 550 (1992).

77. *Miller*, 252 Mont. at 473-74, 830 P.2d at 551-52.

78. *Id.* at 474, 830 P.2d at 552.

79. *Buck*, 248 Mont. at 279, 811 P.2d at 538.

later bought by another company which had a long-standing policy of rewarding its own employees by putting them at the head of new acquisitions. Buck was discharged, and the employer installed one of its own employees as general manager. The supreme court, failing to find legislative guidance on the meaning of "legitimate business reason," held:

A legitimate business reason is a reason that is neither false, whimsical, arbitrary or conspicuous and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of an employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however in the legitimate interests of the employee to secure employment.⁸⁰

The Montana Supreme Court decided the dismissal clearly fell within this definition. The employer's policy rewarded long-term employees who were trusted to look after huge investments. The court said it would be against common sense and rationality to decide otherwise, but added a warning that "[a] company's interest in protecting its investment and in running its business as it sees fit is not as strong when applied to lower echelon employees, and may therefore be outweighed by their interest in continued, secure employment."⁸¹

In spite of references to employee interests, the court seems to place greater emphasis on the needs of the business. In *Buck* the court asserted that "[i]t is inappropriate for the courts to become involved in the day to day employment decision of business."⁸² Moreover, according to *Cecil*, an employer is entitled to be motivated by and serve its own legitimate business interest, and can decide who it will hire and retain.⁸³

In *Kestell v. Heritage Health Care Corporation*,⁸⁴ the supreme court discussed employer and employee interests, explaining that: "[t]he balance should favor an employee who presents evidence and not mere speculation or denial, upon which a jury could determine that the reasons given for his termination were false, arbitrary or capricious and unrelated to the needs of the

80. *Id.* at 281-82, 811 P.2d at 540.

81. *Id.* at 283, 811 P.2d at 541.

82. *Id.* at 282, 811 P.2d at 541.

83. *Id.*

84. 259 Mont. 518, 858 P.2d 3 (1993).

business."⁸⁵ Thus, if the employer provides a particular reason for discharge, the employee must raise factual issues to defeat the employer's summary judgement motion. Therefore, an employee who merely disagrees with an employer's claims will not withstand summary judgment. This burden of proof seriously disadvantages the employee, because it is the employer who made the firing decision and only he or she can really know the reason behind it.

B. Standards in the United Kingdom

Certain reasons for dismissal are given special protection under the United Kingdom's law, and they must be given proper consideration before looking at the general standards. The law provides long-standing and important protection for employees who have been dismissed for belonging to an independent trade union or taking part in its activities.⁸⁶ Furthermore, no minimum period of continuous employment is required; dismissals for these reasons are automatically unfair and attract much larger compensation awards than other dismissals.⁸⁷ This protection is an important guarantee of the right to associate, although the protection to trade union activists has been weakened by judicial interpretation.⁸⁸ Thus, the protections offered under the United Kingdom laws approximate those in the United States under the National Labor Relations (Wagner) Act.⁸⁹ In the United Kingdom, the legal protection for requiring employees to belong to a union in order to work has been dismantled and now dismissal for non-membership of a union is always unfair.⁹⁰

In the United Kingdom, there have been considerable additions and amendments to the law relating to specific reasons for dismissal, particularly through the Trade Union Reform and Employment Rights Act of 1993.⁹¹ Thus where the dismissal occurs through the employee asserting any of a variety of statutory rights, e.g., carrying out a safety function or becoming preg-

85. *Kestell*, 259 Mont. at 526, 858 P.2d at 8.

86. Trade Union and Labour Relations Act, 1992, ch. 52, § 152 (Eng.).

87. Trade Union and Labour Relations Act § 152.

88. *See City of Birmingham v. Beyer*, 1977 I.R.L.R. 2111 (Eng. Employment Appeal Trib.) (holding that trade union activities in a previous job were not within the special protection).

89. 29 U.S.C. §§ 151-169 (1988).

90. Trade Union and Labour Relations Act § 152.

91. *But see* Sunday Trading Act, 1994, ch. 20 (Eng.); Deregulation and Contracting Out Act, 1994, ch. 40 (Eng.).

nant, dismissal is unfair regardless of the employee's period of continuous employment. Unlike the specific protection provided under the Montana Act, there is no general protection for "whistleblowers" in the United Kingdom or a requirement that employers comply with their personnel policies. However, the absence of such provisions is unlikely to be fatal to the employee's cause, as unfairness may be established under the general provisions discussed below, provided the employee has the requisite 2 years of continuous employment.

Another area of unfair dismissal which is specifically addressed under the United Kingdom law is the type of dismissal experienced in *Buck*. To bring the United Kingdom in compliance with a European Community Directive,⁹² Parliament passed the Transfer of Undertakings (Protection of Employment) Regulations in 1981.⁹³ Where an undertaking, including a business, is transferred through sale or other disposition, the employment contracts are transferred.⁹⁴ According to regulation 8(1), where either before or after the transfer, an employee of the transferor or transferee is dismissed due to the transfer, the dismissal is unfair.⁹⁵ The employer has a defense under regulation 8(2), where the dismissal is for "an economic, technical or organisation reason entailing changes in the workforce."⁹⁶ An employer would not be able to establish this if it simply replaced one senior manager with another—as in *Buck*—for the case law requires as a prerequisite for the defense a change in the overall numbers or functions of employees.⁹⁷ Yet, the Transfer of Undertaking Regulations have considerable limitations. In particular, they do not apply where a business is bought through a share transfer; however, despite this limitation, as the regulations are now being interpreted they provide effective protection for many United Kingdom employees.⁹⁸

92. Directive No. 77/187 of the Council of Feb. 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of business, 1977 O.J. (L 61/26).

93. S.I. 1981, No. 1794 (Eng.).

94. *Id.* § 5.

95. *Id.* § 8(1).

96. *Id.* § 8(2).

97. *Berriman v. Delabole State Ltd.*, 1985 I.R.L.R. 305 (Eng. C.A.).

98. Much case law has centered on the privatization of public services under the compulsory competitive tendering policy. Interpretation of the regulations in the light of the European Community Directive has enhanced employee rights. Recently in *Milligan v. Securicor Cleaning Ltd.*, 1995 I.R.L.R. 288 (Eng.), the Employment Appeal Tribunal decided that dismissals under regulation 8(1) are protected even if

In most cases, the employer's reason for dismissal will be judged fair or unfair under section 57 of the Employment Protection (Consolidation) Act of 1978. The employer must prove the reason for dismissal, and this reason must fall within a list of 5 reasons: 1) capability or qualifications; 2) conduct; 3) redundancy; 4) inability to work without contravening a statute; or 5) some other substantial reason.⁹⁹ Additionally, the reason must be valid at the time of dismissal.¹⁰⁰ The onus of proof is clearly on the employer to establish the reason, and if the Tribunal disbelieves the employer, the dismissal is unfair. Although the employer bears this burden, it is not normally difficult for the employer to prevail, because the tribunal merely requires a reasonable belief that the supplied reason is sufficient. Once the reason is established, fairness or unfairness depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.¹⁰¹ Each case turns on its facts, but precedent shows that there is a range of reasonableness, within which one employer might reasonably take one view, whereas another could quite reasonably take a different view.¹⁰² If the dismissal falls within this range it is fair; if it falls outside it is unfair. It is not for the tribunal to decide what it would do; it must compare the actions of the particular employer with other employers' possible actions to determine fairness. United Kingdom courts and tribunals accept that business must change; thus, even where a reorganization is a breach of contract, dismissals that follow have been held to be fair.¹⁰³ This deference to employers is very similar to that demonstrated in Montana.¹⁰⁴

However, when one considers requirements for following and creating internal procedures for appealing unfair dismissals,

the employer lacks 2 years continuous employment. *Milligan*, 195 I.R.L.R. at 290-91. This decision is the subject of an appeal.

99. Employment Protection (Consolidation) Act § 57.

100. *W. Devis & Sons Ltd. v. Atkin*, 1977 I.C.R. 662 (Eng. H.L.).

101. Very unusually for United Kingdom law there is no onus of proof.

102. *Union of Constr. Allied Trade & Technicians v. Brain*, 1981 I.R.L.R. 224 (Eng. C.A.).

103. *Hollister v. National Farmers Union*, 1979 I.R.L.R. 238 (Eng. C.A.).

104. See, e.g., *Kestell v. Heritage Health Care Corp.*, 259 Mont. 518, 525, 858 P.2d 3, 7 (1993) (holding that "courts should not intrude on the day-to-day employment decisions of business owners").

United Kingdom law is very different from the Montana WDFEA. Although employers are not specifically obliged to operate internal procedures, they are encouraged to do so in various ways. At the outset of employment, the employer is required to provide the employee with details of the employment which must include information on disciplinary procedures.¹⁰⁵ Important standards are set by the Advisory Conciliation and Arbitration Service (ACAS), through its Code of Practice on Disciplinary Practice and Procedures. It gives guidance on a system of progressive warnings and internal appeals. Since the House of Lords decision in *Polkey v. A. E. Dayton Services Ltd.*,¹⁰⁶ procedural fairness is often crucial in determining reasonableness in an unfair dismissal action, and the ACAS code is particularly influential. The Lords explained that in the great majority of cases the employer will not act reasonably unless he takes appropriate procedural steps. Such high standards are not expected of the small employer, who may argue that the statute requires an Industrial Tribunal to take into account the size and administrative resources of the undertaking. Also, the Lords accepted that the employer will at times reasonably believe a fair procedure would be "utterly useless."¹⁰⁷ Despite these exceptions, however, procedural fairness is a key element of the standard of fairness in the United Kingdom, whereas in Montana it plays no part in the concept of discharge for good cause.¹⁰⁸ Indeed, procedural fairness plays such a significant role in the United Kingdom's law that fairness to a particular employee may become irrelevant. For example, In *Monie v. Coral Racing Ltd.*,¹⁰⁹ the employer could not determine which of two employees was dishonest. He therefore dismissed both. The court recognized the employer's predicament and his behavior was judged reasonable. For an apparently innocent employee, the end result was the loss of a job and a finding that the dismissal was fair. A similar result in Montana is possible given the emphasis on employer

105. Employment Protection (Consolidation) Act §§ 1, 3.

106. 1987 I.R.L.R. 503 (Eng. H.L.).

107. See *Duffy v. Yeomans & Partners Ltd.*, 1994 I.R.L.R. 642 (Eng. C.A.).

108. Industrial relations specialists interviewed saw little future as expert witnesses under the Act. All they could do was confirm whether the written personnel policy was complied with. Yet arguments about procedural fairness may return. Given that a legitimate business reason must not be "false, whimsical, arbitrary or capricious," *Buck v. Billings Montana Chevrolet, Inc.*, 248 Mont. at 276, 282, 811 P.2d 537, 540 (1991), it seems the existence or absence of procedures may assist a court in applying this part of the definition.

109. 1980 I.R.L.R. 464 (Eng. C.A.).

needs, but perhaps case law developing from the interest in balancing employee needs will avoid such a divergence from common sense notions of fairness.

In both the United States and the United Kingdom, industrial relations specialists recognize the advantages of procedural fairness. Through a system of progressive discipline and procedural guidelines, less arbitrary dismissals will occur and employees are encouraged to improve; any disputes over a dismissal can be dealt with internally without resort to an expensive legal action. In Montana, considerations of internal, procedural fairness play no part of the notion of "good cause." Indeed, by including a violation of a personnel policy as a separate section of the WDFEA, the law may actually be discouraging internal business procedures. Whereas in the United Kingdom, the growth of procedures is arguably the most important benefit flowing from the introduction of unfair dismissal laws. Unfortunately, its legal significance has depended on judicial creativity rather than statutory law, and in consequence its application has varied as judges have wavered. Nevertheless, the promotion of procedural fairness as a consideration in an employee's discharge stands out as one of the advantages in the United Kingdom system.

VI. ARBITRATION ALTERNATIVE

In Montana, legal controversies can be referred to arbitration,¹¹⁰ and the WDFEA encourages this form of alternative dispute resolution. If an employee's offer of arbitration is accepted by the employer and the employee succeeds in the arbitration, the employee is entitled to have the employer pay the arbitrator's fee and all costs of arbitration.¹¹¹ Additionally, where either party offers to go to arbitration and the offer is rejected, the offering party is entitled to recover attorney fees if he or she prevails in that action.¹¹² Thus there are clear financial incentives in arbitration for both parties beyond the traditional benefits attributed to arbitration. As with many forms of alternative dispute resolution, these benefits include speed, cost, informality and finality.¹¹³ Also, the employer often places a

110. MONT. CODE ANN. § 27-5-114(1) (1995).

111. MONT. CODE ANN. § 39-2-914(4) (1995).

112. MONT. CODE ANN. § 39-2-915 (1995).

113. See Paul F. Gerhart & Donald P. Crane, *Wrongful Dismissal: Arbitration and the Law*, 48 ARB. J. 56, 57-59 (June 1993). For an example of the court's refusal to vacate a wrongful discharge arbitration award, thereby indicating the finality benefit, see *May v. First Nat'l Pawnbrokers Ltd.*, 269 Mont. 19, 887 P.2d 185 (1994).

higher value on the lack of publicity by avoiding trial.¹¹⁴

Despite the intent of the Montana Legislature, however, arbitration is fairly rare under the WDFEA. Commentators recently investigated the experiences of the Montana Bar and found that in 1,076 cases, only 67 (or 6.3%) were resolved through arbitration.¹¹⁵ The responses showed that lawyers preferred court procedures, formal discovery and jury trials. They also believed some arbitrators were biased and that Montana lacked arbitrators. Anecdotal evidence in 1995 suggests that, although alternative dispute resolution is generally becoming more accepted, the picture for the WDFEA has not changed significantly. Given the low numbers of cases going to arbitration and the availability of arbitrators in neighboring states, the lack of local arbitrators is unlikely to be the major problem. There seemed to be a marked preference for arbitrators without the experience of collective bargaining arbitration. This may explain the view, put forth in the recent commentary, that some arbitrators are biased,¹¹⁶ even though the law is clear that the same standards should apply in both court and arbitration proceedings.

If arbitration is to become the norm, much more needs to be done in Montana to change the attitudes of lawyers and others. In the United Kingdom, although the law promotes internal procedures and encourages settlements with the help of conciliators from the Advisory, Conciliation and Arbitration Service, an industrial tribunal must decide the issue if it remains unresolved. Specifically, section 65 of the EPCA allows unfair dismissal rights to be replaced by arbitration under a dismissal procedures agreement made between the employer and trade unions. To date, only one employer/union agreement, in the electrical contracting industry, has been approved.¹¹⁷ In any industry, only a small proportion of dismissals would be considered by an Industrial Tribunal, and thus the considerable work required to achieve an approved scheme is a major disincentive.¹¹⁸

One should note the potential significance of arbitration in

114. See NYS, *supra* note 68, at 8 (dealing the advantages to employers of selecting arbitration).

115. Leonard Bierman et al., *Montana's Wrongful Discharge From Employment Act: The views of the Montana Bar*, 54 MONT. L. REV. 367, 373-76 (1993).

116. Bierman et al., *supra* note 115, at 375.

117. The agreement was approved in 1979. For detailed account of the requirements for the formal exclusion of voluntary procedures, see STEVEN D. ANDERMAN, *LAW OF UNFAIR DISMISSAL* app. III (2d ed. 1985).

118. See LINDA DICKENS ET AL., *DISMISSED* (1985).

this arena. Many criticisms levelled at the unfair dismissal system, particularly that of excessive legalism, are believed to arise due to the dominant role of lawyers, and it has therefore been argued that arbitration is the answer.¹¹⁹ Lewis and Clark have explained how such a system might work, suggesting that a definition of fairness be derived from the industrial relations forum rather than using the statutory definition.¹²⁰ The recent green paper, *Resolving Employment Rights Disputes, Options for Reform*, draws on this work and proposes arbitration as an alternative to an industrial tribunal.¹²¹ The green paper suggests, though, that the arbitrator take into account statutory law, not case law. Given the importance of case law in determining fairness, it seems that unless arbitration is conducted in complete ignorance of employment law, such an approach will be difficult to implement and will lead to confusion. The green paper's goal is cost reduction, but any proposals receiving serious consideration should look carefully at the standard applied and be wary of creating two standards. Thus, arbitration in the United Kingdom is in a critical position, with great potential and uncertainty before it.

There is a much stronger case for arbitration in Montana than in the United Kingdom. In Montana the alternative is a judge and jury with no particular expertise in employment matters. Whereas in the United Kingdom, the alternative is a tribunal with a legally qualified chair who specializes in employment law, including two lay members chosen by the different sides of industry. The lay members play a pivotal role in determining the reasonableness of a dismissal, by bringing their industrial expertise to the tribunal. The parties in Montana do not have the advantage of this "industrial jury"; the arbitration alternative is therefore more attractive.

119. *Id.* ch. 9.

120. ROY LEWIS & JON CLARK, *EMPLOYMENT RIGHTS, INDUSTRIAL TRIBUNALS AND ARBITRATION: THE CASE FOR ALTERNATIVE DISPUTE RESOLUTION* 25 (1993).

121. *RESOLVING EMPLOYMENT RIGHTS DISPUTES: OPTIONS FOR REFORM*, 1994, CMND 2707, at 31-33 (Eng.).

VII. COMPARITIVE REMEDIES UNDER THE WRONGFUL DISCHARGE LAWS

A. *Montana*

In Montana, under the WDFEA, neither a court nor an arbitrator has the power to order re-employment; the employer retains the absolute right to discharge an employee. The Act provides that the employee can recover wages and fringe benefits for a period not exceeding 4 years from the date of discharge. Also, employees must mitigate their losses, and income they could have earned or any income they did in fact earn must be deducted from the award.¹²² Finally, the Act does not permit damages for emotional distress or punitive damages unless it is established that the employer engaged in fraud or malice by discharging the employee in violation of Montana Code Annotated 39-2-904 (1).

In applying these remedy provisions, the calculation of the actual amount is left to the trier of fact.¹²³ In exercising its discretion, the trier may award zero compensation. This was the sound decision of the jury in *Tyner v. Park County*,¹²⁴ where the employee had only been unemployed for 5 months, had failed to take up an early employment opportunity, and finally took a new job at a higher wage than previously earned at Park County.¹²⁵

As noted, a limit on the amount of damages was crucial for the designers of the WDFEA to overcome the threat of excessive awards. In deciding the Act was rationally related to a legitimate state interest and therefore constitutional, the Montana Supreme Court recognized the reduction in damages must be weighed against the advantages to employees of extended rights and greater certainty in the law.¹²⁶ The appropriateness of the level of damages can be assessed by determining whether employees are encouraged to bring actions and whether employers are deterred from arbitrary discharges.

122. MONT. CODE ANN. § 39-2-905(1) (1995).

123. *Weber v. State*, 253 Mont. 148, 153, 831 P.2d 1359, 1362 (1992).

124. 271 Mont. 355, 897 P.2d 202 (1995).

125. *Tyner*, 271 Mont. at 361, 897 P.2d at 206; *see also* *Dawson v. Billings Gazette*, 223 Mont. 415, 419, 726 P.2d 826, 829 (1986) (approving a zero damage award by a jury that concluded plaintiff failed to mitigate damages).

126. *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 43-52, 776 P.2d 488, 501-06 (1989).

Recent research by commentators¹²⁷ into the attitudes of the Montana Bar revealed that, whereas 52% of attorneys believed there were adequate incentives to sue under the Act, only 20% of plaintiffs' attorneys held such a belief. The survey also found the level of damages led to little incentive for attorneys to take on cases, and nearly half admitted to a declining number of cases under the Act. A majority of attorneys felt business personnel practices had been influenced by the WDFEA, but how these practices have altered is not made clear. This initial research into one interest group is not conclusive, but the evidence disclosed is not encouraging.

B. United Kingdom

Remedies under the United Kingdom's law provide for more than monetary damages. In the United Kingdom, an Industrial Tribunal finding unfair dismissal must consider reinstatement, then re-engagement, and finally compensation. An order for reinstatement directs the employer to treat the employee in all respects as if he or she had not been dismissed.¹²⁸ In contrast, a tribunal order for re-engagement directs the employer to engage the employee in comparable or other suitable employment.¹²⁹ If the employer fails to comply with such an order, he or she will be penalized by having to pay additional compensation.¹³⁰ These re-employment remedies must be particularly attractive to employees at periods of high unemployment, but the statistics show these orders are only made in less than 3% of cases.¹³¹ The infrequency of these orders stems partly from employees not wishing to return, but the courts and tribunals have also shown a reluctance to foist an employee on an unwilling employer.¹³² In practice, then, the remedy for an unfair dismissal is generally monetary compensation.

The total compensation for the unfair dismissal in the United Kingdom is comprised of a basic award and a compensatory award.¹³³ The basic award attempts to value the employee's accrued service and can be calculated from the employee's age,

127. Bierman et al., *supra* note 115.

128. Employment Protection (Consolidation) Act § 69(2).

129. Employment Protection (Consolidation) Act § 69(4).

130. Employment Protection (Consolidation) Act §§ 71, 75A.

131. 102 *Employment Gazette* 24 (1994).

132. See Michael Bennett, *The Practicality of Reinstatement and Re-engagement*, 23 *INDUST. L.J.* 164 (1994).

133. Employment Protection (Consolidation) Act ch. 44, §§ 73-74.

salary and length of service. The basic award has a current maximum of £6,150.¹³⁴ The compensatory award, which has a current maximum of £11,000,¹³⁵ should compensate the employee, rather than punish the employer. In doing this it must not compensate for mental distress.¹³⁶ The industrial tribunal can reduce compensation on various grounds, and, similar to the Montana law, the compensatory award is subject to the rule of mitigation. There are more substantial awards for specific reasons for dismissal, such as trade union membership, but the low maximum applies to most cases and the median compensation in 1990/91 was £1,773.¹³⁷

The re-employment orders provided under United Kingdom law are attractive on their face, in that they remedy the situation by restoring the original employment relationship. Existing unfair dismissal law clearly makes these orders the primary remedies, but the practice in tribunals shows a reluctance to use them. Thus, in both the United Kingdom and Montana, the remedy in most cases is a financial award. In the United Kingdom the calculation of a basic award means the employee will gain some compensation, even though he quickly finds new employment. Compensation in Montana appears more attractive, in that 4 years salary is in most cases greater than the United Kingdom maximum of £17,150. Indeed, the United Kingdom maxima stand out as being low, for Parliament did not index them for inflation, and awards for discrimination, which have no maximum, are much higher. Whether in practice the level of damages in Montana is sufficient to compensate employees and deter employers is uncertain at this point.

VIII. CONCLUSION

This article does not attempt a complete review of both the WDFEA and unfair dismissal law in the United Kingdom. Rather, the article looks at the Montana statute, and, by way of comparison, draws on the experience of a similar law in the United Kingdom. The article highlights weaknesses in the WDFEA and looks for strengths in unfair dismissal law to remedy them.

134. The Unfair Dismissal (Increase of Compensation Limit) Order, S.I. 1993, No. 1348 (Eng.) (amending the Employment Protection (Consolidation) Act ch. 44, § 68, to increase the compensatory award).

135. The Unfair Dismissal (Increase of Compensation Limit) Order, S.I. 1993, No. 1348 (Eng.).

136. Norton Tool Co., Ltd. v. N. J. Newson, 1972 I.R.L.R. 86 (Eng. N.I.R.C.).

137. 99 *Employment Gazette* 638 (1991).

Thus, at times it may appear unbalanced, as it does not dwell on some weaknesses in unfair dismissal, e.g., undue legalism.¹³⁸ The article does, however, produce a study of manageable length, which attempts to shed light on the development of employment protection law. The conclusions are made on the basis that an effective system has advantages for both employees and employers.

Other than making arbitration mandatory, it is difficult to see what more the legislators in Montana could have done to encourage this form of dispute resolution. The evidence suggests considerable resistance to arbitration by the Montana Bar, and therefore any information campaign showing the advantages of arbitration should be directed towards employees and employers themselves. As noted, the arguments for arbitration are stronger in Montana than the United Kingdom, given the Montana alternative is a court with no particular expertise. If arbitration becomes the norm, hearings will generally be more informal and will seek practical solutions. In this environment, re-employment may be seen as an obvious next development and less of a threat to employer control.

The possibility for employer-engineered exclusion from the WDFEA in Montana, through the use of fixed terms and long probationary periods, is significant. Therefore, the challenge of avoiding the effect of the WDFEA, rather than the challenge of complying with it, may be the primary concern of some employers. Whereas the exclusion of employment under collective agreements may have advantages for unions, its corollary is that unions have no interest in improving the law.

It is not surprising that Montana's WDFEA seems primarily concerned with employer interests. Courts realize their task is not to manage enterprises, and they are concerned that an overly invasive approach will put the jobs of others in jeopardy. The United Kingdom experience shows that the law can modify employer behavior by encouraging internal procedures to ensure fairness. But the comparison to the United Kingdom's law also demonstrates that procedural fairness needs to be part of statutory law, as unfair dismissal has suffered fluctuation through judicial precedent over the years.¹³⁹ As the WDFEA currently

138. For an example of the complex contractual principles used to explain constructive dismissal, see *Western Excavation (E.C.C.) Ltd. v. Sharp*, 1978 I.R.L.R. 27, 29-30 (Eng. C.A.).

139. In the early days of unfair dismissal, procedures were regarded as vital, but after *British Labour Pump v. Byrne*, 1979 I.R.L.R. 94 (Eng. Employment Appeal

stands, the strongest encouragement for procedures are put on the employee after dismissal, and this may prove to be an additional hurdle for the discharged employee. Thus, procedural fairness incorporating progressive discipline needs to be incorporated into the key statutory definition of "good cause" within the Montana Act.

The courts and legislators of Montana have reflected the demands of both employees and employers in regulating the employment relationship. The spotlight will remain on Montana to see how the law is applied and developed in the upcoming years.

Trib.), procedural defects were ignored as the tribunal felt they made "no difference" to the overall outcome. This was overruled by *Polkey v. Dayton Servs Ltd*, 1987 I.R.L.R. 503 (Eng. H.L.)

