

The London School of Economics and Political Science

*What model for regulating employee discipline and
grievances most effectively supports the policy
objective of partnership at work and enhanced
competitiveness?*

David Benjamin Hood

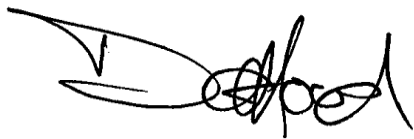
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DECLARATION

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A handwritten signature in black ink, appearing to read 'David Hood', with a stylized flourish extending to the left.

ABSTRACT

This thesis endeavours to answer the following question: is there a viable and workable model for regulating workplace grievances and disciplinary action (EDG), the end objective of which is enhanced business competitiveness by encouraging partnerships at work, or greater levels of organisational commitment behaviour? This thesis argues that the answer to that question may be yes, if the regulation applied can encourage employers to deal with EDG in a way that employees are likely to *perceive* as fair.

This is a challenging objective for law makers. Current regulation of EDG does not and probably cannot achieve the high levels of fairness perception that the partnership model requires. This thesis argues that, in order to rectify this problem, there must be a shift away from formulating employment regulation with a blinkered eye on worker protection, and towards a more sophisticated model which views worker protection against unfair treatment as beneficial in-so-far as it promotes fairness perceptions, and the resulting benefits of a productive and innovative workforce. This recalibration of the regulatory compass calls for a legal framework which allows the parties to formulate a reflexive and self-regulating approach to EDG; a framework according to which the parties will work to prevent and resolve disputes in a manner which accounts for their particular working environment, and the unique circumstances of each dispute or grievance.

The new regulatory model that is proposed in this thesis will provide employers with the opportunity to be immune from the tribunals' jurisdiction relating to EDG. Immunity will apply where the employer can demonstrate that they have in place and follow certain methods and practices for managing EDG which are likely to lead to fairness at work, and therefore a higher degree of fairness perceptions.

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CONTENTS

| | |
|---|----|
| CHAPTER 1: INTRODUCTION | 9 |
| 1.1 Re-directing employment protection regulation | 9 |
| 1.2 The central argument – regulating for competitiveness..... | 10 |
| 1.3 The centrality of fairness and EDG..... | 10 |
| 1.4 The regulatory challenge of generating fairness perceptions .. | 12 |
| 1.5 Thesis summary | 12 |
| CHAPTER 2: ACHIEVEING ORGANISATION COMMITMENT BEHAVIOUR BY PARTNERSHIPS AND FAIRNESS | 21 |
| 2.1 The challenges of Globalisation and the knowledge driven economy | 22 |
| 2.2 Responding to the challenges of the modern economy: the goal of partnership | 24 |
| 2.3 What was the previous Government’s approach to partnership? | 26 |
| 2.4 Trust in partnership: an elusive necessity | 33 |
| 2.5 The significance of EDG in the establishment of partnerships at work..... | 37 |
| 2.6 Achieving partnership: might regulation play a role? | 38 |
| 2.7 Katz’s motivational basis of organizational behaviour | 40 |
| 2.7.1 <i>Understanding OCB</i> | 41 |
| 2.7.2 <i>Staff retention and dependable performance</i> | 43 |
| 2.8 Partnership as an antecedent of essential employee behaviour | 45 |
| 2.9 Refining our understanding of partnership – the centrality of fairness | 46 |
| CHAPTER 3: FAIRNESS AT WORK – WHAT IS IT AND WHAT ARE ITS EFFECTS? | 50 |
| 3.1 The three types of fairness perception | 50 |
| 3.2 Distributive justice and Equity Theory..... | 51 |
| 3.3 Procedural justice | 55 |
| 3.4 Interactional justice | 57 |
| 3.5 The different impact of different fairness perceptions | 58 |

| | |
|--|-----|
| 3.6 Integrative theories of fairness: how employees make fairness judgements..... | 59 |
| 3.7 The effects of fairness perceptions on employee behaviour | 63 |
| 3.7.1 <i>Work performance and counterproductive behaviour</i> | 64 |
| 3.7.2 <i>Organisational citizenship behaviour</i> | 69 |
| 3.7.3 <i>Staff Retention and reducing turnover</i> | 74 |
| 3.7.4 <i>The significance of conflict</i> | 77 |
| 3.8 Partnership and matters to do with employee discipline and grievances..... | 82 |
| CHAPTER 4: THE FOUNDATIONS OF A SUCCESSFUL REGULATORY APPROACH TO EDG? | 85 |
| 4.1 EDG fairness perceptions and the conflict continuum..... | 85 |
| 4.2 The likelihood of voluntary fairness perception maximisation..... | 88 |
| 4.3 A role for regulation of EDG in maximising fairness perceptions? | 90 |
| 4.3.1 <i>Changing the focus of labour law</i> | 91 |
| 4.3.2 <i>Outlining the characteristics of the new regulatory model – reflexive self-regulation and other factors</i> | 93 |
| CHAPTER 5: DOES THE LAW OF UNFAIR DISMISSAL AID FAIRNESS PERCEPTIONS? | 101 |
| 5.1 The law of Unfair Dismissal: substantive fairness and the ‘range of reasonable responses’ test..... | 102 |
| 5.1.1 <i>The range of reasonable responses test: a barrier to fairness perceptions</i> | 103 |
| 5.1.2 <i>The employment tribunals: judging substantive fairness and reasonableness</i> | 110 |
| 5.1.3 <i>Substantive fairness: is it enough to remove the ‘range’ from the reasonableness test?</i> | 112 |
| 5.1.4 <i>The tribunals’ approach to assessing substantive fairness – generic uncertainty</i> | 118 |
| 5.2 A preliminary conclusion – the law of Unfair Dismissal is not suitable to achieve fairness and OCB..... | 123 |
| 5.3 Procedural fairness and unfair dismissal – the tribunals’ “comfort zone” | 124 |
| 5.3.1 <i>The potential impact of procedure fairness on fairness perceptions</i> | 125 |
| 5.3.2 <i>The rights and wrongs of prescribing dismissal process and the dangers of process obsession</i> | 128 |

| | |
|---|------------|
| 5.4 Remedies for Unfair Dismissal: missed opportunities? | 140 |
| 5.4.1 Reinstatement and re-engagement | 142 |
| 5.4.2 Compensation | 149 |
| 5.5 Unfair Dismissal and fairness perception: a brief summary . | 155 |
| CHAPTER 6: DOES CURRENT LEGAL REGULATION OF GRIEVANCES AID FAIRNESS PERCEPTIONS? | 160 |
| 6.1 Regulating employee grievances – extreme abstentionism | 161 |
| 6.1.1 The legal status of internal grievance procedures | 161 |
| 6.1.2 The implied term of trust and confidence and the inadequacy of remedies for breach | 163 |
| 6.1.3 Constructive dismissal – an unsatisfactory choice? ... | 166 |
| 6.1.4 The Statutory Grievance Procedure – a step in the right direction? | 170 |
| 6.2 The New Zealand approach to regulating grievances – is it the solution? | 176 |
| 6.2.1 The disadvantage claim under New Zealand law | 176 |
| 6.2.2 Breach of contract, good faith and the remedy of compliance | 179 |
| 6.2.3 Is the New Zealand approach likely to deliver higher levels of fairness perceptions? | 183 |
| 6.3 A conclusion concerning current regulation of employee grievances..... | 186 |
| CHAPTER 7: CAN THE EMPLOYMENT TRIBUNALS AND THE COURTS INFLUENCE FAIRNESS PERCEPTIONS? | 187 |
| 7.1 The employment tribunals as promoters of fairness: access issues..... | 188 |
| 7.2 The tribunals and the Courts: the barrier of abstentionism.. | 194 |
| 7.3 Weeding out the vexatious litigant and the limits of tribunal jurisdiction..... | 198 |
| CHAPTER 8: THE THEORETICAL UNDERPINNINGS OF A NEW WAY TO REGULATE EDG FOR FAIRNESS | 203 |
| 8.1 Re-capping the shortcomings of current regulation and principles for improvement..... | 203 |
| 8.2 Juridification, structural coupling and the limits of regulation | 205 |

| | |
|---|------------|
| 8.3 Finding a solution to the limits of juridification in the context of EDG – the ‘proceduralisation’ of law | 209 |
| 8.4 The importance of avoiding pre-occupation with process | 212 |
| 8.5 Creating a regulatory framework for self regulation - negotiating systems and the enforcement deficit..... | 216 |
| 8.5.1 <i>Defining negotiating systems and the enforcement deficit</i> | 217 |
| 8.5.2 <i>Achieving effective negotiation systems for EDG – removing escalation paths to the tribunal and creating compliance incentives</i> | 218 |
| 8.6 Summarising the appropriate regulatory model | 222 |
| CHAPTER 9: A NEW REGULATORY MODEL TO ACHIEVE FAIRNESS AT WORK AND OCB | 223 |
| 9.1 A radical new model which creates a “safe harbour” for employers | 223 |
| 9.2 A requirement to be accredited for fairness in return for immunity | 226 |
| 9.3 The accreditation criteria – principles over process and the challenge of escalation | 228 |
| 9.4 Creating the accreditation criteria | 233 |
| 9.4.1 <i>The training and learning criteria</i> | 233 |
| 9.4.2 <i>The representation and governance criteria</i> | 237 |
| 9.4.3 <i>The negotiated approach to managing EDG</i> | 242 |
| 9.5 Measuring the employer’s approach for accreditation and the issue of small employers | 246 |
| 9.6 The role of mediation..... | 248 |
| 9.7 Should certain claims be excluded from the immunity and consequences?..... | 254 |
| CHAPTER 10: CONCLUSION..... | 258 |
| BIBLIOGRAPHY | 262 |
| A. Statutes, regulations, codes and white papers (UK unless otherwise stated)..... | 262 |
| B. Cases | 263 |
| C. Books, articles and reports | 265 |

CHAPTER 1: INTRODUCTION

This thesis endeavours to answer the following question: is there a viable model for regulating how employers and employees deal with workplace grievances and disciplinary action (EDG), the end objective of which is not employment protection, but is instead enhanced business competitiveness by encouraging partnerships at work or greater levels of organisational commitment behaviour? This thesis argues that the answer to that question may be yes, if the regulation can encourage employer's to respond to the demands of EDG in a way that employees are likely to perceive as fair.

1.1 Re-directing employment protection regulation

Labour law has traditionally focused on regulating the employment relation for the purpose of protecting the interests of employees. Those who pioneered labour law did so in large part because they perceived an imbalance of economic power between the parties to the employment relationship that heavily favoured the employer. This power imbalance left the employee exposed to exploitation by the employer whose perceived primary concern lay in the generation of profits for the benefit of its owners, rather than in the fair treatment of its workforce. This understanding of the labour market continues to pervade much of labour regulation, although it is arguable that the market conditions in which labour law currently functions are such that the focus of labour law may, in certain areas of employment protection, be justifiably adjusted.

This thesis argues that in countries including Britain the demands upon labour have shifted from traditional methods of production to new ways of working that reflect the highly competitive and interdependent global market in which commercial organisations do business. Particular emphasis is now placed on the need for British businesses to respond to the demands of the 'knowledge driven economy' as an essential ingredient in Britain's recipe for remaining competitive in the face of globalisation and the current economic downturn.

For many if not most employers these changing and challenging economic conditions necessitate the development and maintenance of a workforce that is motivated to function beyond the strict obligations of their employment agreements. Such employers desire their workforce to be highly productive, even innovative, as a key aspect of commercial success. Of course governments also identify the value in such productive employment relationships. The macro-economic demands and associated political challenges of the modern global market, encourages governments to find ways of achieving higher levels of business competitiveness within and outside of their geographical and economic boundaries.

1.2 The central argument – regulating for competitiveness

This thesis does not challenge the continued potential value of labour law as a mechanism for protecting the interests of some employees from exploitation at the hands of the economically more powerful employer. This thesis does, however, argue that law makers should, given the economic conditions just described, consider a new end-game for employment protection regulation. In particular, it is mooted that labour regulation can have as its end goal higher levels of business competitiveness and economic well-being which are achieved through laws that encourage a more productive employment relationship. Such a shift in regulatory emphasis will not mean that employees are exposed to greater levels of exploitation as a result of a weakening in the protections afforded them by law. In fact, the contrary is true and employment protection would continue to be an important element of the reconfigured regulatory approach. What this thesis argues, however, is that employment protection should cease to be the overriding objective of labour law, and should become instead a means to the new final end of labour law which is greater competitiveness.

1.3 The centrality of fairness and EDG

The argument in favour of a new or alternative direction for labour law focuses its attention on the importance of fairness at work. This thesis argues

that employees are more likely to work in a manner that exceeds their contractual obligations, and be highly productive and innovative, if they perceive that their employer will treat them fairly and, in particular, handle their concerns and disciplinary matters (or EDG) in a manner that is fair. The corollary is of course that employees who perceive that their employer is unfair are not likely to be productive and may in fact, for reasons that are explored later, be destructive or counter-productive in response to their perceptions of unfairness. To help frame the discussion this thesis picks-up on the previous Labour Government's conception of partnership between employers and employees as a means of achieving greater levels of business competitiveness. It suggests that the previous Government's notion of partnership articulates a formula for an employment relationship that can effectively respond to the demands of the modern global economy, but this thesis also identifies the significance of fairness perceptions as a precondition (as well as a potential outcome) of successful partnerships at work.

For some (perhaps most) employers, fair treatment and a concern for fairness is an objective for their workplace environment. Those enlightened employers recognise the value of fairness as a mechanism for achieving higher levels of worker productivity or, at least, avoiding the negative outcomes that can flow from unfairness. But this thesis argues that it is not enough for lawmakers to leave all employers alone to realise the benefits of fairness. It is highly unlikely that fairness, employee perceptions of fairness, and the subsequent achievement of partnership at work will be universally realised in all workplaces given the traditional 'them and us' construct of the employment relationship; a relationship that has historically been based on subordination of the employee and their interests to the demands and interests of the employer. Even for those employers who articulate and purport to demonstrate an enlightened view of the employment relationship, it may be necessary for the law to set a directing framework of better behaviour that will help maximise fairness at work.

1.4 The regulatory challenge of generating fairness perceptions

The challenge for regulators posed by the alternative regulatory objective that this thesis propounds is apparent. Whereas regulation of employee disciplinary and grievance related matters, or EDG, that maintains employee protection as its primary objective, might achieve that objective by relatively unsophisticated rules backed by robust enforcement, regulation to achieve greater levels of fairness *perceptions* amongst employees is arguably a much greater challenge which calls for a more sophisticated regulatory approach. Where the regulatory objective is employee protection, the law typically places the parties in potential conflict as a device for preventing, by negative incentive, disputes about EDG (e.g. if you break the rules I will bring legal action against you, so do not break the rules). But such a regulatory device is, or so this thesis argues, unlikely to promote a belief in the employee that their employer is fair. This traditional or common form of employment protection regulation tends, it is argued, to pitch the parties to the employment relationship against each other, which in turn perpetuates the ‘them and us’ employment relationship. Further, the discussion which follows suggests that it is more than just the content of current regulation that prevents it from promoting fairness perceptions and partnerships. The challenges set in its way are fundamental and touch on the nature of the regulatory approach and, significantly, its means of enforcement (i.e. the tribunals and the Courts). A new radical approach to regulating EDG is necessary if an end goal of greater competitiveness is to be realised.

1.5 Thesis summary

This thesis sets out to find a model for the regulation of EDG that is likely to achieve partnership at work, increased worker productivity and enhanced competitiveness. It begins this search in Chapter 2 by exploring the previous Government’s conception of partnership at work. The second chapter describes the economic conditions that promote the search for a mechanism for greater workplace productivity and competitiveness, including the rise of globalisation and the knowledge driven economy. These economic drivers

encouraged the former Labour Government to develop its notion of partnership at work as a policy basis for new regulation of the labour market. That new regulation would, according to the previous Government, promote greater business competitiveness *and* fairness at work (as this thesis progresses we shall see that there was and remains a substantial distance between the policy rhetoric and the legislation that purported to support the policy).

The second chapter moves on to identify the Labour Government's model of partnership amongst a number of alternative models and to describe its essential characteristics. In short the previous Government's conception of partnership at work was focused on 'mutual gains' which is consistent with the view that partnerships should promote fairness at work. This view of partnership resembles (in form and desired outcome) the model of Organisation Commitment Behaviour (OCB) which Daniel Katz described as being an essential characteristic of a successful business. This thesis explores Katz's idea of OCB and articulates its essential features as being an important embellishment of the Labour Government's partnership model. In short it is argued that the partnership model is given greater and clearer meaning if it is understood to include OCB. But achieving effective partnership at work and OCB was and remains a significant challenge. Essential to the realisation of partnerships and OCB is a high level of trust but, it is argued, such a high level of trust may be elusive given that the employment relationship is historically based on notions of command and control, subordination and, arguably, low trust (this immediately suggests the potential for regulatory intervention to help circumvent the barriers to partnership). Remembering that this thesis is focused on regulating EDG, the second chapter also describes the significance of EDG as an element in the building or destruction of trust and perceptions of fairness. An employer who is committed to treating its employees fairly in the context of EDG is more likely to be considered fair and to be trusted by those employees who are essential to its competitive performance. A fair and trusted employer will be more likely to realise the competitiveness enhancing benefits that flow from OCB and partnership.

In Chapter 3 this thesis asks what does it mean to be ‘fair’ in the context of EDG? More specifically the chapter explores the circumstances in which employees are likely to judge that their employer is fair or unfair. In the final analysis a regulatory model which aims to increase fairness perceptions to achieve OCB, will need to reflect a rational and fact based assessment of what it means to be fair *and* how employees form fairness judgements. To this end the thesis calls upon the large amount of research into fairness that has been undertaken in the area of organisational justice. We discover that there are three relevant types of fairness: distributive fairness, procedural fairness and interactional fairness. Distributive fairness concerns the perceived fairness of outcome allocations; procedural justice refers to the perceived fairness of the allocation process; interactional justice accounts for fairness perceptions based on the interpersonal treatment an employee receives from others. Here it is important to recognise that these three constructs, while distinct, are closely related. In other words it is likely that an employee’s belief about whether or not in any particular set of circumstances they have been treated fairly, will be based on a combination of distributive, procedural and interactional factors. This chapter goes on to explore and apply several theoretical models for predicting how employees process fairness information to reach fairness judgements. In particular, we investigate how fairness judgements can impact on the realisation of partnership and the elements of OCB that were discussed in the previous chapter.

In Chapter 4 we move on to form some initial thoughts about the essential elements of a regulatory model that might support the achievement of fairness at work, partnership and OCB. That discussion is preceded with a recap of the key barriers to fairness at work which must be overcome if fairness perceptions are to thrive. In this chapter we introduce the notion of reflexive self regulation as a likely key ingredient in the final regulatory model. The argument to take forward is that a law, which aims to influence the actions of employers in a manner that positively impacts the mental perceptions of employees, must be adaptable to the workplace in which those judgements are formed, *and* to the specific instances of EDG to which the law will apply. In other words, the likely regulatory model will provide a framework of

acceptable behaviour which is, at the same time, clear and specific, but adaptable enough to encourage behaviour that will drive realisation of the regulatory objective. Further, any such regulatory model must take into account the point made in Chapter 3 that fairness perceptions involve a complex interaction of distributive, procedural and interactional justice. It is wrong to suggest that any one element of fairness is predictably more important than another in any instance of EDG.

In Chapter 5 this thesis begins a discussion about current regulation of EDG. We consider the extent to which existing laws do or can positively influence fairness perceptions. Chapter 5 focuses on the law of Unfair Dismissal and draws comparisons with the New Zealand law of Unjustifiable Dismissal. We refer to the law in New Zealand because it is, perhaps more so than any other common law jurisdiction, similar enough to the British regulation to make it a valuable source of comparison. The first conclusion is that the current application of the law of Unfair Dismissal is unlikely to support the goal of fairness perceptions and OCB. In particular, the judicial application of the range of reasonable responses test to the law of Unfair Dismissal appears to impede the law being a support for greater fairness perceptions. That is in part because the test, by providing employers with significant leeway in relation to distributive fairness, fails to reflect the relationship discussed in chapter 4 between fairness perceptions and the three areas of fairness (distributive, procedural and interactional). The current application of the law places its primary emphasis on procedural fairness and, it is argued, this preoccupation with procedural fairness has the potential to negatively impact overall fairness perceptions. That is partly because a regulatory focus on procedure results in employers following procedural rules and guidance to avoid the consequences of non-compliance, with little or no regard to the substantive outcomes of the process. This approach can leave an impression in the mind of the employee that their employer is simply going through the procedural motions without genuine regard for the employee's interests. Such a perception is the antithesis of regulation aimed at building trust and fairness perceptions.

But Chapter 5 also identifies a dilemma. It may be possible to draft legislation which instructs the tribunals to holistically focus more robustly on all aspects of fairness (i.e. procedural, distributive and interactional) and to put aside the range of reasonable responses test, but can the tribunals effectively translate that instruction into decisions which provide clear guidance to employers about the meaning of fairness - guidance that will engender employer behaviour which leads to a greater level of fairness perceptions? This thesis suggests that setting such an objective for the legislation and the tribunals may be asking too much of both. In short it is not possible for a law to articulate clear and universally applicable guidance on what it means to be fair in each and every instance of EDG. There are too many variables at play from instance to instance for the law to come anywhere near a precise standard. It is, therefore, inevitable that any such law will be non-specific in setting standards against which fairness is judged (e.g. the Unfair Dismissal regulation calls for an assessment of fairness based on standards of “reasonableness”). But such a non-specific standard is subject to broad interpretation by the tribunals in each claim for Unfair Dismissal, and by employers who are contemplating dismissal. Those interpretations will be formed based on a party’s own prejudices and self-interest. In other words such regulation is unlikely to result in a convergence of views about what it means to be fair in every case of EDG, which in turn means that the regulation is unlikely to significantly encourage greater levels of fairness perception for reasons that we explore in some detail.

Further, it is argued that a weakness of the current law of Unfair Dismissal as a means of maximising fairness perceptions goes beyond the challenges associated with substantive and procedural fairness judgements. This is apparent when we recall that the conflict continuum, which predicts that a significant proportion of disciplinary action, including dismissal, sits at the end of the continuum, but is rooted in earlier unresolved perceptions of unfairness that the employee has internalised or responded to by retaliation. The employee’s response manifests itself in, for example, a dip in performance or some form of misconduct. The dip in performance or misconduct may have been the direct and immediate cause of the dismissal,

but its genesis can be far more complex. If we accept this we must recognise that the law of Unfair Dismissal is too focused at the end of the conflict spectrum to have any real chance of minimising conflict and maximising employee judgements that the employer is fair and trustworthy. The law of Unfair Dismissal is framed in a way that turns the employer's attention to the issue of process in particular when they are considering disciplinary sanctions and the possibility of dismissal and not before, but by that stage the attitudes of the parties towards each other have almost certainly deteriorated such that the likelihood of re-establishing mutual trust may be limited.

In Chapter 6 we continue our discussion of current regulation by focusing on how the law treats employee grievances or actions short of dismissal. As with the law of Unfair Dismissal, we find that the regulatory focus is on procedural fairness rather than distributive and interactional fairness, thereby limiting the extent to which the law can effectively influence the employer to take action that might be judged as fair by its employees. Further, this thesis argues that regulation of employee grievances about perceived unfair behaviour provides aggrieved employees with limited options for legal recourse beyond resignation and taking their chances with a claim for constructive dismissal. But such a claim is drastic and likely to be taken by the employee with great reluctance. Arguably, the unlikely prospect of having to defend such a claim will not tend to positively influence employer behaviour. Further, by the time an employee is contemplating such action the odds of maintaining a productive relationship with their employer are low and, therefore, even if, in that instance of EDG, the employer did turn their mind to the employee's view of fairness, it is likely to be too little too late.

But would regulation which provides a meaningful remedy for unfairness at work make any real difference to the level of positive fairness perceptions? Such remedies exist in New Zealand but, it is argued, they are unlikely to substantially influence greater levels of fairness. That is in large part because assessing fairness continues to be based on non-specific standards which are unlikely to result in a common view of what it means to be fair in every instance of EDG. Further, it is a significant and bold step to litigate against

your current employer and employees will, it is argued, be reluctant to take such action. Some employers know this and are not, therefore, likely to be heavily influenced by the potential for such claims in a way that drives employer behaviour which will influence fairness perceptions.

In Chapter 7 we ask whether the tribunals and the Courts are best placed to encourage fairness at work. We assert that the institutions which are tasked with enforcing regulation that aims to encourage fairness must be, as a minimum, easily accessible to employees in particular; in fact they must encourage access where a genuine complaint exists. In other words employees should not be inclined to “lump” their grievances and complaints because they view the process of pursuing their claims as too difficult or intimidating. But, it is argued, such an ambition may be difficult to achieve. While the tribunals and tribunal procedure are meant to be relatively informal, a significant and inevitable level of procedural formality exists which is likely to dissuade employees from filing and pursuing tribunal claims. Moreover, not only must the tribunals be easy to access, they must be willing to make fairness judgements which involve treading the line of what is and is not legitimate managerial prerogative. This thesis argues that the tribunals are, for reasons that we shall explore, extremely reluctant to make decisions which come down against the employer’s assessment of substantive fairness.

Further, the tribunals are hamstrung to an important degree from assessing and passing judgements on fairness at work by the limits of their jurisdiction and the regulation which they enforce. Specifically, this thesis suggests that the law does not provide a broad and general claim of unfairness. Rather it presents employees with limited rights (e.g. Unfair Dismissal and rights not be unlawfully discriminated against) which do not necessarily address every genuine complaint about unfair treatment. The closest the law comes to a general prohibition on unfairness is the implied term of trust and confidence. But that implied term regulates extreme behaviour (i.e. behaviour that is calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee). As such it does not capture less extreme behaviour which may still have significant negative

effects on employee perceptions of fairness. Employees can therefore be left in a position where the tribunals cannot address their genuine concerns which is contrary to the objective of regulation encouraging fairness at work.

Chapter 8 attempts to establish a theoretical basis for explaining the inability of current regulation to promote greater levels of fairness perceptions and OCB, whilst establishing the foundations for a model of regulation that is more likely to realise such an ambition. To this end we consider the work of Teubner on the subject of juridification and the limitations of direct regulation in the arena of complex social relationships. This chapter observes that any law which attempts to mould individual fairness perceptions in the context of the employment relationship is unlikely to be successful unless it recognises the limits of direct regulation as a mechanism for achieving fairness perceptions. This reflects earlier discussions concerning the challenges which prevent direct regulation, such as the law of Unfair Dismissal, from being a catalyst for greater fairness perceptions and OCB. It is argued that all the law can hope to achieve is a framework of indirect regulation that encourages the parties to self-regulate EDG in a manner which is reflexive and flexible enough to adequately account for the particular circumstances that attach to each instance of EDG. Any such indirect regulation must encourage a reflexive approach to EDG which focuses on the total concept of fairness (i.e. procedural, distributive and interactional) and does not limit its regulatory interest to procedural fairness only.

Further, and perhaps most significantly, this thesis argues that it may not be prudent to enforce any indirect regulatory framework via the traditional mechanism presented by the tribunals and the Courts. That is because, we argue, the tribunals and the Courts do not want to, and are not able to, effectively assess substantive fairness in a manner that is likely to be perceived as fair by both parties.

The purpose of the Chapter 9 is to explore an alternative regulatory model for EDG that takes the tribunals and the Courts out of play for the most part, and provides the parties with the necessary incentives to behave in a manner that

will promote fairness perceptions and greater competitiveness. This chapter suggests a new and radical model for the regulation of EDG. It draws upon the arguments made in earlier chapters about the shortcomings of current regulation as a vehicle for greater fairness perceptions, and the suggestion made about a suitable regulatory approach. The proposed model adapts the “safe-harbour” approach to regulation which applies in other areas of law. In short this thesis suggests an approach to regulation of EDG which reduces or eliminates the employer’s liability in relation to EDG if they can acquire accreditation from an agency based on set criteria. An employer will only gain accreditation if they can in essence demonstrate that they have certain methods and practices in place for managing EDG; methods and practices that accord with certain substantive requirements and principles which, if followed, are likely to lead to fairness at work, and therefore a higher degree of fairness perceptions. These requirements and principles will permit the parties considerable scope to find a way of complying with the accreditation criteria that best suits them. If the employer achieves accreditation it will not thereafter be subject to the jurisdiction of the tribunals and the Courts in relation to most potential claims concerning the broad issue of EDG. That is the carrot of the regulation. If they do not achieve the requirements of accreditation they will be subject to a more stringent set of employment rights that are more rigorously enforced by the employment tribunals. That is the stick of the regulation.

CHAPTER 2: ACHIEVEING ORGANISATION COMMITMENT BEHAVIOUR BY PARTNERSHIPS AND FAIRNESS

This thesis sets out to find a model for the regulation of EDG that is likely to achieve partnership at work and increased worker productivity and competitiveness. It begins this search in the current chapter by exploring the previous Government's model of partnership at work and linking that model to the key concepts of fairness and trust that, for reasons which will hopefully become clear as this discussion progresses, must underpin and guide the eventual regulatory model.

This chapter commences with a description of the economic conditions that promote the search for a mechanism (like partnership at work) to achieve greater workplace productivity and competitiveness. Those conditions include the rise of globalisation and the knowledge driven economy. We move on to identify the Labour Government's model of partnership amongst a number of alternative models and to describe its essential characteristics. That model of partnership resembles (in form and desired outcome) the model of Organisation Commitment Behaviour (OCB) which Daniel Katz described as being an essential characteristic of a successful business. This chapter also explores Katz's idea of OCB and articulates its essential features as being an important embellishment of the Labour Government's partnership model. In short it is argued that the partnership model is given greater and clearer meaning if it is understood to include OCB.

This chapter moves to acknowledge that achieving effective partnership at work and OCB was and remains a significant challenge for regulators. That is in large part because the realisation of partnerships and OCB presumes a high level of trust between the parties to the employment relationship. But, it is argued, such a high level of trust may be elusive given that the employment relationship is historically based on notions of command and control, subordination and, arguably, low trust. This chapter suggests that how an employer deals with EDG is a particularly important element in the building or destruction of trust. An employer who is committed to treating its employees

fairly in the context of EDG is more likely to be considered fair and, consequentially, to be trusted by those employees who are essential to its competitive performance. A fair and trusted employer will be more likely to realise the competitiveness enhancing benefits that flow from OCB and partnership.

2.1 The challenges of Globalisation and the knowledge driven economy

The previous Labour Government adopted the metaphor of partnership to describe the type of employment relationship which it believed was most likely to achieve its two key objectives for the labour market: fairness at work and efficiency.¹ Put another way, the previous Government considered fairness and efficiency, generated by partnerships between employers and their staff, to be at the heart of the ideal labour market; it argued that a labour market which achieves this ideal will become a vital engine for economic growth, business output and the enhancement of business competitiveness in Britain.² This ideal of creating greater business efficiency and productivity is at least as valid an objective for labour law reform now, given the current economic climate, as it was when Labour came to power in 1997.

It was not surprising that the previous Government took an interest in the competitiveness of British businesses. After all, the wealth of nations depends to a significant extent on the attraction of inward investment, exports and the servicing of markets worldwide by businesses that reside within each nation's geographical boundaries.³ There has, however, been a relatively recent and significant escalation in the importance to governments of business competitiveness, which is a symptom of the economic system commonly referred to as globalisation. Globalisation has in turn caused policy-makers to consider afresh what type of labour market is best suited to respond to the challenges of today's global marketplace.

¹ *Fairness at Work* (London: HMSO, 1998) 1.8 and 1.11.

² *Ibid*, 2.12 and 2.15.

³ H. Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *ILJ* 15, 17.

The term “globalisation” identifies in part, at least, the increased mobility across national, regional and international borders of not only goods and services, but also of capital, knowledge and people.⁴ This enhanced mobility is due to a rapid expansion in the available means of and methods for achieving fast and cost-effective communication and transportation and the effectiveness of international policies aimed at bringing down barriers to free trade and the integration of capital markets.⁵ In order to survive in this increasingly competitive environment in which, for example, a company in Britain may be competing with a rival in South Africa that enjoys lower labour costs and a favourable exchange rate, businesses must be able to adapt their labour force to new business methods and technology, and to do so expeditiously. To *flourish* in such an environment, businesses and their employees must be innovative and be able to seamlessly change their ways of operating without negatively impacting on production. It follows that the partnership approach, with its emphasis on increased co-operation and efficiency on the part of employees, is bound to be attractive to governments that are attempting to marshal their nations’ economies in the midst of globalisation. This attraction is enhanced in the current global economic environment.

There is a further feature of the modern economy that is linked to globalisation and which provides another incentive for governments to encourage businesses to adopt the partnership model as their guide to labour and employment relations: the knowledge driven economy. It has of course been recognised for some time by many employers that a business will not achieve its potential to generate output and profits, unless it is able to harness the

⁴ J. Stiglitz, ‘Globalisation and Development’, in D. Held and M. Koenig-Archibugi (eds), *Taming Globalisation, Frontiers of Governance* (Cambridge: Polity Press, 2003) 47-67, 51; C. Crouch, ‘The Globalized Economy: An End to the Age of Industrial Citizenship?’, in T. Wilthagen (ed) *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: North Holland, 1998) 151, 151-152; and P. Beaumont, *Change in Industrial Relations* (London: Routledge, 1991) 232.

⁵ D. Schiek, ‘Autonomous Collective Agreements as a Regulatory Device in European Economic Law’ (unpublished draft of paper completed at LSE, 2004) 11. See also A. Supiot, ‘The transformation of work and the future of labour law in Europe: A multidisciplinary perspective’ (1999) 138 *International Labour Review* 31, 33-4.

knowledge and skill potential of its workforce.⁶ What has changed, however, is the nature of the economies in which businesses now function and with that employers have been forced to reassess the importance of exploiting the intellectual capabilities of their workforce. It is no longer the case that the large economies of the world are based on the exploitation of natural resources or the manufacture of products by methods of mass production. It is more accurate to say that we live in a “knowledge driven economy”⁷ in which the key to economic success belongs to those businesses that, with the help of their workforce, adopt or generate technological advancements and innovation to achieve a competitive advantage in national, transnational and international markets.⁸

2.2 Responding to the challenges of the modern economy: the goal of partnership

A key ingredient in the achievement of enhanced business competitiveness in the midst of globalisation and a growing knowledge driven economy is a workforce that is flexible and co-operative. Employees must be willing to undertake new tasks that may be foreign to them and are necessary if the employer is to adapt to rapidly changing methods of production, technology and competition.⁹ In addition, employees must be dedicated to being efficient

⁶ H. Collins, *Employment Law* (Oxford: Oxford University Press, 2003) 23; concepts such as Human Resources Management (HRM) and Total Quality Management (TQM) are similar in many respects to the former Government’s notion of partnership (they recognise the benefits of joint decision-making, autonomy, flexibility etc) (see, for example, R. Storey, *New Perspectives on Human Resources Management* (London: Routledge, 1987)). Many argue that partnership has its origins in the concept of HRM that has been in existence for several decades (see S. Wood, ‘From voluntarism to partnership: A third way overview of the public policy debate in British industrial relations’, in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relation* (The Hague: Kluwer Law International, 2000); see also P. Taylor and H. Ramsay, ‘Unions, Partnership and HRM: Sleeping with the Enemy?’ (1998) 6 *International Journal of Employment Studies* 117).

⁷ Supra at note 3, 19.

⁸ Ibid, 20.

⁹ See W. Streeck, ‘On the Institutional Conditions of Diversified Quality Production’, in E. Matzner and W. Streeck (eds), *Beyond Keynesianism. The Socio-Economics of Production and Full Employment* (Cheltenham: Edward Elgar, 1991) 21-61. This form of flexibility is referred to as ‘functional flexibility’. An employer may also attempt to achieve flexibility by changing the quantity of its labour in response to changes in the market. But this type of flexibility attacks the job security of employees and, as we shall see, is unlikely to breed the levels of trust that are necessary for a successful partnership (see J. Atkinson, ‘Flexibility: Planning for an Uncertain Future’ [1985] *Manpower Policy and Practice* 26).

and productive in what they do, to provide good quality customer service and to complete work that is of the highest standard. But more than that, in a knowledge driven economy it is imperative that employees are encouraged and given incentives to proactively share with their employer their particular skill and knowledge about the employer's business and the industry in which that business functions. That knowledge and skill is learned partly on the job and will be enhanced naturally as time in the job passes, but to expedite and heighten that enhancement, employees must be willing to take steps, with their employer's support, to improve their skills and knowledge by training or by other forms of education. A workforce that has acquired "broad and high skills" has the potential to be more flexible, and their employer is "able to respond more effectively to changing market demands and uncertainty".¹⁰ Further still, a highly skilled and knowledgeable workforce has greater potential to be innovative and able to devise new and valuable products, ideas, services and marketing techniques, all of which are of considerable value to a business¹¹.

How do businesses achieve this level of co-operation and commitment from their workforce? This task is made more difficult, and more important, in a knowledge driven economy, where it is the intellectual capacity of the employee and not their physical ability that the employer is most concerned to exploit. The challenge is greater because it is easier to monitor whether an employee is working to their physical limits than it is to assess whether that worker is using all of their knowledge and intellectual capacity when carrying out their job. No employer is a mind reader with the ability to gauge whether an employee is holding back when it comes to thinking up new ideas that will help the business. It follows that, in the end, a high level of intellectual performance is most likely to eventuate on a voluntary basis, it will be difficult to coerce directly.

¹⁰ J. Knell, 'Partnership at Work', *Employment Relations Research Series No. 7* (London: DTI, 1999) 11.

¹¹ Supra at note 6, 3.

Here then is the importance of fairness as a key ingredient in the former Government's ideal labour market. The previous Government believed that fairness and efficiency go hand in hand, that the latter follows the former¹². It may have been right. Common sense suggests that an employee who believes their employer treats them fairly by, for example, sympathetically and promptly resolving their grievances or by rewarding them equitably for hard work, is more likely to work harder, more productively, co-operatively and innovatively for their employer, than an employee who feels that their employer treats them unfairly. The previous Government believed this competitiveness enhancing relationship between a commitment on the part of the employer to fairness, and a willingness on the part of the employee to be co-operative and innovative in response, can be achieved by the development of strong partnerships at work. There is some evidence to suggest that the former Government's assessment is accurate. In a study carried out on behalf of what was the DTI, John Knell explains that all of the firms examined (each of which declared a commitment to a partnership-like approach to employee relations) believed the partnership approach had helped them achieve enhanced competitive performance by focusing on certain values such as fair reward and open management.¹³

2.3 What was the previous Government's approach to partnership?

There is, therefore, some evidence to suggest that partnership at work can aid the goals of competitiveness underpinned by fairness. This paper has identified some aspects of the nature of partnership, but can we be more specific? For example, what type of principles and practices can we expect to see adopted in workplaces committed to the previous Government's ideal of partnership at work? The answer to that question is complicated by the fact that there is no universally applicable definition or concept of partnership.¹⁴ That said, according to Guest and Peccei, most approaches to partnership can

¹² Supra at note 1, 1.11.

¹³ Supra at note 10, 29; see also A. Marks, P. Findlay, J. Hine, A. McKinlay and P. Thompson, 'The Politics of Partnership? Innovation in Employment Relations in the Scottish Spirits Industry' (1998) 36 *British Journal of Industrial Relations* 209.

¹⁴ D. Guest and R. Peccei, 'Partnership at Work: Mutuality and the Balance of Advantage' (2001) 39 *British Journal of Industrial Relations* 207, 208.

be labelled as either pluralist, unitarist or a hybrid model of the two previous conceptions. We shall consider each of these in turn, starting with the pluralist model.

The pluralist model is firmly rooted in the concept of industrial democracy.¹⁵ This immediately suggests we will not identify the former Labour Government's notion of fair and efficient workplaces by partnership, with its intellectual roots in the Third Way, within this category. The pluralist perspective¹⁶ acknowledges the different interests of management and labour and recognises that capital will seek to limit the power of labour if that power is likely to lead to the redistribution of surplus value.¹⁷ The legislative reaction to this is the development of a legal framework that encourages or mandates co-determination rights for workers.¹⁸ Not surprisingly, the pluralist approach relies heavily on the indirect participation of individual workers in workplace decision-making by preferring the use of representatives systems over direct dialogue between the employee and management as the best means of providing an employee voice in the workplace. That representation is frequently, but not always, provided by a trade union.¹⁹ Again, this suggests a divergence from the notion of partnership put forward by the previous Government. While, as part of its legislative agenda, the former Government made provision for collective representation by trade unions²⁰, it is clear that it did not see trade unions or any other representative grouping of workers as *essential* to partnership. Its notion of partnership was a relationship between the employer and individual employees. As Tony Blair explained in the Foreword to *Fairness at Work*, the former Government's approach to the

¹⁵ Ibid, 208.

¹⁶ Typical of this perspective is the approach taken by the IDE, see: Industrial Democracy in Europe Group, *Industrial Democracy in Europe Revisited* (Oxford: Oxford University Press, 1993).

¹⁷ Supra at note 14, 208-209.

¹⁸ Ibid, 209. As Guest and Peccei point, out the most developed form of this type of partnership exists in Germany where legislation provides clear rights for workers of co-determination, consultation and communication.

¹⁹ J. Rogers and W. Streek (eds), *Works Councils: Consultation, Representation and Cooperation in Industrial Relations* (Chicago: University of Chicago Press, 1995) referred to by Guest and Peccei (supra at note 14, 209).

²⁰ See Recognition Procedure in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992.

employment relationship was based on the “the rights of the individual”.²¹ The employee can choose to be represented by a trade union or other collective grouping of workers, but that is a choice that he or she must make and the government will not impose that decision upon them.²²

The second approach to partnership identified by Guest and Peccei is what they refer to as the unitarist approach.²³ As the label suggests, this approach seeks to assimilate the interests of management and employees, while at the same time maximizing employee involvement and commitment to the business.²⁴ This approach can be divided into several strands, the first of which focuses on creating financial incentives for employees to align themselves more closely with the goals and objectives of their employer (one such incentive is employee share ownership).²⁵ The second strand centres around direct employee participation in decisions that impact on their job. Guest and Peccei point out that within this strand employers are willing to allow their employees greater autonomy, but only where doing so maximises the employee’s contribution to the business and provided that that approach functions in tandem with a system of communicating to employees the business’s goals and values in a manner designed to encourage the employees to adopt those as his or her own.²⁶ In this way, partnerships at work reflect an employer that has little trust in their workforce and for this reason it risks becoming one-sided and ineffective.²⁷ A final strand to the unitarist approach focuses on maximising each employee’s “psychic stake” in the business.²⁸ Central to this approach is the use of a wide range of sophisticated human

²¹ Supra at note 1, the Foreward.

²² Ibid. The Prime Minister stated: “[the white paper] is based on the rights of the individual, whether exercised on their own, *or with others, as a matter of their choice.*” (emphasis added). For a critical perspective on this individualistic view of the employment relationship see: T. Novitz and P. Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Oxford; Portland: Hart, 2001)13-17.

²³ Supra at note 14, 209.

²⁴ Ibid.

²⁵ Ibid; M. Conte and J. Svejnar, ‘The Performance Effects of Employee Share Ownership’, in A. Blinder (ed), *Paying for Productivity: a Look at the Evidence* (Washington D. C.: Brookings Institute, 1990) 143-181.

²⁶ Supra at note 14, 210; see also P. Ackers and J. Payne, ‘British Trade Unions and Social Partnership: Rhetoric, reality and strategy’ (1998) 9 *International Journal of Human Resources Management* 529.

²⁷ Supra at note 14, 210.

²⁸ Ibid.

resources techniques and methods, such as job design, rewards and appraisals, utilised in an effort to create high levels of job satisfaction and commitment amongst employees.²⁹

As is the case with the pluralist model of partnership, the unitarist approach does not match the previous Government's apparent notion of partnership at work. The unitarist model reserves no role for indirect representation in the employment relationship. This is inconsistent with the former Government's approach to partnership which, while not embracing the idea of collective representation as having some universally applicable inherent value that it must promote, does argue that the *choice* of workers to be represented should they so select is something which must be protected.³⁰ In *Fairness at Work* the previous Government acknowledged that "individual contracts are not always contracts between equal partners... Collective representation of individuals at work can be the best method of ensuring that employees are treated fairly, and it is often the preferred option of both employers and employees."³¹

The final approach to partnership identified by Guest and Peccei is their hybrid model.³² Of the three models of partnership it was the hybrid model that the previous Government appeared to adopt. This approach draws on the other two conceptions of partnership by recognising a role for representative systems while at the same time acknowledging the importance of direct employee participation in decisions that affect them, and employees and management working together for the good of the enterprise. As Guest and Peccei point out, this hybrid approach is most closely aligned with the mutual gains model suggested by academics including Kochan and Osterman³³. That model places a great deal of emphasis on the importance of management and

²⁹ See M. Beer, B. Spector, P. Lawrence, D. Quinn Mills and R. Walton, *Human resources Management: A General Manager's Perspective* (New York: Free Press, 1985); and, J. Pfeffer, *The Human Equation* (Boston: Harvard Business School Press).

³⁰ Supra at note 1, 1.9.

³¹ Ibid, 4.2.

³² Supra at note 14, 210.

³³ Ibid: Guest and Peccei referring to T. Kochan and P. Osterman, *Mutual Gains Bargaining* (Boston: Harvard Business School Press).

labour co-operating to achieve the mutual gains of job security, increased flexibility and productivity.

It is apparent that this hybrid approach is more reflective of the Labour Government's notion of partnership than the pluralist or unitarist models. That argument gains support from *Fairness at Work* and the previous Government's recognition that "the best modern companies, whether large or small, have some things in common [including]... a recognition that everybody involved in the business has an interest [or you might say mutual interest] in its success"³⁴. In addition, the DTI (as it was) described partnership at work as being about "developing better employment relations at all levels, helping to build trust in the workplace, the sharing of information and working together to solve business problems. Where partnership is successful, employers and employees both recognise the importance of their relationship and positively work towards developing this further for mutual reward."³⁵ It is also worth noting that central to this mutual gains model is a belief that partnerships of this kind require some form of joint governance system.³⁶ As Guest and Peccei point out, "implicit in this perspective, therefore, is the belief that formalized representative arrangements are necessary both to sustain key elements and processes and (perhaps) to prevent exploitation by management"³⁷. It follows from this statement that if the mutual gains model is to function effectively and in a manner that promotes and protects the objective of fairness at work, it may require a willingness on the part of the government of the day to accept a greater role for collective representation than it has hitherto explicitly shown itself prepared to recognise. This is a point that we shall return to in due course and one that is particularly relevant to the issue of labour law concerning EDG.

³⁴ Supra at note 1, 2.2.

³⁵ DTI, 'What is Partnership at Work?' at <http://www.dti.gov.uk/partnershipfund/index.html>.

³⁶ Supra at note 14, Guest and Peccei referring to J. Cutcher-Gershenfeld and A. Verma, 'Joint Governance in North American Workplaces' (1994) 5 *International Journal of Human Resources Management* 547; and, R. Blatt and E. Applebaum, 'Workers Participation in Diverse Settings: Does Form Effect the Outcome, and if so, Who Benefits?' (1995) 33 *British Journal of Industrial Relations* 353.

³⁷ Supra at note 14, 211.

If we accept that the Labour Government's notion of partnership followed the mutual gains or hybrid approach, it becomes possible to add some further flesh to the bones of that notion of partnership. So far we have spoken about different models of partnership as falling within certain broad categories. However, if we are to chart a legislative course for labour law that is in keeping with the objective of partnership at work, we need to understand more precisely what elements are essential to a successful partnership of the kind envisaged by the former Government. But where can we find these elements? The most systematic attempts to define partnership at work in Britain have almost certainly been made by the Involvement and Participation Association (IPA). Their description of the constituent elements of a successful partnership reflect the mutual gains model of partnership and the Labour Government's apparent approach to partnership. What is more, when approached about the meaning of the previous Government's conception of partnership, the DTI referred senior academics to the IPA's framework on partnership.³⁸ It is, therefore, to that framework that we now turn in an effort to obtain a better understanding of the Labour Government's policy of achieving partnerships at work.

In their 1998 report for the IPA³⁹, Guest and Peccei developed the IPA's definition of partnership in the following terms. The definition has three components: a set of values or principles; a set of practices; and a promise of benefits. The principles are defined as the "values underlying partnership which prescribe appropriate forms of behaviour and practice in organisations".⁴⁰ The main principles are specifically identified as: good treatment of employees now and in the future; creating opportunities for employee contribution (or what might be referred to as employee empowerment); employee rights and benefits; and employee responsibilities. As Knell has pointed out, these principles underline the importance of

³⁸ See S. Wood above, *supra* at note 7, 131-132. Wood recounts that in an attempt to find a link between the Government's notion of partnership and HRM, the DTI official responsible for administering the Partnership Fund, directed him to the IPA framework on partnership and the operational definition of partnership used in the report on WERS98.

³⁹ D. Guest and R. Peccei, *The Partnership Company: Benchmarks for the Future* (London: Involvement and Participation Association, 1998).

⁴⁰ *Ibid.*

mutuality and the reciprocal rights of management and their staff, which distinguishes the partnership model of employment relations from the traditional view of the employment relationship as one of command and control.⁴¹ Having adopted the principle of partnership an organisation must decide how to go about implementing those principles in practice to create actual partnerships. Guest and Peccei have compiled a list of practices that an organisation pursuing partnerships at work is likely to adopt. They include: direct and indirect (i.e. representative) participation by employees in decisions about their own work and employment issues in general; flexible job design and a focus on quality; performance management; and communication, harmonisation and employment security.⁴² Finally, Guest and Peccei identify three key areas in which the outcomes of a partnership approach are likely to be beneficial. They are: the positive commitment and contribution of employees to the business (in this category we can identify the level of flexibility and innovation the previous Government hoped partnerships would achieve); a reduction in poor labour relations including reduced conflict, absence and turnover; and an improvement in business productivity, overall innovation, sales and profits.⁴³

It is worth making the point here that the establishment of a successful partnership at work will almost certainly require more from the employer than just a willingness to put in place measures which *they* believe are in keeping with the partnership approach outlined above. Before a successful partnership will take root those steps must be *perceived* by the workforce to be genuine and not based on management self interest, and they must be carried out faithfully by both employers and employees. This perception and the willingness to faithfully follow the partnership model will, to a large degree, depend on the extent to which the employee and employer trust each other. It is this issue of trust that we now turn to explore.

⁴¹ Supra at note 10, 6.

⁴² Supra at note 39, 24.

⁴³ Ibid, 32.

2.4 Trust in partnership: an elusive necessity

There are, of course, different degrees to which an organisation might achieve the positive outcomes envisaged by the model of partnership outlined above, however, from the previous Government's point of view the objective was to achieve as wide an adherence to the most successful forms of partnership at work as could be achieved. In other words the former Government's policy was to maximise the level of employee commitment and contribution to the business, to eliminate conflict in the workplace and to increase innovation and profits in British businesses such that the British economy becomes as competitive as it can be. This begs the question what aspects of the partnership model require particular attention if this ideal of widespread successful partnerships at work is to be achieved? This paper suggests that the focus of policy-makers should be on the interrelated factors of trust and mutuality. And when speaking of trust in this context we are not referring to the "trust and confidence" that is said to be an essential feature of the employment relationship.⁴⁴ That concept is traditionally identified as giving rise to negative obligations on employers and employees to refrain from acting in a manner that destroys their relationship. The trust necessary for successful partnerships is much more than that; it is a higher form of trust which requires each party to have faith that the other will act in the best interests of both parties and their partnership.

The significance of trust in the establishment of successful partnerships at work becomes apparent when we recognise that employers and employees are unlikely to commit themselves to partnership, unless they each trust that the other party to the relationship will use their best endeavours to reciprocate and live up to their end of the partnership arrangement. A failure to achieve that level of trust will almost certainly manifest itself in the following downward spiral of negative responses: if employees do not trust that their employer will meet its partnership commitments to, for example, the good treatment of workers and allowing workers to equitably share in the fruits of their

⁴⁴ See Lord Steyn in *Mahmoud v Bank of Credit and Commerce International S. A.* [1998] AC 20.

successful labours, the employer will not receive from its workforce the degree of commitment, loyalty, innovative performance and intellectual as well as physical endeavour that is necessary to maximise quality output. Yet without such commitment, endeavour and loyalty on the part of its employees, the employer is unlikely to reciprocate with those rewards and other forms of treatment that are beneficial and a motivating factor for the employee.⁴⁵ No successful partnership can evolve and continue to exist in such an environment.

But the objective of achieving the levels of trust necessary for successful partnerships is made increasingly difficult by several factors. First, we should recognise that any attempt to put in place and adhere to those measures which characterise the previous Government's approach to partnership, requires a leap of faith on the part of employers and employees. This is partly "because the benefits of co-operation are unlikely to accrue immediately"⁴⁶ and, in-fact, they may never accrue given the fluctuating fortunes of businesses in the modern marketplace. Moreover, partnership requires employees to be flexible, to undertake different and unfamiliar tasks. In this way adherence to the partnership approach involves employees actively participating in the mutation of their work and job functions that in turn may well result in their positions becoming redundant. It could therefore be considered counter-intuitive for employees to believe their employer's promise that a willingness on the part of employees to be flexible, and to follow the partnership

⁴⁵ See Sako, *Prices, Quality and Trust: Inter-firm relations in Britain and Japan* (Cambridge: Cambridge University Press, 1992) 39, where the author argues that partnership at work envisages a relationship in which, for example, the employee "can be endowed with high discretion, as he can be entrusted to take initiatives while refraining from unfair advantage taking". That discretion, which is a key facet of the partnership model, is unlikely to be granted without a high degree of trust between the parties. This is a clear obstacle to successful partnerships because the employer will be missing out on a central benefit of employees working with additional discretion and responsibility. As Hill has argued, "employees with multiple competencies, who will work diligently and thoughtfully without close supervision, use their knowledge to find more effective and efficient ways of doing things and are committed to the objectives of the firm... Participative company cultures that incorporate high trust and non-adversarial relationships are seen as the most appropriate to motivate people to work in these ways." (S. Hill, 'How Do You Manage a Flexible Firm? The Total Quality Model' (1991) 5 *Work, Employment and Society* 397, 398).

⁴⁶ A. Birecree, S. Konzelmann and F. Wilkinson, 'Productive systems, competitive pressures, strategic choices and work organisation: an introduction' (1997) 7 *International Contributions to Labour Studies* 3, 16.

approach, will eventually result in a more profitable business from which those employees will receive enhanced benefits and rewards.

Secondly, there are certain other features of the modern labour market which might be construed as challenging the credibility of any promise that an employee's commitment to the partnership approach will benefit them in the long run. Those features include the decline of internal labour markets; the increase in outsourcing; the "casualisation" of employment; and the growth in the less secure or "peripheral" workforce.⁴⁷ These economic developments are particularly evident in the large economies of Britain and the United States⁴⁸ and they have, when taken as a whole, led to an increased insecurity for particular groups of workers: "As a consequence, the forging of partnership arrangements with these progressively disadvantaged and peripheral sections of the workforce may prove problematic. The reality of their employment and job experiences is likely to make them sceptical about the likely longevity of any partnership arrangement they enter into."⁴⁹

Thirdly, the road to partnership is made rockier still given that the reluctance to trust is not unique to employees. A major obstacle to the uptake of partnership mechanisms (including methods of direct employee participation in decision making) is "the reluctance of management in many organisations to shift from traditional forms of work organisation"⁵⁰. One reason for this reluctance is almost certainly the perception amongst a large number of managers that many if not most employees are inherently untrustworthy. One well-known corporate executive was recently heard to say: "most employees will take any chance they can to screw you". No employer who harbours such

⁴⁷ Supra at note 10, 14.

⁴⁸ In relation to Britain see P. Nolan and J. Walsh, 'The Structure of the Economy and the Labour Market', in P. Edwards (ed) *Industrial Relations: Theory and Practice in Britain* (England: Blackwell, 1995); and in relation to the USA see T. Kochan and M. Weinstein, 'Recent Developments in US Industrial Relations' (1994) 32 *British Journal of Industrial Relations* 483.

⁴⁹ Supra at note 10, 15.

⁵⁰ K. Sissons, *Closing the Gap – Ideas and Practices: Direct Participation in Organisational Change* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 1996) 30.

feelings of mistrust will allow its employees the additional discretion and responsibility that is characteristic of the partnership approach.

Finally, and central to this thesis, is the extent to which achieving the high levels of trust necessary for the attainment of successful partnerships is inhibited by the authoritarian nature of the traditional employment relationship and the role of disciplinary sanctions as a cornerstone of that relationship. This will be explained in the discussion that follows. Collins argues that, “[t]he paradigm of an employment contract... contains an authority structure at its heart. In return for the payment of wages, the employer bargains for the right to direct the workforce to perform in the most productive way. An employee consents to obey these instructions, and so enters into a relation of subordination.”⁵¹ That statement emphasises that a vital feature of the authority structure is obedience by the employee to the commands of the employer. Without that obedience the authority structure breaks down and, not surprisingly, avoiding that break-down has become an important feature of management practice.

To ensure that the authority structure remains intact, the employer retains and advertises in handbooks and manuals their willingness to sanction the disobedient employee. As Collins points out, the most visible sign of the authority structure is the employer’s use of disciplinary measures, such as demotion or dismissal, as its primary means of achieving employee compliance with the employer’s instructions and commands.⁵² And because the employer places such importance on its power to take disciplinary action against the disobedient employee, it is inevitable that the spectre of disciplinary sanctions will sit close to the forefront of the employment relationship. It is not surprising, therefore, that employees and their representatives often become concerned that management might exercise their power to discipline workers in a harsh and unfair manner. This concern

⁵¹ Supra at note 6, 10. HRM has addressed the problems of subordination and its inability to motivate employees to higher levels of commitment and achievement (see M. Beer, B. Spector, P. Lawrence, Q. Mills and R. Walton, *Managing Human Assets* (New York: Free Press, 1984); and C. Fomburn, N. Tichy and M. Devanna, *Strategic Human Resources Management* (New York: John Wiley, 1984)).

⁵² H.Collins, *ibid.*

results in wariness on the part of employees towards their employer⁵³, and for some employees that concern escalates to become an anxiety about the long term security of their livelihood. It is always going to be difficult to achieve the level of trust necessary for a successful partnership out of a relationship that places such importance on “discretionary power laced with disciplinary sanctions”⁵⁴.

2.5 The significance of EDG in the establishment of partnerships at work

It follows that one specific aspect of the employment relationship in respect of which an employer’s trustworthiness is very much under the spotlight, and where its commitment to the principle of good treatment of staff must be credible if the goal of partnership at work is to be realised, is in the area of EDG. At the heart of that suggestion is the argument that only when the parties approach this area of the employment relationship in a fashion which departs from the practices of the past, will they be positioned to overcome the lack of trust that is likely to flow from placing “discretionary power laced with sanctions” at the forefront of the employment relation. Moreover, an employer who displays little or no real concern for the grievances of their employees, or who disciplines or threatens to discipline its staff in a seemingly unfair or irrational manner, is unlikely to successfully nurture and preserve the feelings of trust and security that are necessary for the maintenance of a co-operative relationship of partnership between employers and employees. And no employee is likely to go that extra mile for his or her employer if they have been subject to what they perceive as an unjustified warning, or where their employer has failed to address their concerns that a colleague is behaving towards them in an inappropriate and de-motivating manner. In fact when an employer exercises their discretionary power to discipline staff in a harsh manner, or when it fails to adequately address the grievances of its staff, not only will their employees refuse to cooperate with them in the fashion required by the partnership approach, they may also resign, thereby costing the

⁵³ As Fox argued, it is difficult for employers to build trust amongst their employees when workers are “permanently weary of management and its practices” (A. Fox, *Beyond Contract Work, Power and Trust Relations* (London: Faber, 1974) 115.

⁵⁴ Supra at note 6, 11.

employer the training investment it has made in those staff, the money to recruit a replacement and, perhaps, the expense of defending a claim for constructive Unfair Dismissal.

So while we can agree on the need to generate high trust in the employment relationship before we can hope to see the strongest forms of partnerships develop in British workplaces, the question remains how do we go about that task, particularly in relation to EDG? One of the difficulties we face is that the former Government's notion of partnership did not suggest the mechanisms and institutions necessary to achieve the resolution of EDG in a manner that is consistent with the goal of partnership at work. In particular the previous Government did not make it clear what role the law would play in the achievement of that goal.

2.6 Achieving partnership: might regulation play a role?

What is apparent from the white paper *Fairness at Work* is that the former Government's preferred route to successful partnerships at work was a voluntary one: "the Government believes that each business should choose the form of relationship that suits it best."⁵⁵ This approach is not surprising because it goes without saying that the most effective forms of partnership will involve employers and their employees freely establishing, through consultation and experimentation, and with reflection upon the peculiarities of their particular workplace, mechanisms for resolving issues and disputes that are fair and that result in just outcomes which promote the kind of high trust that is so essential for successful partnerships. This discussion must pause, therefore, to ask whether employers and employees can be made to adopt and achieve the model of successful partnerships by little more than Government encouragement and a message that such an approach to employment relations is the best way for a business to succeed?

⁵⁵ Supra at note 1, 2.6.

The answer must be no. It is highly unlikely that employers and employees, who have traditionally come together in a low trust relationship of subordination, will suddenly, freely, effectively and without exception grasp and run with the concept of partnership. Such a change would involve a dramatic shift in the culture of many if not most workplaces. What is more, the empirical evidence suggests that even in workplaces that purport to favour a partnership approach to employment relations, there is a reluctance on the part of those employers to put in place rules and practices that provide mutual gains for employees and employers and that generate the high levels of trust necessary for a business to maximise the benefits that might be achieved by partnership at work.

In a study carried out by Stuff and Williams of Borg Warner, a company that has for some time now declared its commitment to a partnership approach to employment relations, the authors found that according to management and unions the formal partnership arrangements that had been put in place were a great success and had led to improved company performance.⁵⁶ The employees' view of Borg Warner's approach to partnership was, however, considerably more complicated. While the employees questioned endorsed the partnership model and were able to identify certain benefits to them brought about by that approach (such as better communications from management), it was apparent from their responses that the Borg Warner approach to partnership fell well short of the genuine mutuality that we have identified is a key element of the former Government's approach to partnership. For example, while mechanisms for two-way communication had improved the flow of information between employer and employees, employees continued to feel that they had little ability to influence the organisational decisions that impacted upon them and their colleagues.⁵⁷ Specifically in relation to the key issue of trust, while the partnership approach had increased the degree of trust employees felt towards their employer, a

⁵⁶ R. Stuff and S. Williams, 'The myth of mutuality? Employee perceptions of partnership at Borg Warner' (2004) 26 *Employee Relations* 30.

⁵⁷ *Ibid*, 41.

climate of distrust continued to prevail.⁵⁸ This problem of continuing distrust is apparent from other studies that consider the effectiveness of partnership at work.⁵⁹

It is not enough, therefore, for the Government to leave the adoption of partnership at work to employers and employees themselves. To do so would result in at best a failure to achieve the high levels of trust and mutuality that are necessary for a successful partnership, or at worst a refusal on the part of employers to take *any* steps away from the traditional employment relationship of subordination towards one of partnership. This suggests a role for regulation in the drive for successful partnerships based on high trust relations between employers and employees. But can regulation help in this regard and if it can, and specifically in relation to EDG, what type of regulation is most likely to achieve that goal? The answer to that question lies at the heart of this thesis and is explored in detail in later chapters.

2.7 Katz's motivational basis of organizational behaviour

We have so far discussed the significance of employee co-operation, flexibility, innovation and “beyond contract” performance as features of partnership in the context of globalisation and the knowledge driven economy, but it would be wrong to conclude that recognising the role that such employee behaviour can play in enhancing the competitiveness of businesses is something new⁶⁰. It would be wrong also to assess that these types of employee behaviour are the only behavioural features of a successful (i.e. business competitiveness enhancing) modern employment relationship.

⁵⁸ Ibid.

⁵⁹ Supra at note 14, 223-224. Guest and Peccei investigated the effect of partnership in a number of businesses that purported to support the concept. Of the many questions asked one requested to rate, on a five point scale, from ‘very low’ (1) to ‘very high’ (5), the following: ‘levels of trust between employers and management’; ‘the fairness with which people are treated’ and ‘the sense of employment security’. Of all the areas investigated in this study, this was the only item on which the responses of employee representative (representatives rather than employees themselves were questioned) were significantly lower than those of management.

⁶⁰ Although it may be accurate to assert that its significance as a topic for investigation and research has risen in line with the growth in global economic interdependence and the knowledge driven economy.

As long ago as 1964 Daniel Katz was concerned with the question of how people are tied into an organisation (such as a business) so that they become effective functional units in that organisation.⁶¹ In particular Katz identified 3 categories of employee behaviour that he considered essential for organisational effectiveness: (1) employees must be induced to enter and remain in employment; (2) as employees they must carry out their role assignments in a dependable fashion; and (3) employees must engage in innovative and spontaneous activity that goes beyond their role specifications or job descriptions.⁶² Smith, Organ and Near labelled Katz's final category of employee behaviour as 'Employee Organizational Behaviour' or 'Organizational Commitment Behaviour' (OCB).⁶³

2.7.1 Understanding OCB

According to Katz, OCB supports, complements, and enhances the tasks and objectives that are demanded of employees by their employer and which are recorded or authorised formally in employment contracts, job descriptions and rule books. OCB does these things by acknowledging what Katz refers to as the 'great paradox' at the heart of any social organization, of which the employment relation is one example: to be effective and achieve its goals an organization must not only limit human variability so as to ensure reliable role performance, it must also provide space for some level of variability and in fact it must actively encourage it.⁶⁴ OCB is important to the effective functioning of any organisation because no organisation can foresee all contingencies within its operations, or anticipate with perfect accuracy all environmental and market changes, or control or identify perfectly all human variability (including the extent to which some employees can do more than is

⁶¹ D. Katz, 'The Motivational Basis of Organisational Behavior' (1964) 9 *Behavioural Science* 131.

⁶² Ibid, 131-132.

⁶³ C.A. Smith, D. W. Organ and J. P. Near, 'Organisational citizenship behaviour: Its nature and antecedents' (1983) 68 *Journal of Applied Psychology* 653-663. See also P. Blau, *Exchange and power in social life* (Wiley: New York, 1964); J. G. Holmes, 'The exchange process in close relationships: Microbehavior and macromotives', in M. J. Lerner and S. C. Lerner (eds) *The justice motive in social behavior* (Plenum: New York, 1981) 261-284.

⁶⁴ Supra at note 61, 132.

expected of them). As Katz put it: “the resources of people in innovation, in spontaneous co-operation, in protective and creative behaviour, are thus vital to organizational survival and effectiveness. An organization which depends solely upon its blueprints of prescribed behaviour is a very fragile social system.”⁶⁵

Katz proceeded to extrapolate OCB into certain sub-categories, including the sub-category of ‘constructive ideas’. By constructive ideas Katz meant creative suggestions for the improvement of methods of production and maintenance. Katz acknowledged that formulating creative ideas and expressing them to management is not the typical or traditional role of the employee, but an organisation which is able to motivate its workforce to seek out and contribute innovative thinking is likely to be a more effective organisation than those that do not. That is so for the reasons we have already discussed in relation to the importance of innovation in the context of globalisation and the knowledge driven economy: “people who are close to operating problems can often furnish informative suggestions about such operations. The system which does not have this stream of contributions from its members is not using its potential resources effectively.”⁶⁶

Other sub-categories of OCB identified by Katz include the following. First, there is what Katz referred to as ‘Protection’, or the behavioural manifestation of the willingness of employees go beyond their contractual obligations to protect the organisation from negative, even disastrous outcomes.⁶⁷ For example, an employee committed to OCB who becomes aware that their employer’s largest customer is being courted by the competition, will bring that fact to the attention of their employer regardless of whether or not they are under an obligation to do so. Secondly, Katz recognised that the willingness of employees to self-train or self educate themselves with a view to becoming better and more able workers, is an important aspect of an effectively

⁶⁵ Ibid, 132.

⁶⁶ Ibid, 133.

⁶⁷ Ibid.

functioning business.⁶⁸ Thirdly, Katz postulated that employees can contribute to the effective operation of their employer's business by aiding in the creation of a favourable climate for that business in the community, or communities, that surround it and upon which it depends for certain things including new staff and sales. For example, employees may converse with people who they are close to about the excellent or the poor qualities of the company for whom they work. Favourable references may help with the employer's sales and recruitment, while negative comments may have the opposite effect.⁶⁹ Fourthly, Katz identified the role of co-operation as a vital factor in the success of any organisation. By co-operation he meant more than the mere adherence to rules and orders:

Within every work group ... there are countless acts of co-operation without which the system would break down. We take these everyday acts for granted, and few, if any, of them form the role prescriptions for any job. One man will call the attention of his companion on the next machine to some indication that his machine is getting jammed, or will pass along some tool that his companion needs, or will borrow some bit of machinery he is short of. Or men will come to the aid of a fellow who is behind on his quota... [we] recognise the need for co-operative relationships by raising this specific question when a man is considered for a job. How well does he relate to his fellows, is he a good team man, will he fit in?⁷⁰

2.7.2 Staff retention and dependable performance

You will recall that we pointed to OCB as one of the categories of employee behaviour that Katz and others have viewed as vital for organisational effectiveness. The first of the other categories concerns the attraction and retention of staff. Katz highlighted the obvious point that sufficient employees must be kept within the organisation if it is to maintain its essential functions. That being the case, people must be induced to take up offers of employment at a sufficiently rapid rate to counteract the level of defection. And while they are employed in the business, workers must validate their position in the organisation by constant attendance at work. By attendance Katz meant psychological as well as physical attendance: an employee may be punctual and regular in their attendance at work, but spend their entire time during work hours with their mind on other things. Such employees are unlikely to be

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

functioning in accordance with the minimum requirements of their job, let alone in an innovative and beyond contract manner consistent with OCB.

One factor that Katz failed to discuss in this context was the inadequacy of merely replacing defecting employees as a means of achieving the goal of maximum organisational effectiveness or competitiveness. Of course an employer will have invested time and resources in training a departing employee that will be lost upon the employee's eventual departure, and duplicated upon the arrival of their replacement. But more than that, an effective organisation that has managed to motivate its workforce to act innovatively and otherwise in accordance with Katz's model of essential employee behaviour, will lose the benefits that flow from such employee performance in terms of greater productivity and profitability and, what is more, they may lose them to a competitor who becomes the departed employee's new employer. That commitment to OCB may not be duplicated in the performance of the replacement worker, or if it is, it is unlikely to re-occur immediately. At best it will take time for the new employee to develop the necessary commitment to the employer's business that was exhibited by the departed employee. That commitment may evolve, but only once the new employee has had the opportunity to make certain judgements about their treatment by the employer and other factors. This is an issue we shall return to in some detail in subsequent discussions on fairness.

The last of the three categories of employee behaviour described by Katz as being essential to an organisation's effective performance is the willingness of employees to carry out their role requirements in a dependable fashion. In other words, Katz explained, employees must carry out their assigned roles so as to meet some minimum level of quality and quantity of performance.⁷¹ That minimum level of performance is likely to be established by contractual or other express or implied notices to the employee. What Katz did not expressly consider is the notion of intentional poor performance or counterproductive work behaviour (including what we might commonly

⁷¹ Ibid, 132.

understand as misconduct). In this category we can place behaviour such as pilfering, disclosing confidential information and trade secrets and other similarly negative and intentional employee misbehaviour. Both types of poor or undependable performance are potentially very damaging to the employer's business and where they are common practice amongst the workforce they are likely to be disastrous for the business's survival.

2.8 Partnership as an antecedent of essential employee behaviour

The question is: how can we replicate the behaviour that is essential for effective organisational functioning, in particularly OCB, in all British businesses? If that tough assignment were to be achieved, Britain would be well on its way to becoming as competitive as it can be in the global marketplace. The Labour Government and others were and are of the opinion that the development of "partnerships" at work between employees and employers is a significant step in the right direction; they believe that partnerships lead directly to the co-operative, flexible, innovative and beyond contract performance which the likes of Katz consider is vital if a business is to perform to its fullest potential:

[T]he returns from effective partnership to the business and its employees are real whether it operates in local or global markets:

- Where they have an understanding of the business, employees recognise the importance of responding quickly to changing customer and market requirements;
- Where they are taken seriously, employees at every level come forward with ways to help the business innovate, for example by developing new products; and
- Where they are well prepared for change, employees can help the company to introduce and operate new technologies and processes, helping to secure employment within the business.⁷²

It is worth repeating what we mean by partnership at work. In their 1998 report for the IPA⁷³, Guest and Peccei developed the IPA's definition of partnership in the following terms. The definition has three components: a set

⁷² Supra at note 1, 2.4.

⁷³ D. Guest and R. Peccei, *The Partnership Company: Benchmarks for the Future* (London: Involvement and Participation Association, 1998).

of values or principles; a set of practices; and a promise of benefits. The principles are defined as the “values underlying partnership which prescribe appropriate forms of behaviour and practice in organisations”.⁷⁴ The main principles are specifically identified as: good treatment of employees now and in the future; creating opportunities for employee contribution (or what might be referred to as employee empowerment); employee rights and benefits; and employee responsibilities. As Knell has pointed out, these principles underline the importance of mutuality and the reciprocal rights of management and their staff, which distinguishes the partnership model of employment relations from the traditional view of the employment relationship as one of command and control.⁷⁵ Having adopted the principle of partnership an organisation must decide how to go about implementing those principles in practice to create actual partnerships. Guest and Peccei have compiled a list of practices that an organisation pursuing partnerships at work is likely to adopt. They include: direct and indirect (i.e. representative) participation by employees in decisions about their own work and employment issues in general; flexible job design and a focus on quality; performance management; and communication, harmonisation and employment security.⁷⁶ Finally, Guest and Peccei identify three key areas in which the outcomes of a partnership approach are likely to be beneficial. They are: the positive commitment and contribution of employees to the business (in this category we can identify the level of flexibility and innovation the Government hopes partnerships will achieve); a reduction in poor labour relations including reduced conflict, absence and turnover; and an improvement in business productivity, overall innovation, sales and profits.⁷⁷

2.9 Refining our understanding of partnership – the centrality of fairness

Having spent some time understanding the principles, practices and outcomes that characterise the concept of partnership at work, we are in a position to refine our definition of partnership. Doing so will help us to better

⁷⁴ Ibid.

⁷⁵ Supra at note 10, 6.

⁷⁶ Supra at note 35, 24.

⁷⁷ Ibid, 32.

understand, (a) whether partnership can achieve the benefits that its proponents claim it can, and (b) how best to set about striving for those benefits. To this end it is important not to lose sight of the Labour Government's overriding objective for the labour market as expressed in Fairness at Work: to foster a culture of fairness at work which will underpin enhanced competitiveness.⁷⁸ Partnership is the metaphor used to describe the employment relationship that is most likely to achieve that objective. Put another way, it is possible to understand the concept of partnership in this context as describing, in part at least, an employment relationship in which the parties treat each other fairly and justly. If they do so they will, or so the story goes, achieve the competitiveness enhancing benefits that are described by Guest and Peccei as the outcomes of a partnership approach: employee commitment to the organisation, innovation, reduced turnover, increased productivity, reduced conflict etc. Or, to hark back to our discussion of Katz's three categories of essential employee behaviour, fairness through partnership should result in dependable performance by employees of their specific role requirements, a commitment to join and to remain with the employer, and OCB. This understanding of partnership – that it is a metaphor for a relationship based on fairness - seems to gain support when we reconsider the principles and practices that Guest and Peccei have identified are characteristic of a partnership approach to the employment relationship. Fair treatment, employee voice, ensuring employee rights and responsibilities, employment security, are all types of behaviour that we might intuitively expect from an employer who is committed to treating its staff justly and fairly. Moreover, these forms of behaviour have long been considered antecedents of fairness by academics and researchers in the field of organisational justice.⁷⁹

So it is possible to restate the partnership model for the purposes of this thesis. A partnership based employment relationship has the potential to obtain the previous Government's labour market objectives of fairness at work and

⁷⁸ Supra at note 1, 1.8.

⁷⁹ See, for example, R. Cropanzano and D. E. Rupp, 'An Overview of Organizational Justice: Implications for Work Motivation', in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003).

efficiency. These objectives if achieved should drive enhanced business competitiveness partly, it is argued, through the achievement of OCB. But partnerships cannot develop, as we have discussed at length, without the pre-existing foundations of trust; successful partnership is in fact conditional upon the parties to the employment relationship trusting each other in such a way that each of them has faith that the other will act in the best interests of both parties and their partnership. But how does trust develop when the parties have traditionally come together in a low trust relationship of subordination? Here again we see the importance of fairness (particularly in the context of EDG), but this time it is a key ingredient in the creation of partnerships as opposed to being an output or outcome of partnerships. If employers treat their employees fairly their employees are more likely to trust them and from that point the creation of effective partnerships becomes possible, and the likelihood of achieving OCB increases. In fact it may be possible to link the two functions of fairness in the following cumulative and constantly improving sense: fairness builds trust which leads to partnership which in turn enhances perceptions of fairness which strengthens the partnership and so on.

The question that remains unanswered is whether in fact fair treatment of staff can in fact do what the partnership model predicts; can it provide the competitiveness enhancing benefits that drive the former Government's enthusiasm for the concept? In other words, can fairness build trust such that partnership at work and OCB will evolve? Fairness at Work makes a massive assumption that it can, but to what extent is that assumption accurate? To answer that question it is essential to understand more about what it means to be fair, how employees in particular form judgements about whether they have been treated fairly, and how they react based on their formulated perceptions. At this stage it is worth stressing that it is the employee's *perception* of their treatment or the treatment of another that is vital. An employee will not respond to treatment by the employer in the manner predicted by the partnership approach unless the employee *perceives* that treatment to be fair; the fact that the employer considers their behaviour to be fair will not by itself influence the reaction of the employee. These issues have for some time now been considered important and explored by

researchers in organisational justice, and it is to the material emanating from that area of study that we now turn.

CHAPTER 3: FAIRNESS AT WORK – WHAT IS IT AND WHAT ARE ITS EFFECTS?

In this chapter we ask what does it mean to be ‘fair’ in the context of EDG? More specifically this chapter explores the circumstances in which employees are likely to judge that their employer is fair or unfair. In the final analysis it is proposed that a regulatory model which aims to increase fairness perceptions to achieve partnership and OCB, will need to reflect a rational and fact based assessment of what it means to be fair *and* how employees form fairness judgements. To this end we call upon the large amount of research into fairness that has been undertaken in the area of organisational justice. We discover that there are three relevant types of fairness: distributive fairness, procedural fairness and interactional fairness. We emphasise the importance of realising that these three types of fairness, while distinct, are closely related and no one type is predictably more important to an employee in any particular instance of EDG. This chapter goes on to explore and apply several theoretical models for predicting how employees process fairness information to reach fairness judgements. In particular we investigate how fairness judgements can impact on the realisation of partnership and the elements of OCB that were discussed in this chapter.

3.1 The three types of fairness perception

Most researchers in the field of organisational justice appear to divide fairness perceptions by employees into at least two types – distributive justice and procedural justice.⁸⁰ Distributive justice refers to the perceived fairness of outcome allocations, whereas procedural justice refers to the perceived fairness of the allocation process. There is however a body of research that recognises a third category of fairness perceptions; what is generally referred

⁸⁰ R. Cropanzano and D. E. Rupp, ‘An Overview of Organizational Justice: Implications for Work Motivation’, in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 82, 83.

to as interactional justice.⁸¹ Interactional justice accounts for fairness perceptions based on the interpersonal treatment an employee receives from others. Here it is important to recognise that these three constructs, while distinct, are closely related.⁸² In other words it is likely that an employee's belief as to whether or not in any particular set of circumstances they have been treated fairly, will be based on a combination of distributive, procedural and interactional factors. At the same time it is inevitable that the significance of any one of those three categories of fairness perceptions in any given instance will, as we shall see, depend on a variety of factors including the nature of the treatment that is being subject to a calculation of fairness by the employee. For example, and without prejudging the subsequent discussion, it may be that in a particular case procedural justice plays a larger role than distributive justice in determining in the mind of an employee that their pay increase was unfair. With those introductory points made we turn to consider in more detail the different categories of fairness perceptions and how they act and interact in the mind of the employee as he or she forms an overall judgement as to whether they have been treated fairly.

3.2 Distributive justice and Equity Theory

The notion and significance of distributive justice (and indeed the origins of organisational justice and academic interest in the importance of fairness in organisations) can be traced back to the work of Adams and the development of his Equity Theory.⁸³ Adams expressed the employment relationship as an

⁸¹ See, for example, R. J. Biers, 'Interactional (in)justice: The sacred and the profane', in J. Greenberg and R. Cropanzo (eds) *Advances in Organizational Justice* (Stanford University Press: Stanford, 2001) 89. Note that some scholars prefer to view interactional justice as a social aspect of procedural justice (see T. R. Tyler and S. L. Blader, *Co-operation in groups: procedural justice, social identity and behavioural engagement* (Psychology Press: Philadelphia, 2000)). Others argue that interactional justice should be divided into informational justice (which refers to the presence of explanations and social accounts) and interpersonal justice (meaning the degree of dignity and respect afforded to a worker) (see J. Greenberg, 'The social side of fairness: Interpersonal and informational classes of organizational justice', in R. Cropanzo (ed) *Justice in the Workplace: Approaching Fairness in Human Resources Management* (Lawrence Erlbaum Associates: Hillsdale, 1993) 79-103).

⁸² Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 308.

⁸³ See J. S. Adams, 'Toward and understanding of inequity', (1963) 67 *Journal of Abnormal and Social Psychology* 422; J. S. Adams, 'Inequity in social exchange', in L. Berkowitz (ed) *Advances in Experimental Social Psychology* (Academic Press: New York, 1965) 267; and, J.

exchange relationship in which employees furnish inputs (for example, education, work experience, effort and training) and receive outcomes in return. The most important outcome in research on equity has been pay, although outcomes can include a variety of things (for example, recognition, praise by a supervisor, promotion and status).⁸⁴ According to Equity Theory, the more an employee puts in to the employment relationship, the more they expect to receive in return. So, for example, if an individual inputs a high level of performance he or she may expect one or more of the following outcomes in return: a large pay increase, a promotion, praise or some other form of recognition.⁸⁵ This expectation was expressed by Adams as a ratio of outputs over inputs. He proposed that an employee forms a judgement as to whether or not they have been treated fairly in relation to the outcome they received by comparing their ratio to the ratio of some similar other. That other or comparator might be a co-worker engaged in a similar or the same role as the employee, or they may be the person who previously filled, or will occupy, a similar or the same role as the employee.⁸⁶ It is also possible that the other or comparator will be the employee themselves.⁸⁷ The vital point is that, according to Equity Theory, people arrive at a judgement about whether the outcomes they have received are fair by a process of social comparison. Equity or fairness is perceived to exist where the employee believes that their ratio of outcomes to inputs equals the ratio of the comparator's or other's outcomes to inputs. Perceived inequity or unfairness will exist whenever the two ratios are unequal.⁸⁸ But that is not all. The relative weight to be

S. Adams and S. Freedman, 'Equity Theory revisited: Comments and annotated bibliography', in L. Berkowitz and E. Walster (eds) *Advances in Experimental Social Psychology* (Academic Press: New York, 1975) 43.

⁸⁴ R. T. Mowday and K. A. Colwell, 'Employee reactions to unfair outcomes in the workplace: The contributions of Adam's Equity Theory to understanding work motivation', in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 65, 67.

⁸⁵ R. Cropanzo and M. L. Randall, 'Injustice and work behaviour: A historical review', in R. Cropanzo (ed) *Justice in the Workplace: Approaching Fairness in Human Resources Management* (Lawrence Erlbaum Associates: Hillsdale, 1993) 3, 6.

⁸⁶ C. T. Kulik and M. L. Ambrose, 'Personal and situational determinants of referent choice' (1992) 17 *Academy of Management Review* 212.

⁸⁷ T. P. Summers and A. S. De Nisi, 'In search of Adam's other: Re-examination of referents used in the evaluation of pay' (1990) 43 *Human Relations* 497.

⁸⁸ R. T. Mowday and K. A. Colwell, 'Employee reactions to unfair outcomes in the workplace: The contributions of Adam's Equity Theory to understanding work motivation', in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 65, 68.

afforded any input or outcome will depend upon the importance of those inputs to the individual employee. For example, a lawyer with only 4 years post qualification experience (PQE) who is applying for a promotion to a more senior position may place less importance on experience, and more on technical ability, than a different applicant with 15 years PQE.

Furthermore, it should be remembered that the conditions necessary to produce feelings of inequity and unfairness are based on the individual employee's *perception* of the fairness of the outcomes they receive, and not necessarily the objective characteristics of the situation. Nonetheless, Adams was of the view that most people tend to react to what they receive in a manner that reflects the objective comparative reality of their position. But subsequent research suggests that this may not always be the case. Summers and De Nisi conducted a study of restaurant managers and their perceptions of the fairness or unfairness of the levels of pay they received from their employer.⁸⁹ They found that 65% of the managers sampled reported feeling that they had been unfairly remunerated, even though an objective salary survey reported that they generally received higher levels of pay than comparable managers in other restaurants. This points to one of the challenges for the employer who is seeking to get the most out of their staff by providing them with what the employer hopes their employees will perceive as fair outcomes. A commitment to providing fair outcomes is unlikely to *eliminate* perceived inequity, because it goes without saying that people can have, and often do have, wildly inflated estimates of the value of their inputs or performance.⁹⁰ Even when those perceptions are not so exaggerated, it may be that the employee fails to perceive receipt of a fair ratio of outcomes to inputs because the employer and the employee have an irreconcilable, albeit equally reasonable and defensible, understanding of what a fair and equitable exchange actually is in the circumstances.

⁸⁹ T. P. Summers and A. S. De Nisi, 'In search of Adam's other: Re-examination of referents used in the evaluation of pay' (1990) 43 *Human Relations* 497.

⁹⁰ R. T. Mowday and K. A. Colwell, 'Employee reactions to unfair outcomes in the workplace: The contributions of Adam's Equity Theory to understanding work motivation', in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 65, 77.

Adam's Equity Theory spawned a considerable amount of research into the impact of justice perceptions on the behaviour of employees, some of which identified certain flaws in Adam's theory. Most of those perceived flaws are based upon the argument that Equity Theory is too narrow an explanation of how employees form judgements about whether or not they have been treated fairly. Several of those flaws warrant particular attention as part of the present discussion. First, Adam's theory states that fairness is based, at least in part, on employees being rewarded for their performance; an employee that performs to a high standard can expect to be paid a higher level of pay than a comparator whose performance is not as good. If that expectation is met the employee will consider that they have been treated fairly. But this fails to recognise that there are other allocative systems available to employers, including, for example, those that split the desired outcome evenly (the 'equality rule')⁹¹ and those that assign outcomes based on individual need⁹². Perceptions of fairness may also be achieved where the employer adheres to the rules of equality or need, rather than equity. Which approach is preferred will depend on a variety of circumstances, including the cultural characteristics of the parties. For example, an equity system is more likely to be considered fair where the emphasis is on maximising group performance. On the other hand, an equality rule is likely to be preferred where the primary focus is on group harmony, or when performance is largely determined by uncontrollable factors.⁹³ A related problem with Equity Theory is that it only considers the outcomes people *receive*, which are typically material or economic in nature, when explaining why people make certain justice judgements. The theory fails to take into account that people often become involved in decision processes for socio-emotional reasons.⁹⁴ An employee's perception of justice in relation to any given outcome may also be affected by that employee's moral code or set of moral principles and emotional sensitivities, but Equity Theory fails to

⁹¹ M. Deutsch, *Distributive Justice* (Yale University Press; New Haven, 1985).

⁹² R. Cropanzano and M. L. Randall, 'Injustice and work behaviour: A historical review', in R. Cropanzo (ed) *Justice in the Workplace: Approaching Fairness in Human Resources Management* (Lawrence Erlbaum Associates: Hillsdale, 1993) 3, 7.

⁹³ *Ibid.*

⁹⁴ R. Folger and R. Cropanzano, 'Fairness theory: Justice as Accountability', in J. Greenberg and R. Folger (eds) *Advances in Organizational Justice* (New Lexington Press: Lexington, 2001) 1.

account for the extent to which these factors might impact on fairness judgements.⁹⁵ In a similar sense, Equity Theory fails to recognise that a third party may feel a sense of injustice or unfairness by perceiving that another (for example, a work colleague and friend, or even someone they don't know) has been treated unjustly.

3.3 Procedural justice

The next major flaw in Equity Theory is its preoccupation with outcomes and its failure to address the role of the allocation process in employee perceptions of fairness. Such an approach is like saying that people are only concerned with what they get and have little or no interest in how they get it or how they are treated; but this seems contrary to our everyday experiences and cannot be right.⁹⁶ This problem with Equity Theory was highlighted as research in the area of organisation justice began to gather empirical support for the idea that the perceived fairness of the process by which outcomes are achieved is an important and in some cases the most important, determinant of perceived fairness and justice.⁹⁷ In the midst of this research scholars developed rules to explain when procedural justice exists. It is generally accepted amongst organisational justice researchers that procedural justice can be found when procedures embody certain types of normatively accepted principles. For example, according to Leventhal's conceptualisation⁹⁸, there are six rules that, when followed, yield procedures that are likely to be perceived as fair: (a) the consistency rule, which states that allocation procedures should be consistent across persons and over time; (b) the bias suppression rule, which concerns preventing the personal self-interests of decision makers from influencing the allocation process; (c) the accuracy rule, which refers to the quality of the information used in the allocation process; (d) the correctability rule, which

⁹⁵ R. Folger and R. Cropanzano, *Organizational Justice and Human Resources Management* (Sage: Beverly Hills, 1998).

⁹⁶ Cropanzo and Randall above, 9.

⁹⁷ See, for example, E. A. Lind and T. R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press: New York, 1988)

⁹⁸ G. S. Leventhal, 'What should be done with equity theory? New Approaches to the study of fairness in social relationships', in K. J. Gergen, M.S. Greenberg and R. H. Willis (eds) *Social Exchange: Advances in Theory and Research* (Plenum: New York, 1980) 27.

deals with the existence of opportunities to change an unfair decision (for example, a right to appeal); (e) the representativeness rule, that emphasises that the needs, values and outlooks of all the parties involved should be represented in the decision making process; and (f) the ethicality rule, which points to the importance of ensuring that the allocation process must be in keeping with the fundamental moral and ethical values of the perceiver.

It is generally accepted amongst researchers that process control (or voice) is the factor which more than any other enhances judgements of procedural justice.⁹⁹ The debate in this area has tended to focus on *why* voice has such an important bearing on an employee's perception of whether or not they have been treated fairly. Some researchers have argued that voice is important to employees because they place certain value on being given the opportunity to state their case irrespective of whether their input has any bearing on the final outcome (put another way they have a *value expressive perspective* of the importance of voice).¹⁰⁰ Others have argued that employees value voice because being able to have their say affords them the opportunity to influence the outcome of the process (according to this argument employees have an *instrumental perspective* of the importance of voice).¹⁰¹ Shapiro argues that in the end most employees see little value in voice for voice's sake, but at the same time where the outcome goes against them (i.e. where they don't have outcome control) that does not by itself lead employees to conclude that there was no point in them having their say. Shapiro suggests that employees are unlikely to perceive procedural fairness unless their participation in that procedure has the *potential* to influence the outcome and they won't perceive that potential exists unless they are convinced that the decision maker is considering and, when the decision is reached, has considered their statements. This assessment of whether the employee's views are being taken into account

⁹⁹ D. L. Shapiro, 'Reconciling theoretical differences among procedural justice researchers by re-evaluating what it means to have one's views "considered": Implications for third-party managers', in R. Cropanzano, *supra* at note 85, 51.

¹⁰⁰ T. R. Tyler, 'Conditions leading to value-expressive effects in judgements of procedural justice: A test of four models' (1987) 52 *Journal of Personality and Social Psychology* 333.

¹⁰¹ J. M. Brett, 'Commentary on procedural justice papers', in R. Lewicki, M. Bazerman and B. Sheppard (eds) *Research on Negotiation in Organizations* (JAI Press: Greenwich CT, 1986) Vol. I, 81.

or considered will be formed based on the presence or absence of certain factors including the decision-maker's perceived interpersonal responsiveness to what the employee has said (e.g. are they taking notes, do they maintain eye contact, do they ask questions or make comments that reflect what the employee has said?). This approach unites the value-expressive and instrumental perspectives of the importance of voice. As Shapiro explains:

[T]he non-instrumental aspects of process control (e.g. the desire to be "heard") will probably be perceived ... as a means to instrumental ends (e.g. being heard will enhance the chance of possibly changing the listener's/decision maker's thinking). ... For example, the present author has been to Court, and has valued the opportunity to appeal a traffic fine – despite my failure to "win" a favourable decision. The current literature would classify my persistent affinity for process control as evidence that I value my voice opportunity for value-expressive reasons. However, I chose to visit Court because I had hoped that presenting my case would result in a reduced, or cancelled, fine; that is, I saw potential instrumentality in doing so. Having failed, I still valued the privilege to appeal an unfavourable decision (i.e. fine) because it gave me a chance to modify it. ... It seems to me now, as it seemed to me then, that it is better to have voiced and lost than never to have voiced at all.¹⁰²

3.4 Interactional justice

Equity Theory also fails to account for the effects of interpersonal treatment or interactional justice on perceptions of fairness. Bies and Moag concluded that individuals frequently make justice appraisals based on the quality of the interpersonal treatment they receive from management.¹⁰³ Bies and Moag referred to this as the "communication criteria of fairness".¹⁰⁴ Bies found that there were four attributes of interpersonally fair procedures: truthfulness, respect, propriety of questions, and justification.¹⁰⁵ The first attribute can be divided into two parts: deception and candidness. Employees who

¹⁰² D. L. Shapiro, 'Reconciling theoretical differences among procedural justice researchers by re-evaluating what it means to have one's views "considered": Implications for third-party managers', in R. Cropanzano, *supra* at note 85, 51 and 67-8.

¹⁰³ R. J. Bies and J. S. Moag, 'Interactional justice: Communication criteria of fairness', in R. J. Lewicki, B. H. Sheppard and M. Bazerman (eds) *Research on Negotiation in Organizations* (JAI Press: Greenwich, CT, 1986) Vol. 1, 43.

¹⁰⁴ *Ibid.*, 46.

¹⁰⁵ See commentary in R. Cropanzano and M. L. Randall, 'Injustice and work behaviour: A historical review', in R. Cropanzo (ed) *Justice in the Workplace: Approaching Fairness in Human Resources Management* (Lawrence Erlbaum Associates: Hillsdale, 1993) 3, 13, in which the authors are citing an unpublished manuscript by Bies from 1985 entitled *Individual reactions to corporate recruiting encounters: the importance of fairness*. See also, for example, R. J. Biers, 'Interactional (in)justice: The sacred and the profane', in J. Greenburg and R. Cropanzo (eds) *Advances in Organizational Justice* (Stanford University Press: Stanford, 2001) 89.

participated in Bies's study could not abide being deceived, and Bies reported that deception was one of the most commonly expressed explanations for perceived unfairness. But he also recognised from his data that employers had to do better than simply telling the truth if they wanted to be perceived as fair. Employees also expected to be treated in a forthright manner; they wanted to be presented with a realistic and accurate description of the circumstances under which they will be working. Bies and Moags second attribute concerned employees' expectations that they be treated politely and respectfully as opposed to rudely and insultingly.¹⁰⁶ The third attribute concerning the propriety of questions can also be divided in two. First, some questions are by their very nature considered improper. Bies and Moag argued that a question about a woman's future plans to have children falls within this category. Secondly, questions concerning race, sexual orientation and other questions that involve prejudicial statements are likely to be considered improper. The final attribute, justification, becomes relevant following a negative outcome or unfair treatment. It suggests that perceptions of unfairness may be reversed or healed by the expression of an adequate justification.¹⁰⁷ Bies argued that a sense of anger over perceived unfairness can be reduced or extinguished by providing the effected employee with a social account (that is, an explanation or an apology).¹⁰⁸

3.5 The different impact of different fairness perceptions

It is helpful at this stage to make some preliminary points concerning the different impact these varying forms of justice perception have on the attitudes, emotions and behaviour of the perceiver. We will expand on these points in the discussion that follows. To start with, because it focuses on the outcomes people receive distributive justice is predicted to be related mainly

¹⁰⁶ This appeared to be confirmed in research by R. A. Baron, 'Countering the effects of destructive criticism: The relative efficacy of four potential interventions' (1990) 75 *Journal of Applied Psychology* 235.

¹⁰⁷ R. J. Bies and D. L. Shapiro, 'Voice and Justification: Their influence on procedural and fairness judgements' (1988) 31 *Academy of Management Journal* 676.

¹⁰⁸ R. J. Bies, 'The predicament of injustice: The management of moral outrage', in L. L. Cummings and B. M. Staw (eds) *Research in Organizational Behavior* (JAI Press: Greenwich, CT, 1987) Vol. 9, 289.

to cognitive, affective and behavioural reactions to *particular outcomes*.¹⁰⁹ The position is predictably different in relation to procedural justice. The procedures adopted by an employer represent the way that the employer allocates resources and therefore procedural justice appears to relate to the employee's cognitive, affective and behavioural reactions toward their employer's organisation as a whole.¹¹⁰ For example, when an employee considers that a process leading to a particular outcome is unfair, the employee's reaction to that unfairness is thought to impact upon that employee's commitment to their employer.¹¹¹ The situation is different again in relation to perceptions of interactional justice. You will recall that interactional justice is concerned with the way management (or whoever it is that controls rewards and resources) behaves toward employees (are they polite or rude etc). Because interactional justice perceptions are determined by the personal interaction of management or supervisors and employees, it is generally considered amongst researchers to relate to cognitive, affective and behavioural attitudes towards those management and supervisors. Thus, when an employee perceives interactional injustice, rather than reacting negatively towards the employer's organisation as a whole, as predicted by the procedural justice model, or towards the particular outcome, as anticipated by the procedural justice model, they are expected to feel dissatisfied and negative towards their direct manager.¹¹²

3.6 Integrative theories of fairness: how employees make fairness judgements

Having taken stock of the flaws in Equity Theory, research in the area of organisational justice began to search for an integrative theoretical approach to

¹⁰⁹ Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 280.

¹¹⁰ C. L. Martin and N. Bennett, 'The role of justice judgements in explaining the relationship between job satisfaction and organization commitment' (1996) 21 *Group and Organization Management* 84.

¹¹¹ P. D. Sweeney and D. B. McFarlin, 'Workers' evaluations of the "ends" and the "means": An examination of four models of distributive and procedural justice' (1993) 55 *Organizational Behaviour and Human Decision Processes* 23.

¹¹² S. S. Masterton, K. Lewis-McClellan, B. M. Goldman and S. M. Taylor, 'Integrating justice and social exchange: The differing effects of fair procedures and treatment on work relationships' (2000) 43 *Academy of Management Journal* 738.

understanding how people make fairness judgements; one which accounted for those factors that Adam's theory did not (including, different allocative systems and rules, socio-emotional outcomes, moral principles, procedural justice, interpersonal treatment or interactional justice). To this end Folger and Cropanzano proposed Fairness Theory.¹¹³ Fairness Theory suggests that perceptions of unfairness occur when an individual is able to hold another responsible for a situation in which their material or psychological well-being has been threatened.¹¹⁴ According to this theory there are three conditions that must be satisfied before a situation will be interpreted as unfair or unjust. First, the individual must imagine alternative situations that could have arisen that *would have* resulted in less adversity than was caused by what actually occurred. Importantly, the easier it is for the individual to imagine a positive alternative, the more likely it is that the actual event will cause a sense of unfairness. Moreover, the degree of discrepancy between the actual event and the perceived alternative will impact upon the strength of the individual's response to the situation. Notably and unlike Equity Theory, the generation of alternatives, and the process of comparing those alternatives to the actual event, can involve both material/economic, socio-emotional and relational considerations.¹¹⁵ Secondly, the individual must determine whether the person responsible or accountable for their adversity *could have* acted differently. Research in this area has shown that the social account provided to the individual for the action taken often mitigates this condition.¹¹⁶ In other words, when it is explained to the individual why it was that a particular action had to be taken, perceivers are less likely to envisage an alternative to what

¹¹³ R. Folger and R. Cropanzano, 'Fairness Theory: Justice as accountability', in J. Greenberg and R. Folger (eds) *Advances in Organizational Justice* (New Lexington Press: Lexington, 2001) 1. This was an attempt to address certain perceived shortcomings of Folger's earlier theory of Referent Cognitions Theory (see R. Folger, 'Rethinking equity theory: A referent cognitions model', in H. W. Beirhoff, R. L. Cohen and J. Greenberg (eds) *Justice in Social Relations* (Plenum Press: New York, 1986) 145.

¹¹⁴ R. Cropanzano, Z. S. Byrne, D. Ramona Bobocel and D. E. Rupp, 'Moral Virtues, Fairness Heuristics, Social Entities, and other denizens of organizational justice' (2001) 58 *Journal of Vocational Behavior* 164, 168.

¹¹⁵ Ibid.

¹¹⁶ Ibid, and see R. J. Biers, 'Interactional (in)justice: The sacred and the profane', in J. Greenberg and R. Cropanzo (eds) *Advances in Organizational Justice* (Stanford University Press: Stanford, 2001) 89.

actual happened.¹¹⁷ For instance, “[i]f the target admits that things could have been better, but the circumstances were unavoidable due to situational constraints, the individual facing the negative situation may not interpret it as unfair. This is because if the target *could have* acted differently, they *would have*, and this meets only one of the requirements for perceiving a situation as unfair.”¹¹⁸ The third condition that is necessary for injustice to be perceived is the *should* component. This involves the perceiver undertaking a moral judgement as to whether, in the circumstances, the responsible party *should have* acted differently. A situation is not perceived as being unjust unless the perceiver considers that it violates some moral code or set of principles. Importantly, and unlike Equity Theory, this *should* component explains why we often collectively respond to unfair situations faced by others with whom we may or may not have any personal connection.¹¹⁹

While Fairness Theory seems to address many of the shortcomings of Equity Theory, it is yet to gain much empirical support; nor does it adequately explain why so many studies conclude that employee evaluations of procedures are often more relevant than employee evaluations of outcomes in the making of overall fairness judgements. Assistance in this area is provided by a further theory developed by Lind and others and referred to as Fairness Heuristic Theory (FHT).¹²⁰ Significantly, FHT differs from Fairness Theory in that it focuses “on the cognitive limitations involved in processing relational information and explains how fairness information serves as an aid in making sense of the plethora of interpersonal stimuli we must face in our daily lives.”¹²¹

¹¹⁷ R. Cropanzano and D. E. Rupp, ‘An Overview of Organizational Justice: Implications for Work Motivation’, in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 82, 88.

¹¹⁸ Supra at note 14, 168-9.

¹¹⁹ Ibid, 169.

¹²⁰ E. A. Lind, ‘Fairness heuristic theory: Justice judgements as pivotal cognitions in organizational relations’, in J. Greenberg and R. Cropanzano (eds) *Advances in Organizational Justice* (Stanford University Press: Stanford, 2001); and K. Van den Bos, E. A. Lind and H. A. M. Wilke, ‘The psychology of procedural and distributive justice viewed from the perspective of fairness heuristic theory’, in R. Cropanzano (ed) *Justice in the Workplace*, Vol. 2 *From Theory to Practice* (Erlbaum: Mahwah, 2001).

¹²¹ R. Cropanzano and D. E. Rupp, ‘An Overview of Organizational Justice: Implications for Work Motivation’, in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 82, 89.

FHT proposes that employees use fairness information to simplify these large processing demands. The theory identifies three stages by which fairness and justice judgements are formed. The first is the *pre-formation* stage. At this stage the employee collects information about whether or not the employer and/or management can be trusted. But explicit trustworthiness evidence will often be unavailable, or at least not readily available, in which case the employee will use fairness information as a heuristic substitute in making this evaluation. The second stage of FHT is the *formation* stage. The employee proceeds at this second stage to reach a judgement about whether or not in the particular instance they have been treated fairly and justly. Here the employee will search for information about their inclusion in or exclusion from their relevant social unit. Given that procedures (such as employee voice, representation, access and respect etc) are particularly informative about an employee's level of inclusion, fairness judgements will, at this point, communicate to the employee their value to the group with which they are associated.¹²² The third stage of FHT is the *post-information* stage. This stage explains how the employee's initial fairness judgement will guide their behaviour and their future fairness evaluations.

As suggested above, there is considerable empirical evidence to support the accuracy and utility of FHT as a model for understanding how employees make and use fairness judgements. These studies identify several important characteristics of employee fairness evaluations that are particularly relevant to the ongoing discussion. First, it appears that people, including employees, tend to give more weight to the information that they receive first, than they do to information that comes later.¹²³ This is significant for several reasons. To start with, it suggests that fairness judgements tend to perpetuate themselves and that once an employee forms an initial or first impression about whether or not their employer is fair, that impression will be difficult for

¹²² Supra at note 114, 170.

¹²³ K. Van den Bos, R. Vermunt and H. A. M. Wilke, 'Procedural and distributive justice: What is fair depends more on what comes first than on what comes next' (1997) 77 *Journal of Personality and Social Psychology* 95.

the employer to displace.¹²⁴ This suggests it is important for employers to provide employees with fair procedures at the beginning of any decision process and the relationship in general. That is because it is these early demonstrations of an employer's commitment to fair treatment that are likely to have an ongoing and strong effect on the employee's subsequent reactions to the outcomes they receive and their calculations as to how much their employer can be trusted. Secondly, studies show how difficult it can be for employees to assess the fairness of outcomes or distributive justice. That is because such an evaluation will usually require information about outcomes received by others with whom the employee can compare themselves and that information is often hard, if not impossible to come by.¹²⁵ For example, it will be difficult for an employee to determine whether they are being paid fairly if they do not have access to information about the level of pay being received by those in positions that are the same or similar to theirs. The more this information is available the more likely the employee will be able to make a properly informed evaluation of whether or not they have been treated fairly. Where that information is not available employees will tend to substitute information about outcomes for information about processes in making their fairness judgements.¹²⁶ But using procedural fairness information as a heuristic substitute for information that is unavailable, inevitably means that fairness perceptions or judgements can be inaccurate and unwarranted and that may cause an employee to form a view about their employer or to behave in a manner that is not justified or that is contrary to how they would have behaved had they been accurately informed.

3.7 The effects of fairness perceptions on employee behaviour

To this point we have considered how employees make judgements about whether or not they have been treated fairly, but it remains to assess how, if at all, such judgements influence employee behaviour. More precisely, we want

¹²⁴ Supra at note 114, 170.

¹²⁵ K. Van den Bos, R. Vermunt and H. A. M. Wilke, 'Procedural and distributive justice: What is fair depends more on what comes first than on what comes next' (1997) 77 *Journal of Personality and Social Psychology* 95.

¹²⁶ Ibid.

to know whether employee perceptions that they have been treated fairly will cause them to act in a manner consistent with the predictions of the partnership approach and Katz's model of employee behaviour essential for effective organisational functioning. The short response is that there is considerable evidence that an employee who perceives they are being treated fairly by their employer will respond in a positive fashion that can have a beneficial impact on the employer's business. Conversely, research suggests that perceptions of unfair treatment can lead to negative reactions that have a corresponding detrimental impact on the employer's business. To help us understand in more detail the effects of justice perceptions on employee behaviour this thesis will divide the following discussion into sections that correspond with the types of employee behaviour that Katz and the partnership approach are particularly focused on. They are: work performance and counterproductive work behaviour; OCB; organisational commitment; and conflict. In other words we will investigate how perceptions of fairness or unfairness (distributive, procedural and interactional) are likely to influence employee behaviour under these headings.

3.7.1 Work performance and counterproductive behaviour

Equity Theory provided specific hypotheses regarding the impact of perceived distributive justice on work performance.¹²⁷ Adams predicted that perceived inequity creates tension, stress, anger and resentment in the employee which is proportional to the magnitude of the perceived distributive unfairness. Those feelings and emotions will in turn motivate the employee to heal or reduce the inequity and the strength of that motivation will reflect the level to which the employee perceives they have been unfairly treated. The methods that employees adopt to heal the perceived inequity are what Adam's labelled *inequity reduction strategies* and depending on which strategy the employee chooses to adopt, an attempt to do something about their sense of inequity can have a negative impact on their quantity and quality of performance. For example, an employee may choose to reduce their inputs as an inequity

¹²⁷ Supra at note 83 (Adams,1965); see also W. Austin and W. Walster, 'Participants' reactions to "equity with the world"' (1974) 10 *Journal of Experimental Psychology* 528.

reduction strategy (perhaps by lowering their levels of performance). It is also possible for an employee to perform a comparison of ratios and discover that they are being over-rewarded by their employer (that is, they are receiving relatively more outcomes than their comparator). In this over-reward position an employee should not feel anger or resentment but they should experience a sense of guilt, shame or remorse.¹²⁸ These emotions are negative and therefore Equity Theory predicts that the employee will take steps to right the imbalance. Because people are not inclined to forego positive outcomes, employees in this situation are likely to respond by increasing inputs (perhaps by increasing their levels of performance).¹²⁹ These predictions have been tested in a number of field experiments. In a 1988 study by Greenberg a sample of employees were randomly assigned to temporary offices that were of a higher, lower or equal status to the employees' normal positions. Consistent with Equity Theory, those employees assigned to a higher status position showed improved levels of performance, while those assigned to the lower status positions showed the opposite.¹³⁰ In an earlier experiment Greenberg and Ornstein randomly provided a group of employees with a mixture of high and low status job titles and required them to carry out the same type of work. Those with the higher status titles showed higher levels of performance than their lower status colleagues.¹³¹

As I have already explained, Equity Theory had nothing to say about the impact of procedural justice on the fairness and justice perceptions of employees, but subsequent research showed this to be a significant flaw in the theory. Studies have since demonstrated a strong correlation between procedural justice and employee behaviour, including work performance. For example, Cohen-Charash and others carried out a meta-analysis of 190 field and laboratory studies into the perceived justice of outcomes and

¹²⁸ Supra at note 85, 6.

¹²⁹ Ibid.

¹³⁰ J. Greenberg, 'Equity and workplace status: A field experiment' (1988) 73 *Journal of Applied Psychology* 606.

¹³¹ J. Greenberg and S. Ornstein, 'High status job titles as compensation for underpayment: A test of equity theory' (1983) 68 *Journal of Applied Psychology* 285.

procedures.¹³² Their analysis suggested that, in fact, work performance is strongly related to procedural justice, but not to distributive or interactional justice. This tended to contradict earlier work that considered there was a link between distributive justice and performance, including Equity Theory. It seems however that this finding can be explained on the basis that where employees believe that outcomes have been unfairly distributed, they will examine the allocation process to determine whether it is fair¹³³ and only if they feel that the procedure was unfair, will they withhold performance as a means of restoring equity.¹³⁴ This is consistent with the earlier discussion of the *could* component of Fairness Theory and the idea that an employee is unlikely to feel that they should have been treated differently if the reason for their treatment is adequately explained to them.

It is possible to take this discussion further. You will recall during the explanation of Katz's model of essential employee behaviour that we mentioned the dangers to the employer of an employee who is willing not only to work beneath their full capacity, but to be counterproductive, to commit misconduct (including pilfering, giving up proprietary information and trade secrets, absenteeism etc). Equity Theory and other models of distributive justice predict this type of behaviour as one potential employee response to perceived distributive injustice or inequitable outcomes. It is possible therefore to argue that an employee who commits misconduct or counterproductive behaviour is doing so because they believe that hurting their employer is the appropriate strategy to ensure their outcome to input ratio is adjusted back to the equilibrium.¹³⁵ For example, in legal practice the writer was involved in a case in which an employee was dismissed for constantly leaving work early. At a mediation convened to resolve his claim that the

¹³² Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 304.

¹³³ J. Brockner and B. M. Weisenfeld, 'An integrative framework for explaining reactions to decisions: Interactive effects of outcomes and procedures' (1996) 120 *Psychological Bulletin* 189.

¹³⁴ Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 304.

¹³⁵ W. Hendrix, T. Robbins, J. Miller and T. P. Summers, *Procedural and distributive justice effects on turnover* (paper presented to the Annual Meeting of the Society for Industrial and Organizational Psychology in Atlanta, April 1999).

dismissal had been unlawful, he admitted leaving early without authorisation but justified doing so on the basis that he had spent a number of months prior to his spell of early departures working far beyond his contracted hours for no reward, and leaving early was his way of getting what he felt he was owed. Explained in terms of Equity Theory, the employee felt his level of inputs exceeded his level of outcomes and working fewer hours was his way of adjusting his inputs so as to restore the balance. Of course re-establishing equal ratios of outcomes to inputs is not the only explanation for counter-productive behaviour and misconduct (for example, the employee in the example just given may have been leaving work early not because he was concerned with restoring equity, but because he had another job to attend, or a regular social engagement that he did not want to miss) but it may explain a significant proportion of such behaviour.

From a procedural justice perspective, we can predict that perceived unfairness will lead to negative perceptions about the employer's organisation as a whole and, hence, to counterproductive behaviours that will hurt the organisation: "to the extent employees perceive their organization to be unfair because it uses unfair procedures for resource allocations, employees will develop negative attitudes toward the organization (e.g. lower trust and commitment and greater anger). Negative attitudes and emotions lead to employees not having incentives to work in favour of the organization. Moreover, they might lead employees to act against the organization".¹³⁶ An example of this theory in action may have been explained in a recent New Zealand newspaper article. A female employee had made a formal written request to her employer for flexible working hours to look after her young son. She had been with the employer for 20 consecutive years and by all reports she was an excellent performer. The employer failed to respond to the request and after a period of waiting the employee re-sent her letter. She eventually received a response that stated simply that her request was denied; the response contained no explanation as to why the request had been denied. Having been notified of the employer's decision the employee proceeded to

¹³⁶ Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 286

take regular time off work anyway (often leaving at 2 and 3 in the afternoon; the same time her son's school finished for the day) each time complaining that she was suffering from some ailment. She was very shortly thereafter dismissed for misconduct and the employer lost a long serving and previously productive worker. She brought a claim against her employer for Unjustifiable Dismissal¹³⁷ and during her hearing she admitted that she had not been sick, but that she had lost so much respect for her employer because it had dismissed her request out of hand without explanation and without giving her an opportunity to fully explain her reasons for making the request, that she did not care that taking the time off was a breach of her employment contract.

The category of fairness perceptions that we have not yet mentioned under this heading is interactional justice. It is conceivable that interpersonal treatment of an employee by their manager or supervisor will have a direct impact on that employee's work performance: if a manager treats their staff with respect and Courtesy those staff may reciprocate with better performance; but if a manager is rude and discourteous to staff those people may respond negatively by poor performance or misconduct.¹³⁸ This proposition, and indeed the argument that procedural justice perceptions can influence work performance, seems at first glance to contradict a long standing view in economics that people are exclusively self-interested and that they are concerned with justice only because, in the long run, they are more likely to profit from a fair system than from an unfair one.¹³⁹ In other words people are not interested in fairness for fairness sake. But this view of human behaviour has been challenged by several academics in a manner that is directly relevant to the present discussion. Fehr and Gächter postulated that people will deviate from purely self-interested behaviour in a reciprocal manner: "[r]eciprocity means that in response to friendly actions, people are much nicer and much more co-

¹³⁷ The equivalent under New Zealand law of the English claim of Unfair Dismissal.

¹³⁸ R. P. Settoon, N. Bennett and R. C. Liden, 'Social exchange in organizations: Perceived organisational support, leader-member exchange, and employee reciprocity' (1996) 81 *Journal of Applied Psychology* 219.

¹³⁹ D. L. Shapiro, 'Reconciling theoretical differences among procedural justice researchers by re-evaluating what it means to have one's views "considered": Implications for third party managers', in Cropanzano and Randall (supra at note 85, 51).

operative than predicted by the self-interest model; conversely, in response to hostile actions they are frequently much more nasty and even brutal. ... People repay gifts and take revenge even in interactions with complete strangers and even if it is costly for them and *yields neither present nor future material gains*".¹⁴⁰ Clearly this contention has significant implications in the context of interpersonal interaction between managers and their staff. It suggests that an employee who is confronted with discourteous and rude behaviour (i.e. interactional injustice or unfairness) may well react in a devious and destructive fashion albeit that their reaction nets them zero or negative economic benefit. The opposite may also be true and a supervisor who treats their workers with dignity and respect may be rewarded by an increase in worker productivity. Although the employees have nothing material to gain (at least not in the short term) from their extra effort, they are motivated to act in this manner as a way of repaying the treatment afforded to them by their supervisor. It is also possible to view reciprocity as a predictor of a downward spiral of negative responses to rude and discourteous behaviour on both sides of the employment relationship. In simple terms we mean that a supervisor's disrespectful and rude treatment of an employee may be met with similarly negative behaviour by the employee, to which the supervisor will respond in a negative fashion, and so on and so forth until, presumably, the relationship breaks down entirely and the employee quits or is dismissed.

3.7.2 Organisational citizenship behaviour

You will recall that a key ingredient in a successful business is, according to Katz and others, the willingness of its employees to function innovatively and beyond the call of duty. More specifically this form of behaviour or OCB is, as we have discussed, an essential feature of a successful business in the rapidly evolving global market and the knowledge driven economy. Organ described OCB as "organizationally beneficial behaviours and gestures that can neither be enforced on the basis of formal role obligations nor elicited by contractual guarantees of recompense. OCB consists of informal contributions

¹⁴⁰ E. Fehr and S. Gächter, 'Fairness and Retaliation: the Economics of Reciprocity' (2000) 14 *Journal of Economic Perspectives* 159, 159.

that participants can choose to proffer or withhold...”.¹⁴¹ The question for us is, to what extent if at all is that decision to proffer or withhold OCB influenced by employee perceptions of fairness? In short there is considerable research supporting the hypothesis that perceived procedural and interactional justice are major predictors of OCB.¹⁴² And it is no surprise that procedural and interactional justice is, theoretically, more closely tied to OCB than distributive justice. That is because it is those two forms of organisational justice that are most likely to develop trust in a social exchange relationship (of which the employment relation is, in part at least, one example) and it is trust that is most likely to lead to OCB.

But we are getting ahead of ourselves and this proposition requires a more detailed explanation. The first part of that explanation is to distinguish between a social exchange relationship and an economic exchange relationship. Among the first people to draw this distinction was Peter Blau.¹⁴³ Blau understood social exchange relationships as being essentially characterised by a number of unspecified future obligations. He also recognised that, like economic exchange relationships, social exchange relationships give rise to an expectation of some future return for contributions, but, unlike economic exchange relationships, the exact nature of the return on one's contribution in a social exchange is unspecified. In addition Blau noted that social exchange does not occur on a carefully measured or calculated basis; while economic exchange is based upon transactions and expectation of short term fairness, social exchange relationships are founded on each party to the exchange trusting that the other party will fairly discharge their obligations over the long term.¹⁴⁴ The characteristic of trust is vital for the health of social exchange relationships,

¹⁴¹ D. W. Organ, 'The motivational basis of organizational citizenship behavior', in L. L. Cummings and B. M. Straw (eds) *Research in Organizational Behavior* (JAI Press: Greenwich CT, 1990) 43, 46.

¹⁴² R. H. Moorman, 'Relationship between organizational justice and organizational citizenship behaviour: Do fairness perceptions influence employee citizenship?' (1991) 76 *Journal of Applied Psychology* 845.

¹⁴³ P. Blau, *Exchange and Power in social life* (Wiley: New York, 1964).

¹⁴⁴ See also J. G. Holmes, 'The exchange process in close relationships: Microbehaviour and macromotives', in M. J. Lerner and S. C. Lerner (eds) *The Justice Motive in Social Behavior* (Plenum: New York, 1981).

especially in the short run, when some temporary or perceived asymmetries may exist between a party's inducements (i.e. the benefits they receive in return for their contribution to the social exchange relationship) and their contributions. Trust is particularly vital in the context of any attempt to elicit OCB and this certainly rings true when we consider the predicted benefits of OCB under the partnership model. An employer may immediately reap the benefit of, for example, increased profitability that flows from the beyond contract performance of its staff, but it may not simultaneously reward its staff for their hard work. Those rewards may be predicted for the future and they may not be monetary (they may include greater job security that stems from the enhanced competitiveness of the business, greater responsibility and other benefits). However, it is unlikely that the employees will provide beyond contract effort in the first place unless they trust that the employer will look after them in the long run and that those benefits will eventually ensue.

But how does this level of trust develop within the employment relationship? Konovsky and Pugh have argued that trust requires "evidence of self-sacrifice and responsiveness to another person's needs".¹⁴⁵ Such evidence may exist in the procedures an employer adopts to reach decisions that impact upon employees; in other words one source of trust in the employment relationship is procedural fairness.¹⁴⁶ As Konovsky and Pugh have explained: "the use of procedurally fair ... practices affects high order issues such as employees' commitment to a system and trust in its authorities because the use of fair procedures demonstrates an authority's respect for the rights and dignity of individual employees. This demonstrated respect indicates that an authority is devoted to the principles of procedurally fair treatment, thus resulting in the employees' trust in the long run fairness of the relationship. Fair procedures may have symbolic meaning insofar as individuals are treated as ends rather than means".¹⁴⁷ Similarly, Lind and Tyler predicted procedural justice to be "... a source of both satisfaction and positive evaluations of the

¹⁴⁵ M. A. Konovsky and S. D. Pugh, 'Citizenship behaviour and social exchange' (1994) 37 *Academy of Management Journal* 656, 659.

¹⁴⁶ E. A. Lind and T. R. Tyler, *The Social Psychology of Procedural Justice* (Plenum: New York, 1988).

¹⁴⁷ Supra at note 145, 658.

organization... [and to] make individuals more willing to subordinate their own short term individual interests to the interests of a group or organization.”¹⁴⁸ We might also predict that interactional justice will have an important bearing on the levels of trust necessary to motivate OCB from employees. For instance, Organ argued that the fair interpersonal treatment of employees by their supervisors leads to employee citizenship because a social exchange relationship develops between employees and their supervisors.¹⁴⁹ When supervisors treat employees fairly, social exchange and norms of reciprocity that we discussed above in the context of work performance, dictate that employees reciprocate, and one avenue of reciprocation is OCB.¹⁵⁰

In contrast to procedural and interactional justice, distributive justice is the typical metric for assessing the fairness of economic exchange and is unlikely to have as significant an influence on the level of employee trust in an organisation that is essential for employee OCB. As Konovsky and Pugh explain: “a norm of distributive fairness implies that the parties to an exchange give benefits with the expectation of receiving comparable benefits in the short run. When the conditionality of an exchange is salient, as it is when distributive justice and economic exchange characterise a situation, the expression of feelings like trust is undercut because sufficient extrinsic explanations for the parties’ continued participation in the relationship exists. The conditionality of economic exchange also inhibits the development of trust because that development requires evidence of one party’s self-sacrifice and responsiveness to another person’s needs, which conditional exchanges do not provide. Transactional contracts and distributive justice are therefore less likely than relational contracts and procedural justice to produce attributes of trust.”¹⁵¹ That is not to say that distributive justice cannot have any bearing on the creation of long term trust and OCB. At a theoretical level this can be explained by recognising that the employment relationship is at the same time a social exchange relationship and an economic exchange relationship; in

¹⁴⁸ E. A. Lind and T. R. Tyler, *The Social Psychology of Procedural Justice* (Plenum: New York, 1988) 191.

¹⁴⁹ D. W. Organ, *Organizational Citizenship Behavior: The Good Soldier Syndrome* (Lexington Books: Lexington, 1988).

¹⁵⁰ Supra at note 145, 657.

¹⁵¹ Ibid, 659.

other words it combines the long term uncertain outcome characteristics of social exchange with the short term identifiable benefits of economic exchange (the most easily identifiable aspect of the latter is the wage-work bargain). These two features of the relationship are not mutually exclusive and where economic exchange intersects with social exchange the former can impact on the levels of trust that are so vital for social exchange and OCB. For example, an employer who reneges on a promise to reward an employee with additional remuneration in their next pay packet for working extra hours, or putting in extra effort, is likely to seriously damage, even destroy the trust that the employee might previously have felt towards the employer. Moreover, such behaviour on the employer's part is almost certainly going to dissuade the employee from putting in similar extra effort in the future.

Finally under this heading, it is important to recognise that, just as OCB is influenced by the supervisors' and organisations' treatment of employees and procedural and distributive justice, OCB can also influence the behaviour of supervisors and organisations towards employees.¹⁵² The same observation can be made in relation to work performance. For example, it is possible that an employee's preparedness to engage in OCB will cause the employer or the employer's manager to extend to the employee more considerate and respectful treatment. This therefore creates a cyclic series of positive responses: the more an employee is treated fairly the more they are willing to work beyond contract and exhibit OCB, and the more employees are prepared to behave in this way the more employers and management are likely to reciprocate with fair treatment, and so on. This perpetuating phenomenon is of course essential if OCB is to have a sustained beneficial impact on the competitiveness of the employer's business, but at the same time it is important to realise that the trust on which this interaction is based is fragile. Once the cycle of positive responses is broken, it may be difficult to repair and in the meantime the business is likely to lose ground on its competitors in the global market and knowledge driven economy that it may struggle to make up.

¹⁵² Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 305.

3.7.3 Staff Retention and reducing turnover

You will recall that during our discussion of Katz's categories of essential employee behaviour we pointed to the importance of being able to retain staff and reduce turnover. This is a particularly significant achievement in a modern business that has invested considerable time and resources in staff training. An employer will want to retain staff so as to get the most out of their investment (while not having to duplicate that investment when a replacement is hired) and, in particular, it will want to retain its best staff (i.e. those staff who are technically the most proficient, are willing to go that extra mile and are prepared to be flexible). But reducing turnover is likely to be particularly challenging in organisations with professional or technically skilled employees who have high job mobility.¹⁵³ One way for an employer to retain staff and reduce turnover is to create amongst its employees a sense of affective commitment or emotional attachment to the organisation. Such emotional commitment may be generated by a host of factors and some employees may be more susceptible to its influence than others due to their individual emotional and moral make-up. Nevertheless it seems that one universally important ingredient in the evolution of affective commitment is the employee's perception that their employer is fair. An employee who considers their employer to be fair may feel a sense of closeness to the employer; a feeling that the employer has a genuine interest in their wellbeing which in turn creates an emotional bond between the employer and the employee that the employee is reluctant to break. This attachment is most likely where the employee has experienced first-hand the benefits of their employer's commitment to the fair treatment of its staff. But it is also possible to view commitment to the employer as flowing less from an emotional attachment and more from a pragmatic assessment by the employee that there is value in remaining with an employer who is perceived to be fair, or more precisely, it is possible to view the employee's commitment as being based on a reluctance to quit rather than a positive endorsement of the employer. Cohen-Charash and Spector have explained that when an employee

¹⁵³ R. C. Dailey and J. K. Delaney, 'Distributive and procedural justice as antecedents of job dissatisfaction and intent to turnover' (1992) 45 *Human Relations* 305, 315.

understands its employer to have adopted fair procedures and treated that employee with respect, the employee will perceive themselves to have more investments in the organisation which they will be reluctant to relinquish by moving jobs. Conversely, when the employee believes their treatment is unfair and disrespectful, the employee will feel they have little to lose in moving to a new employer.¹⁵⁴

Another example from the writer's legal practice may help to make the point. A large hotel had suffered a sustained period of poor room sales and as a result it had, for two years, been unable to reward its staff with anything above a 1% pay increase. The hotel was paying considerably less than its competitors in all but a small number of positions and was, as a consequence, unable to retain many of its most valuable staff and overall turnover was extremely high. In an effort to address the turnover problem the hotel decided to grant its staff a 5% pay-increase. This level of pay increase did not bring the hotel's pay up to the level of its competitors, but it was sold to its staff as a reward for the commitment staff had demonstrated by staying with the hotel during the tough times. As part of the process of selling the pay increase the hotel opened its books to the two unions that represented 80% of the hotel's workers. The books showed that the pay increase was a significant short term strain on the business and they also explained that the Managing Director had taken a substantial pay-cut to off-set some of the additional money going to staff. These factors were outlined to staff in a letter written by the union to its members and in the year following the pay increase the level of turnover reduced to a negligible amount; a reduction which the hotel and the unions attributed to the pay increase and the manner in which it was explained to staff.

It may be possible to understand the reduced turnover in this example as a manifestation of an emotional commitment that staff felt towards their employer as a result of the pay increase and the circumstances surrounding it. The pay increase and its explanation suggested to some staff that the employer

¹⁵⁴ Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 306.

was committed to being fair which in turn may have engendered in staff a willingness to put aside their own narrow self-interest in moving to a better paid job in favour of showing loyalty to the organisation that had demonstrated loyalty and self sacrifice to them. Alternatively, it may be that the reduction in turnover is attributable to an assessment on the part of employees that remaining with an employer who is overtly committed to fairness is likely to be in their long term interests, whereas moving to another employer who, while paying them a small amount extra on arrival, they know little about, may not be in their best interests. In the end the reduction in turnover was probably attributable to a number of factors, including a combination of the two forms of commitment discussed above. Some employees may have been reluctant to leave because they felt a bond with the employer in keeping with their perception (which may have been flawed) that the hotel was prepared to compromise its short-term financial interests for the good of their staff. Others employees may have stayed because they felt better the devil you know.

Before leaving the topic of organisational commitment and turnover it is worth making a point that may also be born-out in the hotel example above. Konovsky and Cropanzano argued that because affective or emotional commitment is generally aimed at the organisation as a whole, it is most likely to be related to procedural justice as opposed to distributive justice.¹⁵⁵ This prediction was confirmed by Cohen-Charash and Spector's meta-analysis which showed affective commitment to be significantly more strongly related to procedural justice than to distributive justice or, for that matter, interactional justice.¹⁵⁶ Similarly, it appears that organisation commitment based on a pragmatic assessment of the employee's own self interest in remaining with a fair employer, is also tied more closely to procedural justice than distributive justice.¹⁵⁷ That is not to say of course that distributive justice can have nothing to do with turnover. An employee who feels they are being

¹⁵⁵ M. A. Konovsky and R. Cropanzano, 'Perceived fairness of employee drug testing as a predictor of employee attitudes and job performance' (1991) 76 *Journal of Applied Psychology* 698.

¹⁵⁶ Y. Cohen-Charash and P. E. Spector, 'The Role of Justice in Organizations: A Meta-Analysis' (2001) 86 *Organizational Behavior and Human Decision Processes* 278, 306.

¹⁵⁷ Ibid.

unfairly rewarded for the work they do is very likely to be tempted by an offer to move to an organisation that will pay them what they believe they should be paid to do the work they are currently undertaking. The point worth making however is that the more the employee feels a commitment to the employer based on their perception that the employer uses fair processes in reaching decisions about pay outcomes and other matters, the more the new employer will be forced to offer to entice the employee away from their current role. In other words the pragmatic employee places a premium or a value on their current employer's fairness that they are only willing to relinquish for a price. In addition, it is wrong to say that interactional justice can have no bearing on an employee's willingness to stay with or leave an organisation. In the end an employee's desire to remain with their current employer will be based to a large extent on the degree to which they are or are not satisfied and comfortable with their everyday working environment. Those feelings are likely to reflect in part the employee's everyday personal interaction with their work colleagues, including their line managers and supervisors. An employee who is subjected everyday to negative, rude and disrespectful treatment by their immediate boss is more likely to be actively seeking and willing to accept alternative employment than someone who is happy in their work environment because, in part, they are treated by management in a respectful and Courteous manner.

3.7.4 The significance of conflict

The previous Government's partnership approach promised a reduction in work place conflict as one of the benefits to be had by businesses that embrace partnership at work.¹⁵⁸ By conflict we take the Labour Government to have meant disagreements between employers and employees over any matter relating to the employment relation. Interestingly, in his work on organisational behaviour Katz fails to identify a willingness not to conflict with their employer as an essential form of employee behaviour. That is not surprising of course because Katz was focused on the positive forms of

¹⁵⁸ In *Fairness at Work* (supra at note 1) the Tony Blair begins his Prime Minister's Foreword by stating that "this White Paper is part of the Government's programme to replace the notion of conflict between employers and employees with the promotion of partnership."

employee behaviour that would result in business being more, as opposed to less, effective. In other words, where there is conflict we are less likely than we are when it is absent to find the behavioural requirements of organisational effectiveness. In fact the opposite is likely to be true; where there is conflict we may well find the behavioural associates of organisational dysfunction. In the parlance of organisation justice and fairness it is possible to view conflict as an outcome of *perceived unfairness*, whereas Katz's behavioural requirements (including OCB and organisational commitment) result in part at least from *perceived fairness*. It is also possible, indeed vital in many instances, to view conflict as more than just an immediate reaction to perceived unfairness. Conflict can often be understood as part of a continuum of unfairness judgements on both sides of the employment relation that become progressively more destructive. Consider again the example of the employee who took unauthorised time off work following her employer's refusal to grant her time flexible working time so that she could care for her son. The employee in that case considered the employer's refusal of her request and the manner of the refusal unfair and, therefore, she felt justified in lying to her employer about being ill and taking time off without permission. The employer in turn considered the employee's behaviour unjust and unfair and responded by dismissing her. The continuum was extended by the employee reacting to the employer's decision to dismiss her by bringing a claim in the employment tribunal that her dismissal was unlawful.

This example hints at a further important point about conflict. It is possible to understand conflict in the employment relation as falling within one of three broad categories: externalised conflict, retaliatory conflict or internalised conflict. The first category refers to a situation where an employee or employer perceives that they have been treated unfairly by the other party and their response is to address those specific concerns directly to that party or to a third party. An employee for example may do that in a number of ways. They may approach their supervisor on an informal basis to discuss what is bothering them. Alternatively they may raise a formal grievance with their employer through the employer's formal grievance mechanism. Finally, they may take legal action against the employer in the tribunals or Courts. This

form of conflict may however be quickly and effectively resolved if the employer responds to the employee in a manner that the employee believes is fair. As soon as the employer's response is perceived by the employee to be fair the conflict continuum is completed and the parties can proceed with a productive relationship.

The second category of conflict captures those instances where an employee feels they have been treated unfairly but rather than raise their concerns directly with their employer they take retaliatory action instead. Such action may take the form of misconduct or other counter-productive behaviour. In those circumstances it is more difficult to close the continuum because the employer is not immediately aware of the motivation behind the employee's reaction and is unlikely to respond in a manner that remedies the employee's original feelings of unfairness. Instead the employer is likely to perceive the employee's actions as unfair and react in what the employer considers, in their ignorance of the motive behind the employee's actions, to be justified. In other words retaliatory conflict has a habit of perpetuating the conflict continuum. The continuum may be broken once the employer is made aware of the employee's original concerns, but that is perhaps unlikely. By the time the employer is made conversant with employee's original concerns the relationship between the parties is likely to have deteriorated to such an extent that neither party is inclined to treat the other fairly, or to view whatever treatment they receive or have received at the hands of the other as being fair. As we have already identified during our discussion of Fairness Heuristic Theory, once we make an initial fairness evaluation it is very difficult for the object of that judgement to alter that perception; we tend to get "stuck" at the level of the original fairness judgement.

A similar observation can be made in relation to the third category of conflict. Conflict in this category is initially internalised. By that we mean one party to the relationship perceives that they have been treated unfairly but chooses to take no immediate action in response to that perception. A number of studies have suggested that it is not uncommon for employees in particular to internalise feelings of anger and resentment that flow from perceived

unfairness. For example, in a role-playing study carried out by Martin, Brickman and Murray, the authors of the study found that the extent to which participants in the experiment were underpaid for the work they undertook was entirely unrelated to their tendency to report their concerns about how they were treated to their employer.¹⁵⁹ Not bringing their concerns to the attention of the employer has a number of negative consequences for the organisation and the employee. The employee's feelings that flow from their perceptions of unfairness are likely to fester until the employee feels unable to bear them any longer and decides to act on those feelings by, as is very often the case, resigning and bringing a claim against their former employer for constructive dismissal. Of course up until that point the employer's business may suffer because the employee is not motivated to be innovative, to assist their fellow employees and generally to exhibit OCB. Moreover, particularly where the actions of the employer that are perceived to be unfair are ongoing, the feelings of resentment and anger that well-up unabated within the employee are unlikely to be quelled at some later stage once the reason for the perceived unfairness is finally discussed (assuming that they are ever disclosed to the employer) because by that stage the sense of unfairness has become entrenched in the employee's impression of the employer. And it is not only employees who are susceptible to internalised conflict. As Robert Baron points out, it is not unusual for managers to internalise feelings that their staff are underperforming or misbehaving.¹⁶⁰ Failing to address staff about their concerns is often the preferred course for a number of reasons, not the least of which is that managers are reluctant to engage in the unpleasant interpersonal exchange which they anticipate will occur when they confront the offending employee. But this approach can and often does have damaging consequences. If the behavioural problem is not addressed it is likely to continue and over time become more of a problem (either because the cumulative effects of the behaviour are increasingly negative or because the

¹⁵⁹ J. Martin, P. Brickman, and A. Murray, 'Moral outrage and pragmatism: Explanations for collective action' (1984) 20 *Journal of Experimental Psychology* 484.

¹⁶⁰ R. A. Baron, 'Criticism (informal negative feedback) as a source of perceived unfairness in organizations: Effects, mechanisms, and countermeasures', in Cropanza and Randell (supra at note 85).

staff behaviour itself worsens as the staff member(s) identify that they can get away with more).

Of course it is wrong to think that these categories of conflict are mutually exclusive. They are very much intertwined and it is that relationship which explains the evolution of some of the most destructive instances of conflict. For example, an employee who has a grievance against their employer may choose the path of externalised conflict and pursue that grievance through the employer's internal grievance procedure. During and at the end of the procedure they may reach the conclusion that the procedure was unfair, maybe because the employer did not give them sufficient opportunity to voice their case. As a consequence the employee sees no value in the pursuing the grievance process any further. Instead he chooses to retaliate against the employer's unfair treatment of him and his grievance by lowering his level of productivity or by refusing to work beyond his contracted hours. That may in turn set the employee on a course to eventual resignation or dismissal. Similarly, a manager who perceives that his staff is treating him unfairly by refusing to properly abide by his instructions, but who delays in confronting them with his concerns will, as the problem intensifies, develop an increasing sense of frustration and resentment towards those employees. Eventually the manager's level of restraint will be exceeded and he will be forced to stand up to the troublemakers. But taking this stance at such a late stage is likely to have several negative consequences. For instance, because the manager has developed an enhanced sense of frustration and anger towards the offending employees he is more likely to address them in what they may consider is a rude and disrespectful manner (i.e. an interactionally unfair manner). This perception of interactional unfairness is all the more likely given that the behaviour the employees have been told is unacceptable has been continuing over a period of time. The employees are likely to feel that if the behaviour was unacceptable it would not have been allowed to continue and the fact that it was has sent them a message that it was acceptable. The employees will perceive that the manager is acting unfairly by rebuking them for behaviour that they were led to believe was acceptable. The employee's may react to this treatment and perceived unfairness by reducing their level of co-operation

or by taking some other form of retaliatory action. The manager may in response choose to externalise the conflict by disciplining the employees which may in the end lead to their dismissal.

There are of course various permutations of conflict interaction but the important point which has already been made but is worth repeating is that unfairness tends to breed unfairness, and it is vital to recognise that the sources of conflict are complex and usually rooted in early perceptions of unfairness that have spiralled out of control. The longer this conflict continuum is allowed to grow the more likely it is that it will lead to competitiveness damaging behaviour and eventually to complete relationship breakdown. The seemingly obvious answer to the problem is to prevent the conflict continuum from extending to the point beyond which the relationship is doomed and to do that of course requires the parties to address the potential sources of conflict and perceptions of unfairness sooner rather than later.

3.8 Partnership and matters to do with employee discipline and grievances

It is possible at this stage to draw several important conclusions about partnership at work that we will take forward into the chapters that follow. The previous Government used partnership as a metaphor for an employment relation based in large part on each party to the relationship treating the other fairly. The previous Government believed that fair treatment by each party of the other will lead to reductions in employee turnover, reduced workplace conflict, greater employee commitment to the employer's business, greater employee OCB and innovation and, as a result, greater sales and profitability. Our discussion of research on fairness and responses to fairness in the area of organisational justice suggests that the previous Government may be on to something and fairness can lead to enhanced business competitiveness. The foregoing discussion indicates that employees in particular are likely to behave in the manner predicted by the partnership model where they perceive they have been treated fairly and, conversely, they are likely to act in a manner that is contrary to the development and maintenance of productive employment

relations where they perceive they have been treated unfairly. This seems simple enough; all that the employer must do to ensure enhanced business competitiveness is to treat its staff fairly. But of course it is not so simple and in the next chapter we consider why that is and what can be done to address that problem and we do so with particular reference to EDG.

But why focus on EDG? In part because EDG in the broadest sense is the aspect of the employment relation that more than any other has the potential to impact negatively and positively on perceptions of fairness and as such it stands to play a significant role in achieving the predicted benefits of partnership. That is because, to begin with, the way in which an employer facilitates the resolution of grievances and disciplinary issues can either cure or cause a sense of unfairness and mistrust amongst employees. For example, an employer who fails to provide a trusted and effective mechanism for employees to air their concerns and grievances is missing a chance to rectify employee feelings of dissatisfaction with their work and their work environment that could, if not checked, escalate into destructive retaliatory action followed by resignation or dismissal. Furthermore, an employer who displays little or no real concern for the grievances of their employees, or who disciplines or threatens to discipline its staff in a seemingly unfair manner, is unlikely to successfully nurture and preserve the feelings of trust and security that are necessary for the maintenance of a co-operative long term relationship of partnership between employers and employees. And no employee is likely to go that extra mile for his or her employer if, for example, they have been subject to what they perceive as an unfair warning, or where their employer has failed to address their concerns that a colleague is behaving towards them in an inappropriate and de-motivating manner. This is not the fair and efficient labour market the Labour Government hoped would take root in this country. Of course the opposite is true and EDG may positively and significantly influence employee perceptions that their employer can be trusted and is fair not only in relation to grievances and disciplinary action but generally. For example, an employee might feel aggrieved that they have not received what they consider is a fair pay rise and may, as a result, be inclined to retaliate by reducing their level of effort or by absenting themselves from

work without good reason. But that reaction might be avoided if they are presented by the employer with a means to channel their grievance; to have it heard and considered in what they judge to be a fair way. If that employee perceives they have been treated fairly in relation to their grievance it is predictable that they will feel more inclined generally to trust their employer to look after their long term interests and hence they are more likely to exhibit the sort of behaviour that we have discussed is necessary if the benefits of partnership are to be realised.

CHAPTER 4: THE FOUNDATIONS OF A SUCCESSFUL REGULATORY APPROACH TO EDG?

The preceding analysis suggests that employees who perceive that their employer is fair are more likely to exhibit greater commitment to the employer's business, greater innovation and OCB, and less destructive and unproductive behaviour, than those who perceive their employer to be unfair. The impact of this phenomenon will be an increase in profitability and an overall appreciation in the level of competitiveness amongst British businesses. But, we have argued, employers and employees cannot be left alone to realise these benefits and there is, therefore, a role for regulation in encouraging the parties towards the essential foundation of partnership and OCB – fairness, and more particularly fairness perceptions. In this chapter we reconsider this argument in favour of regulation as the catalyst of fairness perceptions and express some initial thoughts about the essential elements of a regulatory model that might assist to achieve fairness at work, partnership and OCB. First, however, we explore some of the barriers to, and necessary features of, fairness perceptions.

4.1 EDG fairness perceptions and the conflict continuum

This thesis focuses on the importance of EDG, or the way that employers and employees seek to deal with and resolve conflict, as a factor relevant to fairness perceptions. And when we talk about EDG we are referring to it in the broadest sense. We are not only referring to those apparently discrete instances where an employee formally raises a grievance with their employer under the terms of the employer's grievance procedure, or where an employer takes formal disciplinary action against an employee because that employee has committed what appears at first glance to be an isolated instance of misconduct. To focus so narrowly on what some might consider are discrete EDG events is to miss the opportunity to understand the underlying causes of many of those events, which is vital if we are to understand how employers can set about maximising fairness perceptions on the part of their staff and thereby limit the negative effects of conflict. In other words formal grievance

or disciplinary action may well have its roots in some previous decision that was subject to a negative fairness perception on the part of the employee (e.g. an employee is aggrieved about missing out on a promotion and performs poorly as a result) and which could have been avoided had that earlier decision been dealt with, if not substantively, then at least procedurally in a manner more likely to procure from the employee a judgement that they have been treated fairly. If that had been achieved the chances of resolving the conflict or dispute before it was too late, and in a manner that may well have a positive bearing on the each party's perception of the other, is far greater than if the issue was left until it transitions to a later part of the conflict spectrum. By that later stage the earlier perceptions of unfairness on the part of both parties are likely to have escalated such that there is no way back and in those circumstances the grievance or disciplinary process is simply delaying the inevitable and probably bitter termination of the employment relationship.

So when we refer to EDG we are concerned not only with how the parties deal with those grievances and instances of disciplinary action that take place towards the end of the conflict spectrum, we are also talking about the earlier perceptions of unfairness that may have eventually led to the formal grievance or disciplinary action and how the parties to the employment relationship deal with those. The importance of EDG to fairness perceptions is inescapable because, in large part, every perception of unfairness is a potential grievance or the early stages of conflict that may indeed escalate into something significantly more destructive and contrary to the wellbeing of the employer's business.

All this is not to say that every formal grievance or disciplinary action originates from some earlier perception of unfairness that starts out small and evolves into an ever more serious negative and destructive sense of anger and resentment, because of course the reasons why employers take disciplinary action or employees perform poorly or commit misconduct are many and varied. But even in relation to instances of misconduct for example that are discrete and uncharacteristic of the employee in question, and which do not have their origins in earlier perceptions of unfairness, the manner in which the

employer deals with those instances can influence the way employees perceive the employer which will impact on trust development in the mind of not only the employees in question, but their colleagues looking on, and which will have importance for the future performance of their employment relationship. In other words it is possible to view discrete instances of misconduct or poor performance and the manner in which they are dealt with as having the potential to sit at the beginning of a conflict spectrum which if dealt with in a manner perceived by the workforce to be fair are likely to bolster trust development, whereas if they are handled in manner considered to be unfair they are likely to engender the opposite reaction. Such trust development is, as we have discussed, likely to establish a commitment on the part of the employee to their employer that will act as a bulwark against the possibility of future misconduct or poor behaviour, and that will encourage OCB and greater levels of productivity.

This thesis proposes that a successful approach to EDG is one that is able to avoid these early perceptions of unfairness or, where that is not possible, has in place mechanisms that will prevent the judgements of unfairness evolving into something from which the employment relationship cannot recover. As we have already explained, the positive side effect of such an approach to EDG is the bolstering of trust between employers and employees as both parties perceive the other's willingness to deal with their concerns in a fair manner. This level of trust will encourage OCB and the forms of employee behaviour that Katz identified as essential for effective business, and which the former Government hoped would flow from partnerships and fairness at work. The question then becomes how to achieve this? What is apparent from the white paper *Fairness at Work* is that the Labour Government's preferred route to successful partnerships and fairness at work was a voluntary one: "the Government believes that each business should choose the form of relationship that suits it best."¹⁶¹ This approach is not surprising because it goes without saying that the most effective forms of partnership will involve employers and their employees freely establishing through consultation and

¹⁶¹ Supra at note 1, 2.6.

experimentation, and with reflection upon the peculiarities of their particular workplace, mechanisms for resolving issues and disputes that are fair and that result in just outcomes which promote the kind of high trust that is so essential for successful partnerships. This discussion must pause therefore to repeat the question that was posed in the first chapter: can employers and employees be left to adopt and achieve the model of EDG that we have just sketched, and which should limit conflict and maximise fairness perceptions, with little more than government encouragement and a message that such an approach to employment relations is the best way for a business to succeed?

4.2 The likelihood of voluntary fairness perception maximisation

We previously argued that it is difficult to be optimistic about the chances of a positive answer to the question of whether a conflict reducing partnership model is possible. This is the argument adopted by this thesis because putting in place the EDG mechanisms necessary to enhance fairness perceptions and reduce protracted and destructive conflict, and then to effectively and genuinely implement those mechanisms, requires a belief on the part of both parties to the employment relation that such a change is worthwhile and in their respective best interests. Essential to achieving that belief is an internal acknowledgement by each party that the other is as committed to the success of the system as they are. Once the system is up and running effectively the ideal is that its success will perpetuate its increasing acceptance on the part of both parties. In other words, the longer the partnership model of EDG is in place, the more it will result in employees having their concerns dealt with in what they perceive is a fair way, and this in turn will leave the employer with an increasingly productive workforce, and the early scepticism about the system will gradually subside. But the initial hurdle of overcoming that early scepticism and lack of trust in the worth of the system, and the other party's willingness to genuinely adopt and implement it, is substantial for a number of reasons. We have already discussed those reasons in some detail, but it is worth summarising them at this point.

First, any attempt to put in place and adhere to those measures which characterise the previous Government's approach to partnership, requires a leap of faith on the part of employers and employees. This is partly "because the benefits of co-operation are unlikely to accrue immediately"¹⁶² and, in fact, they may never accrue given the fluctuating fortunes of businesses in the modern market place. Secondly, a lack of immediate benefit may reflect in part the employee's unease about committing, initially at least, to the flexible and innovative forms of work behaviour that the employer will expect as its reward for adopting a partnership approach to EDG. Thirdly, the high levels of trust that are necessary to support partnership at work and OCB are unlikely to exist at the outset in a workplace in which the concept of partnership is something entirely foreign. Fourthly, the likelihood of employees freely responding to efforts by the employer to maximise fairness perceptions in the early stages in the way predicted by the partnership approach is uncertain and perhaps unlikely due to other features of the modern labour market. These features might be construed as challenging the credibility of any promise that an employee's commitment to the partnership approach will benefit them in the long run. They include the decline of internal labour markets; the increase in outsourcing; the "casualisation" of employment; and the growth in the less secure or "peripheral" workforce.¹⁶³ Fifthly, the extent to which achieving the high levels of trust necessary for the attainment of successful partnerships is inhibited by the authoritarian nature of the traditional employment relationship and the role of disciplinary sanctions as a cornerstone of that relationship. Finally, the road to partnership is made rockier still given that the reluctance to trust is not unique to employees; many managers view their staff as inherently untrustworthy and many managers are, as a result of this lack of trust, unwilling "to shift from traditional forms of work organisation"¹⁶⁴.

¹⁶² A. Birecree, S. Konzelmann and F. Wilkinson, 'Productive systems, competitive pressures, strategic choices and work organisation: an introduction' (1997) 7 *International Contributions to Labour Studies* 3, 16.

¹⁶³ Supra at note 10, 14.

¹⁶⁴ K. Sissons, *Closing the Gap – Ideas and Practices: Direct Participation in Organisational Change* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 1996) 30.

It is interesting to speculate about the current sources of this mistrust between employers and employees which are no doubt many and varied from workplace to workplace. A possible source of mistrust may be certain individual employment rights, such as the law of Unfair Dismissal, which does more to encourage legal posturing between the parties which in turn promotes animosity on the part of the employer in particular who believes that their “right” to control their business and to direct labour as it sees fit is undermined by the following antagonistic threat: “if you dismiss me I’ll sue you”. The employer who is confronted with that threat (particularly where they consider it to be spuriously made) is likely to feel resentful towards the staff making the threat and that may in turn impact on their feeling and suspicion about the motives and trustworthiness of their staff in general.

In addition to the 6 impediments to partnership listed above, it is worth making the point again that to realise the economic benefits of partnership and OCB, employers must increase the likelihood of their workforces *perceiving* them as fair. Of course it is unlikely, if not impossible, to predict that an employer can achieve fairness perceptions amongst all employees in relation to all things, because in the end what is and is not considered fair will vary greatly between individuals. An employer cannot be expected to realise the cornucopia of expectations held by its entire workforce. This is so given that, in particular, the employer cannot be held responsible for perceptions of unfairness formed on the part of individuals when those perceptions are, by any reasonable standard, unfair or unrealistic, but nevertheless entrenched and unwavering in the mind of the employee. What the employer can realistically hope to achieve is a maximisation of fairness perceptions amongst as many of its workforce as possible and in relation to as much as possible, be that issues of pay, promotion, benefits, the list goes on. But how does the employer set about this task?

4.3 A role for regulation of EDG in maximising fairness perceptions?

This thesis poses the question phrased in the first chapter: can employers and employees be effectively encouraged to adopt and achieve a model of

successful partnerships by little more than government encouragement, and a message that such an approach to employment relations is the best way for a business to succeed? The answer is probably no. To repeat the point made earlier in this thesis: it is highly unlikely that employers and employees, who have traditionally come together in a low trust relationship of subordination, will suddenly, freely, effectively and without exception grasp and run with the previous Government's concept of partnership, particularly in relation to EDG. Such a change would involve a dramatic shift in the culture of many if not most workplaces. What is more, the empirical evidence suggests that even in workplaces that purport to favour a partnership approach to employment relations, there is a reluctance on the part of those employers to put in place rules and practices that provide mutual gains for employees and employers and that generate the high levels of trust necessary for a business to maximise the benefits that might be achieved by partnership at work.¹⁶⁵ This suggests a role for regulation in the drive for successful partnerships based on high trust relations between employers and employees. But can regulation help in this regard and if it can, and specifically in relation to EDG, what type of regulation is most likely to achieve that goal?

4.3.1 Changing the focus of labour law

A common and long standing view of the relationship between labour and capital and the role of labour regulation was famously described by Kahn-Freund in *Labour and the Law*. He viewed that relationship as:

... an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.¹⁶⁶

Since Kahn-Freund's seminal work, labour law has evolved as a vast array of laws and labour standards that provide a host of collective and individual

¹⁶⁵ Supra at note 56.

¹⁶⁶ P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law 3rd edn* (London: Stevens, 1983)

rights and obligations for employers and employees. But despite the changing and varied face of labour law, the justification for much of its content has remained the same. Labour lawyers have continued to argue that law is needed to protect workers from the potential for exploitation and mistreatment at the hands of the unscrupulous employer. In this way lawyers have side-stepped arguments that such regulation imposes unnecessary costs on employers and creates rigidities in the labour market, by pointing to certain distributive concerns that labour law is said to address and that are perceived as fundamentally worthwhile ends in themselves without reference to broader economic factors.¹⁶⁷ This view of labour law understands that the law's primary function is to shift wealth and power within companies and other employers by providing workers with certain rights and influence over the decisions of management. Those rights include the right to partake in collective bargaining, the right not to be discriminated against on the grounds of sex or race, the right not to be unfairly dismissed and other employee protection regulation.

But the primary concern of this thesis is to find a model for the regulation of EDG in particular that is likely to promote fairness perceptions leading to partnership and OCB. The end goal of this regulation is to achieve greater productivity and business competitiveness; it will not view employee protection, or balancing economic power in the employment relationship, as its primary objective. Which is not to say that this thesis and the regulatory model eventually proposed will not see any value in law that protects and promotes workers rights, and that creates institutions for the purpose of policing and facilitating the enforcement of those rights: it does, but for different reasons than those traditionally expressed. The position adopted by this thesis is that regulation, which protects and promotes certain rights for workers, and which in turn helps the evolution of fair and efficient workplaces and high levels of fairness perceptions, can have the effect of improving the competitiveness of business and it is on this basis that such regulation should

¹⁶⁷ K. Ewing (ed), *Working Life – a New Perspective on Labour Law* (London: Institute of Employment Rights, 1996) and F. von Prondzynski, 'Labour Law as business facilitator', in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relation* (The Hague: Kluwer Law International, 2000) 99.

be justified. In other words, employment protection regulation, for example, can be justified on the basis that it supports realisation of the overriding policy objective of greater competitiveness; it is not developed on the basis that employment protection is, by itself, the regulatory end goal.

This change in emphasis from regulation for certain egalitarian purposes, to regulation for the object of improving competitiveness through partnerships at work, was and is significant. It creates a new regulatory compass that points lawmakers in the area of labour law towards setting aside or amending certain individual or collective rights or long established mechanisms and institutions devised to protect those rights because, in the end, those rights and institutions are considered to be detrimental to, or incompatible with, the greater good of enhanced competitiveness through fairness at work and partnerships. This approach has significant potential implications for the regulation of EDG that we shall explore in later chapters. But it is first worth considering some of the characteristics that the new regulatory model is likely to require.

4.3.2 Outlining the characteristics of the new regulatory model – reflexive self-regulation and other factors

Effective regulation of EDG that aims to maximise fairness perceptions is more than just the enactment of standards or processes aimed at achieving or assisting the policy objective of creating and preserving partnerships at work. That regulation must also be concerned with changing the behaviour of employees and employers such that they act in conformity with the legal framework established to support the policy objective. This is a difficult task no matter what the objective, but it is particularly challenging in the context of regulating for partnerships. Where a statutory right or obligation is aimed at protecting employees against nothing more than an employer's abuse of managerial power, compliance with that obligation might be achieved by providing the employee whose rights have been violated with a significant level of compensation. In those circumstances compliance may be accomplished because the cost to the employer of non-compliance, and the

incentive for the employee to bring a claim, are both substantial.¹⁶⁸ In the context of laws aimed at preserving and promoting partnership, however, that formula is unlikely to succeed in achieving the policy objective. That is because the use or the threat of legal sanctions as the primary means of deterring or preventing the abuse of managerial power is incompatible with the attainment of high levels of trust between employers and employees and the level of cooperation that is necessary for successful partnerships.

The role of the law in the context of regulating EDG for partnership is a subtle one; it is to reduce the likelihood or unnecessary escalation of trust damaging conflict, and the creation of a regulatory framework which at the same time protects and promotes a working environment that is favourable to the emergence of high trust relations.¹⁶⁹ To achieve this, the law relating to EDG (particularly the law of Unfair Dismissal) must move away from its current focus on attributing blame after the relationship has broken down and providing compensation for any failure on the part of the employer to comply with its legal obligations. More consistent with the objective of partnership are standards or rules that focus on preventing certain forms of relationship damaging behaviour and that encourage the parties to preserve their relationship where that is possible. Laws that create incentives to enforce rights after the event through the use of adversarial institutions, without mandating some prior form of internal resolution or, more to the point, dispute prevention, promote the type of relationship of conflict that is anathema to the concept of partnership and the maximisation of fairness perceptions. Legal regulation of EDG for fairness requires a legislative framework which recognises and promotes, amongst other things, those factors that we set out in the previous chapter as being the essential elements of fairness judgements. Those elements include: a willingness on the part of employers and employees to raise their concerns early and a mechanism that allows that to happen; a recognition of the role of procedural and interactional fairness in maximising fairness perceptions; and the free and accurate flow of information about

¹⁶⁸ Supra at note 10, 23.

¹⁶⁹ S. Deakin and F. Wilkinson, 'Labour law and economic theory: A reappraisal', in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relation* (The Hague: Kluwer Law International, 2000) 29, 58.

rights and obligations in relation to EDG. The regulation of EDG in this context should also overtly acknowledge that the implementation and enforcement of the law will take into account the gains that employers expect to achieve by adhering to, in good faith, the partnership driven legal framework.

This regulatory focus of this thesis on enhancing business competitiveness is significant because, as discussed above, it reminds us that fairness and partnership are not policy ends, but simply means to an end. Therefore, while some form of regulation may well create circumstances that appear to encourage partnership, that regulation cannot be enacted or implemented if the cost to the employer or the economy of its implementation is such that the regulation blunts the competitive edge it is intended to enhance. That is not to say that regulation must avoid costs to the employer or the state; in the end the regulator will be concerned about creating efficient rules and processes that balance the costs of regulation against its potential benefits. Let us take an example to make that point. It may be possible to eliminate all unfair dismissals by requiring each employer to pay for the services of an employment judge to determine whether or not the employer is legally entitled to dismiss an employee before the dismissal takes place. That mechanism might eliminate all unfair dismissals and it may well support partnership at work by providing employees with a real sense that their employer will not arbitrarily and unreasonably terminate their employment, but this possible benefit will be outweighed by the substantial cost to employers of complying with such a process.

It is also fair to say that successful partnerships will not be preserved and promoted by coercive regulation of EDG which takes little account of the peculiarities of particular workplaces and each instance of EDG, including the personalities involved.¹⁷⁰ Such regulation is likely to breed resentment between the parties and, even worse, a resistance to the type of co-operative

¹⁷⁰ Knell makes the point that “organisations are made up of a diverse range of stakeholders. It therefore follows that the establishment of mutual gains and common understandings is unlikely to be a straightforward process.” (supra at note 10, 14).

relations envisaged by the partnership model. Partnership is more likely to be assisted by a legal framework that promotes or at least reflects a culture in which the parties are encouraged to resolve their problems themselves and to set their own standards and methods within certain broad boundaries established by law. This might be achieved in part at least by the enactment of certain minimum standards of behaviour on which more detailed and reflexive forms of self-regulation can be constructed by the parties themselves. This is particularly relevant in the context of an attempt to maximise fairness perceptions given that what is considered fair treatment will vary greatly from workplace to workplace and from individual to individual. Because that is the case it is impossible and unhelpful for the law to set anything but a general and imprecise substantive standard of conduct in any given instance of conflict or potential conflict between the parties. Any attempt by the regulator to do otherwise is likely to impose burdens on both parties that are inconsistent with their particular expectations and objectives and which are therefore likely to be ignored or avoided where possible. Such regulation is unlikely to do much for the maximisation of fairness perceptions.

Perhaps the most common form of state supported or induced self regulation of the employment relationship is procedural regulation by which the state compels or entices the parties to resolve those issues that exist between them by negotiation. This form of regulation involves the state setting certain procedural ground-rules that govern the general nature, and in some cases content, of the negotiations, but which refrain from imposing substantive outcomes on the negotiating parties.¹⁷¹ Collective bargaining between trade unions and employers is one example of this form of regulation. The law sets out certain processes and conditions concerning how and sometimes when collective bargaining should take place and leaves the parties to bargain over certain issues and to resolve those issues as they see fit. The law has no say in the outcome of those negotiations, but will intervene if asked to by one party claiming a failure on the part of the other to comply with their procedural obligations. The emphasis of this form of regulation is on process rather than

¹⁷¹ Supra at note 6, 30.

substance because, as Collins argues, “it is expected that conformity to the procedure is likely to produce outcomes that correspond more closely to the desired standard than any attempt to enforce rigid substantive standards”¹⁷².

The standard sought in the present context is co-operative partnerships between employers and their staff. But as we have suggested, there are certain problems with this form of self-regulation. To begin with, insofar as this regulation requires the involvement of a trade union or other employee representative body, the fact that trade union membership is currently very low means that collective representation is likely to be difficult for employees to achieve and as a result they will be left to negotiate (or not to negotiate as the case may be) directly with their economically more powerful employer. The reality is that in such circumstances employers will tend to impose terms on employees who are unlikely to resist such imposition. As a consequence, any outcome, say for example in relation to procedures for resolving EDG issues, will only support the concept of partnership to the extent that the employer is prepared to self-impose terms that may not always seem in their best interests, and to comply with those terms in good faith and in such a way that its employees believe the employer’s commitment to the fair treatment of its staff is real and constant. This suggests perhaps the need for some form of representative body to plug the gap created by Britain’s relatively low level of union membership. In the context of EDG, the representative body could be involved not only in the negotiation of the processes and substantive standards by which issues relating to EDG are resolved, it could also participate in the actual resolution of individual cases. Whatever the approach adopted, the central object is not the achievement of an agreement on certain processes and standards about fair and reasonable ways to deal with EDG, the central concern is on reaching agreement and implementing that agreement in a way that supports the goal of partnership at work. As we have already suggested, that goal is likely to be realised only if employees *believe* that they will be treated fairly and reasonably in relation to EDG and employers are convinced, as a consequence of any agreed standards and processes for resolving EDG

¹⁷² Supra at note 6, 25; and G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993) Chapter 5.

issues, that such processes and standards are more than just an additional cost for them to bear, but are a worthwhile goal of their business to which they are committed.

Further, the law should act as a backstop or a stick, creating a strong sanction available to the parties where internal resolution has been tried, but without success because one party has not complied with the established internal processes and standards. In other words, the sanction will only be available to either party where the internal processes have failed. This is logical because by that time the hope of preserving a relationship of partnerships between those involved in the dispute will almost certainly have given way to other concerns.¹⁷³ Those other concerns are probably related less to the particular dispute than they are to maintaining the future effectiveness of the legal backstop. Ongoing co-operative relations are unlikely to be preserved unless the employer continues to be in a position to make credible promises to its employees regarding, for example, fair treatment and a commitment to refrain from unfairly disciplining its staff. Those promises are less credible where the employees perceive from their understanding of previous cases that the employer can disregard their legal obligations with relative impunity. The strong sanction acts as an incentive for the employer to comply with the internal processes and standards. This method of regulation may also act as an incentive to employees to raise their concerns directly with their employer, because they know that they will have no recourse to external processes unless they first seek resolution through those mechanisms set up internally to deal with such issues. An optimistic view of such regulation is that the more employers and employees resolve disputes without reference to the Courts and the employment tribunals, the more they will come to recognise the value attached to such behaviour and the less likely they will be to resort to more conflict based, adversarial and trust destroying forms of dispute resolution.

One further point concerns the credibility of the internal processes. It is not enough to mandate by regulation that an employer must put in place processes

¹⁷³ L. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) 35-38.

to deal with disciplinary issues or employee grievances. Such self regulation is likely to lack credibility in the eyes of the employees who seek to rely upon it or against whom it is enforced. As we have explained, any external regulation that establish a general framework for the establishment of certain EDG processes and standards, will inevitably and desirably leave considerable scope for the parties to the employment relation to implement standards and procedures that best reflect their particular workplace. But if those workplace specific rules are compiled by the employer alone they are likely to represent the employer's interests and perhaps, at best, an assumption on the part of the employer concerning the interests of their employees. The result is unlikely to be a perception on the part of employees that those rules represent the route to fair treatment. Even where by any reasonable standard certain rules imposed more or less unilaterally by the employer are, objectively speaking, fair, they are nonetheless likely to be considered unfair by employees because they are likely to be seen by employees as lacking legitimacy.

More likely to succeed in maximising fairness perceptions are rules that are compiled with real employee input, and that are implemented and monitored for compliance by employees and employers. Employees are less likely to question the legitimacy and therefore the fairness of regulations which they helped prepare. That is so partly because the very process of genuinely involving employees in the preparation and implementation of these processes is likely to elicit feelings of fairness and trust towards the employer such that the employees are already inclined to find that the rules are fair. And then there is the point that if the rules and their implementation are to a significant degree sanctioned by employees they are more likely to be viewed as fair by most of the workforce and it might be considered less likely, where an employee makes use of an internal process the outcome of which is unfavourable, for that employee to judge that the process is unfair if in fact he was instrumental in the establishment of that process. And even if an individual employee does feel aggrieved by the process as it has been applied to them on this occasion one can speculate that any action they might take against the employer in response to that outcome is not likely to be supported by other employees who will not perceive the employer to have been unfair.

The complainant's colleagues are more likely to take the view that: "the employer has done everything we agreed they had to do and that is all we can ask of them". So while the internally agreed processes and standards may have in this instance raised the ire of one employee, the damage to the general perception of the employer as fair is unlikely to be effected and therefore the overall negative impact on employee behaviour and workplace motivation is unlikely to be significant. More than that, the general view that the employer has been fair in their dealing with the complainant may eventually bring that employee into line with the general consensus. That is because in those circumstances the complainant employee may be considered by his fellow employees as the unfair party to the conflict because he is refusing to accept the legitimacy and fairness of the process that he and they agreed was fair. The reactions of his colleagues may be to sideline that employee or ostracise him from the group of employees until he accepts the outcome of the agreed process.

CHAPTER 5: DOES THE LAW OF UNFAIR DISMISSAL AID FAIRNESS PERCEPTIONS?

Having made these general comments about the shape regulation of EDG to maximise fairness perceptions might take, we turn now to consider whether or to what extent current regulation of EDG matches this analysis. In other words, is the current regulation of EDG promoting fair treatment at work and thereby increasing the likelihood of fairness judgement and the competitiveness enhancing benefits that flow from that regulation? In this chapter we focus on the law of Unfair Dismissal and we refer to the equivalent law in New Zealand because it is, perhaps more so than any other common law jurisdiction, similar enough to the English regulation to make it a valuable source of comparison. The first conclusion we come to is that the current application of the law of Unfair Dismissal is unlikely to support the goal of fairness perceptions and OCB. For reasons that we will explore, the tribunals have failed to take a holistic view of fairness, preferring instead to focus on procedural fairness and effectively leaving to one side considerations of distributive and interactional justice. This is unsatisfactory if the regulatory objective is greater fairness perceptions because, as we have discussed, employee fairness judgements involve a variable mix of employee assessments about substantive and procedural fairness. The second main point made in this chapter is that it may be possible to draft legislation which instructs the tribunals to focus holistically and more robustly on all aspects of fairness (i.e. procedural, distributive and interactional), but it may not be possible for the tribunals or the parties themselves to effectively translate that instruction into decisions and actions that are likely to lead to a greater level of fairness perceptions.

Further, it is argued that a weakness of the current law of Unfair Dismissal as a means of maximising fairness perceptions goes beyond the challenges associated with substantive and procedural fairness judgements. This is apparent when we recall that the conflict continuum, which predicts that a significant proportion of disciplinary action, including dismissal, sits at the end of the continuum, but is rooted in earlier unresolved perceptions of

unfairness that the employee has internalised or responded to by retaliation and which has led to, for example, a dip in performance or some form of misconduct. The dip in performance or misconduct may have been the direct and immediate cause of the dismissal, but its genesis is far more complex. If we accept this we must recognise that the law of Unfair Dismissal is too focused at the end of the conflict spectrum to have any real chance of minimising conflict and maximising employee judgements that the employer is fair and trustworthy. The law of Unfair Dismissal is framed in a way that turns the employer's attention to the issue of process in particular when they are considering disciplinary sanctions and the possibility of dismissal and not before, but by that stage the attitudes of the parties towards each other have almost certainly deteriorated such that the likelihood of re-establishing mutual trust is limited.

5.1 The law of Unfair Dismissal: substantive fairness and the 'range of reasonable responses' test

The protection against Unfair Dismissal is contained in Part X of the Employment Rights Act 1996 (ERA 1996). Section 94 of that Act states simply that an employee has the right not to be unfairly dismissed by his employer, while section 98 goes on to provide the employment tribunals with a degree of guidance about the factors relevant to determining whether a dismissal is fair or unfair. Specifically, section 98 establishes a framework for the tribunal's decision that defines three steps for the fairness enquiry to follow. First, the employer must show that the reason given for the dismissal is the principal reason for the dismissal. Secondly, the employer must demonstrate that the reason they relied on for dismissal was a substantial reason. The statute sets out examples of what amounts to a substantial reasons which include, for our purposes, capability, qualifications and misconduct, although a substantial reason does not have to be one of those reasons specifically contained in section 98.¹⁷⁴

¹⁷⁴ *RS Components Ltd v Irwin* [1973] ICR 535.

5.1.1 The range of reasonable responses test: a barrier to fairness perceptions

Finally, and perhaps the most contentious of the three steps in the fairness enquiry, is the requirement that the employment tribunal consider whether the dismissal for the established substantial reason, was reasonable or unreasonable in accordance with equity and the substantial merits of the case.¹⁷⁵ In applying this third step it is vital to recognise that the employment tribunals have refrained from the imposition of precise standards of behaviour upon employers. Tribunals have instead chosen to respect the autonomy of managerial disciplinary decisions by recognising a discretion within which the employer can act without detailed supervision. This approach is commonly referred to as the range or band of reasonable responses test which was famously articulated by Browne-Wilkinson J (as he was) in *Iceland Frozen Foods Ltd v Jones*¹⁷⁶:

We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answer to the question posed [(ie whether the decision to dismiss was reasonable or unreasonable)] is as follows: (1) the starting point should always be the words of section [98(4)] themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunals, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

The range of reasonable responses test suggests that there is very little scope for employment tribunals to challenge or find fault with the substantive justification that an employer presents for their decision to dismiss. In short, the tribunals are instructed to consider not whether the dismissal was fair, but to ask whether dismissal was an action that *some* reasonable employers would have taken. A dismissal should only be viewed as unfair if no reasonable employer would have dismissed the employee in the circumstances. As

¹⁷⁵ Employment Rights Act 1996, section 98(4).

¹⁷⁶ [1983] ICR 17 (EAT).

Collins explains, “[i]n effect, the tribunal has to find that the employer acted perversely, arbitrarily, capriciously, or in some other way outside the broad band of discretion left to them”¹⁷⁷ before they will find that the dismissal is unfair.

There are a number of possible explanations for the tribunals’ and Courts’ insistence on this abstentionist approach to the legislation and their reluctance to interfere with management decisions to dismiss. One view is that any other approach would lead to an escalation in the number of unfair dismissal claims such that the cost of maintaining a tribunal system able to cater for such a case load would be prohibitively expensive. However, Collins suggests that underlying the range of reasonable responses test is reluctance on the part of judges brought up in the common law tradition to depart from three perceived virtues of the common law: respect for the autonomy of the private sphere; neutrality between conflicting interests; equality of treatment of the parties.¹⁷⁸

As Collins explains:

The legislation demands an investigation of the propriety of the exercise of managerial discretion, hitherto a largely unregulated sphere of private autonomy. It requires the Courts to favour the interests of employees in job security, thereby abandoning the legitimizing stance of neutrality between capital and labour. Finally, the formal legal equality is shattered, for whilst employees remain free to terminate the employment relation for any reason abruptly, the employer has to follow certain procedures and give certain reasons for dismissals.¹⁷⁹

It may also be the case that tribunals prefer the range of reasonable responses test because they are reluctant to become involved in managerial decisions which are made based on a particular expertise and understanding of the employer’s workplace, the industry in which they work, the personalities involved and other information which the tribunal does not feel best placed to judge. In that situation the tribunal may feel that they are simply not in a position to make a better decision than the employer.

¹⁷⁷ H. Collins, *Nine Proposals for the Reform of the Law of Unfair Dismissal* (London: The Institute of Employment Rights, 2004). The range of reasonable responses test has been endorsed by the Court of Appeal on a number of occasions: *British Leyland UK Ltd v Swift* [1981] IRLR 91; *Post Office v Foley*; *HSBC v Madden* [2000] ICR 1283; *Sainsbury plc v Hitt* [2003] ICR 111.

¹⁷⁸ H. Collins, *Justice in Dismissal* (Oxford: Oxford University Press, 1992) 32.

¹⁷⁹ *Ibid*, 35.

Whatever the reason behind the range of reasonable responses test, its significance in the context of the current discussion concerning fairness perceptions, is that it treads destructively upon what we might consider is the potential of the current Unfair Dismissal legislation to promote fairness at work. As we have explained, employee perceptions that their employers are fair will help to create trust and bonds of loyalty that are likely to motivate employees towards OCB and innovative performance. This was the view adopted by Alan Fox who argued that employees are motivated to work at or near their best in a high trust environment.¹⁸⁰ If employees feel the employer trusts them to do a good job, they will repay that trust by working hard and doing their best for the firm. The employer can go some way to creating a high trust environment by, amongst other things, avoiding circumstances which cause the employee to feel constantly under the threat of dismissal, because any working environment in which the employee feels insecure will only encourage employees to do the minimum required of them and to shirk.¹⁸¹

But as we have discussed that threat of dismissal sits close to the surface of many employment relationships as employers use the threat of disciplinary sanctions as one means of maintaining the authority structure which most employers believe is an essential characteristic of the employment relation. That being the case it is arguable that some form of regulatory control over the employer's power to dismiss will alleviate employee feelings of insecurity and help create an environment in which loyalty and productivity are more likely to flourish. But of course it is not enough that the legal prohibition against Unfair Dismissal simply exist for it to have this positive effect on employee performance. If the law of Unfair Dismissal is to help maximise fairness perceptions and feelings of trust it must affect employer behaviour in relation to dismissal such that, because of the law, the employer acts in manner that employees consider fair. In a similar vein, the law of Unfair Dismissal may also assist in the evolution of a high trust working environment by bolstering

¹⁸⁰ Supra at note 53, chapter 1.

¹⁸¹ A. C. L. Davies, *Perspectives on Labour Law* (Cambridge: Cambridge University Press; 2004) 158. .

the credibility of employer promises of future benefits or rewards and reducing the likelihood of certain unfair and trust destroying opportunistic behaviour on the part of the employer. For example, an employer may promise an employee a bonus if they manage to reach a certain sales target. The employee is motivated to work to achieve that target because he feels the target is fair and the bonus worthwhile, but the employer can make a short-term cost saving by dismissing the worker before he becomes entitled to the bonus.¹⁸² Such action by the employer will be potentially devastating to any trust that the employer has built up amongst its employees. A law against Unfair Dismissal can avoid this outcome, and help convince workers that when their employer promises them something, it will not easily be able to avoid the short term costs of that promise by using its power of dismissal, because should it attempt to renege on the promise made, it will become subject to legal sanctions.

But any optimism about the ability of the law of Unfair Dismissal to maximise fairness perceptions by encouraging fair behaviour in relation to disciplinary action, and adding credibility to certain employer promises, is heavily diluted if not washed away by the range of reasonable responses test. By sanctioning only the worst kinds of dismissal it is inevitable that a large proportion of dismissals determined to be within the range of reasonable responses test are nevertheless viewed by the reasonable employee as being harsh and unfair. For some employees this sends a negative message that the law is prepared to permit unfair treatment. This does little to bolster the credibility of employer promises, promote trust and reduce the likelihood of opportunistic employer behaviour. Furthermore, the range of reasonable responses test does not encourage fair behaviour by employers, rather it discourages the most arbitrary and capricious disciplinary practices which will at best have a neutral impact on fairness perceptions.

The range of reasonable responses test also reduces or eliminates the ability of the law to minimise the likelihood of an employer dismissing an employee

¹⁸² Note, "Employer opportunism and the need for a just cause standard" (1989) 103 *Harvard Law Review* 510.

who had hitherto been productive and committed to OCB for an isolated incident of, for example, misconduct. Such a dismissal may have a negative impact on business competitiveness. To start with, the employer is likely to have invested time and resources in training the dismissed employee that will be lost when the employee departs, and duplicated upon the arrival of their replacement. But more than that, an effective and competitive business that has managed to motivate its employees (including the dismissed employee) to work innovatively and hard, will lose the benefits that flow from such employee performance in terms of greater productivity and profitability and, what is more, they may lose them to a competitor. That commitment to OCB may not be duplicated in the performance of the replacement worker, or if it is, it is unlikely to re-occur immediately. At best it will take time for the new employee to develop the necessary commitment to the employer's business that was exhibited by the departed employee. That commitment may evolve, but only once the new employee has had the opportunity to make certain judgements about their treatment by the employer and other factors.

In addition, the range of reasonable responses test reduces the opportunity for the law of Unfair Dismissal to set in motion a chain of fairness perceptions, of the kind discussed in the previous chapter, which can have a positive impact on employee performance. For example, the test does not include any assessment of the proportionality of the dismissal. Tribunals are directed to refrain from precise calibrations of the proportionality of the punishment of the employee's disciplinary offence. The reason for this is of course that such an assessment would involve the tribunal substituting their own judgement for that of the employer. But a test of proportionality may not only reduce the number of harsh dismissals, it may force employers to reassess the worth of dismissals over other forms of remedial action, which may in turn have a positive bearing on fairness perceptions. Consider for instance an employee who has committed some isolated incident of misconduct, such as failing to turn up to a client meeting, with the result that the client complains to the employer's Managing Director and the employer loses one order of work. The employee in question has a long and successful service record with the employer, he is one of the employer's top sales people and he has an

unblemished disciplinary record. Furthermore, the impact on the employer's business is not significant; while the client complains, it does not withdraw its business altogether. The employee is upset and disappointed with themselves and concerned that they may lose their job and the employer is angry and minded to dismiss the employee. An application of the range of reasonable responses test to this set of facts may lead the employer to conclude that dismissal in these circumstances is fair and warranted and a tribunal may support that assessment. But if the employer is required to step back and consider whether dismissal is a proportionate response to the employee's offence, taking into account the employee's service record and sales success, and the damage done to the employer's business by the employee's actions, the employer may be forced to conclude that dismissal is not the right option. The willingness of the employer in this example to refrain from dismissal may have a positive impact on the employee. He may feel that the employer has been fair with him in circumstances where even the employee himself may have considered dismissal to be justified or at least a real possibility. That being so the employee may respond to their reprieve by increasing their level of effort and productivity. In addition the employer's actions may be favourably looked upon by the employee's colleagues and the employer has in the end managed to retain a productive and profitable employee. The equation in this example is simple: had the employer chosen to dismiss this employee they would have gained nothing, but they would have lost a valuable human resource.

The range of reasonable responses test reduces the likelihood of fairness perceptions in relation to dismissals or possible dismissals further still given that it permits employers to dismiss employees whom they merely *suspect* are guilty of some form of misconduct, even though the evidence does not demonstrate guilt on the balance of probabilities, let alone any higher standard, such as beyond reasonable doubt. Provided the employer has carried out some form of investigation, the tribunal is unlikely to overturn the employer's decision that the suspicion of misconduct is enough to warrant dismissal, because doing so would amount to the tribunal substituting its

judgement for that of the employer. A well known case will suffice to illustrate this approach.

In *HSBC v Madden*¹⁸³ the employee, Mr Madden, had been employed by the Bank from 1986 to the time of his dismissal in 1997. During that time up until the circumstances that led to his dismissal he was regarded by the employer as a good and trustworthy employee. Prior to Mr Madden's dismissal three of the employer's customer's had their debit cards stolen after they had been dispatched for collection by them from their respective branches. The cards were used to obtain goods by deception. Around the same time bank computer records showed that someone had made unauthorised inquiries through the bank's internal computer system as to the status of each of the three customers' accounts to which the debit cards related. Mr Madden happened to be in the relevant branches when the cards might have been stolen and he was the only member of the employer's staff who was at the respective branches when all three inquiries were made using the employer's internal computer system. Based on this set of circumstances, and despite Mr Madden's denials that he had anything to do with the theft of the cards and the refusal of the police to press charges against him, he was summarily dismissed for gross misconduct. The tribunal found that the dismissal was unfair based in essence on the inadequacy of the evidence on which the decision to dismiss was based, including: that there was no clear culprit for the theft of the cards; there was no firm evidence as to when the cards were taken; there was no direct evidence that Mr Madden had accessed the computer system; there was no consideration of the personal or financial affairs of other members of staff; that Mr Madden was in a good financial position and why would he jeopardise his career for such a paltry sum; and so on. The Court of Appeal rejected the tribunal's finding and approach criticising it for substituting its judgement of the evidence for that of the employer. The result was that the dismissal was judged to be fair because, in effect, the bank had not found anyone other than Mr Madden who had the opportunity to commit the offence.

¹⁸³ [2000] ICR 1283 (CA).

But such an approach can do little to promote fairness perceptions amongst employees whose feelings of insecurity and therefore reluctance to commit to OCB and other ‘beyond contract’ performance is only likely to be reinforced by such employer action. The aim of the employer seeking to maximise fairness perceptions must be to get right judgements about whether misconduct occurred, before deciding to dismiss, and the only way to do that is to base that decision on solid evidential foundations. A willingness to dismiss on sketchy or purely circumstantial evidence, will do nothing for the development of trust and loyalty amongst employees, and who is likely to commit to OCB for an employer who might terminate your employment on the basis of a suspicion? In a sense, the law of Unfair Dismissal may be adding to a feeling of mistrust and unfairness amongst employees by building up their expectations of protection under the law only to have them dashed when they see those protections so easily avoided by the employer. In those circumstances employees are likely to feel even less inclined to trust the employer and to work hard for the good of the business, and in fact this scenario may be considered as a force perpetuating the low trust relationship that Fox identified as characteristic of the employment relation.

5.1.2 The employment tribunals: judging substantive fairness and reasonableness

One factor that we have not yet discussed, in relation to the range of reasonableness responses test, is the how the tribunals set the boundaries of what is and what is not reasonable behaviour. Collins explains that this process is at the same time a standard setting and standard reflecting exercise.¹⁸⁴

The members of the Industrial Tribunal draw upon their experience of the standards of employers, but then interpret that experience to set the boundary of the range of reasonable responses. That boundary line draws upon conventional practices, but represents an interpretation of those practices, viewing them in the light which the members of the tribunal regard as most fair and reasonable. The approach is neither wholly conventional nor normative, neither merely standard-reflecting nor standard-imposing. The tribunal adopts an interpretative approach itself, taking its own view of industrial practice viewed in its best light.

¹⁸⁴ Supra at note 178, 78.

At first glance this notion of “good industrial practice” appears to provide employees with a good deal of protection against arbitrary and unfair dismissals. But this initial optimism is tempered when one takes into account two factors. First, the conventions to which the tribunals turn in their search for best practice have evolved out of negotiations between employers and employees and, having done so, they reflect the relative bargaining power of the parties. If, as is commonly understood to be the case, employees lack bargaining power such that the employer is able to insist on, for example, a harsh disciplinary policy, then the tribunal’s interpretation of those conventions is likely to bolster and perpetuate standards that do very little to maximise fairness perceptions, but that are instead viewed by employees, either in form or implementation or both, as unfair and unjust.¹⁸⁵ Secondly, as Collins explains, “it must be recalled that the standard of ‘good industrial practice’ sets only the boundaries to reasonable behaviour, so that employers can operate a severe disciplinary policy provided they do not step outside the spectrum of conventions recognised by the standard of ‘good industrial relations practice’”.¹⁸⁶

The first of these two points is particularly relevant in the current context, because a law that allows an employer to promulgate disciplinary rules that are unfair from the employee’s perspective is missing an important opportunity to promote fairness at work. If the law required the tribunals to question the merits and justice of disciplinary rules, it would cause the employer to consider those rules from not just their perspective, but from a wider perspective, including the views of their workforce as to what is a fair and just disciplinary policy. Only by doing that might employers feel comfortable that those rules are not going to be subject to legal review and criticism. Such an approach by the tribunals would promote the kind of reflexive self regulation that we have discussed is essential for the maximisation of fairness perceptions at work. But the reality is something different. Because of their

¹⁸⁵ H. Collins, K. Ewing and A. McColgan, *Labour Law: Text and Materials* (Oxford; Portland: Hart Publishing, 2001), 519.

¹⁸⁶ *Ibid.*

superior bargaining power many employers unilaterally produce disciplinary rules that are presented to each new employee on a non-negotiable basis. The document therefore represents the employer's view of the appropriate disciplinary policy and provided the employer thereafter follows those rules, there is a reduced likelihood that the tribunal will find that a resulting dismissal is unfair.¹⁸⁷

5.1.3 Substantive fairness: is it enough to remove the 'range' from the reasonableness test?

To this point it has been suggested that while a law which prohibits unfair dismissals might promote fairness perceptions at work and grow trust, the adoption by the tribunals and the Courts of the range of reasonable responses test, at least as it applies to the employer's substantive reasons for dismissal, has the effect of stymieing that potential. It does so by permitting harsh dismissals that employees view as unfair, by allowing employers to disregard whether the sanction of dismissal is a proportionate response to the employee's offence, by allowing dismissals based on suspicion and circumstantial evidence, by refusing to question the fairness of disciplinary rules unilaterally promulgated by the employer, by thereby limiting the role the law might play in bolstering the credibility of employer promises to their staff, and generally by limiting the role the law might play in helping employers to appear fair in relation to disciplinary matters. All this said it would be naïve to think that by doing away with the range of reasonable responses test we will instantly render the law of Unfair Dismissal an effective regulatory instrument in the goal of maximising fairness perceptions at work.

There is much more to be done that we will discuss below, but at this stage we continue to focus on the reasonableness standard that is so central to the law. Even if we do away with the range of reasonable responses test we are still left under the current legislation with the need to determine the standards of

¹⁸⁷ See, for example, *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 (EAT), where there is no evaluation of the merits of a disciplinary rule, but rather an apparent assumption in the part of the tribunal that the rule must state the appropriate substantive standard for disciplinary matters.

reasonable behaviour that apply in any instance of alleged unfair dismissal. The obvious question for the tribunals is by whose standard do we judge reasonableness: the employer's, the employee's, or a neutral or reasonable person's? These three standards may often agree, but not necessarily and, in particular, there are likely to be clear differences between the views of the employer and its employees in a number of situations.

One could suggest that an employer's inclination would be to put immediate business concerns ahead of more abstract notions of social justice and welfare that might appeal more to employees, and that in general, employers take a stronger approach to disciplinary matters than employees. As such these distinctions make a critical difference to the outcome of a dismissal case and therefore to the potential impact the law can have on the behaviour of the parties prior to that outcome and the perceptions of fairness or unfairness that might flow from that. In other words, if the approach of the Courts and tribunals is to base standards of reasonableness on what a reasonable employer would do, which is, as we have seen, the approach taken by the tribunals and Courts in Britain, it is highly unlikely, unless the standards of the employee match that of the employer in a given set of circumstances, that the law will encourage employer behaviour in relation to dismissal that employees will consider to be fair. At the same time, if the standards of reasonable behaviour are set by reference to the views of the reasonable employee, the employer is likely to feel aggrieved and resentful and inclined to respond by defensive behaviour aimed not at maximising fairness perceptions amongst its workforce, but at avoiding future claims. Such action may include reducing employee responsibility and freedom of action and an increase in close management; action which is anathema to the overriding objective of partnership and fairness at work which, it has been argued, can increase the competitiveness of British businesses through innovation and OCB.

This, therefore, suggests that some form of neutral standard is preferable. Early decisions from the Courts in New Zealand suggested a preference in that country for adopting an 'objective reasonable person' approach to the issue of

whether, under New Zealand's law against Unjustifiable Dismissal¹⁸⁸, a dismissal was reasonable. In *Wellington Road Transport Union v Fletcher Construction Co* the specialist labour Court stated that each case must be treated on its individual merits, but in doing so the Courts and tribunals must take account of:

... the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated and implied); the terms of any other relevant agreements, and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the moral and social attitudes of the community.¹⁸⁹

In *Telecom South Ltd v Post Office Union*, Richardson J in the New Zealand Court of Appeal explained that the correct approach to determining the lawfulness or otherwise of a dismissal is as follows:

A dismissal is unjustifiable if it is not capable of being shown to be just in all the circumstances. Justification is directed at considerations of moral justice. Whether a dismissal can be said to be justifiable can only be determined by considering and balancing the interests of the worker and the employer. It is whether what was done and how it was done, including whether recompense was provided, is just and reasonable in all the circumstances, including of course, the reason for the dismissal.¹⁹⁰

Despite this earlier preference for a neutral approach to assessing reasonableness standards, the New Zealand Courts subsequently, albeit as we shall see temporarily, moved to an approach in keeping with the practice in this country of assessing whether dismissal was action which a reasonable and fair employer could have taken in the circumstances.¹⁹¹ An approach to assessing reasonableness and fairness that accounts for the interests of both parties is more likely to lead to outcomes that are objectively fair and capable of promoting fairness perceptions. Such an approach will arguably require employers to take disciplinary action that is proportionate to the offence, to consider employee interests when it comes to preparing disciplinary rules, to require more than suspicion before deciding to dismiss etc. At the same time a neutral approach recognises that employers have a legitimate interest in being

¹⁸⁸ Section 103, Employment Relations Act 2000 (NZ).

¹⁸⁹ [1983] ACJ 653, 666.

¹⁹⁰ [1992] 1 NZLR 275, 286-7.

¹⁹¹ *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. The Courts in New Zealand were forced away from the range of reasonableness test in 2004 by the enactment of section 103A of the Employment Relations Act 2000. See below for further comment.

able to dismiss employees whose continued presence is detrimental to the interests of their business. The reasons why the tribunals¹⁹² and Courts in New Zealand and Britain prefer to consider what is reasonable from the employer's perspective are probably a mixture of those referred to earlier (common law traditions, not feeling able to reach a better decision than the employer, concern to limit the number of tribunal applications etc)¹⁹³ and, in Britain at least, the fact that section 98 of the Employment Rights Act 1996, and in particular section 98(4), arguably directs the tribunals towards such an approach.¹⁹⁴

But this optimism about the merits of a neutral reasonableness standard in achieving the goal of maximising fairness perceptions at work and growing trust, must be questioned when we considered, yet again, what fairness in this context actually is. For fairness to impact upon employee performance it is not enough that the employer considers their actions to be fair, and nor is it enough that an employment tribunal considers the employer's actions to be fair. What matters is that employees consider the employer's behaviour to be fair and therein rests one of the key shortcomings of a law against Unfair Dismissal, range of reasonable responses test and employer standards or not, as a mechanism for maximising fairness perceptions.

The potential for the law of Unfair Dismissal to impact upon perceptions of fairness, at least in-so-far as those perceptions relate to the reasons for

¹⁹² Under the Employment Relations Act 2000 (NZ), the Employment Tribunal has been replaced by the Employment Relations Authority.

¹⁹³ See also H. Forrest, "Political Values in Individual Employment Law" (1994) 43 *Modern Law Review* 361.

¹⁹⁴ Section 98(4) provides that: "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) 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...

Arguably the section provides scope for considering the interests of the employee. First, the section does not insist that the fairness of the employer's actions and reasons for the dismissal be assessed from the perspective of the employer and the list of factors to be taken into account (i.e. the size and administrative resources of the employer's undertaking) is by no means exhaustive. Secondly, if the employee's interests are not to be taken into account in relation to section 98(4)(a), then there is scope for them to be considered under section 98(4)(b) which states that: "(b) [whether the dismissal is fair or unfair] shall be determined in accordance with equity and the substantial merits of the case".

dismissal, depends upon its ability to mould employer behaviour in a way that employees consider to be fair. But its ability to do this is limited by the fact that any such law cannot be overly, if at all, prescriptive of the circumstances that will merit dismissal and those that will not. What is or is not a fair dismissal will depend at best on a detailed examination of the facts set against the surrounding circumstances, interests and personalities of the parties and other individuals involved. That being so, any law against Unfair Dismissal must be drafted in broad terms, and that is certainly the case in Britain, New Zealand, Canada, Australia and elsewhere. But this necessary lack of specificity about what constitutes good grounds to dismiss, means that the capacity of the law to effect employer behaviour, and employee perceptions of that behaviour, will be subject to the employer's interpretation of what it means to be fair, and that interpretation will be loaded with the employer's views about the best way to run their business.

It is very unlikely that the employer's interpretation of what is fair when it comes to disciplinary action, and an employee's view of the requirements of fairness, will coincide. For example, an employer may feel that they are justified in dismissing an employee who has been ill for a long period of time because the employer needs that position filled and does not believe they should bear responsibility for an illness that has nothing to do with them. An employee, on the other hand, when determining what is a fair response by the employer will focus on, for example, the importance to him of retaining his position, including: maintaining the social bonds he has developed at work; the need to provide financially for him and his family; the challenges of finding a new position; the commitment that he has shown prior to falling ill. Even if the message is clear from the statute, and its judicial interpretation, that the employee's interests should be considered before dismissal, the employer is likely to skew any balancing of interests in favour of their perceived interests and might, at the same time, misinterpret what the employee's interests actually are. The result will almost certainly be that the employer takes action or behaves in such a way that the employer believes is lawful and fair, but that the employee considers is unlawful and unfair. All this is not to say that there will not be a number of enlightened employers who

will strive to act in a manner perceived to be fair because they understand the value to the business of doing so, but those efforts are unlikely to be driven by the standards of reasonableness contained in the statute.

A long term optimistic view is that the more the tribunals and the Courts are required to assess and determine Unfair Dismissal claims, the more adept they will become at structuring guidance for employers on what it means to be fair and reasonable in a dismissal context. Provided employers are aware of and consider the guidance so as to avoid the risk of a successful Unfair Dismissal claim, they are not likely over time to dismiss unfairly, and this improved behaviour will positively impact on employee fairness perceptions. This may be an overly optimistic view for a number of reasons. First, the protection against Unfair Dismissal has been interpreted and applied for not far short of half a century and there is no clear evidence that employers are becoming better or “fairer” when assessing the subjective justification for dismissal.

Secondly, and this point has already been suggested in the preceding discussion, there is an infinite number of potential scenarios involving workplace discipline or dismissal, and for that reason it is not possible for the tribunals and Courts to give definitive guidance relevant to dealing with every possible scenario. Whilst it is true that there are many dismissals which are similar on their face, the deeper complexities that accompany most Unfair Dismissal claims means that no two instances are identical. The endless differences between dismissals are caused by a variety of factors including workplace culture, personalities, the peculiarities of the industry, the commercial position of the business and a host of other factors that cannot easily be reconciled to create a framework for employer behaviour that has the potential to ensure that a dismissal, if undertaken in accordance with the framework, is guaranteed to be fair.

Thirdly, this optimistic assessment also depends on the tribunals forming a view of fairness in each given instance of dismissal that is aligned with the employee’s view of fairness. Unless these two views are aligned, judicial guidance on substantive justification for dismissal cannot hope to promote

increased employee perceptions of fairness. But just as it is unlikely that the employer will form a view of what is fair that accords with the employee's perception of fairness, so too it is unlikely that the members of the employment tribunal will form a view that aligns precisely with the employee's perception of what is fair. This is inevitable given that the members of the tribunal themselves come to the task of assessing fairness with their own personal understanding of what is fair in any given instance of dismissal, and with limited insight to the particularities of each employer's workplace, and the personalities and personal histories involved. In addition and as already discussed, historically the tribunals have set the boundaries of what is fair with reference to the reasonable employer's notion of fairness which, again, is unlikely to be aligned with reasonable employee's understanding of the concept.

5.1.4 The tribunals' approach to assessing substantive fairness – generic uncertainty

In reality the tribunals and the Courts have given very little clear guidance on the meaning of substantive fairness and the reasons for this are explained in more detail elsewhere.¹⁹⁵ In the meantime it is instructive to review the value or not of instances where judicial guidance has been offered on what it means to be fair in the context of a decision to dismiss. In summary, judicial guidance invariably reflects the obstacles to effective direction that are discussed above; the guidance is broad and generic and at times it adds a further skin of uncertainty to the already uncertain statutory language. In this way it is possible to view judicial instruction on the meaning of substantive fairness as creating a further level of description beyond the statutory language which itself is subject to interpretation and uncertainty. The New Zealand experience presents a good example.

In 2004 Parliament in New Zealand introduced section 103A of the Employment Relations Act 2000. The Employment Relations Act includes

¹⁹⁵ See discussion in chapter 8.

provisions that protect employees against Unjustifiable Dismissal – the statutory equivalent in New Zealand of the Unfair Dismissal protections adopted in the United Kingdom. Prior to the enactment of section 103A the question of whether or not a dismissal was justified was determined by judicial interpretation of the statute alone¹⁹⁶. That interpretation, best demonstrated by the New Zealand Court of Appeal's decision in *W & H Newspapers Ltd v Oram* [2000] ERNZ 448, reflected the range of reasonable responses test and required the New Zealand Employment Relations Authority to inquire whether or not the act of dismissal was what a fair and reasonable employer *could* have done given the relevant surrounding circumstances. Section 103A altered this test. This new statutory provisions required the Authority to apply the following test when determining the question of justification:

...the question of whether a dismissal or action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer **would** have done in all the circumstances at the time the dismissal or action occurred [emphasis added].

The test in section 103A was, on the face of it, a fundamental shift from the range of reasonable responses test. The new test suggested that in any given instance of dismissal there is a single standard of fairness to be applied – in the circumstances dismissal is justified or it is not. This binary decision required the Authority to assess the process that the employer followed leading up to the dismissal and the substantive reason for the decision to dismiss.

The impact of section 103A was considered in detail by the New Zealand Employment Court in *White v Auckland District Health Board*¹⁹⁷. In *White* the employee was a senior physician, having been a registered medical practitioner since 1974 and employed by the employer in this case since 1977. He was dismissed for alleged inappropriate use of the employer's internet and email facilities. In delivering his decision on Dr White's claim that he had been unjustifiably dismissed, the Chief Judge of the Employment Court

¹⁹⁶ Prior to the enactment of section 103A of the Employment Relations Act 2000, the Act provided no guidance on the meaning of unjustified dismissal. Section 103(1)(a) stated simply that an employee may pursue a claim or a grievance against their employer where the employee contends that they have been unjustifiably dismissed.

¹⁹⁷ [2007] ERNZ 66.

proceeded to set out in some detail the Court's view of how section 103A should be interpreted and applied.¹⁹⁸ That direction was:

The Employment Relations Authority and the Court are required to consider separately what the employer did and how the employer did it, to determine what a fair and reasonable employer would have done and how in these circumstances.

Although an employer may continue to have recourse to a range of legitimate options in determining whether the employer will dismiss an employee or disadvantage an employee in employment, it is for the Employment Relations Authority or the Court to evaluate that action against the objective standard of what a fair and reasonable employer would have done in the circumstances.

This test does not, however, give the Authority or the Court unbridled licence to substitute their views for that of the employer.

The Authority or the Court may, on an objective analysis, reach a different conclusion from that of the employer.

Such scrutiny is not to be undertaken in a mechanical or pedantic way and in many instances there is no clear distinction in practice between what an employer does and how the employer does it.

The concept of "unjustifiability" is not confined to matters of legal justification but is, rather, a broader concept of whether what has happened was in accordance with justice and fairness.

With respect to the Chief Judge, this guidance could do little to meaningfully direct employers on whether or not dismissal in any given instance was fair. To the contrary and as suggested above, the guidance tended only to layer uncertainty on the already uncertain meaning of justification as defined by section 103A. An analysis of some of the direction given by the Chief Judge helps to make the point. First, section 103A appeared on a plain reading to discard the range of reasonable responses test by requiring that any person applying the test for justification consider what the fair and reasonable employer *would* (rather than *could*) have done in the circumstances. But the Employment Court in *White* awkwardly extrapolates the wording of the statute in a manner which might serve to confuse employers. On the one hand the Court says that the employer may continue to have recourse to a range of what the Court refers to as "*legitimate*" options when determining whether to dismiss, while on the other hand the Court says that it will be for it to determine whether the action actually taken is what a fair and reasonable employer would have done in the circumstances. In the next breath the Court

¹⁹⁸ The Court's guidance adopted and expanded on direction given in an earlier decision of the Employment Court on section 103A, namely *Air NZ Ltd v Hudson* (2006) 3 NZELR 155.

says that it does not have “*unbridled license*” to substitute its views for those of the employer, but that it “*may*” reach a different conclusion to the employer.

What do these statements mean in practical terms? One interpretation of the dictum is that it is very unclear: the employer has a number of legitimate options to choose from including, presumably, dismissal, but if it chooses dismissal the Court has the right to disagree with that choice, but only up to a point, although exactly where that point is cannot be determined. It might be more explicable to simply recite the provisions of the section? Secondly, what is one to make of the statement that the concept of “*unjustifiability*” is not confined to matters of legal justification but is, rather, a broader concept of whether what has happened “*was in accordance with justice and fairness*”? Here the Court has added the concept of justice to the test for justification. By doing so the Court runs the risk of unnecessarily introducing a further loaded term to the existing notions of fairness and reasonableness that expressly underpin the test in section 103A. It may be in the context of section 103A that the term “*justice*” adds nothing to the concepts of fairness and reasonableness, but if that is correct, what is the point of introducing the concept of justice in the judicial guidance? If on the other hand the concept of justice is intended to add something to the statutory language, what precisely is that addition and what assistance is it to the employer who is trying to apply the Court’s guidance to a real life disciplinary situation? Thirdly, the Court says that justification must be determined from the point of view of the neutral observer. But this appears at odds with a plain reading of section 103A which appears to invite the inquiry from the perspective of the fair and reasonable employer.

For the sake of completeness it is worth noting that the law in New Zealand has been altered yet again. In particular the test for justification was amended by the Employment Relations Amendment Act 2010 to now read:

“(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

“(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

“(3) In applying the test in subsection (2), the Authority or the Court must consider—

“(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

“(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

“(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

“(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

“(4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it thinks appropriate.

“(5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

“(a) minor; and

“(b) did not result in the employee being treated unfairly.”

This new section was largely the result of intensive lobbying by the business community in New Zealand, which complained that the previous test for justification placed too much of a burden on employers and was too difficult to apply in practice. The first thing to note about the new section is that it effectively reintroduces a range of reasonable responses test by providing that the Authority and the Court must consider whether the actions of the employer were aligned with what a reasonable employer “*could*” have done in the circumstances. The further point to make about this provision in the context of the current discussion is that it demonstrates the difficulty of effectively developing precise statutory standards of fairness, that apply to every employment relationship and every instance of alleged unfair and unreasonable treatment. The Employment Court is yet to interpret the new legislation, but on its face the new provisions create an increased scope for argument about the meaning of justification, because they introduce terms which purport to add clarity to the meaning of justification but which are, each of them, at best subject to interpretation, and at worst confusing. In short, the amended section 103A tends to lump uncertainty of application on a statutory test the meaning of which was, admittedly, already unclear. For example, subsection 3(a) requires that before reaching a conclusion on justification, the Employment Relations Authority must consider whether the employer took

the time to “investigate the allegations” made against the employee. This requirement makes very little sense in the context of a dismissal for redundancy and similar concerns can be raised in relation to subsection 3(b). In fact, the entire subsection 3 appears to be focused on action taken in response to alleged misconduct. It refers to investigations and giving the employee a chance to *respond* to allegations. Where, for example, the employer’s action relates to concerns about performance, fairness would typically dictate a requirement to provide an opportunity to improve over time. This approach to dealing with poor performance would not typically be couched in terms of an investigation and allegations which must be responded to. But the statute requires that the Authority must take these matters into account when considering all instances of justification.

5.2 A preliminary conclusion – the law of Unfair Dismissal is not suitable to achieve fairness and OCB

The preceding discussion about the law of Unfair Dismissal, and specifically substantive fairness, leads inexorably to the following preliminary conclusion: the current law is not suitable if the policy objective is greater OCB and maximising fairness perceptions amongst employees. The current law relies on concepts of fairness and reasonableness that are necessarily broad and lacking definition to account for the infinite variety of circumstances that might surround a decision to dismiss. But the vagueness of these core concepts means that the parties charged with interpreting and applying the concepts to specific instances of disciplinary action (employers, employees and the tribunals) will inevitably diverge in their interpretations of what it means to be substantively fair, because each of them will bring their own interests and prejudices to the exercise. That being so, the law of Unfair Dismissal can do little to aid the goal of maximising employee perceptions that their employer is fair. The Courts and the employment tribunals cannot be, as we have seen, reasonably expected to adjust this negative assessment by putting flesh on the bones of the fairness and reasonableness concepts; they cannot be expected to provide employers in particular with clear direction that if followed will guarantee disciplinary outcomes that have every chance of

being perceived by employees as fair. Where the Courts have attempted to provide direction that direction itself tends to be at best vague and at worst confusing, which in turn adds to the complexity of the interpretation exercise. In other words, the argument can be made that judicial interpretations of substantive fairness which add to the complexity of the interpretation exercise, may increase the likelihood that employers will dismiss employees for reasons that the employees perceive as being unfair.

5.3 Procedural fairness and unfair dismissal – the tribunals’ “comfort zone”

While the tribunals and Courts have demonstrated a clear reluctance to supervise disciplinary dismissals closely, particularly when it comes to questioning the employer’s substantive reasons for dismissal, they have been relatively rigorous in asserting that, before they will find a dismissal was fair, they must be convinced that the employer followed a fair procedure. The necessary procedural steps have not been formulated precisely by the Courts and they have always been subject to the overriding question of reasonableness, but they normally include the following: a clear explanation to the employee of the alleged offence, an opportunity to respond to that allegation or to improve performance, and a right to have that response or attempt to improve considered before a decision to dismiss is taken.¹⁹⁹ The willingness of the tribunals to require certain procedural standards in relation to dismissal, and their reluctance to second guess the employer’s reasons for dismissal, has meant that a claim of procedural unfairness is by far the most likely ground for a successful application to the tribunal.²⁰⁰ The willingness of tribunals and judges to impose procedural standards may have several explanations. As Collins explains²⁰¹:

Procedural requirements may be perceived by the Courts as posing a lesser degree of interference with managerial discretion than substantive standards. A fair procedure can be presented as a necessary ingredient of any rational personnel policy, because it ensures both

¹⁹⁹ See *Polkey v A. E. Dayton Services Ltd* [1988] ICR 142 (HL). Court

²⁰⁰ See J. Earnshaw, J. Goodman, R. Harrison and M. Marchington, *Industrial Tribunals, Workplace Disciplinary Procedures and Employee Practice* (London: DTI, 1998)..

²⁰¹ Collins, *Ewing etc* 527.

that dismissals occur only when dismissal lies in the employer's economic interest, and that potential damage to co-operation from the remaining workforce owing to resentment against harsh discipline is minimised. Another explanation may simply be that in addressing questions of procedural fairness the Courts are dealing with familiar principles of 'natural justice' or 'due process', which can be applied by analogy to public law standards.

A further possible explanation relates to the wording of section 98(4)(a) which requires the tribunal, when determining the issue of fairness, to consider whether the employer "acted reasonably". Deakin and Morris have suggested that this emphasis on the employer's conduct means that the substantive justice of the dispute is, by and large, a secondary consideration.²⁰²

5.3.1 The potential impact of procedure fairness on fairness perceptions

But whatever the reason for the tribunal's willingness to impose standards of procedural fairness, the fact that they do is, on the face of it, a practice that might play a positive role in maximising fairness perceptions at work. In an earlier chapter we discussed the significance of procedural fairness as a factor likely to impact upon employee behaviour including OCB. An employer whose disciplinary processes are considered to be unfair by its workforce may, as a result, engender amongst employees negative perceptions of the employer's organisation as a whole which may in turn lead to counterproductive employee behaviour that will hurt the organisation.²⁰³ More specifically a fair disciplinary process is likely to have the following effects. The person who is subject to the disciplinary action is unlikely to feel fairly treated if they are dismissed irrespective of whether the dismissal procedure was objectively fair, but, that said, the chances of a dismissed employee feeling that the employer acted fairly by dismissing them are certainly increased if the decision was reached following what most fair minded people would consider was a fair process.

²⁰² S. Deakin and G. S. Morris, *Labour Law 2nd ed* (London: Butterworths, 1998) 482. In support of this argument the authors cite Viscount Dilhorne in *W Devis & Sons Ltd v Atkins* [1977] IRLR 314 at 317 that section 98(4) directs the tribunal to "focus on the conduct of the employer and not on whether the employee in fact suffered any injustice".

²⁰³ See discussion in Chapter 3.

But does it matter that an employee who no longer works for the employer perceives their dismissal to be unfair? Such an outcome may cause the dismissed employee to feel anger and resentment that will encourage him to bring a claim of Unfair Dismissal that, had they perceived their dismissal to be fair, they would not have been inclined to bring. The fact is that an Unfair Dismissal claim has the potential to impact negatively on the employer by forcing it to expend sometimes significant sums on defending the claim, and by forcing it to involve other members of staff in the unpleasant process of preparing for, and participating in, an adversarial tribunal process that may negatively impact on staff morale. The perception of unfairness by the dismissed employee may also cause him to speak disparagingly about the employer to existing and prospective employees and customers, or other business associates, in a manner that damages the employer's reputation amongst those individuals or organisations. Of course the dismissed employee may be inclined to criticise the employer regardless of whether in truth they consider their dismissal was fair, but in those circumstances an employer is better placed to defend their reputation, and minimise any reputational damage, if they are able to point out that the decision to dismiss was based on the outcome of an objectively fair process. In other words, the damage to the employer's reputation amongst its remaining employees and others caused by the dismissed employee's statements regarding his dismissal will be minimised, or avoided, if those employees and others perceive that the dismissal was fair. The same assessment can be made in relation to potential reputational damage that is based on perceptions of the dismissal that are unrelated to the statements of the dismissed employee, but are formed by passive observance and interpretation of the dismissal and the processes leading to it.

The fairness of the process and its impact on the disciplined worker is also relevant in circumstances where the outcome of the process is not dismissal but some lesser sanction, such as a warning or demotion. Just because the worker was not dismissed that does not make him immune to a sense that his treatment was nonetheless unfair. If he harbours those feelings he is in a position, as an existing employee, to act upon them in a manner that is

damaging to the employer. Indeed this sense of unfairness may eventuate where the employee has not been sanctioned at all but has been subject to a disciplinary process that he feels he should never have been subjected to. Perceived procedural fairness will help alleviate these feelings and increase the ability of the parties to get on with their relationship in a manner that is productive.

Furthermore, it may be the case that dismissals following a fair procedure do more than merely avoid damage to the employer's reputation; they may have the effect of enhancing the commitment of the employer's remaining employees to the employer's organisation and thereby increase levels of productivity. As Konovsky and Pugh have explained: "the use of procedurally fair ... practices affects high order issues such as employees' commitment to a system and trust in its authorities because the use of fair procedures demonstrates an authority's respect for the rights and dignity of individual employees. This demonstrated respect indicates that an authority is devoted to the principles of procedurally fair treatment, thus resulting in the employees' trust in the long term fairness of the relationship. Fair procedures may have symbolic meaning insofar as individuals are treated as ends rather than means".²⁰⁴ Employees who perceived that they will not be subject to the ultimate disciplinary sanction, without first being given the opportunity to participate in a fair process, are more likely to feel a greater sense of job security and trust in their employer, and they are more likely, therefore, according to Fox²⁰⁵, to function at a higher level and be more productive than those who do not feel that way. It is also worth making the point that the more an employee feels a sense of job security and commitment to their employer based on their perception that the employer uses fair processes in relation to disciplinary matters, including, most importantly, dismissal, the less likely the employee will be enticed away to work for another employer. We have already discussed the importance to the employer's organisation of retaining productive and good quality staff, and that is more likely if those staff feel a

²⁰⁴ A. Konovsky and S. D. Pugh, 'Citizenship behaviour and social exchange' (1994) 37 *Academy of Management Journal* 656, 658.

²⁰⁵ Supra at note 53.

sense of commitment towards their employer. The employer's staff may assess that remaining with an employer who is overtly committed to fairness is likely to be in their long term interests, whereas moving to another employer who may be prepared to pay them more on arrival, but who they know little about, may not be in the employees' best interests. In other words the pragmatic employee places a premium on their current employer's fairness that they are not in a hurry to relinquish.

In a similar vein, following a genuinely fair process that involves an investigation, meeting with the employee, giving the employee an opportunity to put their case and considering the employee's statements, is likely to reduce the number of dismissals (fair and unfair). Employers who undertake such a process may be encouraged not to dismiss on the basis that their early understanding of events was wrong, or that there are mitigating circumstances that mean dismissal is not warranted etc. In this way employers give themselves the opportunity to make a better and more informed decision that avoids the cost and inconvenience of dismissing a productive employee who it is in the best interests of the business to retain, while at the same time encouraging perceptions of fairness from amongst staff that can have the positive effects we have already discussed.

5.3.2 The rights and wrongs of prescribing dismissal process and the dangers of process obsession

This leads us to consider whether the law of Unfair Dismissal is mandating or at least encouraging the use of disciplinary procedures that are likely to be perceived as fair and to have the positive effects discussed above? It has never been the case until recently that the law provides employees with an unqualified right to a fair procedure before they can be fairly dismissed and while, as we have suggested, the tribunals and Courts have been reluctant to permit dismissal without the employer adhering to some basic conception of natural justice, they have never mandated or described a minimum standard of procedural fairness. That said it is generally accepted that one of the principle effects of the law of Unfair Dismissal has been the introduction or revision by

employers of disciplinary procedures and processes aimed either directly or indirectly at compliance with the legislation. A study carried out by Evans and others found that of the two-thirds of firms sampled with formal procedures, nearly three-quarters had introduced them in response to the Unfair Dismissal legislation.²⁰⁶ Whether or not the reason for the introduction of disciplinary procedures is a response to the legislation or some other imperative, the fact is that the majority of employers in Britain have adopted a formal disciplinary procedure.²⁰⁷ But that fact requires some fleshing out for the purposes of this discussion. The percentage of workplaces with formal disciplinary procedures drops substantially for employers with 10-24 employees and one might reasonably assume that the percentage continues to decline for employers with less than 10 employees.²⁰⁸ It is also correct that these small employers are disproportionately found as respondents in claims before the employment tribunals, including claims for Unfair Dismissal.²⁰⁹ If you consider these factors together it is possible to conclude that small employers are subject to a disproportionate number of tribunal claims for Unfair Dismissal because they do not have in place formal disciplinary procedures. Add to this the point made by Evans²¹⁰ that the mere existence of written procedures does not imply their use and that, of the employers sampled who had formal disciplinary procedures, a significant proportion chose not to follow them. Hence the way to reduce Unfair Dismissals, and maximise the chances of procedural fairness in the context of disciplinary action having a positive influence on employee behaviour, is to impose a mandatory procedure on all employers, regardless of their size. Or is it?

²⁰⁶ S. Evans, J. Goodman and L. Hargreaves, *Unfair Dismissal Law and Employment Practice in the 1980's* (London: Department of Employment Research Paper No. 53).

²⁰⁷ The WERS 1998 survey reports that 92% of workplaces in the UK in its survey (which excludes very small employers with 10 or less employees) had a formal disciplinary procedure (M. Cully et al, *Britain at Work* (London: Routledge, 1999) 78).

²⁰⁸ According to the WERS 1998 the percentage of workplaces with formal disciplinary procedures drops to about 70% for employers with 10-24 employees (Cully, *ibid* 263).

²⁰⁹ See B. Hayward, M. Peters, N. Rousseau and K. Seeds, *Findings from the Survey of Employment Tribunal Applications 2003* (London: DTI, 2004) in which the authors point out at page 20 that ET applications for the period covered by the study were disproportionately found in small workplaces (those with 1-24 employees). Forty-five percent of cases in the employer survey were in workplaces with 1-24 employees, which account for 35 percent of employees; conversely, 14 per cent of cases in the employer survey were in workplaces with 250 or more employees, which account for 27 percent of employees.

²¹⁰ *Supra* at note 206.

As part of its reforms contained in the Employment Act 2002, the previous Government introduced fixed minimum procedural standards for dismissal and the resolution of grievances (these mandatory procedures have since been revoked).²¹¹ There was much about this piece of legislation which conformed to the type of regulation that we suggested earlier might go some way to creating and maintaining partnerships and fairness at work. First, the statutory procedure mandated that the parties must come together to discuss their problems before any decision to dismiss is taken and the regulations created clear incentives for the parties to follow that course (for example, any failure to do so by the employer would result in an automatic finding of Unfair Dismissal).

Secondly, it is worth noting that while the law of Unfair Dismissal as it has been interpreted by the Courts is generally considered to require an employer to follow some form of procedure before dismissal, the exact nature of that procedure has never been clarified. The Labour Government's procedure helped to overcome that problem (although, as we discuss below, there is a question mark over whether a prescribed procedure is desirable in the context of a law which aims to maximise fairness perceptions at work).

Thirdly, a mandated procedure has the potential benefit of assisting employers to make credible commitments to their staff that they will be treated fairly, at least in terms of any disciplinary *process* that might lead to dismissal. The ability of employers to make credible commitments in this area of the employment relationship is important to building successful partnerships. This is particularly so in the context of a relationship that has for so long been characterised by a level of mistrust between the parties; a lack of trust that is, to a large extent, attributable to the concern employees have about the ability of their employer to unfairly exercise their managerial power against them. The credibility of that promise was promoted further still by the existence of enhanced sanctions for non-compliance with the procedure.

²¹¹ Employment Act 2008.

Fourthly, the previous Government left scope for the parties to adapt the procedure to better suit their particular workplace. It did so by mandating minimum standards that are not overly prescriptive and that small employers in particular could (in theory) apply without difficulty. At the same time the procedure allowed larger employers with existing EDG procedures to keep or modify those procedures, provided their alternative processes included the minimum procedural standards contained by the legislation.

Finally, if the statutory procedure was followed in good faith, it should have gone some way to avoiding certain outcomes that might have been considered market failures in a labour market intended to be characterised by partnerships, fairness and efficiency. For example, an employer who follows the procedure might have uncovered circumstances that should have caused them to refrain from dismissing an employee with a good performance record and in whom they had invested a considerable amount of management and training time.

But despite the optimism implicit in the preceding comments, the empirical evidence about the ability of disciplinary procedures in general to impact upon employer and employee behaviour, such that Unfair Dismissals are reduced and fairness perceptions increased, is ambiguous to say the least. It is far from clear that those procedures are likely to result in employers dealing with disciplinary matters in a way that employee's consider is fair. Using data from the 1998 Workplace Employee Relations Survey, Knight and Latreille studied the rates of disciplinary sanctions and dismissals, and the incidence of Unfair Dismissal complaints to employment tribunals in Britain.²¹² They concluded, inter-alia, that while employee perceptions of managerial style, high levels of commitment and job satisfaction do indeed act to reduce the rate of disciplinary sanctions, including dismissal and disciplinary action short of dismissal, the existence of dismissal procedures alone has little bearing on the probability that a firm will be the subject of an employment tribunal claim of Unfair Dismissal. The latter finding might encourage us to think that the

²¹² K. G. Knight and P. L. Latreille, "Discipline, Dismissals and Complaints to Employment Tribunals" (2000) 38 *BJIR* 533.

existence of formal disciplinary procedures does not positively impact on employee perceptions of fair treatment when it comes to disciplinary action and dismissal, because for those procedures to have such an impact they would have to reduce the number of incidences of unfair disciplinary action which would in turn reduce the number of Unfair Dismissals and Unfair Dismissal claims. But while the conclusion that the existence of disciplinary procedures does not impact on fairness perceptions may be correct (a point we shall address below) that is not a conclusion which can be drawn from Knight and Latreille's work.

Their conclusion relates to the impact of procedures on the likelihood that a dismissed employee will bring a claim of Unfair Dismissal; it is not concerned with whether or not the dismissal was actually objectively unfair and in a similar vein it does not address whether the procedure was in form and operation fair and likely to be perceived as such. It is the latter point that we are most interested in when we talk about dismissals (as opposed to some other lesser form of disciplinary action) because where procedures have the effect of causing an employer to act in a manner that we might consider is objectively fair, those actions are likely to impact positively on fairness perceptions amongst the employees that remain following the dismissal and it is, as we have discussed, the perceptions of those remaining employees that are particularly significant. Just because a dismissed employee brings a claim for Unfair Dismissal, that does not mean the dismissal was objectively unfair, or perceived by the dismissed employee's former colleagues as unfair. While an employee will almost certainly be less inclined to bring a claim if they perceive their dismissal was fair²¹³ there will be cases where employees are motivated to bring a claim in spite of this perception (for example, they may see bringing a claim as a way of rectifying their damaged reputation, they may consider it a means of forcing the employer to settle and thereby receive a compensation payment, or they may be pressured into bringing a claim by those who are well positioned to influence their actions). There is of course also the point that an employee who has suffered the ultimate sanction of

²¹³ L. Dickens, M. Hart, M. Jones and B. Weekes, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (Oxford: Blackwell, 1985) 29-51.

dismissal is unlikely to readily accept that their dismissal was fair and that is true even in circumstances where the procedure leading to the dismissal was, objectively speaking, entirely fair. That is almost certainly an indirect result of the stigma attached to dismissal and the negative effect it can have on how others, particularly prospective new employers, might view the dismissed person. Being dismissed for disciplinary reasons sends a negative message about the employee as a person and a worker (for example, it might suggest they are dishonest, incompetent or disloyal). That message may be real or it may be in the employee's head, but either way it is counter-intuitive for a person to accept such negative implications about themselves irrespective of whether, objectively and in relation to the events leading to their dismissal, they contain an element of truth. What must be correct is that the *mere existence* of dismissal procedures (whether legally prescribed or compiled by the employer) is unlikely to have any bearing on fairness perceptions. At best, written procedures can when first publicised instil a hope of fair treatment in the minds of those employees who consider they are on paper a statement of fair processes, but that hope will soon be dashed if the employer fails to follow the procedures or applies them in a way that employees consider to be unfair. In other words what matters is not the existence of procedures but how employers make use of those procedures and how employees judge that use.²¹⁴

The question becomes, therefore, whether the law as it stands is able to play a positive role in achieving the goal of increasing the likelihood of employers using disciplinary procedures in a manner that employees consider to be fair? Let us consider first the former statutory disciplinary procedure. As we have already discussed there were several aspects of the statutory procedure that reflected what has been suggested are the essential characteristics of a regulatory system geared to achieving partnerships and fairness at work, but those aside, its ability to direct employer behaviour in such a way so as to maximise fairness perceptions was limited. At the heart of its shortcomings was, perhaps ironically, the fact that it attempted to prescribe a disciplinary process. This is a problem for several reasons. To begin with, any attempt to

²¹⁴ J. Earnshaw, J. Goodman, R. Harrison and M. Marchington, *Industrial Tribunals, Workplace Disciplinary Procedures and Employee Practice* (London: DTI, 1998).

prescribe a process that is intended to cover all workplaces in all industries having, as they do, an infinite variety cultures, methods of working and personalities, is unlikely to appear fair, either in form or implementation, to all employees in all workplaces. The law cannot hope to prescribe a procedure that takes into account all of these factors; all it can hope to achieve is a general non-reflexive standard process that applies a broad and general understanding of what it means to be procedurally fair, but which might not reflect in its execution what it means to be fair in a particular workplace in a particular instance of employee misconduct or poor performance. In the context of a policy aimed at maximising fairness perceptions one might conclude therefore that the law should steer away from any attempt at prescribing a disciplinary process.

One argument against this might be that some procedure is better than no procedure, and that at least there is a chance that an employer who follows a minimum standard will be judged by its employees to have acted fairly in *some* instances of disciplinary action. The weakness of such an argument is that it fails to recognise that a minimum procedure encourages employers to do nothing more than what has been prescribed which in turn will do little to influence perceptions of fairness and may in fact have a negative impact on fairness at work. It is very arguable that a prescribed statutory process reduces the incentive or encouragement (encouragement which is potentially inherent in a general non-prescriptive standard of fairness coupled with sanctions for non-compliance) for employers to reflect on what is a fair and reasonable process in the circumstances before they take disciplinary action. An employer who is required to reflect on what is fair in a particular set of circumstances may be forced to genuinely consider the interests and circumstances of the employee in question lest they fall foul of the law. But that incentive is less likely to exist in the context of the current statutory procedure because such a procedure sends a message to employers that all they have to do to avoid falling foul of the law is to follow the minimum requirements of the procedure and nothing more.

Of course, in Britain, adherence to the statutory procedure did not technically mean that the employer had done enough to pass the general test of fairness, but it did mean they would avoid a finding of automatic unfairness and having to pay enhanced levels of compensation. Moreover, while merely following the statutory minimum procedure did not guarantee that a dismissal was procedurally fair, employers (and employment tribunals for that matter) might have taken the view that only in extraordinary circumstances would following the statutory procedure fall outside the employer's range of reasonable responses and fail to pass the general test of fairness contained in Section 98 of the Employment Rights Act 1996. At least in the pre-statutory procedure environment the employer was left guessing to some extent about what they needed to do to comply with the legal standard of fairness when it came to process. That level of uncertainty may have encouraged some employers to go beyond what became the statutory minimum and that extra might have enhanced the chances of the employer's workforce judging the employer's conduct to be fair. The apparent weakness in the ability of the statutory procedure to increase fairness perceptions might have been reduced by imposing a more onerous and detailed minimum procedure that more closely reflects existing codes of practice, such as the current ACAS Code on Disciplinary and Grievance Procedures, but that is unlikely.

This thesis argues that the correct position is that any legislatively mandated standard of procedural fairness (whether general or prescriptive) will struggle to significantly impact on fairness perceptions at work. The more you prescribe a disciplinary process the more you increase the chances that its implementation and application will not appear genuine; the procedure's non-reflexive nature will cause employers to deal with disciplinary issues in a way that may be unnecessary or pointless in the circumstances and which may be unwanted by the employee. Just because the law says that an employer's behaviour is fair does not necessarily make it so in the eyes of the employer's employees and it is the employees' perceptions that matter in the current context. It is ironic, therefore, that for some employers at least the statutory procedure may have caused them to deal with disciplinary matters in a manner that was less likely to encourage fairness perceptions than the regime that

existed prior to the statutory procedure, because the minimum procedures discouraged internal reflection on what amounts to a fair process in a particular workplace in a particular set of circumstances.

We have already explained that a prescriptive process, like the mandatory statutory procedure, encourages the employer to go through the motions of following the procedure, in order to insulate themselves from the consequences of a legal finding of unfairness. To that we add that a general standard of fairness such as exists in section 98(4) of the Employment Rights Act 1996 is likely to have a similar effect. This fact is borne out in empirical studies which indicate that one of the most significant changes prompted by the enactment of the Unfair Dismissal law was the introduction to workplaces of formal dismissal and disciplinary procedures. For example, a study by Evans found that of the two-thirds of firms with formal procedures nearly three-quarters had introduced them in response to the legislation.²¹⁵ A probable explanation for this phenomenon is that employers are introducing disciplinary procedures in an attempt to minimise the likelihood that they will be subject to successful Unfair Dismissal claims, and given that, as we have discussed, the vast majority of successful claims are the result of defects in the dismissal process, such defensive action is likely to be worthwhile. As Collins points out: “the growth of formal disciplinary procedures can be explained as a defensive tactic in the cost/benefit calculus of management. The cost of introducing formal procedures is (I assume) fairly low, and the potential benefit is the reduction of claims for Unfair Dismissal.”²¹⁶

But the difficulty of this defensive approach in the context of a policy that seeks to maximise fairness perceptions is clear. If employees perceive that employers are following the legally prescribed process to the letter to avoid an Unfair Dismissal claim rather than any genuine attempt to deal with disciplinary issues in a fair way, the ability of the law to positively impact on feelings of trust and fairness will be substantially reduced if not destroyed.

²¹⁵ S. Evans, J. Goodman and L. Hargreaves, *Unfair Dismissal Law and Employment Practice in the 1980's* (London: Department of Employment Research Paper No. 53).

²¹⁶ H. Collins, *Regulating Dismissals: possibilities for self-regulation* (London: unpublished paper, LSE, 2003) 8.

That is an inevitable conclusion based on our discussion of organisation justice research into procedural fairness, which found that employees are likely to judge they have been treated fairly overall if they believe that their involvement in the decision process carries with it the potential to influence the outcome of that process. An employee, who judges that the process in question is being followed to avoid the legal consequences of not following that process, is likely to conclude that their involvement in that process is not intended, and is highly unlikely, to influence the employer's final decision.

Of course that is not always the case and there will be instances where the employee's involvement can, in the end, affect the outcome of a disciplinary process. Take for example the *Madden* case that was outlined above. If Mr Madden had been able during the investigation into the theft of the debit cards to produce a witness who could testify to the fact that Mr Madden was with the witness at the time the goods purchased with the cards were bought, it is perhaps unlikely that Mr Madden would have been dismissed. But such instances of employee input affecting the outcome of disciplinary action are, it is argued, rare. It is the writer's experience that most employers approach disciplinary action with a pre-determined outcome in mind and the point of the disciplinary process is to achieve that outcome in a manner that is least likely to expose them to legal action. Moreover, this view of the employer's approach to procedure is, in the writer's experience as a legal practitioner, shared by employees. In other words most employees view the disciplinary process as leading to an inevitable outcome which will be predicted by the employer's disciplinary policy (for example, if the employee has committed some form of minor misconduct which the policy says may warrant a warning, the employee is likely to believe that a warning is the inevitable outcome once the process has begun).

A recent example from the writer's own practice is arguably typical. The employee had worked as a nurse in a rest-home for 17 years. One morning two members of staff witnessed the employee kick one of the elderly residents in the leg. The witnesses reported what they had seen to the rest-home manager who contacted the owner who contacted the writer. His immediate

instructions were an explanation of what had been witnessed and a request for advice on how to dismiss the employee (bear in mind that at this stage there had been no investigation beyond what the witnesses had told the manager). An investigation was conducted and it turned out that there were mitigating circumstances in the employee's favour that some reasonable employers may have felt excused her actions, or at least justified the imposition of a sanction less than dismissal. But it appeared to the writer, as it has done on many occasions, that having pre-determined the outcome before the process began, the employer was in no mind to back away from that initial judgement and the employee was dismissed. Of additional interest was the employee's attitude to the procedure. From the start she protested that the process was a sham and a waste of her time and when, following her dismissal, she was offered a right of appeal, she refused saying that nothing she said was going to change the employer's mind.

Of course this view of the reason why employers follow disciplinary procedures may be skewed and overstated somewhat given the context in which that view has been formed. It is perhaps predictable that employers who seek the advice of a lawyer about how to undertake a legal disciplinary procedure before it has begun are doing so because they have already conceived the outcome of the procedure. An employer who enters a process with an open mind, or with motives unrelated to the legal consequences of the outcome, is perhaps less likely to consult a lawyer; at least in the early stages before any threat of legal action has been explicitly or implicitly made by the employee. In support of this suggestion it appears that some employers do introduce disciplinary procedures for reasons other than to avoid certain legal consequences. The Evans study we referred to earlier indicated that two-thirds of the organisations studied introduced formal procedures in response to the Unfair Dismissal legislation, which means of course that one-third of the sample formulated the procedures for other reasons. Similarly, in a survey of 100 *Times* 1000 companies quoted in research by Dickens et al showed that two thirds of the employers sampled had formal procedures, and most of those procedures had been in place prior to the legislation. Only a quarter of the employers in the study had introduced procedures because of the Unfair

Dismissal law.²¹⁷ In addition it is worth considering that in the United States, where employment at will remains the norm in many states, it is by no means uncommon for employers to operate formal disciplinary policies. If avoiding the legal consequences of an Unfair Dismissal is not the motivating factor behind the introduction by these employers of disciplinary procedures then what is? Collins suggests that one explanation for why certain employers introduce procedures is their concern to appear fair and to achieve the benefits that are likely to flow from that appearance:

The very existence of a formal procedure is intended to help to establish perceptions among the workforce of the fairness of the disciplinary system, whatever the reality of the situation. By contributing to the construction of a reputation for fairness, the formal procedure should help to create consent to the disciplinary system and reduce objections to it, which might otherwise lead good workers to quit or refrain from full co-operation in the performance of work.²¹⁸

We note that Collins does not appear to be arguing that a law which mandates a standard of fair process can contribute to fairness perceptions amongst the workforce. In fact the law is superfluous to the argument which is that some employers will introduce formal procedures because they want to appear fair and, if that is correct, they will formulate those procedures irrespective of what the law says. Somewhat ironically in the context of a discussion that supports some form of regulation in the area of EDG, this argument gains support *a priori* from Epstein's work on employment at will.²¹⁹ Epstein argued *inter-alia* that employer's will be reluctant to dismiss employees unfairly under employment at will for two main reasons that resonate in the midst of the present discussion. First, the employer would lose the benefit of the dismissed worker's skills and would incur the cost of hiring and re-training their replacement. Secondly, and most significantly in the current context, the employer's reputation would suffer. Members of the current workforce who witness that the employer had dismissed someone arbitrarily might decide to look for a new job elsewhere with a better employer. Alternatively they might

²¹⁷ L. Dickens, M. Hart, M. Jones and B. Weekes, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (Oxford: Blackwell, 1985)

²¹⁸ H. Collins, *Regulating Dismissals: possibilities for self-regulation* (London: unpublished paper, LSE, 2003) 8.

²¹⁹ R. A. Epstein, "In defense of the contract at will" (1984) 51 *University of Chicago Law Review* 947.

decide to reduce their level of effort: there is no point in working hard if there is no job security. Employers who take this view are likely to seek out methods to avoid dismissing employees in a way that is and appears unfair. One way of achieving that is to introduce disciplinary procedures that if followed by management will minimise the risk of apparently Unfair Dismissals.

So there are employers who are motivated to introduce fair procedures because they see the potential benefit to their businesses in appearing to the workforce as a fair employer, but in the end the important point is whether or not they are successful in that objective: are employers that are motivated to be fair actually perceived as fair by their employees? A further observation is that these enlightened employers are not driven by legislation to introduce procedures that they hope are perceived as fair. This provides a glimmer of hope for regulation that aims at bringing the other employers into line. That is because such regulation is not extreme or radical at least in terms of its objective given that the objective is shared by a good proportion of employers who do not require statutory encouragement to introduce fair dismissal and disciplinary processes. At the same time it is worth reiterating that the existence of prescribed and general standards of what is a fair process may undermine the ability of those employers who seek to enhance their reputation as fair from actually achieving that goal? Is it the case that employees employed by an employer who wants to appear fair will be unconvinced that fairness is the employer's true intention because their judgement is clouded by a general perception that employers adhere to disciplinary processes so as to appear fair in the eyes of the law? This seems a reasonable theory and all the more likely to be correct in a modern labour market in which job mobility is high and employees are likely to sample a large number of employers during their working lives.

5.4 Remedies for Unfair Dismissal: missed opportunities?

The nature of the fairness inquiry and its application make it unlikely, if not impossible, for the law of Unfair Dismissal to have a positive impact on

fairness perceptions. But that said might the statutory limits on dismissal encourage fair treatment at work if the remedies for Unfair Dismissal are properly targeted and sufficiently robust to discourage unfair treatment leading to dismissal? The answer to that question would depend, in part, on whether the tribunals and the Courts are encouraged and willing to interpret and award those remedies in a way which supports the creation of a strong regulatory stick that prods and pokes employers towards a better understanding of what it means to be fair, and towards applying that understanding in a manner that will aid fairness perceptions and OCB. We might predict that an employer faced with the prospect of, for example, having to pay a substantial financial remedy if they complete a dismissal which a tribunal later finds to have been unfair, will as a result go the extra mile to ensure that the dismissal is fair. That desire may cause the employer to engage with the employee in a manner which is focused on finding a resolution to the disciplinary issue that avoids dismissal (or at least the prospect of an Unfair Dismissal claim). The employer's motivation in that case is not to be fair, or to be perceived as fair, it is to avoid having to defend a claim the outcome of which is uncertain and, if the outcome goes against the employer, that may be costly. In other words the perception of fairness is a means to an end rather than the end itself. But, that said, if the impact of the employer's actions on the employee is to garner a belief that the employer is concerned about the employee's best interests, that belief may be enough to support a growth in fairness perceptions and OCB amongst the employee and his or her colleagues.

In this section we ask and explore the following question: are the current remedies for Unfair Dismissal and the extent to which they are applied by the tribunals, likely to encourage fair treatment at work; if the answer to the first question is no, would new and different remedies coupled with a more robust approach on the part of the tribunals and Courts to awarding those remedies, have a more positive impact on fair treatment at work?

5.4.1 Reinstatement and re-engagement

We consider first the remedies of reinstatement and re-engagement. The Employment Rights Act 1996²²⁰ provides that if, on a finding of dismissal, the employee indicates a wish to be re-employed, the tribunal may make an order of either reinstatement or re-engagement under sections 114 and 115; if no order is made under this section, it must make an award of compensation calculated in accordance with sections 118 to 126. In other words, “the preferred remedies for Unfair Dismissal are reinstatement, re-engagement and monetary compensation in that order”.²²¹ An order for reinstatement requires the employer to “treat the complainant in all respects as if he had not been dismissed”, and must specify any amount payable by the employer in respect of the period during which the employee should have been in employment but was not.²²² The practical consequence of reinstatement is apparent – the employee is put back in the position that they held before they were unfairly dismissed. Re-engagement on the other hand involves the employer (or an associated employer) being forced to re-employ the claimant to a position which is “comparable to that from which he was dismissed or other suitable employment”.²²³

Both reinstatement and re-engagement are discretionary remedies. In deciding whether to award either remedy the tribunal must consider not simply whether the claimant wants to be reinstated, but also “whether it is practicable for the employer to comply with the order of reinstatement”, and in a case where the employee has contributed to the dismissal, whether the order would be just.²²⁴ Where the tribunal does not believe that reinstatement is appropriate, it must go on to consider re-engagement, which will cause it to reflect on the same factors that it considered in assessing the claim for reinstatement.²²⁵ Except in a case where the employee contributed to his own dismissal, an order for re-engagement must be on terms “which are, so far as reasonably practicable, as

²²⁰ Section 98ZE

²²¹ *O’Laoire v Jackel International Ltd* [1990] ICR 197, 200.

²²² Employment Rights Act 1996, section 114(1), (2).

²²³ *Ibid*, section 115(1).

²²⁴ *Ibid*, section 116(1).

²²⁵ *Ibid*, section 116(2).

favourable as an order for reinstatement”.²²⁶ And in exercising its discretion to make either order, the tribunal may not take into account the fact that the employer has hired a permanent replacement for the complainant unless the employer can show that it was not practical to do otherwise, or that it engaged the replacement after a reasonable period had elapsed without the complainant indicating that he or she wished to be re-employed.²²⁷ Significantly the Act does not provide the tribunals and the Courts with the power to require that the employer abide by the order of reinstatement or re-engagement. Under section 177 of the Act, if the employer fails to abide by the order, the tribunal’s only option is to make an award of compensation. According to section 177(3), where the employer’s non-compliance is a full failure to reinstate or, as the case may be, re-engage the employee, the compensatory award will include an additional amount equivalent to between 26 and 52 weeks’ pay (this figure is subject to a statutory cap on the amount of a week’s pay). Further, the employer may avoid the additional award of compensation if it can show that it was not practical to comply with the order.²²⁸ This means that the employer gets two chances to argue for the impracticality of reinstatement or re-engagement. According to the Employment Appeals Tribunal, “one process looks forward, the other looks back and although it may be that a cherry that is rejected at the first bite will be likely to be regarded as indigestible at the second, there is in our view no doubt at all that two bites are allowed”.²²⁹

On the face of it the remedies of reinstatement and re-engagement might be useful allies in the battle for greater fairness in relation to disciplinary action and enhanced fairness perceptions. Any employer who is contemplating dismissal might think twice if they believe there is a real chance that following the dismissal the employee will be back at work by order of the tribunal. The employer might at least be more concerned to avoid unfairness in the dismissal or, more optimistically, they might look to resolve the issues which have led to the disciplinary situation, given that it is better to fix those issues immediately rather than be forced to do so following a drawn out and costly tribunal

²²⁶ Ibid, section 116(4).

²²⁷ Ibid, section 116(5), (6).

²²⁸ Ibid, section 117(4)(a).

²²⁹ *Mabrizi v National Hospital for Nervous Diseases* [1990] IRLR 193.

hearing, at the conclusion of which the employee might well be re-employed. However, there are a number of obstacles which stand in the way of reinstatement and re-engagement being aids to greater fairness perceptions.

First, the tribunals and the Courts have shown themselves reluctant to take a robust approach to applying and awarding the two remedies. In particular, the tribunals and the Courts have taken a conservative line in their interpretation of when it is “practicable” to order reinstatement or re-engagement in the first place, or, when the order is made, whether to grant the additional compensatory award where the employer has failed to comply with the order. At both stages the Courts have made it clear that what is practicable should not be equated with what is possible. It has been held that the tribunal should not order re-engagement for instance, where the evidence “points overwhelmingly to the conclusion that the consequence of any attempt to re-engage will result in serious industrial strife”.²³⁰ It has also been decided that it is inappropriate to order reinstatement where the parties had been in a close personal relationship which had broken down beyond the point of repair²³¹, or where the employer, no matter how unreasonably, remains convinced of the employee’s alleged misconduct.²³² In this way the tribunals’ approach to the exercise of their discretion reflects the method of the common law Courts in that factors to be taken into account are, “the fact that the atmosphere in the factory is poisoned... the fact that the employee has displayed her distrust and lack of confidence in her employers and would not be a satisfactory employee on reinstatement... insufficient employment for the employee”.²³³ This reluctance on the part of the Courts and the tribunals to be robust in their application of the “primary remedy” of reinstatement may in part be a reflection of the reluctance of judges from the common law tradition to tread on managerial prerogative (this is Collins’ analysis which we have discussed above and which we shall consider again in this ongoing discussion). This view gains additional support from the Court of Appeal’s decision in *Port of*

²³⁰ *Bateman v British Leyland UK Ltd* [1974] ICR 403,406.

²³¹ *Enessy Co SA v Minopriro* [1978] IRLR 489.

²³² *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680.

²³³ *Rao v Civil Aviation Authority* [1992] IRLR 203, 207.

*London Authority v Payne*²³⁴. In that case the decision that re-engagement was not impracticable on the grounds that the employer could have considered offering voluntary redundancy to existing staff in order to make way for the applicant, was held to have been incorrect. The Court said:

[The tribunal] should give due weight to the commercial judgement of the management unless of course the witnesses are disbelieved. The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time.

It may also be the case that this reluctance to award reinstatement reflects nervousness on the part of the Courts and the tribunals about re-inserting an employee into a working environment where, given the inevitable relationship damaging nature of litigation, the employment relation will have been, at least, seriously harmed. Perhaps not surprisingly, the tribunals and the Courts are reticent to make judgements about whether the employment relationship, once legally reinstated, can practically work.

The bare facts are that the remedies of reinstatement and re-engagement are rarely awarded. According to the Tribunal Service's own statistics, between 2007 and 2008 only 8 out of the 3,791 successful claims for Unfair Dismissal resulted in orders of reinstatement or re-engagement.²³⁵ There are several apparent reasons for the low rate of awards. The first picks-up on the point made above regarding the reluctance of the tribunals to grant such awards. Research conducted by the Industrial Relations Research Unit in the early 1980s led to the conclusion that:

...the [employment] tribunals pay a lot of attention to the employer's views regarding the acceptability and practicability of re-employment and rarely award the remedy in the face of employer opposition. This is partly because of a view that re-employment which has to be imposed will not work.²³⁶

²³⁴ [1994] IRLR 9, 16.

²³⁵ Tribunal Service, *Employment Tribunal and EAT Statistics (GB) 1 April 2007 – 31 March 2008*, Table 3.

²³⁶ L Dickens, M Jones, B Weekes, and M Hart, *Dismissal: A Study of Unfair Dismissal and the Industrial Tribunal System* (Blackwell, Oxford, 1985) 138.

A related explanation (and perhaps justification) for the tribunals' reluctance to award reinstatement reflects the main reason why dismissals are found to be unfair. We have argued that the tribunals are not well positioned to make judgements about whether or not the employer's reasons for dismissal are unfair. The tribunals do appear aware of this gap in their competency which reflects in the fact that most successful Unfair Dismissal claims are successful based on findings of procedural unfairness. Reinstatement and re-engagement may not be appropriate in cases where the dismissal was fair but for a defect in the procedure followed leading to the dismissal. We return to this point in the next several paragraphs.

The final reason for the low rate of reinstatement and re-engagement awards is that claimants rarely ask for them. This is perhaps not surprising given that the Unfair Dismissal, the events leading to the dismissal and the litigation process, will frequently make the prospect of returning to work unpalatable for many claimants. There is also the practical point that a number of employees will have found alternative work by the time they receive a decision from the tribunal, which makes the question of reinstatement irrelevant.

It is possible to conceive of changes to the current regulation that may make reinstatement and re-engagement more powerful remedies; effective as a deterrent against unfair treatment at work. For instance, the legislation could be amended to direct the tribunals to be more willing to order reinstatement and to restrict the right of employees to seek compensation without first stating a reason why reinstatement or re-engagement should not be awarded. Such a change in the law may cause employers in particular to focus more on what it means to be fair in the context of disciplinary action. As with all cases of Unfair Dismissal, the employer cannot know for certain in advance of the tribunal's decision, whether their defence to a claim will be successful. If the defence is not successful and the tribunal is likely to order reinstatement, the employer will be faced with the prospect of trying to re-integrate an employee who will almost certainly harbour feelings of resentment that will be difficult to manage. This point was made above, but it may be better from the employer's perspective to deal with and resolve the employer's concerns in an

effort to avoid dismissal, a possible claim for Unfair Dismissal and the challenges of re-integration following an award of reinstatement. On the employee's part, if they understand the tribunal's reluctance to award compensation over reinstatement, they too may be more inclined to search out ways of resolving the issues which have lead to the disciplinary action. This would be preferable to drawn out litigation with no certainty of outcome on the issue of liability, only to be at best given the option by the tribunal at the end of the proceedings of returning to work in an environment which, following the litigation proceedings and because of those proceedings, is significantly more challenging than it was prior to the litigation. But aside from the challenges associated with creating legislation which is clear enough in its instruction to ensure that the tribunals do in practice award reinstatement more readily, it is highly questionable whether a more robust approach to awarding remedies which result in re-employment will also result in higher levels of fairness perceptions.

First, there remains the problem that the tribunals are unlikely and probably unable, for the reasons we have discussed, to challenge the employer's substantive justification for the dismissal in a way that the employees looking on will perceive as fair. And if the employer's reason for the dismissal is not able to be rigorously challenged by the tribunal, the potential fairness incentive which might flow from a greater willingness on the part of the tribunals to award reinstatement is not likely to be realised. That is because reinstatement cannot and will not be a commonly awarded remedy unless, *inter-alia*, there is a corresponding increase in the number of instances where the tribunals find Unfair Dismissal for reasons relating to substantive unfairness in particular. . The tribunals are, as we have discussed, much more willing and able to judge procedural fairness, but awards of reinstatement are unlikely to increase off the back of an increased willingness on the part of the tribunals to enforce stricter standards of procedural fairness. In the case where Unfair Dismissal is found based on procedural unfairness only, it may well be that reinstatement is not appropriate, because the employer has good and objectively fair reasons for dismissal, which reasonably dictate that the employee should not be returned to work. On this final point it is worth

recalling that fairness perceptions is the goal with respect to the dismissed employee (accepting that such a goal may be difficult to achieve) and, perhaps more importantly, those employees who remain employed. The employer is unlikely to be perceived as fair by the remaining workforce if they re-employ (or do not dismiss because they fear an order for reinstatement) an employee who their colleagues rightly perceive to be disruptive, a poor performer, a trouble maker etc.

Secondly, and most importantly in the context of this thesis, the remedies of reinstatement and re-engagement are unlikely to aid fairness perceptions because they almost certainly do not drive general improvements in how employers deal with EDG issues, in particular they are unlikely to encourage dispute prevention and early resolution. That is because an employer is only likely to turn its mind to the remedies for Unfair Dismissal and consequentially be influenced by their potential impact, if dismissal and the possibility of an Unfair Dismissal claim is looming. In that case it is likely that the dispute will have escalated to a point where the relationship may well be irreparably damaged and where the prospect of regaining trust and confidence on both sides is slim. What is required, as we have said on several occasions above, is a mechanism which promotes dispute prevention and the early resolution of the disputes that do arise.

The preceding discussion is not to say that the rigorous application of a strong sanction like reinstatement or compensation would not influence some employers to put in place practices that are likely to avoid Unfair Dismissal, because it may. And those practices might focus on effective dispute prevention and early dispute resolution. It is argued, however, that it would take a significant shift towards a much more stringent and stringently enforced re-employment remedy before such a remedy is likely to have a significant influence on the creation of internal practices that will build and maintain trust and promote fairness perceptions. But such a stringent remedy would itself present different impediments to greater fairness at work and, in particular, the goal of partnership through increased fairness, which is the enhanced competitiveness of British businesses. An employer who believes that its

ability to dismiss poor performing or misbehaving staff is impaired because they are likely to be reinstated, may be reluctant to hire staff in the first place, which may in turn inhibit the employer's ability to grow and prosper, which then has potentially negative implications for society and the economy as a whole. Also an employer may be reluctant to dismiss a poor or troublesome employee because they fear the cost of having to defend a tribunal claim, the outcome of which may well be that the employee comes back to work, in which case the expenditure attached to defending the claim is all for nothing.

5.4.2 Compensation

We have discussed the remedies of reinstatement and re-engagement, but what of the compensation remedy? Could a substantial financial disincentive, in the form of a stringently enforced monetary award for Unfair Dismissal, drive employers to improve their approach to EDG in a manner which promotes fairness perceptions? Perhaps, but the current approach of the tribunals and Courts to awarding compensation is unlikely to have that effect. Let us begin to explore this point by first summarising the relevant statutory provisions and the manner in which they have been interpreted by the Courts. Although compensation is intended to be the remedy of last resort, in practice over 99% of successful claims for Unfair Dismissal result in a monetary award.²³⁷ The award usually consists of two elements: the basic award²³⁸ and the compensatory award.²³⁹ The basic award is intended to compensate the employee for his or her loss of job security and it represents a number of weeks' gross pay calculated with reference to the employee's length of service. Simplistically explained, an employee is entitled to a weeks' gross pay (currently capped at £350 per week) for every whole year of service up to a maximum of 20 weeks. In short, the end value to the employee and the cost to the employer of a basic award are not likely to be substantial. The greater potential for financial disincentive to unfairly dismiss is found in the wording

²³⁷ Tribunal Service, *Employment Tribunal and EAT Statistics (GB) 1 April 2007 – 31 March 2008*.

²³⁸ Employment Rights Act 1996, section 119.

²³⁹ *Ibid*, section 123.

of section 123 of the Employment Rights Act 1996, which describes the basis on which tribunals can make a compensatory award for Unfair Dismissal.

Section 123 is designed to compensate the employee for the loss suffered as a result of dismissal. Specifically subsection 1 states that:

... [T]he amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances have regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

On a plain and isolated reading of this provision it seems that the compensatory award might provide a potentially substantial tool in the quest to achieve greater fairness at work, but of course the provision cannot be read in isolation. The first point to make in this context is that the level of compensation awardable is capped. Section 124 of the Act establishes that the compensatory award shall be subject to a maximum which is currently just in excess of £66,000, and which is updated annually by statutory instrument. The cap might be considered a barrier to behaviour changing awards of compensation, in that it limits the extent to which the tribunals can in certain cases award compensation that genuinely reflects what the employee has lost, but in actuality the tribunals very rarely award compensation anywhere near the level of the cap.

In practice, the average award of compensation in Unfair Dismissal cases is a small fraction of what is permitted and from 2007 to 2008 the median award was £4,000.²⁴⁰ The low rates of awards may in part be because a large proportion of the claimants are low earners with short service, but it is also, and perhaps mainly, because of how the employment tribunals and Courts have interpreted and applied the legislation. The award is a compensatory award, it is not intended to penalise the employer for poor treatment of its staff. The award must only reflect what the employee actually lost as a result of the dismissal, which is thereafter subject to a number of deductions. Some of the deductions are remnants of the common law approach to calculating

²⁴⁰ Employment Tribunals Service, *Employment Tribunal and EAT Statistics (GB) 1 April 2007 to 31 March 2008*, Table 5.

compensation, while others are driven primarily by the Act, but have been applied by the Courts in a way that gives the statutory provisions greater significance as a force for driving down levels of compensation.

First, the employee's compensation will be reduced if they have not taken steps to mitigate their loss by attempting to find another job or source of income.²⁴¹ If they do find alternative work then any award of compensation will be reduced by the income that they have received in their new role. Secondly, the employment tribunals have the power under section 123(6) of the Act to make a reduction in the compensatory award where the employee is found to have contributed to the dismissal. Such reductions are, in the writer's experience, frequently made, and they are often substantial, in some cases up to 100%.²⁴² Thirdly, the employment tribunals are prepared to reduce compensatory awards by application of the "no difference rule" which derives from the decision in *Polkey v A E Dayton Services Ltd*.²⁴³ The question of whether or not to apply this rule arises where the dismissal is unfair because of a procedural defect only. The point for consideration is whether the employee would have been dismissed even if the procedure had been fair; in other words, did the flawed process make any difference to the outcome of the dismissal? If the tribunal decides that the employer's failure to follow a fair procedure did not affect the outcome, then it will be right to make no compensatory award. If the tribunal is in doubt about whether the employee would have been dismissed, then that doubt "can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".²⁴⁴ In addition to the sources of deduction just mentioned, the tribunals will reduce compensatory awards to reflect ex-gratia payments made by the employer and other

²⁴¹ See, for example, *Gardiner-Hill v Roland Berger Technics Ltd* [1992] IRLR 498.

²⁴² See, for example, *Charles Robertson (Developments) Ltd v White* [1995] ICR 349; it has been suggested that in 10% of cases there is a finding of 100% contributory fault (J White, 'Unfair Dismissal: How Much Will the Employment Tribunal Award?' *Solicitors' Journal*, 25 April 1997).

²⁴³ [1988] AC 344.

²⁴⁴ Lord Bridge in *Polkey* at page 365, quoting Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91.

payments which serve to reduce the amount of money the employee has lost because they were dismissed from their previous position.²⁴⁵

A further important point to consider is the extent to which the tribunals and the Courts have been prepared to award compensation for non-pecuniary loss. It is difficult to argue against the suggestion that much of what the unfairly dismissed employee suffers is not financial loss; they suffer other damage which may be more important to them than pure loss of income and other financially measureable benefits (e.g. hurt and humiliation caused by the manner of the dismissal). If the tribunals fail to award remedies to compensate for such loss it is inevitable that the employee will feel they have not been fully recompensed for what they have suffered which may, amongst other consequences, negatively impact the employee's assessment of the worth of the regulatory system as a mechanism for protecting them from unfair treatment at work. This creates a further barrier to the argument that the law of Unfair Dismissal can have the effect of imparting credibility to the employer's promises (in policy documents, in presentation and in contracts) about its desire to treat employees fairly. This potential effect of aiding credible promises must be in question if the remedies that the tribunals award for Unfair Dismissal do not address and compensate for the important consequences of that unfairness. But, that said, it is apparent from the wording of section 123(1) of the Act that it was open to the tribunals and Courts to award financial compensation for non-pecuniary loss which flows from an Unfair Dismissal, including the unfair manner of the dismissal (i.e. where there was procedural unfairness). This point was addressed *obiter* by Lord Hoffman in *Johnson v Unisys*²⁴⁶:

[In] *Norton Tool Co v Tewson* ... it was said that the word 'loss' can only mean financial loss. But I think that is too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life.

²⁴⁵ See, for example, *Chelsea Football Club & Athletic Co Ltd v Heath* [1981] IRLR 371.

²⁴⁶ [2001] IRLR 279.

However, since the *Johnson* decision the House of Lords has confirmed that compensation for Unfair Dismissal should only be payable in respect of identifiable financial loss.²⁴⁷ The unwillingness of the Courts to permit awards of compensation for non-pecuniary loss further limits the extent to which the law of Unfair Dismissal is likely to be a check on unfair treatment at work. One presumes that if such loss was recoverable the average award of compensation would increase which may result in a greater wariness on the part of employers in relation to how they handle EDG.

So as things stand there is little prospect of the financial awards for Unfair Dismissal amounting to a significant disincentive to employers not to treat employees unfairly in the context of EDG. That is not to say they are no disincentive, particularly for smaller employees, but for financial awards to play a substantial role in encouraging fair treatment at work which is likely to improve fairness perceptions, those awards would have to be more substantial than they are. They would probably have to take the form of some kind of penalty or, at the very least the scope of potential deductions and the cap on compensation would have to be revised.

But increased and substantial financial ‘compensation’ to penalise poor treatment of staff is likely to have the same negative effects that we discussed might result from a more stringent application of the remedies of reinstatement and re-engagement. Assuming that the legislation could be effectively amended to require the tribunals and the Courts to tread firmly on managerial prerogative by ordering large financial remedies, substantial financial penalties for Unfair Dismissal may, if awarded, seriously weaken or even destroy some businesses, and therefore the prospect of such awards is likely to drive defensive hiring policies and a reluctance on the part of the employer to effectively address issues of poor performance and misconduct. This reluctance can in turn negatively impact the fairness perceptions of other staff. Such an outcome is anathema to the end goal of fairness at work which is improved business competitiveness.

²⁴⁷ *Dunnachie v Kingston-upon-Hull City Council* [2005] IRLR 727.

Penal remedies for dismissal may also encourage employees to raise claims (including resigning and claiming constructive dismissal) in the hope that the employer will be prepared to give the employee a smaller, but nevertheless substantial, financial payment in order to avoid the possibility of a much larger financial penalty following a tribunal hearing. But this incentive is inconsistent with a policy aimed at partnerships, fairness perceptions and OCB; a policy which requires the parties to prevent and resolve disputes by better communication and building trust. Mutual trust is less likely to evolve if employees are encouraged by legislation to seek financial gains in preference to exploring with their employer how to resolve their differences, whilst maintaining and improving their employment relationship.

The issue of financial payments to address concerns about unfairness raises a further point of inquiry. Again, we address this point in more detail in what follows, but it is worth discussing briefly in the current context. So far we have talked about remedies as a disincentive to undertake certain unfair behaviour in the first place. There is certainly a place for such remedies, but there must also be a place for remedies that effectively target the problem in dispute and provide a potential avenue for it to be resolved without dismissal and without recourse to financial compensation or penalties. In other words, financial payments may, notwithstanding the challenges that have just been outlined, limit the behaviour that gives rise to the dispute, but they are unlikely to effectively compensate or address disputes that arise despite the financial remedy and which relate to issues of fairness. For example, an employee who is dismissed and whose dismissal is found to be unfair has not had their complaint effectively resolved and nor are they appropriately compensated for the loss and damage they have suffered, by the award of a financial remedy. The loss they suffered would almost certainly have included a sense of humiliation, upset, and loss of confidence, loss of social ties with his workmates, loss of purpose, and financial loss. A financial remedy does not address this list of damages, but what is the alternative? Reinstatement may be one alternative, but the difficulties with this remedy are apparent and have been outlined above.

The only alternative may be to focus a greater level of regulatory attention on preventing disputes or ensuring that they are effectively raised (which means in part that they are raised early) and resolved (if possible) before they escalate to the point of dismissal or resignation. In other words regulation should strive to significantly diminish the relevance of the financial remedy, including its relevance as a mechanism for discouraging unfair behaviour at work. The regulatory model to achieve this will be a radical departure from the current model, and it must take into account the peculiarities of different workplaces and separate instances of EDG.

5.5 Unfair Dismissal and fairness perception: a brief summary

Let us summarise the position so far. The current law of Unfair Dismissal usually requires that employers follow a fair procedure before they dismiss an employee. In addition to the general standard of fairness the previous Government introduced the statutory procedure which if not complied with resulted in an automatic finding of unfairness and enhanced levels of compensation. While both forms of regulation may have the effect of increasing employee job security by limiting the freedom of employers to dismiss, they are not likely to have a significant impact on the goal of maximising fairness perceptions. That is in large part because laws that require a prescribed form of procedure before a dismissal is lawful are likely to encourage a perception that the employer's process is a façade of fairness to protect them from legal action and is not in place to give them a meaningful say in the decision process. Further, employers are required to refrain from dismissal if the substantive reason for the dismissal is objectively unfair. Only when the employer's view of substantive fairness converges with that of its employees' understanding of the concept will employees perceive that their employer is fair. But the broad and undefined concepts of fairness and reasonableness mean that this convergence of views is highly unlikely for the reasons already discussed.

Further, the weakness of the current law as a means of maximising fairness perceptions goes beyond the challenges associated with substantive and procedural fairness judgements. This is apparent when we recall that the conflict continuum which predicts that a significant proportion of disciplinary action, including dismissal, sits at the end of the continuum and is rooted in earlier unresolved perceptions of unfairness that the employee has internalised or responded to by retaliation which has led to, for example, a dip in performance or some form of misconduct. The dip in performance or misconduct may have been the direct and immediate cause of the dismissal, but its genesis is often far more complex. If we accept this we must recognise that the law of Unfair Dismissal and the statutory procedure in particular, are and were too focused at the end of the conflict spectrum to have any real chance of minimising conflict and maximising employee judgements that the employer is fair and trustworthy. The law of Unfair Dismissal and the statutory procedure are and were framed in a way that turns the employer's attention to the issue of process when they are considering disciplinary sanctions and the possibility of dismissal and not before, but by that stage the attitudes of the parties towards each other have almost certainly deteriorated such that the likelihood of re-establishing mutual trust is limited. This fact seems to be reflected, in part at least, in the results of a study carried out by Rollinson et al which cast doubt on the effectiveness of disciplinary action on the behaviour of employees.²⁴⁸ The research found that most disciplined workers had a tendency to further rule break and two reasons given for this was a feeling by employees that the disciplinary process was flawed and that management decisions were a form of revenge for earlier behaviour. In other words the disciplinary process and outcome can be seen as one further step in the conflict continuum which led to retaliatory and non-productive behaviour from the employee and which brought the employment relation closer to an end. If the employer had been encouraged to engage with the employee at an earlier stage, when the attitude of the parties to each other was almost certainly

²⁴⁸ D. Rollinson, J. Handley, C. Hook and M. Foot, "The Disciplinary Experience and its Effects on Subsequent Behaviour: An Exploratory Study" (1997) 4 *Work, Employment and Society* 109.

more attuned or receptive to resolution rather than disciplinary sanctions and retaliation, the outcome may have been more favourable for all concerned.

But the law is not formulated to achieve that outcome: the law is focused on minimising the number of occasions an employer responds to an employee's misconduct or poor performance by dismissing in a manner that the law considers is unfair (and we can question whether it successfully achieves that objective). However, if the goal is fairness maximisation the law relating to dismissals and disciplinary action should be re-focused on reducing the types and instances of behaviour by both sides that result in the employer taking formal disciplinary action in the first place. How to achieve this is the question? We have already made the case that imposing a standard disciplinary process on the parties is not the way forward and that the preferred approach is to mandate that the parties develop their own policy and procedure (including an understanding of fairness standards) which takes account of the peculiarities of the particular workplace and is adaptable to fit any instance of conflict. Is it enough therefore to leave employers to develop their own procedures? No must be the answer to that question. Any such process will tend to reflect the interests of the employer and is unlikely to be viewed as fair by the employer's workforce. In the Rollinson study mentioned earlier it was discovered that employees objected to their employer's policies and procedures in large part because they felt those rules lacked legitimacy.²⁴⁹ This tends to confirm that it is in the interests of all parties to ensure that there is in place policies and processes relating to EDG that are effective and acceptable to those who are required to operate them, and equally to those whose concerns they address. In this respect, it will be helpful to involve employees in the formulation and implementation of those policies and rules. This approach will mean a significant change for most employers in the way they devise and utilise their workplace policies and procedures. Kersley et al in their study of data from the 2004 Workplace Employment Relations Survey found that grievance and disciplinary procedures had not been subject to consultation or negotiation with employees or their representative in four-

²⁴⁹ Ibid.

fifths of all workplaces sampled.²⁵⁰ The law must be formulated to alter this statistic if any process is to be viewed as fair in terms of its form and implementation.

There is a further point worth making at this stage. Recall the argument that the policy objective of regulation in the area of EDG is to maximise OCD by increasing fairness perceptions amongst employees. It is important to remember that the employees whose perceptions we are concerned with are not just those who are subject to disciplinary action; we are also concerned with the perceptions of their colleagues looking on. And in cases of dismissal it is the perceptions of the remaining employees that matter the most – the dismissed employee is gone and the importance of their perception will be marginal in most cases. Moreover, it is not just the decision to dismiss that will be subject to scrutiny by the employer's other employees, the decision not to dismiss will also be subject to fairness and reasonableness judgements. Just as a decision to dismiss may be judged by the remaining workforce as unfair, so to a decision not to dismiss may be judged as unfair and the consequences of not dismissing may have direct or indirect negative impacts on employee OCB and productivity. Take for example the case of an employee who is constantly performing below an acceptable standard. Their failure to perform is having a negative impact over a long period of time on his colleagues who are forced to work extra hours for no additional reward to cover the poorly performing employee's inadequacies. The employee in question has been warned on a number of occasions regarding their failings but those warnings have apparently fallen on deaf ears. The employee's colleagues have complained about the poor performance and its impact on them but still the employer will not dismiss the offending worker. Why is the employer reluctant to dismiss?

Herein lays a key dilemma for employers faced with the current Unfair Dismissal legislation and it is an important weakness of this and equivalent

²⁵⁰ B. Kersley, C. Alpin, J. Forth, A. Bryson, H. Bewley, G. Dix and S. Oxenbridge, *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (London: Routledge, 2006) 223.

employment protection legislation the world over. Many employers are reluctant to dismiss because they are not certain that dismissal will be lawful (that is, that it will not be judged as unfair by an employment tribunal). And they have good reason to be unclear about whether a decision to dismiss will be judged as unfair – it is impossible to be certain. It is simply not possible when dealing with concepts such as fairness and reasonableness to assess in any given instance that a decision to dismiss will or will not be judged by a tribunal as unfair. Of course there will be cases where the judgement can be made with a level of confidence, but this will not always be the case. The result of this uncertainty is that many employers will act conservatively or in a way that seeks to avoid dismissal when dismissal may well be the correct outcome for the business and the rest of the workforce. Any regulatory model that seeks to increase fairness perceptions and OCB will have to overcome this weakness in the current legislation and provide employers with a greater level of certainty regarding when it is lawful to dismiss.

CHAPTER 6: DOES CURRENT LEGAL REGULATION OF GRIEVANCES AID FAIRNESS PERCEPTIONS?

To this point our discussion of the law of Unfair Dismissal has focused on its relationship to disciplinary action and dismissal, but any attempt to understand the limits of the law in the context of fairness maximisation requires us to also consider the law's impact on grievances. This discussion is particularly important given our understanding that grievances and disciplinary action are often inextricably linked in that an unresolved grievance can lead to negative employee behaviour that can result in disciplinary action and perhaps dismissal. Furthermore, its link with disciplinary action and dismissal aside, the manner in which an employer responds to employee grievances can, as we have discussed, have an important bearing on an employee's productivity, their level of OCB and other factors that are vital for organisational effectiveness, including staff retention.

As with the law of Unfair Dismissal, in this chapter concerning grievance regulation we argue that the regulatory focus is on procedural fairness rather than distributive and interactional fairness, thereby limiting the extent to which the law can effectively influence the employer to take action that might be judged as fair by its employees. Further, this chapter argues that regulation of employee grievances provides aggrieved employees with limited options for legal recourse beyond resignation and taking their chances with a claim for constructive dismissal. But such a claim is drastic and likely to be taken by the employee with great reluctance, and the unlikely prospect of having to defend such a claim will not tend to positively influence employer behaviour. Further, by the time an employee is contemplating such action the odds of maintaining a productive relationship with their employer are low and, therefore, even if, in that instance of EDG, the employer did turn their mind to the employee's view of fairness, it is likely to be too little too late.

But would regulation which provides a meaningful remedy for unfairness at work make any real difference to the level of positive fairness perceptions? Such remedies exist in New Zealand but, it is argued, they are unlikely to

substantially influence greater levels of fairness. That is in large part because assessing fairness continues to be based on non-specific standards which are unlikely to result in a common view of what it means to be fair in every instance of EDG, and the Employment Relations Authority in New Zealand is predominately focused on procedural fairness when interpreting and applying those standards. Further, it is a significant and bold step to litigate against your current employer and employees will, it is argued, be reluctant to take such action. Where employers know this they are not likely to be influenced by the potential for such claims in a way that drives employer behaviour which will influence fairness perceptions.

6.1 Regulating employee grievances – extreme abstentionism

In the first part of this chapter we consider the extent to which regulation of employee grievances in Britain provides a mechanism for generating fairness perceptions. We look at the status of internal grievance procedures, the implied term of trust and confidence and the regulatory experiment that was the Statutory Grievance Procedure.

6.1.1 The legal status of internal grievance procedures

Most employers in Britain have adopted some form of grievance procedure for managers and employees to follow in relation to employee complaints about perceived negative treatment that they have received during the term of their employment.²⁵¹ In some instances those procedures are incorporated expressly or impliedly within the contract of employment, in the remainder of cases the grievance procedures are expressed to sit outside the contract as policies which the employer has the right to amend without the agreement of

²⁵¹ M. Peters, K. Seeds, C. Harding and E. Garnett, *Findings from the Survey of Employment Tribunal Applications 2008* (Employment Relations Research Series no. 107, Department for Business, Innovation and Skills, 2010) 30. This study found that a large proportion of employers surveyed claimed that they had written grievance procedures in place (92 percent). This contrasted starkly with the perceptions of employee claimants, 56 percent of who acknowledged that their employer had written grievance procedures.

their employees.²⁵² This distinction between contractual and non-contractual disciplinary grievance procedures is, on the face of it, an important one. Where an employer fails to follow a contractual grievance process they are in breach of contract and in principle the employee has grounds to pursue a claim for breach of contract in the employment tribunals or the Courts. Where, however, the procedure is not contractually binding on the employer, the employer's failure to follow the procedure will not by itself give rise to a breach of contract claim. The employee may claim that the employer's refusal to follow the non-contractual process amounts to a breach of the implied term of trust and confidence, which we shall discuss in more detail below, but this is a more challenging claim to successfully pursue for the obvious reason that a breach of the non-contractual procedure is not necessarily a breach of contract, whereas non-compliance with a contractually binding procedure is. The barriers of proof and evidence are substantially higher in the former compared to the latter.

Importantly of course the contractual or non-binding nature of the grievance procedure is primarily an issue of process, not substance. An employer may have in place a written contractual process which it follows, but adherence to that process will not necessarily resolve the substance of the employee's grievance in a fair manner. Where the employee considers that their grievance has not been dealt with fairly, what if any, further recourse do they have? Some procedures provide a right of internal appeal, but assuming that also does not satisfy the employee, does the law provide the employee with a meaningful avenue of complaint? The cautious answer to that question is "possibly". While it is possible that the contract of employment provides an

²⁵² The notion that a grievance process might be implied in a contract of employment stems from the EAT decision in *W.A. Goold (Pearmark) Ltd v McConnell* [1995] IRLR 516. In that case the claimant resigned and claimed constructive unfair dismissal. They resigned because their employer had failed to deal with the claimant's grievance that they had unfairly suffered a reduced remuneration following a company restructuring. The EAT found, inter-alia, that the tribunal had been justified in its finding that the individual employment contract contained an implied term that employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. As with any implied term, this term can be specifically excluded by the express wording of the employment contract (see *Mahmoud v Bank of Credit and Commerce International S.A.* [1998] AC 20). It is not uncommon, as we suggest above, for employers to expressly provide in their contracts of employment that disciplinary and grievance procedures are not contractually binding on the parties.

express right that might form the basis of a breach of contract claim which challenges the substantive outcome of the grievance (for example, a right to be treated fairly and in good faith) such express provisions are not, in the writer's experience, the norm. More likely the employee will be forced to formulate a claim based on the implied term of trust and confidence.²⁵³

6.1.2 The implied term of trust and confidence and the inadequacy of remedies for breach

This implied term has been judicially formulated as follows: the employer shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.²⁵⁴ On its face, therefore, the implied term of trust and confidence might provide an aggrieved employee with an opportunity for justice where they perceive that they have been treated unfairly or unreasonably whilst in employment, and their complaint has not been resolved by the employer to the employee's satisfaction. Any initial optimism should, however, be reflected upon with caution.

Following analysis of a line of cases culminating in the Court of Appeal's decision in *Bournemouth University Higher Education Corporation v Buckland*²⁵⁵, Bogg argues that the implied term of trust and confidence is based on, or should be interpreted with reference to, the concept of reasonableness. Without the concept of reasonableness, Bogg argues, "trust and confidence simply could not function".²⁵⁶ Whilst suggesting that there is

²⁵³ This assumes that the employee's complaint is not grounds for a claim that the employee has been discriminated against on one of the protection grounds of discrimination (for example, race, sex or disability). In that case the claim of discrimination could be pursued whilst in employment in reliance on one of the discrimination statutes and the various actions available under that legislations (for example, the Equality Act 2010).

²⁵⁴ See *Mahmoud v Bank of Credit and Commerce International S.A.* [1998] AC 20; *Woods v W. M. Car Services (Peterborough) Ltd* [1981] ICR 666, 670; *Lewis v Motorworld Garages Ltd* [1986] ICR 157; and *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589.

²⁵⁵ [2010] ICR 908.

²⁵⁶ A L Bogg "Bournemouth University Higher Education Corporation v Buckland: Re-establishing Orthodoxy at the expense of Coherence" (2010) 39 *ILJ* 408, 419.

no general duty on the employer to act reasonably, Bogg argues that the implied term gives rise to “a multiplicity of more specific rules which deploy reasonableness in a crisp and focused way (i.e. did the employer’s conduct have reasonable cause? Was the contractual power exercised within appropriate parameters of reasonableness? Was there reasonable reliance so as to generate a protected legitimate expectation?)”.²⁵⁷ Bogg’s interpretation might suggest that the law, via the implied term, does in fact provide employees who have complaints of unreasonableness and unfairness, with a potential and effective remedy for unfair treatment. But, it is argued, such an assertion is likely to be an overstatement or, at the very least, it requires careful qualification. Bogg’s assessment that the implied term has resulted in a number of cases where the tribunals and Courts have placed limits on employer power and managerial prerogative, is of course correct, but those limits have their own boundaries that are established by the judicial definition of the implied term that is described above: to breach the term the offending behaviour must be calculated to destroy or seriously damage the employment relationship.

In other words, whilst it may be true that the implied term has acted as the foundation for a number of specific rules prohibiting certain forms of employer behaviour, it is also true that the behaviour prohibited by those rules was of a particularly harsh nature. The cases that Bogg cites to support his case help to reinforce this point.²⁵⁸ The implied term does not, therefore, we argue, provide a legal basis for raising concerns about employer behaviour that the employee perceives as unfair, but which is not, by any objective measure, “calculated to destroy or seriously damage the employment relationship”. And this continues to leave a gap, discussed in more detail in the following chapter, between the law and genuine employee concerns about unfairness;

²⁵⁷ Supra at note 256, 419.

²⁵⁸ For example, *Gogay v Hertfordshire CC* [2000] IRLR 703 (where the Court of Appeal scrutinised the employer’s exercise of disciplinary powers of suspension following an allegation of sexual abuse); *United Bank v Akhtar* [1989] IRLR 507 (the employee was given 6 days notice that he was required to move his employment from Leeds to Birmingham and he was refused a relocation allowance); *French v Barclays Bank* [1998] IRLR 646 (the employee was required to relocate by his employer and the employers provided an interest free loan to support the move. The employer subsequently sought to adjust the terms of the loan which would have caused the employee to suffer a financial loss of £40,000).

concerns which do not stand to be tested by legal rules, but which nevertheless stand in the way of fairness perceptions. While it is true that the implied term and its applications are evolving, and may evolve into a general duty of fairness or good faith, it is submitted here that no such evolution is foreseeable in the near future.²⁵⁹

The shortcomings of the implied term as a mechanism for driving higher levels of fairness perceptions deserves further comment in the current context. Many if not most concerns that an employee is likely to have about treatment at work will not derive from employer behaviour that is calculated to destroy or seriously damage the relationship of confidence and trust. But, as we have explained, the genesis of more serious outcomes and negative impacts on fairness perceptions can be found in these seemingly less significant grievances and the law should, in the context of a policy aimed at maximising fairness perceptions, be concerned to avoid instances where employee grievances escalate such that the complaint becomes a serious issue that may amount to a breach of the implied term. Take for instance the employee who is aggrieved because they believe that their manager is overly verbally aggressive towards them. The employee complains but the employer, having heard the complaint, decides to take no action. The employer has in place a non-contractual grievance procedure, but the employer chooses not to follow the procedure in this instance because it views the employee's complaint as unreasonable. It is highly unlikely that the employee in the example will have grounds to successfully claim that the employer's action (or inaction) amounts to a breach of the implied term of trust and confidence. But the employee is not satisfied. They feel that they have been unfairly brushed aside by the

²⁵⁹ To complete this point the writer prefers to explain the implied term of trust and confidence with reference to the following statement by Mark Freedland, who argues that a central function of the implied term is to establish "a general standard of behaviour for employing entities and employees, which is elaborated in particular contexts or aspects of employment relations". Adopting this statement in the current context this thesis argues that the implied term of trust and confidence does provide a general and adaptable standard of behaviour or fairness, but that standard is set so as to provide employers with considerable leeway in terms of what is and is not permissible. That leeway is inconsistent with the policy objectives expressed in this thesis. (M. R. Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003) 159).

employer. They perceive that the employer is unfair. They immediately begin searching for an alternative position, their standard of work performance reduces and their level of absence from work increases to the point that they are issued with a formal warning. They shortly thereafter resign. If in the example the employer was under potential threat of a successful claim for breach of contract or some other legal obligation, would they have dealt with the employee's claim in a manner that was more likely to satisfy the employee? That different approach may not have resulted in the employee's ideal outcome, but it may have involved the employer proceeding to address the grievance in a manner which demonstrated to the employee that at least the complaint was taken seriously and fairly considered.

6.1.3 Constructive dismissal – an unsatisfactory choice?

Further, if we assume an instance where the behaviour of the employer is sufficiently serious enough to constitute a breach of the implied term, what is the employee's remedy? The employee continues in their role and their reputation is intact so there is no question of them having suffered any financial loss for which they might be compensated by an award of damages. The employee may well have suffered distress and injury to feelings by the employer's conduct, but the tribunal or Court is highly unlikely to award compensation for such non-pecuniary loss.²⁶⁰ Can the employee obtain a non-financial remedy; can the employee insist that the employer follow the grievance procedure or, more to the point, can the employee obtain an order from the tribunal or Court that the employer must require the manager to

²⁶⁰ In a contractual action, the right to recover damages for injury to feelings is restricted by the decision of the House of Lords in *Addis v Gramophone Co Ltd* [1909] AC 488. In that case a company wrongfully dismissed a manager in was that the Court accepted was "harsh and humiliating" (at 493). Their Lordships refused however to make an award of damages for the injury to feelings cause by the manner of his dismissal. However, in *Johnson v Unisys Ltd* [2001] UKHL 13, an employee who recovered the maximum compensation amount under the unfair dismissal legislation also sought to recover damages for non-pecuniary loss at common law, alleging that the manner of his dismissal constituted a separate breach of contract which had cause him mental distress. The House of Lords rejected the claim on the grounds that it would be wrong to allow the financial limit set down by the statutory scheme for unfair dismissal to be evaded by giving the claimant a parallel remedy at common law which is subject to no such limit. Significantly therefore it appears that the House of Lords has left open the door for a possible review of the *Addis* judgement where the claim is pursued discretely as a common law action. It would however take a very brave employment tribunal to award such a remedy without further and clearer guidance from a higher Court.

behave in a different and less aggressive way? No is the simple answer. The common law will not normally permit a Court or tribunal to make an award of specific performance in such circumstances. While it is the case that the traditional limits on the award of specific performance have been significantly relaxed in the context of the employment relationship,²⁶¹ it remains highly unlikely that the Courts will make an award requiring an employer to alter the *outcome* of a grievance procedure where the procedure was followed, but the outcome was, or was perceived by the employee, to be unfair.²⁶² Such power over the substantive outcomes of processes that occur within the context of an ongoing employment relationship is well beyond what the common law Courts have demonstrated they are willing to wield. The Courts are only likely to order specific substantive outcomes following a grievance process on the occasion where the contract or grievance procedure expressly requires the employer to reach those specific substantial outcomes in the circumstances of the grievance, and such occasions are, in the writer's experience, rare.

In short, therefore, unless an employee can establish that the basis of their grievance amounts to a breach of contract (perhaps a breach of the implied term of trust and confidence) or some unlawful form of discrimination, the employee has no action at common law or statute. And even if the employee

²⁶¹ H. Collins, K. D. Ewing and A. McColgan, *Labour Law, Text and Materials* (Hart Publishing, Oxford, 2005) 463.

²⁶² Generally speaking the Courts will not award specific performance where the contract provides for personal performance by the defendant (see Edwin Peel, *Treitel: The law of Contract* (12th ed., London, 2009) 1100). Also, specific performance will not be ordered of continuous contractual duties, the proper performance of which might require constant supervision by the Court, and that would certainly apply in the case of the example given in the text above (see *Ryan v Mutual Tontine Association* [1893] 1 Ch 116 and *Treitel: The Law of Contract* (at 1114)). But see later discussion regarding compliance orders under the provisions of the New Zealand Employment Relations Act 2000. This not to say that the Courts will not grant injunctions to restrain an employer from taking action against an employee where, for instance, the employer has failed to follow their internal disciplinary process (see *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307). The principle situation to be considered is that in which an employer purports to dismiss the employee without granting him or her the benefit of a contractual procedure, or without having a good substantive reason when, in the rare instances where this is the case, the contract requires such a substantive reason. The employee may then refuse to accept that the employer's breach has brought the contract to an end and seek an injunction to restrain the employer from treating the employee as dismissed until the correct procedure is operated and/or a good reason established (see *Jones v Lee* [1980] ICR 310; *Irani v Southampton and South West Hampshire Health Authority* [1985] IRLR 203; *Robb v Hammersmith and Fulham London Borough Council* [1991] IRLR 7). A specific order may also be sought to prevent a unilateral variation of contractual terms (*McLaren v Home Office* [1990] IRLR 338) or unauthorised action short of dismissal (*Honeyford v Bradford Metropolitan City Council* [1986] IRLR 32).

can establish a breach of contract, they will have no remedy unless the employer's breach has caused them some form of financial loss for which the tribunal or Court may award damages. In many cases where the breach occurs in the context of an ongoing relationship which continues beyond and despite the breach, the employee will not have suffered financial loss for which they can be compensated. The only potential avenue of claim is for the aggrieved employee is to resign and claim constructive Unfair Dismissal. But this is a drastic step for the employee to take. They will potentially be left without a job and income for an indefinite period and there are certainly no guarantees that the Unfair Dismissal claim will succeed. There is never a guaranteed outcome in any Unfair Dismissal case, but the hurdles to success are greater for the employee in the context of a constructive dismissal claim. In that case the onus is on the employee to establish that the employer's behaviour was such that the employee can say they have been dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996.²⁶³ Effectively, this course reflects the common law approach to repudiation and cancellation or termination of contracts. In other words the employee is asserting by their resignation that the employer's behaviour amounted to a breach of contract such that the employee was entitled to bring the contract to a conclusion and they chose to do so. Having established dismissal, the onus switches to the employer to show that the dismissal was fair.²⁶⁴ And given that the employee is alleging repudiation on the part of the employer, it is not enough to overcome their onus for the employee to demonstrate that the employer was unreasonable, nor is it enough that the employer was merely in breach of contract. The employee must adduce evidence to support a conclusion that the employer conducted itself in a manner which constituted a fundamental breach of the employment contract.²⁶⁵ Further, even if the employee is successful in

²⁶³ Section 95(1)(c) states an employee is dismissed if, inter alia, "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct." Cases such as *Western Excavating (ECC) Ltd v Sharpe* [1978] ICR 693 demonstrate the question of onus.

²⁶⁴ *Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693.

²⁶⁵ *Western Excavating (ECC) v Sharp* [1978] ICR 221. Note also that it is possible for the employer to commit a fundamental breach of contract by a series of acts which taken separately, do not amount to a fundamental breach. In *Lewis v Motorworld Garages Ltd* [1986] ICR 157, 167 Neill J made the following statement of principle: "[I]t is now established that the repudiatory conduct may consist of a series of acts or incidents, some of

their claim, they will have expended considerable effort and emotion getting to that point. They may also have incurred the cost of legal representation which will offset to a degree (potentially to a substantial degree) the value of any financial remedy awarded to them by the tribunal or Court.²⁶⁶

In short it is very arguably inconsistent with the policy objective of OCB and maximising employee fairness perceptions that frequently the only legal recourse an aggrieved employee has against unfair treatment at the hands of his employer (and extreme treatment at that), is resignation and a claim for constructive Unfair Dismissal – with all of the challenges and disadvantages that pursuing such a claim inevitably entails. Some may argue that the threat of such a claim sitting in the background is a sufficient incentive for the employer to treat its employees well, but such an argument is arguably incorrect. The substantial hurdles to a successful constructive dismissal claim that are discussed above mean that the chances of an employer being faced with a claim (let alone a successful claim) for constructive Unfair Dismissal are relatively small and unlikely to weigh heavily on the mind of an employer and its managers as they go about their daily interactions with staff. Much more likely to drive good treatment of employees is an enlightened understanding, unrelated to legal regulation, on the part of the employer that fair rather than unfair treatment of employees can create a loyal and more productive workforce. Moreover, any employee who has reached the point where resignation and legal action is the only possible option is party to an employment relationship which is probably beyond repair. Here again the law intervenes at a point in time on the dispute continuum that is simply too late to be of any significant value.

them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee...”

²⁶⁶ We discuss further on the remedy of reinstatement. Reinstatement is unlikely to be awarded in a constructive dismissal claim given that the essence of the claim is the employee saying to the tribunal that the employer’s behaviour was so offensive as to render the relationship repudiated. The employee chose to accept the repudiation and terminate the contract; he cannot now alter his thinking and seek to have the contract reconstituted. If for no other reason the tribunal is likely to determine that reinstatement in such a case is not practicable pursuant to the guidance provided in section 116 of the Employment Relations Act 1996.

6.1.4 The Statutory Grievance Procedure – a step in the right direction?

The obvious shortcoming of the law as it stands in relation to employee grievances is that it lacks teeth when they are needed most. For the law relating to employee grievances to have any hope of positively impacting on the fairness perceptions of existing employees, it must be prepared to meaningfully intervene at a point in time when the relationship can be protected and thereafter encouraged to thrive. Currently, its only meaningful point of intervention is, arguably, upon resignation via the law of constructive Unfair Dismissal. Moreover, the law only mandates fair behaviour on the part of the employer (unlawful discrimination aside) in the context of dismissal (that is, in relation to the reasons for the dismissal and the process followed leading to the dismissal). The employer is not legally prohibited from treating their employees unfairly and unreasonably during employment except to the extent that such treatment is severe enough to constitute a breach of the employment contract (for example, because the treatment amounts to a breach of the implied term of trust and confidence). And as we have discussed, even then the remedies available to the employee for breach of contract while they remain employed can be little or nothing. If the law is to have any chance of encouraging fairness perceptions and maximising OCB, it must present employees with a meaningful opportunity to seek redress for perceived unfair treatment while at work. In this way the law will also send a stronger signal to employers that it requires fair treatment at work which in turn may translate into employer behaviour that is more likely to be consistent with the objective of OCB.

The now repealed statutory grievance procedure (SGP)²⁶⁷ was in principle a step towards a more rigorous legal intervention to prevent unfair treatment during the ongoing employment relationship. The SGP was introduced to ensure that employees' workplace concerns were raised, discussed and

²⁶⁷ Schedule 2 of the Employment Act 2002, which came into force on 1 October 2004, contained two statutory grievance procedures – a three stage procedure and a modified procedure. The circumstances in which the grievance procedures were to apply were set out in the Employment Act 2002 (Dispute Resolution) Regulations 2004.

preferably resolved before the parties became embroiled in tribunal litigation.²⁶⁸ The standard SGP was a three step process as follows:

1. The employee was required to set out the grievance in writing and send the statement or a copy of it to the employer.
2. The employer was required to invite the employee to a meeting to discuss the grievance. The meeting was not to take place unless: the employee had informed the employer what the basis for their grievance was when they made the statement under step 1; and, the employer had been given a reasonable opportunity to consider his response to that information. The employee was obligated to take all reasonable steps to attend the meeting and after the meeting the employer was required to inform the employee of the employer's decision and the employee's right to appeal if they were not satisfied with the decision.
3. If the employee chose to appeal, they were required to inform the employer of that desire and, in response, the employer was required to invite the employee to attend a further meeting. The employee was obligated to take all reasonable steps to attend the meeting after which the employer was required to inform the employee of its final decision.

In order to encourage employees and employers to follow the SGP the Employment Act 2002 provided that, where the SGP applied in respect of an employee's grievance, and where the employee presents an employment tribunal claim arising from that grievance, the tribunal claim was inadmissible unless the employee had sent a written statement of the grievance to the employer (in compliance with step 1 of the standard SGP). Once the SGP had been initiated, both parties were required to comply with its requirements. Where the SGP had not been completed owing to the fault of either party, the tribunal award made to the employee in the event of a successful claim would generally be adjusted (upwards if the fault was the employer's and downwards if it was the employee's).

²⁶⁸ Income Data Services Ltd, *Statutory disciplinary and grievance procedures: employment law supplement* (London, 2004) 37.

The SGP on its face appeared to be a step in the right direction to effectively regulating employee grievances in a way that promoted effective resolution of employment disputes and maximises fairness perceptions. The SGP incentivised the parties to undertake a process of investigation and resolution by blocking access to the tribunal or threatening an increase or decrease in tribunal awards if the mandated process was not complied with. In this way the mandatory process addressed the issue of employee reluctance to raise concerns with their employer for fear of retribution – if they failed to do so they would be without recourse to a legal remedy via the tribunal. And the threat of a greater award would logically focus the mind of the employer on adopting a fair process for fear of being hit harder financially if they failed to do so and following a successful claim by the employee. Further, the procedure was simple and there was nothing to prevent the parties from agreeing a process that was more detailed and tailored to the particular workplace – the SGP was a minimum legal standard.

But beneath its veneer the SGP was never destined to be the secret sauce of effective grievance regulation. It suffered from many of the same shortcomings that have already been discussed in relation to the statutory disciplinary procedure and the law of Unfair Dismissal in general, and several more. First, the SGP was only that – a procedure. It did not mandate substantive fairness in relation to grievances and therefore it remained open for the employer to go through the motions of the procedure with no intention of allowing it to make any difference to the outcome of the grievance. To test the substance of the grievance the employee's only real option remained to resign and claim that they had been constructively dismissed. The only change from the pre-SGP era was that the employer, having followed the SGP, had gone some way to insulating themselves against a finding of Unjustifiable Dismissal because they had followed a process (the SGP) whereas previously they may not have.

Secondly, let us consider the incentives for compliance with the SGP. They were not incentives that were likely to realise early resolution of issues before they escalated beyond the point of repair. They did not incentivise the

employee to raise their concerns as soon as possible to ensure that they could put the issue behind them and get on with their job. The incentive was most likely to kick-in psychologically when the employee was considering resignation and, more than that, a claim of constructive Unfair Dismissal. That is a reflection of the point discussed above that the law does not prohibit unfair treatment at work (other than in the context of dismissal or unlawful discrimination) unless that treatment amounts to a breach of contract. And unless the breach is so serious that the employer is able to resign and claim constructive Unfair Dismissal, the remedy for a breach of contract, pursued while the employee remains employed, may amount to nothing unless the employee can establish that the breach has caused them financial loss. Therefore the employee is unlikely to pursue a claim in the employment tribunal unless that claim is for constructive dismissal and, by the stage, they are considering that course of action the employment relationship is almost certainly beyond salvaging, and the issue of fairness perceptions and OCB is irrelevant. In fact what the incentives were arguably achieving by that stage was to encourage the employee to go through the motions of the SGP to ensure his right to bring a claim and not to have any tribunal remedy reduced.²⁶⁹ Also, in the employee's mind they may have been concerned to maintain leverage in relation to settlement negotiations – this was certainly the writer's experience as a lawyer working in the context of the SGP. In other words, the employee was less likely to obtain a favourable settlement of their claim because the employer could point to the employee's non-compliance with the grievance procedure and reasonably argue that, even if the employee's claim was successful, their award of compensation could be

²⁶⁹ This factor is almost certainly reflected in the increased number of workplace disputes identified by the report published following the review by Michael Gibbons into the impact of, inter-alia, the SGP (in-so-far as those disputes relate to employee grievances). Specifically the report noted that, according to submissions, both large and small businesses reported that the number of formal disputes had risen since the introduction of the statutory disciplinary and grievance procedures. The report said that the review heard that 30-40% increases had been typical in the retail sector (Michael Gibbons, *A Review of Employment Dispute Resolution in Great Britain* (DTI, London, 2007) 25. To the extent that the increase was in the number of employee grievances, it was in my submission predominantly the case that those grievances were raised by employees who were considering a claim for constructive dismissal. Prior to the SGP it is likely that the grievance would have existed and the claim of constructive dismissal may well have been made; the difference is that with the SGP in place the employee was forced into raising the grievance whereas previously they may not have raised it in a formal sense prior to their resignation or the filing of tribunal proceedings.

reduced by as much as 50% and therefore the employer was not inclined to offer much by way of settlement.

And consider the effectiveness of the incentive on the employer. The increase in an award was contingent in the first instance on the employee resigning, then bringing a claim and subsequently succeeding with that claim. Those are substantial dependencies. There was every chance that the employee would not resign. If they did there was every chance that they would not bring and pursue a claim. If they did try litigation there was no certainty that they would succeed. And there were good reasons not to do any of these things (resignation means no job and no income and litigation means time, emotional aggravation and potentially cost, with no guarantee of success). Given these dependencies, to what extent was the risk of a 10% uplift in some far off possibility of a tribunal award likely to weigh heavily on the mind of the employer when it was considering how to respond to an employee grievance? Not significantly was probably the answer in many cases; particularly where the grievance was not perceived by the employer to be serious and they did not consider the risk of a tribunal claim to be great. This is an important point. The incentive is about money – if the employer did not follow the procedure they may have been required to pay more compensation to the employee. But if the employee was not likely to receive compensation because they were not likely to bring a claim or they were but they were not likely to be awarded a remedy, where was the incentive?

Thirdly, and this point was made in relation to the statutory disciplinary procedure, at the heart of the shortcomings of the SGP as a mechanism for maximising fairness perceptions was the fact that it prescribed a process. This was a problem for a number of reasons. To begin with, any attempt to prescribe a process that is intended to cover all workplaces in all industries having, as they do, an infinite variety of cultures, methods of working and personalities, is unlikely to appear either in form or implementation to all employees in all workplaces as being fair. The law cannot hope to prescribe a procedure for handling employee grievances that effectively accounts for all of these factors. All that such a process can reasonably hope for is a general non-

reflexive standard procedure that applies a broad and generic understanding of what it means to be fair, but which might not reflect in its application what it means to be fair in a particular workplace in relation to a particular employee grievance. In the context of a policy aimed at maximising fairness perceptions one might conclude therefore that the law should steer away from any attempt at prescribing a disciplinary process, but focus very much on allowing the parties to the employment relationship to formulate the meaning of fairness in their particular workplace. Further, it is arguable that the SGP did in fact encourage employers to do no more than what was prescribed which would do little to influence perceptions of fairness, and may in fact have had a negative effect on fairness at work. The standard procedure may have reduced the likelihood that the employer would carefully consider what was fair and reasonable in the context of the particular grievance. This was because a mandated standard process sends a message to the employer that all they have to do to act fairly and therefore lawfully is to follow the minimum requirements of the procedure and nothing more.

Finally, as with the statutory disciplinary procedure, the more you prescribe a grievance process the more you increase the chances that its implementation will appear not genuine. That is because you are forcing the employer to follow a process that may not be appropriate in the circumstances of the particular grievance and, more to the point it may be inconsistent with how the employee and the employer would prefer to approach the matter. In that case the employee is more likely, with some justification, to judge that the employer is simply following a process for the processes sake as opposed to being genuinely concerned about resolving the substance of the grievance. In this way, and somewhat ironically, the SGP was less likely to encourage fairness perceptions than a regime which requires simply that the employer deal with employee grievances in a manner that is fair and reasonable.

6.2 The New Zealand approach to regulating grievances – is it the solution?

Is the answer to more effective grievance regulation to enact a law according to which employers are obligated to address employee grievances in a manner that is fair and reasonable and to permit the employee to seek enforcement of that law if necessary, whilst they remain employed, via the employment tribunals? To overcome some of the key difficulties related to current regulation of employee grievances that are discussed above, would it be necessary to grant the employment tribunals the jurisdiction to award remedies for non-compliance with the new fairness law that represent a real incentive to employers to deal with employee grievances in a fair manner, thereby increasing the likelihood of employee fairness perceptions? To help answer this question it is instructive to consider the approach to regulating employee grievances that has been adopted in New Zealand.

6.2.1 The disadvantage claim under New Zealand law

Legal regulation of employee grievances in New Zealand is best thought of under three headings: first, the impact of the statutory requirement of good faith; secondly, breach of contract; and, thirdly, the statutory claim of unjustifiable action or disadvantage. We will focus first on the latter. Subsection 1(b) of section 103 of the New Zealand Employment Relations Act 2000 allows an employee to bring a claim (otherwise referred to as a personal grievance) if “the employee’s employment, or one or more of the conditions thereof, is or are affected to the employee’s disadvantage by some unjustifiable action by the employer”. The first point to note about this claim is that it can be pursued by the employee while they are employed. Initially the Courts took a restrictive approach to the circumstances that could give rise to a disadvantage claim; in order to succeed a grievant was required to demonstrate that the employer’s actions had caused the grievant some material

or financial loss.²⁷⁰ But this narrow interpretation of the disadvantage claim was eventually rejected by the Court of Appeal and it was judicially acknowledged that any disadvantage may form the basis of a claim, provided the grievance relates to the employee's "employment, or one or more of the conditions thereof".²⁷¹

It is enough to pursue a disadvantage claim that the employee was treated unfairly by their employer; it is not a requirement of the legislation that the disadvantage must amount to a breach of contract before the disadvantage claim can be pursued.²⁷² Further, in considering whether there has been a disadvantage the Employment Relations Authority (ERA) or Court may consider the actual effect of the employer's actions on the employee.²⁷³ It is also important in the current context to realise that the claim of unjustifiable disadvantage is assessed with reference to the test for justification contained in section 103A of the Employment Relations Act 2000 (this test was discussed above in the context of the law of Unfair Dismissal). That test specifies that the ERA or Court must, when determining a claim of disadvantage, consider both "the employer's actions, and how the employee acted". In other words the disadvantage claim requires the ERA or Court to consider more than the process the employer followed (or did not follow as the case may be) when dealing with the employee's concern; section 103A also calls upon the ERA or Court to assess the substance of the employee's claim.

If the ERA or a Court determines that the employees claim is upheld, they will go on to assess what, if any, remedy to award. Section 123 of the Act specifies the *financial* remedies available for a claim of unjustified disadvantage and they are:

²⁷⁰ These traditional categories of disadvantage included: demotion (*NZ Bank Officers Union v BNZ* [1980] ACJ 155); suspension without pay (*Canterbury Rubber Workers IUW v Dunlop (NZ) Ltd* [1983] ACJ 367); and a withdrawal of free transport (*NZ Electrical Union v Bonds (NZ) Ltd* [1984] ACJ 353).

²⁷¹ *Alliance Freezing Co (Southland) Ltd v NZ Engineering Union* [1989] 3 NZILR 785.

²⁷² See *Northern Distribution Union v Newman's Coachlines Ltd* [1989] 2 NZILR 677 where unfairness in the compilation of a personnel file was described as giving possible grounds for a disadvantage claim. In *NZ Professional Firefighters Union v NZ Fire Service Commission* [1988] NZILR 992, "adverse entries" were required to be removed from an employee's file.

²⁷³ *Matthes v NZ Post Ltd* [1994] 2 ERNZ 994.

1. Reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the disadvantage.
2. The payment to the employee by the employer of compensation for—
 - a. Humiliation, loss of dignity, and injury to feelings; and
 - b. Loss of benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the disadvantage had not occurred.

Section 128 of the Act goes on, in relation to the remedy of reimbursement, to provide that where the employee has lost remuneration as a result of the disadvantage, the ERA must order the employer to pay the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. That same section also provides that the ERA may order the employer to pay more than 3 months' remuneration if the circumstances warrant an enhanced award.

The important point to note in relation to Section 123 is the availability under the New Zealand legislation of compensation for non-financial loss. Unlike English law, Section 123 recognises that non-financial injury which flows from unfair treatment at work can be worthy of a financial remedy. Although the availability of this remedy gives rise to difficulties associated with determining quantum²⁷⁴, its existence provides the employee with the opportunity to seek redress for the injury they have suffered and, importantly for present purposes, it has the potential to discourage unfair treatment on the part of the employer. That is because the employer knows that unfair treatment of its workforce may result in claims for compensation irrespective of whether or not the employee has suffered financial loss. A further point worth making in the context of Section 123 is the impact that an actual award of damages can have on future employer behaviour. Take for instance a case

²⁷⁴ *Telecom New Zealand Ltd v Nutter* (2004) 7 NZELC 97,563.

where an employee has been refused an opportunity to apply for promotion in circumstances where an invitation to seek promotion would have been reasonably anticipated. The Courts in New Zealand have accepted that such circumstances can give rise to a successful claim of disadvantage from which can flow financial remedies.²⁷⁵ If in such a case the employer is found to have unjustifiably disadvantaged the employee and is required to pay financial compensation as a result, it is arguably unlikely that the employer will behave in the same manner again towards the employee concerned, having been publically reprimanded and stung financially for their prior actions. This argument might be made in most instances where the employee has successfully pursued a disadvantage claim.

6.2.2 Breach of contract, good faith and the remedy of compliance

The existence under New Zealand law of the claim for disadvantage does not prevent an employee from also pursuing a claim that the employer's actions amount to a common law breach of contract. While such a claim cannot, as in the United Kingdom, give rise to an award of damages to compensate for non-financial loss²⁷⁶, it does under New Zealand law open the door for the employee to pursue other remedies not directly available in the context of a disadvantage claim. Perhaps most notable of these additional remedies is a compliance order. Section 137 of the Employment Relations Act 2000 provides that:

(1) This section applies where any person has not observed or complied with...(a) any provision of... any employment agreement... (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party... that person to do any specified thing or to cease any specified activity, for the purpose of preventing non-observance of or non-compliance with that provision...

In effect Section 137 sounds a right in the Authority to make an award akin to specific performance (but without the limitations and restriction associated with the equitable remedy) in circumstances where the employee has an

²⁷⁵ *NZ Air Line Pilots Association v Air NZ Ltd* [1992] 3 ERNZ 73.

²⁷⁶ *Ogilvy & Mather (NZ) Ltd v Turner* [1993] 2 ERNZ 799; *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275.

established claim that their employer has breached their contract of employment. In this way it is open to an employee whose grievance also constitutes a breach of contract to ask the ERA to force an alteration of the employer's behaviour such that the grievance is remedied. In theory such a remedy is likely to be more effective as a solution to employee grievances than damages; a compliance order directly addresses and corrects the behaviour that has given rise to the grievance, whereas damages retrospectively applies a financial solution to what is often a non-financial problem. The significance and breadth of the remedy of compliance is particularly well illustrated when we consider that the jurisdiction extends to ordering compliance with the implied terms of the employment contract. In *United Food and Chemical Workers Union of NZ v Talley*²⁷⁷ an allegation was made (but found by the Employment Court to be baseless) that threats had been issued by an employer against employees with the object of preventing them giving evidence for the union in Court. The Court held that that this amounted to a breach of an implied term of the contract and said further:

... it is quite clear that if such a threat was made as is alleged – that is to say, a threat of reprisals in retaliation for the workers being either parties to or witnesses in any such proceeding as that before the Employment [Relations Authority] would be entitled, in its discretion, to make a compliance order requiring the defendants to do some specified thing or to cease some specified activity as may be necessary for the purpose of preventing further non-observance of or non-compliance with that term of the employment contract.²⁷⁸

The importance of compliance orders has escalated following the enactment in 2000 of the statutory obligation of good faith. Section 4 of the Employment Relations Act 2000 requires that the parties to the employment relationship must deal with each other in good faith; including in the context of employee grievances²⁷⁹. The obligation of good faith casts aside any doubt that might have existed previously concerning the extent of the implied terms and whether they included a general obligation of fairness and fair treatment. As

²⁷⁷ [1992] 1 ERNZ 756.

²⁷⁸ Ibid, 771-772.

²⁷⁹ Section 4(4)(bb) of the Employment Relations Act 2000 provides that the duty of good faith applies to “any matter arising under or in relation to an individual employment agreement while the agreement is in force”.

the Court of Appeal explained when comparing the good faith obligation to the implied term of trust and confidence²⁸⁰:

Good faith relates both to process and outcomes in how an employment relationship is conducted and defined or characterised. Mutual trust and confidence is part of this underpinning, but other factors will also be part of a relationship founded on good faith, such as responsiveness, communication, respect, goodwill, etc.

The Court of Appeal's assessment was effectively codified in 2004 by the enactment of section 4(1A) of the Employment Relations Act which provides that:

The duty of good faith... –

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative...

A breach of good faith cannot it appears be remedied by an award of damages, but it can be addressed by an order for compliance under Section 137. In this way the ERA is empowered by the Act to require an employer to rectify its behaviour such that it aligns with the broad duty of good faith – a duty that “has more to do with notions of honesty, frankness, and what lawyers call ‘bona fides’ rather than adherence to legal rules”²⁸¹. Therefore good faith, coupled with the remedy of compliance, provide the opportunity for the employee to seek redress for perceived unfairness and to have that unfairness put right, without the need to match the circumstances of their complaint to some rigid legal cause of action.

Of course not all established breaches of contract and good faith will be remedied by compliance; the remedy of compliance is discretionary. As the Employment Court has explained:

It is not enough to justify the making of compliance orders that there has been non-compliance or non-observance of an employment contract. Once that threshold has been crossed the Employment [Relations Authority] has a discretion to make a compliance order or to refuse to make it or to postpone making [it]... That does not mean, however, that the [Authority] has an uncontrolled discretion to do as it pleases on the particular day as between

²⁸⁰ *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533.

²⁸¹ *National Distribution Unions Inc v Carter Holt Harvey Ltd* [2001] ERNZ 822.

the particular parties. The exercise of the discretion is subject to the supervision of the Court and the Court will not be satisfied with the governing the exercise of discretions generally and the specific principles which can be gleaned from relevant provisions in the [Act] [A]s to the general principles, we think it is best to be remembered that what is required of judicial discretion is that the adjudicator seeks to do justice between the parties. It is a rule of statutory interpretation that where a discretion is conferred upon any judicial officer or public official it is to be regarded not as an absolute discretion but one that is conditioned by the requirement to do justice... justice and reason are to be the guide and not personal whim or predisposition.²⁸²

But while the discretion to order compliance is subject to the general principle that the ERA should seek to do justice between the parties, the specific provisions of the Employment Relations Act 2000, and the associated judicial dicta, tend to encourage the ordering of compliance following a finding of breach of contract, unless there is good reason not to:

It is a salient feature of the provisions of the Act with which the [Authority] and the Court will be most concerned (those contained in Part IV) that the object of that Part is to establish that employment contracts create enforceable rights and obligations, that it is the responsibility of the parties to employment contracts to enforce their rights under them and that the primary remedy under the Act for breach of any employment contract or of any provision of the Act is an order for compliance... This means that in general where there has been a breach or a non-observance of or non-compliance with a right or obligation created by an employment contract, the party claiming to be affected by that breach is entitled to enforce the contract and is entitled at least to a compliance order unless some good reason exists for refusing that remedy. As the Court put it in its recent judgement in *Grant v Superstrike Bowling Centres Ltd* [1992] 1 ERNZ 727, ‘the [Authority] has been given by the legislature a heavy responsibility, almost a duty’... That is a very good way of describing the discretions conferred by [section 137].

Specifically in the context of considering compliance in the context of a breach of good faith, the Employment Court has said²⁸³:

Breaches of section 4 having been established... the next question is whether there should be an order for compliance... as the plaintiff claims or, as the defendant submits, there should be no sanction. The remedy of compliance is discretionary... unless... a compliance order is made, the defendant will be seen to have breached with impunity its statutory obligations affecting employees, many of who will lose their employment. That is not an attractive proposition for a Court required to decide such cases in equity and good conscience: section 189(1) Employment Relations Act 2000.

²⁸² *United Food and Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756.

²⁸³ *NZ Amalgamated Engineering etc Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597.

6.2.3 Is the New Zealand approach likely to deliver higher levels of fairness perceptions?

In summary, the claim of disadvantage under the New Zealand Employment Relations Act 2000 allows the employee a broad opportunity to apply to an adjudicative body for a remedy in circumstances where they have been treated unfairly during ongoing employment. The question for the ERA or Court in reaching a conclusion on the claim is whether the employee suffered a disadvantage as a result of the unfair treatment, and whether the actions of the employer leading to the disadvantage were nevertheless justified with reference to the test in Section 103A. On its face therefore the New Zealand legislation via the disadvantage claim addresses a key shortcoming of the law in Britain in relation to employee grievances: the New Zealand law effectively prohibits unfair treatment at work without the need for the employee to establish a breach of contract or to resign and claim constructive dismissal. In this way it might be argued that the New Zealand approach is more aligned with an approach to grievance regulation that is likely to maximise employee fairness perceptions. Specifically the threat of a claim for disadvantage places pressure on the employer to act fairly whilst the employee is employed for fear of being subject to legal action. Most employers would want, one imagines, to avoid such a claim if at all possible given the cost (including in terms of legal fees and management time) and disruption that defending such a claim typically entails.

Further, the remedies available under New Zealand law appear on their face more likely to encourage fair treatment within the employment relationship and adherence to the concepts of good faith and compliance with the implied term of trust and confidence. This is in part because they appear to realise and address the realities and peculiarities of the employment relationship, the imbalance of economic power that typifies the relationship, and the failings of the common law to meaningfully address these realities in the context of EDG. To begin with the law in New Zealand recognises that unfair treatment at work may not always lead to financial loss and in fact the damage suffered by employees who are subject to unfair treatment at work while remaining

employed, may well be limited to non-pecuniary loss, and the Employment Relations Act grants employees a legal right to recover that loss. In this way the law refuses to allow the employer to act unfairly and leave the employee without a financial remedy and therefore without redress, unless they (the employee) is prepared to take the drastic step of leaving employment to take their chances with a claim for constructive dismissal. Beyond monetary awards New Zealand law sets aside the restrictive approach of the English Courts to the award of specific performance, by introducing the compliance order. In this way employees in New Zealand are able to request that a third party, the ERA, order that the employer change its behaviour and begin acting in a manner that is consistent with fairness and good faith.

On the face of it therefore the regulatory approach to EDG in New Zealand seems, as already suggested, far more likely to elicit fairness perceptions and greater levels of OCB because it creates more meaningful incentives (albeit negative incentives in the form of compensatory remedies and compliance orders) for employers to treat their employees in a manner that is likely to be perceived as fair. Further, in theory at least, the law in New Zealand is more likely to promote a belief in the minds of employees that employer-promises regarding fair treatment are credible. That is because a failure to live up to those promises can be more effectively addressed by legal action. This ability of New Zealand employers to make more credible promises that drive fairness perceptions amongst staff, in turn has the potential to increase greater OCB.

But this initial optimism about the New Zealand approach is tempered when we recall our earlier discussions regarding the challenges associated with judging reasonableness and fairness in the context of EDG. As in Britain, in New Zealand the right or wrong of an employer's actions leading to a grievance and then how the employer deals with that grievance, are judged with reference to the standards of reasonableness, fairness and, specifically in New Zealand, good faith. We have already discussed that concepts such as reasonableness and fairness are vague and subject to interpretation. The interpretation applied in the context of EDG will tend to vary between employers and employees and this creates an obvious challenge for the goal of

fairness perceptions, which almost certainly requires employer and employee behaviour to be aligned according to a common understanding of what it means to be fair and reasonable in each instance of EDG. In reality, the employer's and the employee's respective interpretations of fairness, loaded with traditionally divergent interests, will predict the lawful (i.e. fair and reasonable) outcome of any grievance in a potentially very different way. It is important to remind ourselves of this point in the context of a discussion which focuses on the remedies in New Zealand for unfair treatment (such as the compliance order for a breach of good faith), because in the end access to those remedies might presuppose in part at least an assessment by both the employer and employee that, should the employee pursue a claim in any given instance of perceived unfairness, they will in fact be awarded a remedy which is worth the effort and cost of that pursuit. This is vital because the employer's actions are less likely to be influenced (particularly early in the dispute continuum) by a potential sanction or remedy if they (the employer) do not believe in the first instance that their actions or inactions are unfair and therefore likely to be subject to a remedy. In other words, the ability of the legal remedy to influence behaviour and therefore fairness perceptions and the making of credible promises, is hampered to a degree by the challenges associated with finding a common view amongst the protagonists of what it means to be fair and reasonable in the first place. If an employer does not believe that their actions are unfair and unreasonable, they might believe in turn that they have very little reason to be concerned about a remedy that can only flow from a finding or assessment that their view of fairness is in fact incorrect.

That said it would be wrong to suggest that a strong sanctions and remedies regime can have no influence on employer behaviour. An employer who is aware that unfair treatment of an employee in a given instance may result in, for example, a substantial award of compensation, is likely to be more cautious in their assessment of what it means to be fair. The key point to repeat is that a sanctions or remedies regime is not, without more, likely to influence employer behaviour and maximise fairness perceptions amongst employees. The 'more' might be substantial financial remedies that have the

effect of penalising the employer for unfair treatment. But punitive remedies that are supported by robust adjudicative application are likely to have the other negative consequences that we discussed above in relation to remedies for Unfair Dismissal (defensive or conservative hiring practices and a reluctance to take disciplinary action where such action is appropriate).

6.3 A conclusion concerning current regulation of employee grievances

It is arguable that the potential impact of the current legal sanctions regime as it applies to employee grievances and the outcome of grievances, is most likely to influence the behaviour of the employer at a point in time when the possibility of litigation draws nearer; and there is a realisation that the employer's interpretation of fairness may be subject to challenge. But by that stage the damage to the employment relationship is likely to have grown acute and the likelihood of eliciting fairness perceptions is significantly reduced. Moreover, the influence of the potential sanction is not necessarily about a realisation in the mind of the employer that they may have acted unfairly and will therefore face an award of compensation or some other remedy. For the employer the willingness to resolve or settle a claim on its own terms might be about a host of factors which may or may not include the possibility that they have acted unfairly. Those other factors might include: the legal costs associated with defending the claim; the potential cost of a compensation payment; the cost in terms of management time used in defending the claim; the fact that the claim is a matter of public record; not wanting to place control over the outcome of the dispute in the hands of a third party (the tribunals). As has already been stressed, what is required is an approach to the resolution of employee grievances that encourages the employer to focus on the employee's perception of what it means to be fair in a given instance. This focus should occur during the early stages of the dispute spectrum when the employer's actions are most likely to create perceptions of fairness amongst their workforce and when the parties are best placed to explore a common view of what it means to be fair in any given instance.

CHAPTER 7: CAN THE EMPLOYMENT TRIBUNALS AND THE COURTS INFLUENCE FAIRNESS PERCEPTIONS?

It is not just the different interpretations by the employer and employee of fairness and reasonableness that hampers the ability of the law and remedies to influence employer behaviour and maximise fairness perceptions. A further important barrier is, we argue, the role of the employment tribunals and Courts in the grievance and disciplinary process. Any regulatory regime aimed at maximising fairness and fairness perceptions in relation to EDG must ensure an enforcement mechanism that encourages compliance with the appropriate standards of fairness. In other words the tribunals and the Courts, if they are the chosen means of enforcing the regulation, must be prepared to challenge and sanction unfair behaviour and give direction to the parties regarding what it means to be fair, both in terms of process and substance. But, as we have already discussed, this ambition assumes a number of factors that may not be achievable. First, it assumes that the tribunals and the Courts can find a universally applicable interpretation of fairness that is both generic yet easily adaptable to specific instances of EDG; an interpretation that can guide employers and employees towards fair outcomes which employees in particular will always view as fair. This is of course impossible for the reasons that we have already explored. All that the tribunals and Courts can hope to do is try and interpret and apply the concepts of fairness and reasonableness to the facts of the particular case, but the outcome of that application and interpretation is unlikely to be predictable with certainty, nor will it yield clear guidance for future behaviour given the infinite variety of circumstances in which those claims of unfair treatment can and do arise.

Secondly, notwithstanding the challenges associated with interpreting fairness and reasonableness in any given instance of EDG, the tribunals and the Courts could play a role in forcing employers to reflect more closely on their handling of EDG. They could attempt an interpretation of fairness that does incorporate employees' views of fairness, which in turn might drive a higher degree of fair treatment and fairness perceptions. But to achieve this objective the tribunals and Courts must be able and willing to rigorously question and challenge why

and how employers choose to act as they do when faced with EDG situations. The reality is that the employment tribunals and Courts do not rigorously challenge employer perceptions of fairness; nor do they stringently question the actions and inactions of employers that are driven by those perceptions. It is partly the purpose of this chapter to explore the reasons for this failure. In summary, we argue that there are three broad explanations, all of which are closely interrelated. First, access to the tribunals and the limits of their jurisdiction, are not conducive to the meaningful enforcement of fairness at work and the evolution to a higher degree of fairness perceptions amongst employees. Secondly, and this issue has already been explored to some extent in the context of our discussions about the law of Unfair Dismissal, the common law traditions from which the tribunals have evolved and according to which they continue to function, do not encourage judicial interference with the exercise of managerial prerogative. Thirdly, even if the first and second factors could be overcome, a policy that aims at maximising fairness perceptions and greater OCB cannot be effectively realised by the use of a third party adjudicator to assess and rule on whether or not in any specific instance of EDG an employer has been fair and reasonable (we deal with this point extensively in the next chapter).

7.1 The employment tribunals as promoters of fairness: access issues

A tribunal and judicial system which enforces rights to fair treatment at work cannot hope to achieve greater levels of fairness perceptions unless access to and use of the system is simple. If employees perceive (rightly or wrongly) that they are not easily able to bring their grievances and claims before the adjudicating body, the value of the regulation which that body is established to enforce is significantly reduced, and the goal of influencing higher levels of fairness at work is seriously compromised for a number of reasons.

First, the more difficult it is in the employee's mind for them to achieve a tribunal ruling on his or her charge of unfair treatment, the less likely they are to believe that their employer's promises about fair treatment are credible, because they are backed up by enforceable legal principles and rules. Further,

where the employee perceives significant difficulty in pursuing their claim through the tribunals, they will almost certainly be disinclined to pursue the claim at all. They may be prepared to ‘lump’ their potential grievance on the basis that the challenge associated with having the grievance eventually brought before a tribunal if that is necessary to resolve it, is simply too substantial.²⁸⁴ This is anathema to the policy of increased OCB. As we have discussed, unless the employee is encouraged to raise their grievances, resentment associated with those grievances will build, productivity will suffer, and the end of the relationship may be inevitable. Similarly, the employer may be less inclined to be guided or encouraged to act fairly by regulation where they know that the obstacles in the way of an employee who might bring a claim in the tribunals are substantial. That is because the employer will realise that the risk of having to defend a claim, meritorious or not, is reduced. Conversely, if the employee believes that the employer is likely to address their grievances, because if they do not the employer could be confronted with a tribunal claim, the employee may be inclined to raise the grievance in the hope of it being resolved.

The story of the employment tribunals is one of an adjudicative body, access to which is perhaps not as simple as one might hope if effective enforcement of legal regulation of EDG is to be achieved. In 1968 the Donovan Commission announced that employment tribunals (then industrial tribunals) should provide employers and employees “for all disputes arising from their contracts of employment, a procedure which is *easily accessible, informal, speedy and inexpensive*”²⁸⁵ [emphasis added]. This was and remains a laudable ideal, partly because disputes over employment rights commonly involve parties (usually claimants) with limited means (in terms of resources, time and/or capability) who are likely to be put off commencing and pursuing legal dispute procedures that are drawn out, slow, expensive, and riddled with procedural hurdles and substantive complexity. A tribunal system that presents a significant proportion of potential claimants with such barriers to

²⁸⁴ Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart, Oxford, 1999) Chapter 2.

²⁸⁵ Report of the Royal Commission on Trade Unions and Employers’ Associations (Cmnd 3623: 1965-68) para 572.

access is undesirable because, of course and as has been suggested, that system threatens to stymie the very employment rights that it is charged with enforcing and that are deemed to have inherent worth, in the context of the current discussion, as a means of promoting greater levels of fairness at work and OCB.

Unfortunately, albeit, looking back, not surprisingly, the Donovan ideal has become in many respects increasingly difficult to achieve. That is in part because it is an ideal that was born in a context which has long since changed. By June 1968, when the Commission reported back, the tribunals' functions, aside from hearing appeals from the assessment to training levy under the Industrial Training Act 1964, included little more than the following: ascertaining redundancy entitlements under the Redundancy Payments Act 1965, resolving disputes over the refusal to provide and the meaning of written terms of employment²⁸⁶, considering certain appeals under the Selective Employment Payments Act 1966, and determining whether work was 'dock work' for the purposes of the Docks and Harbours Act 1966.²⁸⁷ Most other matters arising out of contracts of employment were dealt with by the civil Courts. Given this limited jurisdiction it would have appeared to the Donovan Commission that, even with the tribunals' roles extended to incorporate 'all disputes' between employers and employees arising from their contracts of employment, the ideal tribunal system was achievable because, in fact, as MacMillan has argued, when Donovan referred to the employment tribunals as being "easily accessible, informal, speedy and inexpensive", it was merely describing something which already existed.²⁸⁸

But Donovan almost certainly failed to anticipate the considerable increase that was to take place in the different types of claims that fall within the tribunals' remit. Today employment tribunals have the jurisdiction to determine over 80 different types of claim, many of which involve complex

²⁸⁶ Under s4A of the Contracts of Employment Act 1963.

²⁸⁷ Point made by J. K. MacMillan in 'Employment Tribunals: Philosophies and Practicalities' (1999) 1 *ILJ* 33, 34.

²⁸⁸ *Ibid.*

legal issues arising from various statutes, common law and EU law.²⁸⁹ The increasing number of complex legal issues that the tribunals are required to rule on has inevitably led to more legalistic arguments and procedural formality in the tribunals.²⁹⁰ Legalism and formality is likely to dissuade employees from bringing or pursuing claims. The prospect of facing your employer (or former employer) in what is a court room-like setting will be intimidating for many if not most employees.²⁹¹ The sense of anxiety and discomfort is likely to intensify given the need to present oral and documentary evidence, cross examine witnesses, articulate legal arguments and answer the tribunal's questions. The findings from the Survey of Employment Tribunal Applications 2008 tend to support this point. This was the fifth SETA survey, commissioned on this occasion by the Department for Business Innovation and Skills. The 2008 survey and the earlier surveys in the SETA series of studies are designed to provide information on the parties in, and key features of, employment tribunal cases. The 2008 survey and the associated findings were based on a random sample of more than 4000 employment tribunal cases. And according to the survey findings, 14 percent of tribunal claims filed in 2007-2008 were withdrawn and most of those were withdrawn because the claimants found that the tribunal process was too stressful.²⁹² This figure does not of course account for the number of employees who never raised claims in the first place because they found the prospect of tribunal litigation too daunting. In a similar vein, the tribunals' increasing jurisdiction, coupled with other factors, has produced an exponential growth in their annual caseload and a corresponding difficulty

²⁸⁹ See Appendix C to *Moving Forward: the Report of the Employment Tribunal System Taskforce* (available at www.dti.gov.uk/er/).

²⁹⁰ Lord Wedderburn, *The Worker and the Law* 3rd ed (Penguin, Harmondsworth: 1986) 264-265.

²⁹¹ While it is often said that the tribunal provides an informal setting for the resolution of disputes, it is very much set up like a Court room. The three members sit at the head of the room and often on a raised platform looking down on the parties. Cross examination and the leading of evidence by way of supplementary questions to witness statements accompanies the giving of written arguments or submissions and most tribunals insist on a level of adherence to the traditional rules of evidence, particularly when lawyers are involved. The requirement to deal with these formalities is likely to be, as I suggest, intimidating for a lay litigant with no formal legal training or experience.

²⁹² This does not of course account for the claims or potential claims that were never filed for reasons relating to the stress or intimidation associated with bringing a tribunal claim (see M Peters et al, *Findings from the Survey of Employment Tribunal Applications 2008* (Employment Relations Research Series no. 107, BMRB Social Research) 9.7.

processing cases in a speedy fashion.²⁹³ If claimants perceive that their claim will take a significant period of time to resolve, this is also likely to dissuade them from bringing or raising a claim in the first instance.

Further, the fact that bringing a claim in the employment tribunal involves interpreting and applying legal principles, handling and producing evidence, understanding rules of procedure, dealing with witnesses and making legal submissions, results in a large number of litigants using lawyers which has an associated cost.²⁹⁴ According to the 2008 Survey of Employment Tribunal Applications, claimants paid on average £4,124 for legal advice and representation and this is no small amount, particularly for an employee who has lost their job, or who may be facing the prospect of leaving their current employment.²⁹⁵ Beyond legal costs, the process of bringing and pursuing a claim in the tribunal can be costly, both in terms of financial and non-financial costs²⁹⁶, and escalating cost is a key reason why claimants choose not to pursue their claims.²⁹⁷ Non-financial costs in particular are worth further discussion. All claimants who responded to the 2008 Survey were asked what non-financial effects they had experienced as a result of their case and the most commonly mentioned impacts were stress and depression.²⁹⁸ The next most frequently mentioned negative effects on claimants were physical health

²⁹³ In the late 1960's a smaller number of chairmen were handling a case load of no more than 9,500 applications at more than 80 venues (MacMillan, *supra* at note 287, 44). By 2004/05 that number had risen to over 156,000 while the number of venues had dropped to just over 30 (ETS *Annual Report 2004-05*).

²⁹⁴ According to M Peters et al, *Findings from the Survey of Employment Tribunal Applications 2008* (Employment Relations Research Series no. 107, BMRB Social Research) 46, just under 50 percent of claimants engaged some form of legal representation throughout the course of their claim (i.e. handling paperwork, dealing with the tribunal service, responding to and sending letters etc).

²⁹⁵ *Ibid*, 55. This figure is based on all claimants who paid for advice and representation (excluding those who did not know the amount they paid).

²⁹⁶ *Ibid*, the Employment Tribunals Applications Survey 2008 reports that a little more than one half of claimants reported that they had incurred financial costs as a result of their case. Those costs included communication and travel costs, loss of earnings (paragraph 10.1). Claimants also reported that they spent on average 42 days on their case (although the median was only 7) (paragraph 10.2).

²⁹⁷ *Ibid*, claimants surveyed for the Employment Tribunals Applications Survey 2008 who withdrew their claims did so in at least 19 percent of cases because there was too much expense involved in continuing (paragraph 9.7). It is also worth noting that 21 percent of those who withdrew their claims did so because someone had advised that they should withdraw (paragraph 9.7). It is reasonable to assume that the advice was in some if not many instances based on an assessment of the ongoing cost of continuing with the claim.

²⁹⁸ *Ibid*, para 10.3.

problems, difficulty in getting re-employed and loss of confidence or self-esteem.²⁹⁹ A system of resolving disputes that causes such levels of mental and physical (not to mention financial) hardship, is likely to be a port of last resort and something to be avoided for most employees. Certainly those who have had past negative experiences (either themselves or indirectly through a colleague, friend or family member) of the system will be reluctant to make use of it again. To repeat, if employees are not convinced that employer-promises of fair treatment are supported by an accessible system of third party intervention if those promises are not kept, they are less likely to rely on or be positively influenced by those promises in the first place. Those employees will also be less inclined to raise grievances as a consequence and the circumstances of their unresolved grievances will spawn increased feelings of resentment which is contrary to the objective of greater fairness perceptions and OCB. Certainly it is the case from the writer's experience that potential claimants are reluctant to pursue claims and raise grievances because they are not convinced about the worth of doing so when set against the emotional, physical and financial costs bringing a claim. In fact it is the writer's experience that many lawyers often advise their employee clients not to pursue tribunal claims, because it is frequently the lawyer's assessment that the cost-benefit analysis weighs heavily against a claim.

The current Government's proposals for reforming the tribunals do not appear likely to tackle the challenges of cost, formality and procedure that are discussed above. Arguably a number of those proposals may, if adopted, have the opposite effect and create further barriers to access.³⁰⁰ For example, the Government proposes raising the cap on cost awards from £10,000 to £20,000 while, at the same time, increasing the qualifying period for unfair dismissal claims from 1 to 2 years. In addition the Government proposes providing employment judges with greater powers to make deposit orders at any stage during the proceedings up to £1000. Currently deposit orders may only be made during a pre-hearing review and only then if the case appears to have

²⁹⁹ Ibid, para 10.3.

³⁰⁰ BIS, *Resolving Workplace Disputes: A Consultation* (<http://www.bis.gov.uk/Consultations/resolving-workplace-disputes>).

“little reasonable prospect of success”. The current proposal is to, in effect, relax the test and allow judges to make deposits order where, for example, the employee has previously issued a large number of claims, or where the arguments presented by the claimant are lacking in “clarity and strength”.³⁰¹ While it is understandable that the current Government would seek to apply methods to reduce the burden on the tribunals, by placing additional barriers in the way of access for employees to the tribunal system, these methods do not support the goal of fairness perceptions and OCB.

7.2 The tribunals and the Courts: the barrier of abstentionism

Judging the fairness of employer and management behaviour is not an exercise to which the British Courts and tribunals are particularly adept for reasons that have been explored in several important studies on the subject of regulating EDG. We have already discussed the work by Collins on the law of Unfair Dismissal in which, while examining the range of reasonable responses test, he explains that underlying the range of reasonable responses test is reluctance on the part of judges bought up in the common law tradition to depart from three perceived virtues of the common law: respect for the autonomy of the private sphere; neutrality between conflicting interests; equality of treatment of the parties.³⁰² He says further:

The legislation demands an investigation of the propriety of the exercise of managerial discretion, hitherto a largely unregulated sphere of private autonomy. It requires the Courts to favour the interests of employees in job security, thereby abandoning the legitimizing stance of neutrality between capital and labour. Finally, the formal legal equality is shattered, for whilst employees remain free to terminate the employment relation for any reason abruptly, the employer has to follow certain procedures and give certain reasons for dismissals.

This deep penetration into the management rights terrain involves nothing short of a reorientation of the relation between the State and civil society, or between the Courts and the management of business. Instead of deferring to the business judgement of the management, the traditional stance of corporate and labour law, the Unfair Dismissal legislation applies a regulatory framework to the practice of disciplining labour. It imposes mandatory standards of behaviour in a sphere of social life hitherto regarded in law as an unregulated private arrangement of exchange. In this sense the legislation inaugurates a **juridification of managerial prerogative** and it is this proposed juridification which runs deeply contrary to the settled values and background assumptions of the common law.³⁰³ [emphasis added]

³⁰¹ Ibid, 33 and 32

³⁰² H. Collins, *Justice in Dismissal* (Oxford: Oxford University Press, 1992) 32.

³⁰³ Ibid, 35.

It is worthwhile exploring this concept of juridification in greater depth. As Collins points out, there is no one meaning of the concept. For some juridification means little more than an increase in the amount of law, be it in the form of statutes, precedents or administrative regulations.³⁰⁴ For Simitis, the concept denotes more precisely exchanging the notion of the employment relationship being governed by freedom of contract, for regulation of the employment contract by way of mandatory public regulation.³⁰⁵ By contrast, Teubner regards a central aspect of juridification as the process of replacing the formal general private law, such as ordinary contract law, with specific regulation aimed at social goals such as the improvement of working conditions.³⁰⁶ Teubner's description of juridification has, as we shall discuss, particular significance for the purpose of this thesis, but his meaning of the concept is not the concept that Collins was referring to during his examination of the law of Unfair Dismissal. Nor was Collins referring to the Simitis's interpretation of juridification. In his words:

What I seek to stress by my use of the term juridification is that this legislative intervention [the law of Unfair Dismissal] tackles a field hitherto unregulated by the law to any significant extent. The term juridification therefore denotes the advent of legal regulation in an area of social life previously left to private power, which, though indirectly constituted by laws such as those establishing private ownership of the means of production and the province of legitimate industrial action, was not itself directly colonized and moulded by the law.

In sum, by requiring the juridification of managerial disciplinary powers, the legislation presents the Courts with a task which they have previously sought to avoid altogether for the reasons connected with the respect for individual autonomy and the need to legitimize their position outlined above. In these circumstances we cannot expect an avid endorsement of the principles of the legislation and a fervent pursuit of employees' interest in job security. On the contrary, what we may expect is a reluctance to intervene in disciplinary matters except in the most egregious of cases of Unfair Dismissal.³⁰⁷

While Collins was focused on the law of Unfair Dismissal, his analysis is equally valid in the context of the current discussion regarding the regulation of, and judicial intervention in, the broader concept of EDG. Arguably, the Courts and the tribunals are all the more likely to avoid juridification (in the

³⁰⁴ Ibid, 35.

³⁰⁵ S Simitis, 'The Juridification of Labor Relations' (1985) 7 *Comparative Labor Law* 93.

³⁰⁶ G Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions', G Teubner et al (ed) *Juridification of Social Spheres* (Walter de Gruyter, Berlin, 1987) 3, 10-19.

³⁰⁷ Supra at note 178, 36.

Collins sense of the term) in relation to judging fair treatment of employee grievances, given that to do so would in many instances require the judge to intervene on an existing relationship as compared to one that has been brought to a conclusion by dismissal. In the context of a dismissal, the tribunal or Court is judging past behaviour and is, in most cases, responding to unfair action leading to dismissal with an award of financial compensation. In a dismissal case the tribunal need not (except in the rare case of an award of re-employment or reinstatement) concern itself with how their judgement of the employer's behaviour will impact the future relationship of the two parties because, of course, that relationship is no more. But in the case of a complaint about a grievance in the context of an ongoing relationship, the level of interference with managerial prerogative is potentially greater because the tribunal's finding is likely to have a direct bearing on how the two parties continue to relate going forward and is therefore a lasting influence and limitation on the autonomy of the employer. In other words, even if Parliament was to enact regulation which required the tribunals to inquire as to the fairness of employer behaviour in the context of an ongoing relationship, it is unlikely, because in part of their concern to avoid juridification, that the tribunals would adopt a robust approach to enforcing the law which in turn might aid fairness perceptions. In fact evidence to support such a statement may be found in the approach of the Courts in New Zealand to the unjustified disadvantage claim and in particular the test of justification that was contained in section 103A of the Employment Rights Act 2000.

To recap, an employee in New Zealand can bring a claim in the Employment Relations Authority that they have been unjustifiably disadvantaged in their employment, by some unjustifiable action on the part of the employer. In assessing whether the action of the employer was as a matter of law 'unjustifiable', the ERA is required to apply the test for justification contained in section 103A of the Act. As we have already explained, prior to the changes made in 2011, the test was formulated in a way which seemingly avoided the notion that in New Zealand the test for justification reflected the range of reasonable responses test or similar. The test stated in effect that when determining whether an employee had been unjustifiably disadvantaged,

the ERA had to consider whether what the employer did (the substance) and how they did it (the process) was what a fair and reasonable employer **would** have done in the circumstances. In other words the test in the New Zealand legislation exhorted the ERA to apply a single standard of fairness and reasonableness which the employer could not escape by pleading that it was free to adopt a range of different behaviours, all of which could and should be judged as fair. Further, the New Zealand Parliament had, by enacting provisions within the Employment Relations Act 2000 that steer the ERA and the Courts to interpret the Act in a manner that promotes good faith employment relations, appeared to push the Courts and the ERA to find a standard of fairness and reasonableness that was sufficiently reflexive of the good faith objective. One might have expected therefore that the ERA and the Courts would have applied section 103A in a manner that was in keeping with its plain wording and the stated objective of the legislation – they did not. In the leading case on the old section 103A test the Employment Court somewhat awkwardly applied the test for justification in a manner that supports Collins’ assessment about the relevance of juridification in the context of any judicial assessment of fairness in the employment context.

The case we are referring to has already been discussed above – *White v ADHB*.³⁰⁸ Far from promoting a rigorous inquiry into the appropriate standards of fairness expected of employers, the Court appeared to interpret the section 103A test in a manner that glossed over the plain wording of the section and thereby defeated its apparent purpose. Specifically, the Court held that it remained open to the employer to have recourse to a ‘range’ of legitimate options in determining how to treat its staff.³⁰⁹ Vitally, therefore, it appears that, even when confronted with statutory direction to more rigorously police unfair treatment by employers of their staff, the Courts will refuse to do so. As has been explained above, there is a significant challenge associated with interpreting what it means to be fair and reasonable in any given instance of EDG. But it is possible to view that challenge as presenting the Courts with an opportunity to find an interpretation that weighs in favour of higher

³⁰⁸ Supra at note 197.

³⁰⁹ Ibid.

standards of fairness at work, not against them. The fact that the Courts choose not to adopt such an approach is, arguably, a reflection of Collins' argument regarding their concern with juridification.

7.3 Weeding out the vexatious litigant and the limits of tribunal jurisdiction

The final point to explore in assessing why the tribunals do not rigorously direct fair behaviour at work, is worth exploring in the context of this and the previous Governments' apparent desire to reduce the tribunals' workload by weeding out unmeritorious claims. That is because such a concern (real or not and justified or not) is, for the reasons explained below, anathema to a policy which aims at maximising fairness perceptions. In particular, the influence of this concern about the unmeritorious claimant on regulatory outcomes, demonstrates further the extent to which the traditional model of providing an adjudicative forum as a point to resolve disputes relating to EDG may not be workable if OCB is the policy objective.

And it is no overstatement to assert that the issue of unmeritorious claims and the vexatious litigant has been an important focus of lawmakers and lobbyists in relation to the legal regulation of EDG. This focus is apparent in the present Government's consultation paper on resolving workplace disputes. There are several comments throughout the paper addressing a concern about "over-confident" claimants, the tribunals' failure to deal with "weak and vexatious claims", and ease with which claimant are able to pursue "unmeritorious claims".³¹⁰ It is worth noting that the consultation paper does not present any supporting evidence to substantiate these concerns. The concern about weeding out unmeritorious claims was also central to the debate and discourse leading to the Employment Act 2008 and the resulting repeal of the statutory disciplinary and grievance procedures. As Astrid Sanders observes³¹¹:

³¹⁰ Supra at note 300, 15, 27.

³¹¹ 'Part One of the Employment Act 2008: 'Better' Dispute Resolution' (2009) 38 *ILJ* 30, 35 and 36.

It is interesting to note the mythical figure at the heart of the Act: the allegedly increasing numbers of so called 'vexatious' litigants. Over and over again in the Parliamentary debates on Part One [of the Employment Act 2008], there was disparaging reference to 'obsessive claimants who will just not give up'. There is evidence of a similar mindset also in the Gibbons Review that spoke of the parties 'whose intent or action is to waste time and drain valuable tribunal resources'. Lord Jones in presenting the Act claimed that 17% of cases that go to the tribunal are 'unreasonable'. It is this strong emphasis upon vexatious litigants that dominates Part One with wider consequences for Government policy now and in the future.

Whatever the truth or otherwise behind claims about the numbers of vexatious claimants, the notion of establishing legal rules that aim to reduce the number of unmeritorious claims before the tribunals, gives rise to a much more fundamental point about the nature of employee grievances and the suitability of the tribunal system as a mechanism for resolving those disputes.

It may be true that a number of claimants pursue claims which in strict legal terms have very little chance of success, but that does not mean the claimant is not genuinely aggrieved by what might be, objectively or not, unfair treatment at the hands of their employer. Take for instance an employee who is refused promotion in circumstances where a female colleague, who the employee considers is less able than him, has been promoted. The employee complains to the employer but nothing is done and the employee lodges with the tribunals claims of sexual discrimination and breach of the implied term of trust and confidence. The claims are dismissed because, applying the technical test for direct discrimination, the employee has not been discriminated against on the grounds of his sex, and nor has the employer's actions amounted to a breach of the implied term, which is only contravened when the employer's behaviour is extreme. But that does not mean the employee's complaint of unfairness has no objective merit; it means that the law does not provide him with a cause of action and remedy for that unfairness which the tribunal can then enforce. This absence of a legal right upon which to base a claim is vital, because in this way the law is saying to the employee, the tribunal can help you, but only if you can fit your concerns within one of a limited number of legally prescribed actions. That does not match nicely with a system which aims at resolving disputes in a manner that maximises fairness perceptions and creates an environment in which OCB can grow. A system

that caters for such an objective will facilitate practical decisions about the outcomes of grievances taken on a case by case basis, and which address fairness and are not limited by the remedies currently available to the tribunals.

The fact that employees perceive fairness in terms beyond the confines of regulation and legally defined rights and obligations is born out in the recent EMAR Fair Treatment at Work Report.³¹² The Report was commissioned by the Department for Business, Enterprise and Regulatory Reform, BERR (now Business, Innovation and Skills, BIS) and involved collecting 200 answers from 4000 current or recent employees across Britain. This was the first time a single survey source covered workers' awareness of their rights and the support available to them, a comprehensive view of the problems experienced in the workplace and how those problems get resolved. According to the Report, 13 percent of employees surveyed felt that they had been treated "unfairly" in a sense that was not necessarily associated with a breach of employment rights.³¹³ The reasons expressed to explain the perceived unfair treatment included: the attitude and personality of others (this was by some margin the most common source of perceived unfairness); relationships at work; "it's just the way things are"; and, having a group or clique which caused exclusion of the survey respondent.³¹⁴ Beyond the reasons given to explain the unfairness, the survey disclosed that the unfairness related predominantly to subjects that would be difficult to frame as being in breach of a legal right or duty. They included: being ignored, the type of work given; workload; being excluded from social activities; not being paid fairly; and, assessment of work.³¹⁵

Taken to the extreme, such unfair treatment might amount to a breach of the implied term of trust and confidence, or a breach of an express term of the contract (in the unlikely event that the contract includes an express clause

³¹² R Fevre et al, *The Fair Treatment at Work Report: Findings from the 2008 survey* (Employment Relations Research Series No. 103, Department for Business, Innovation and Skills).

³¹³ Ibid, 64, 65.

³¹⁴ Ibid, 66.

³¹⁵ Ibid, 71.

which clearly proscribes the behaviour complained of), or unlawful discrimination (in the event that there is evidence enough to match the employer's behaviour to the legal tests for discrimination). In truth it is more likely that the unfair treatment complained of is not a breach of a legal right or duty, but is part of the challenge of maintaining fairness perceptions within a complex social environment like the modern workplace. That does not mean that perceived unfair treatment is not important in the context of our policy objective of greater OCB, because as we have discussed at length, perceived unfairness will negatively impact on work performance and organisational commitment.³¹⁶ Again, this assessment is reflected in the results of the Fair Treatment at Work Report which found that a significant number of employees reacted to perceived unfairness by leaving employment with the offending employer³¹⁷ and, more generally, the Report confirmed that perceptions of unfair treatment were particularly likely to undermine an employee's trust in their employer.³¹⁸

This brings us back to the concern about a tribunal system and an associated set of legal rules that are aimed, in part at least, at weeding out unmeritorious claims. Such a system might have the effect of sending a message to employees and employers that unfairness is in many instances lawful and therefore acceptable. You might have been treated unfairly, but do not come to the tribunal looking for a remedy. If you cannot get adequate redress from your employer, your options may be limited. This is not the right message to be sending in the context of our concern to maximise fairness perceptions, but the message is being reinforced by a tribunal system which cannot address broader issues of fairness, and by a public discourse which speaks about claims which may relate to genuine incidents of unfair treatment, as being vexatious or unmeritorious.

³¹⁶ Ibid, 79: in fact, according to the Fair Treatment at Work Survey, with the exception of a problem with pay, respondents were less likely to identify a specific employment rights problem as part of their most serious problem than they were to identify unfair treatment.

³¹⁷ Ibid, Chapter 10.

³¹⁸ Ibid, 104.

Of course it would be prohibitive in terms of cost and tribunal time if employees were able to bring claims for general unfairness to a tribunal system that is already under considerable strain (although, having said that, such a right to claim does appear to exist, as we have discussed, in New Zealand). The cost of the system and a concern that it is under considerable strain is apparent in the Government's consultation paper on workplace disputes. The paper cites statistics from the Ministry of Justice which indicate that between 2008-09 and 2009-10, the number of tribunal claims rose by 56%, from 151,000 to 236,100.³¹⁹ Further, and more importantly in the current context, the point to emphasise again is that the tribunals and indeed any third party adjudicative body is simply not effectively able to deal with issues of perceived unfairness which reflect and are symptomatic of the peculiarities of a particular work environment and set of circumstances (interpersonal and otherwise). This reality does not align snugly within the description of legal rights and duties which the tribunals are asked to rule on and enforce. Moreover (and this has been a theme running through this thesis) resolving perceived unfairness at work should not be subject to formal legal processes that can be costly and distressing for the parties concerned and which take long periods of time. To the extent that regulation of EDG is appropriate, that regulation must place a greater emphasis on resolving issues at the early stages of the dispute spectrum when they are most likely to be effectively resolved in a manner that can maintain or enhance the employment relationship and the employer's reputation for fairness amongst its workforce. All of this points to the tribunals being the wrong mechanism to enforce regulation that is aimed at promoting fairness and fairness perceptions at work. Yet what is also clear is the need to mandate some mechanism for the resolution, or prevention, of perceived unfairness which in turn sets the foundations for the maximisation of fairness perceptions which we argue is essential to partnership at work and greater OCB.

³¹⁹Supra at note 300, 15.

CHAPTER 8: THE THEORETICAL UNDERPINNINGS OF A NEW WAY TO REGULATE EDG FOR FAIRNESS

This chapter attempts to establish a theoretical basis for explaining the inability of current regulation to promote greater levels of fairness perceptions and OCB, whilst establishing the foundations for a model of regulation that is more likely to realise such an ambition. To this end we consider the work of Teubner on the subject of juridification and the limitations of direct regulation in the arena of complex social relationships. We observe that any law which attempts to mould individual fairness perceptions in the context of the employment relationship is unlikely to be successful unless it recognises the limits of direct regulation as a mechanism for achieving fairness perceptions. This reflects earlier discussions concerning the challenges which prevent direct regulation, such as the law of Unfair Dismissal, from being a catalyst for greater fairness perceptions and OCB. It is argued that all the law can hope to achieve is a framework of indirect regulation that encourages the parties to self-regulate EDG in a manner which is reflexive and flexible enough to adequately account for the particular circumstances that attach to each instance of EDG. Any such indirect regulation must encourage a reflexive approach to EDG which focuses on the total concept of fairness (i.e. procedural, distributive and interactional) and does not limit its regulatory interest to procedural fairness only. Further, and perhaps most significantly, we suggest that it may not be prudent to enforce any indirect regulatory framework via the traditional mechanism presented by the tribunals and the Courts. That is because, we argue, the tribunals and the Courts do not want to, and are not able to, effectively assess fairness in a manner that is likely to be perceived as fair by both parties.

8.1 Re-capping the shortcomings of current regulation and principles for improvement

We have already made the point that current regulation of EDG is inadequate as a mechanism for enhancing fairness perceptions and growing OCB at work. The reasons for this inadequacy are many and they have been explored in

some detail in the preceding discussion. To take but a few extracts from what has already been said: current regulation fails to effectively intervene in the early stages of the dispute spectrum; it does not focus on the importance of first impressions of fairness; it relies heavily on concepts such as reasonableness and fairness which are subject to interpretations that are inevitably swayed in their application by each party's varied interests and prejudices; it defines a narrow and finite number of employment rights relating to EDG that do not adequately address important employee concerns about fair treatment (concerns that include being excluded at work, being ignored, not being given interesting enough work and other general but important examples of perceived unfairness at work); the remedies available to incentivise fair treatment are not sufficiently targeted at the causes of unfairness; current regulation tends to focus heavily on process which in turn leads employers to neglect the important substance of employee concerns; current regulation is adversarial and pits employers and employees against each other in a manner that perpetuates the traditional 'them and us' employment relationship; the tribunals and Courts that are tasked with enforcing the regulation are reluctant to do so in a way that robustly upholds and thereby encourages objective standards of fair treatment; the system in which the tribunals and Courts operate is hampered by procedural requirements; the same system can be intimidating, distressing and costly for employees and employers to use, which consequently dissuades the parties from using it.

We have also suggested that despite the shortcomings of current regulation as a means of improving fairness perceptions, some form of regulation is desirable because the parties cannot by themselves be left to achieve greater levels of partnership and thereby more competitive business performance, without being pushed in the right direction. As we have already argued, it is highly unlikely that employers and employees, who have traditionally come together in a low trust relationship of subordination, will suddenly, freely, effectively and without exception take forward the notion of partnership at work, particularly in relation to EDG. Such a change would involve a dramatic shift in the culture of many if not most workplaces. So the question

remains: what does a new and improved model of regulation look like? We have hinted at some likely characteristics of the regulation we seek: it cannot be enacted or implemented if the cost to the employer or the economy of its implementation is such that the regulation blunts the competitive edge it is intended to enhance; it must encourage each party to raise their concerns about the other or their working environment, and to raise those concerns during the early stages of the dispute spectrum, and in an appropriate manner; the law must focus directly on preventing certain forms of relationship damaging behaviour and encouraging the parties to preserve their relationship where that is possible, which will involve mechanisms for the resolution of disputes which are most likely to maintain (even enhance) the employment relationship; regulation must be flexible enough to encourage what the parties consider to be fair resolution of all fairness concerns, not just those that are related to specifically defined employment rights; regulation must allow for the peculiarities of particular workplaces and the various personalities that populate them; the law should act as a backstop or a stick, creating a strong sanction available to the parties where internal resolution has been inadequate; the methods and mechanisms for internal resolution that the law will encourage or mandate must be legitimate in the eyes of the parties to the employment relationship – they must be devised, revised, implemented and, perhaps, applied, with the meaningful involvement of employees as well as management.

8.2 Juridification, structural coupling and the limits of regulation

To better enable an explanation of the current state of regulation, and to help frame a more precise model of better regulation, it is helpful at this stage to explore both in the context of an appropriate theoretical framework. We turn in this regard to the work of Gunter Teubner and others on the subject of juridification as it was defined by Teubner in his 1987 work, ‘Juridification, Concepts, Aspects, Limits, Solutions’.³²⁰ It is important to draw upon the theoretical assessment of juridification in this context because it helps to pull

³²⁰ G. Teubner (ed.) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter, Berlin, 1987) 3;

together the strands of the argument so far and, more to the point, it gives conceptual support to the regulatory model that is suggested in this chapter and is more precisely described in the chapter that follows.

As we have already explained, Teubner regards a central aspect of juridification as the process of replacing the formal general private law such as ordinary contract law with specific regulation aimed at social goals such as the improvement of working conditions and the establishment of fair treatment at work as a conscious priority for employers.³²¹ Teubner recognises that if the law is to play a role in achieving such social objectives, it must overcome certain substantial obstacles. He identified that there were limits to the law's ability to influence certain social institutions and that the law must be wary not to step beyond those limits lest it result in certain negative outcomes:

Is it possible to discern fundamental limits of juridification in so far as certain juridification processes prove inadequate in the face of regulated social structures and/or constitute an excessive strain on the internal capacities of law? The argument I would like to propose here is that this is not merely a problem of the implementation of law, nor of the use of state power, nor merely of the efficiency of law in terms of the appropriateness of means to ends, but it is a problem of the '*structural coupling*' of law with politics on the one hand and with the regulated social fields on the other. Once the limits of this structural coupling have been overstepped, law is caught up in an inevitable situation which I propose to examine more closely under the heading '*regulatory trilemma*'.³²²

Teubner goes on to explain the 'regulatory trilemma' with reference to Max Weber's concepts of formal and material rationality of law.³²³ He points out that Weber identified two conflicting tendencies in the development of law: an increase in formal specialisation, professionalism and internal systematisation on the one hand; and, exposure to increasing material demands from social interests on the other (e.g. the welfare state). Taking his bearings from systems theory, Teubner reformulates Weber's analysis and describes these conflicting tendencies as a battle between the social *function* of law (which Teubner describes as being to produce from conflicts, social expectations in which the law then increasingly intervenes) and effective *performance* of law

³²¹ Ibid, 10-19.

³²² Ibid, 5.

³²³ Ibid, 19.

to match the demands of the social environment.³²⁴ As Teubner points out, this analysis suggests that the development of what he refers to as ‘formal’ law should be understood as a process in which the two conflicting trends intensify simultaneously:

On the one hand the ‘formalisation’ of law is intensified in the sense that law partakes of the functional differentiation of society and develops its autonomy to a point which sociologists today refer to as autopoietic self-reference... In the field of law autopoietic self reference means that its validity is based solely on legal normativity and that legal validity has definitively freed itself from all extralegal connections – politics, morality, science – as well as from justifications in terms of natural law. Law can only reproduce itself intra-legally.³²⁵

On the other hand, Teubner explains, the ‘materialisation’ of law grows with, and is caused by, the increase in formalisation. Teubner says further:

The more the legal system specialises in its function of creating expectations by conflict regulation, the more it develops and refines norms and procedures which can be used for future oriented behaviour control. This can only be formulated in the following paradoxical terms: *law, by being posited as autonomous in its function – formality – becomes increasingly dependent on the demands for performance from its social environment – materiality.* And in today’s conditions this means: autonomous, positive, highly formalised and professionalised law, when instrumentalised for purposes of political control, is exposed to specific demands of politics on the one hand and of regulated areas of life on the other.

This tension between increasing autonomy and increasing interdependence explains the necessity and the problem of modern juridification. The problem lies precisely in the ‘contradiction’ between increasing autonomy and simultaneous increasing dependence. When certain sectors of society such as economy, politics, law, culture and science become so autonomous that they not only program themselves, but exclusively react to themselves, they are no longer directly accessible to one another. Within its own power cycle, politics produces binding decisions, law reproduces its normativity in the decision-rule cycle and the economy is, so to speak, short-circuited in the money cycle. Reciprocal influences do, of course, occur permanently but they do not operate according to simple casual scheme. External demands are not directly translated into internal effects according to the stimulus-response scheme. They are filtered according to specific selection criteria into the respective system structures and adapted into the autonomous logic of the system. In terms of environmental influences on law, this means that even the most powerful social and political pressures are only perceived and processed in the legal system to the extent that they appear on the inner ‘screens’ of legal reality constructions. Conversely, legal regulations are accepted by environmental systems only as external triggers for internal developments which are no longer controllable by law.³²⁶

Teubner’s view is extremely enlightening in the context of this investigation into how best to regulate EDG to achieve greater fairness perceptions and OCB. We are of course, in considering disputes and dispute prevention and

³²⁴ Ibid, 19.

³²⁵ Ibid, 20.

³²⁶ Ibid.

resolution within the employment relation, assessing the extent to which law can influence this particular social structure. By adapting Teubner's arguments to the current discussion we see that we must abandon any notion that law or politics could have a *direct* goal oriented controlling influence on the employment relation. Instead the objective of regulation in the area of the employment relation must be described "in far more modest terms as the mere *triggering of self-regulatory processes*, the precise direction and effect of which can scarcely be predicted".³²⁷ Therefore we are not saying that regulation has no hope of influencing how employers and employees interact in relation to EDG, but we are saying that any influence is limited (and should not attempt to exceed that limit) by the self-regulatory response that the regulation triggers. As Teubner explained, every regulatory intervention which attempts to step beyond these limits is either irrelevant and without any meaningful effect on the applicable social structure, or it has a negative and disintegrating effect on the regulatory law itself and the social structure which it seeks to influence.³²⁸ This assessment rings true when we translate it to the preceding discussions about the impact of current regulation in the area of EDG.

Let us consider as an example the law of Unfair Dismissal, particularly in relation to procedural fairness. If the political or policy objective is greater OCB and partnership through maximising fairness perceptions, that objective cannot be achieved, according to Teubner's analysis, by regulation which prescribes the process that an employer must follow if it wishes to legally dismiss an employee. Such a prescriptive approach is likely, as we have explained, to have a negative effect on the employment relation because it refuses the parties an opportunity to reflect on how best to apply the legal direction in a manner that is reflexive. Instead this form of regulation is likely to lead to strict adherence to process without any regard for the policy objective. In other words, the process cannot be the means to the end, but is rather the end in itself. The result is frequent adherence to process but a cynicism on the part of employees in particular that the process has any value

³²⁷ Ibid, 21.

³²⁸ Ibid, 21.

other than as a means for the employer to insulate themselves from a judicial assessment that they (the employer) has been unfair in dismissing the employee. In that case, and in Teubner's terms, the limits of 'structural coupling' have been overstepped and the potential damage to the social relationship is clear: the employee group does not trust their employer to treat them fairly in relation to disciplinary matters (it perceives that their employer will go through the motions of 'fair' process for its own pure self-interested reasons and nothing more) and the potential for greater OCB and the achievement of the policy objective becomes unlikely.

8.3 Finding a solution to the limits of juridification in the context of EDG – the 'proceduralisation' of law

This brings us to the point of trying to understand what, if any, solutions exist to the challenge of juridification in the context of regulating EDG to achieve partnership and OCB. Put another way; is it possible to regulate EDG to match the stated policy objective without exceeding the limits of structural coupling and running headlong in to the negative impacts of the regulatory trilemma? Such strategies have in the past tended to focus on the abstract conception of law as a vehicle for the indirect regulation of social structures; in this sense law is relieved of its task of regulating social areas and is instead charged with the objective of effectively controlling the self-regulating processes that are triggered by regulation.³²⁹ Teubner describes the obstacles that stand in the way of this objective in the following terms:

The crisis of regulatory law is here diagnosed as a social immune reaction to legal interventions. The problems of juridification show that different social systems operate according to their own inner logic, which cannot easily be harmonised with the logic of other systems. Material legal programs have at their disposal modes of functioning, criteria of rationality and organisational patterns which are not necessarily adequate to the regulated areas. The background theories on which such ideas are based are frequently macro-theories of society and law, usually variants of system functionality or critical theory or manifold attempts to combine the two... Normatively, these approaches have highly different perspectives, from the emancipation of man to smoothly functioning system technology, depending on the theoretical context and normative preferences. Yet they all have one

³²⁹ See, for example, W Bohnert and W Kitzsch, 'Gesellschaftliche Selbstregulierung und Staatliche Implementation politischer Programme' in R Mayntz (ed.) *Implementation politischer Programme* (I. Konigserin, Athenaum, 1980) as cited in Teubner, *supra* at note 320, 33.

problem in common. Is normative integration still possible in a society characterised by inner contradictions, by disintegrating, indeed disruptive conflicts between the specific logic of highly specialised sub-systems? They all assume that neither the state nor law is capable of achieving this integration... However, politics and law have to bring about important structural preconditions for a new type of decentralised integration of society.³³⁰

The proposed solution to the problem as stated is to move to what Teubner calls ‘constitutive strategies of law’, by which he means to introduce structural legal frameworks for social self-regulation. Teubner continues:

The term ‘proceduralisation’, for instance, is used as an overall heading for this function of law, which is to encourage ‘social systems capable of learning’. Essentially three matters are concerned here: 1) the safeguarding of social autonomy by an ‘external constitution’, a legal guarantee for ‘semi-autonomous social fields’; 2) structural frameworks for effective self-regulation, for instance along the lines of ‘external decentralisation’ of public tasks or in terms of internal reflection of social effects; 3) the canalisation of conflicts between systems by ‘relational programmes’ or neo-corporatist mediation mechanisms of ‘procedural regulation’, by ‘negotiated regulations’, by semi formal modes of procedure in the so-called ‘discovery process of practice’, or by legal coordination of different systems rationalities’. In short: instead of directly regulating social behaviour, law confines itself to the regulation of organisation, procedures and the redistribution of competences.³³¹

Teubner goes on to explore what this concept of indirect regulation of social behaviour means in more concrete terms. Referring to the work of Harter in particular³³², Teubner identifies the notion of “Negotiated Regulation” or “Bargaining in the shadow of the law” as two headings under which indirect regulation is often discussed.³³³ Taking as an example US antitrust regulation, it is possible to identify in that area of law a considerable amount of material which highlights regulation through negotiation; where solutions are achieved through negotiation under the threat of legal sanctions.³³⁴ Teubner points to the control of company mergers as one clear instance of where antitrust law can indirectly drive negotiated regulation. In that case the threat of a ban on the contemplated merger looms in the background and encourages the parties to collaboratively modify the merger proposals such that the merger is legally able to proceed.³³⁵ Teubner continues with reference to the notion of ‘bargaining in the shadow of the law’, which he identifies as a mechanism that

³³⁰ Supra at note 320, 33.

³³¹ Ibid, 34.

³³² P Harter, ‘Negotiating Regulation: A Cure for Malaise’ (1982) 71 Georgetown law Journal 1.

³³³ Supra at note 320, 34.

³³⁴ K. Hopt and G Teubner (eds) *Corporate Governance and Directors’ Liability* (De Gruyter, Berlin, 1985).

³³⁵ Supra at note 320, 34.

has been demonstrated in many areas of law (labour law being one). The law in this sense, with its sanctions for non-compliance, lends itself to the creation of negotiating positions which in turn influence the outcome of those negotiations. But for the law, such negotiated outcomes would not result. This method of legal regulation is, in Teubner's view, more likely to lead to flexible, co-operative solutions that are geared to specific situations as opposed to rigid, approximate and authoritative solutions. In this way the challenge of structural coupling is addressed by relegating to the bench the 'official function of law', which is to decree changes of behaviour, while promoting to centre stage law's 'latent function', which is to regulate systems of negotiation.³³⁶ He continues:

Numerous studies have analysed how widespread this phenomenon has become. Events regularly take the following course. First, law is primarily used to bring about a certain kind of behaviour by the threat of negative sanctions. However, enforcement deficits appear which oblige the parties concerned to transform the enforcement system into negotiation systems. One can interpret this by arguing that in this case regulatory law is subject to a latent change of function. As direct regulation of human behaviour it soon reaches its limits and is tacitly interpreted as a kind of procedural law. The threat potential of legal sanctions is not used. It is not so to say 'liquidated', but in fact survives as a legally guaranteed power of negotiation within the self-regulating system of negotiation. Indeed there are even interpretations of regulatory law which warn against taking the implementation of law too seriously. 'Strict interpretation by the book' often appears unreasonable and endangers the precarious regulatory situation. A critical point is reached when not only the parties concerned reinterpret regulatory law more or less openly and more or less legitimately as negotiation regulating law, but law itself abandons direct regulation to concentrate instead on structuring negotiation systems.³³⁷

Of course this concept of law as indirectly structuring negotiation systems resonates with labour lawyers in particular. Health and safety legislation and the regulation of free collective bargaining are but two examples. In many jurisdictions, including in Britain, indirect regulation of free collective bargaining has been preferred to substantive regulation. In this way the parties have been left to devise their own substantive rights within a legal framework which includes formulas for the achievement of union recognition, procedural norms for the system of negotiation and for disputes, and by extending or restricting the competencies of the collective parties. As Teubner points out,

³³⁶ Ibid, 34.

³³⁷ Ibid, 35; see also E Bardach and R Kagan, *Going by the Book – the Problem of Regulatory Unreasonableness* (Temple University Press, Philadelphia, 1982).

‘the attempt here is merely to control indirectly the quality of the negotiation results though a balancing of negotiating power’.³³⁸

8.4 The importance of avoiding pre-occupation with process

The challenge is of course how to devise such a form of regulation in relation to EDG. It is tempting to articulate a regulatory approach which devises norms of procedure according to which the parties will engage. It is tempting to do because, we submit, it is possible to devise processes that are generally applicable and to do so with a degree of certainty. Moreover, the solutions to structural coupling and the challenges of juridification that are articulated by Teubner in particular, place a degree of emphasis on the law creating a legal framework for self regulation which Teubner characterises as the “proceduralisation” of law. In this regard Teubner articulates the legal framework as setting norms of procedure or involving “procedural regulation”.³³⁹ But this thesis argues that it is a risk in the context of regulating EDG to create higher levels of fairness perceptions, to focus the self-regulatory framework on the creation of legislated procedural norms. The possible dangers of focusing regulation of EDG on process have been discussed in the preceding chapters (particularly in relation to unfair dismissal). It is worth repeating some of those arguments in the current context and with reference to the techniques applied to the previous statutory disciplinary and grievance procedures.

We recall that the statutory procedures involved a mandatory minimum and prescribed process that employers and employees were required to follow (subject to agreed enhancements) in the context of grievances and disciplinary action. A failure to follow the procedure had certain defined consequences. For example, a failure on the part of the employer to follow the process leading to a dismissal resulted in the dismissal being deemed automatically unfair. Further, any subsequent award of compensation would be increased based on the employer’s non-compliance with the minimum procedure. But

³³⁸ Ibid, 35.

³³⁹ Ibid.

such norms of procedure and their associated incentives to comply are unlikely to drive higher levels of fairness perceptions. First, the mandatory procedures and the compliance incentives tend to sharpen the employer's focus on what is already the primary concern of employers that are anxious to insulate themselves from claims of Unfair Dismissal – dismissal process. Regulation which penalises employers for failing to follow a preferred procedure is likely to cause preoccupation with that procedure as employers correctly view compliance with the prescribed procedure as a vital ingredient in the recipe for avoiding successful Unfair Dismissal claims. This preoccupation with procedure will almost certainly lead to the purpose of the process (which must be to achieve better and fairer decision making in relation to potential dismissals) being neglected. This is unsatisfactory given our policy aims because employees judge fairness with reference to substantive or distributive outcomes and interactional justice, as well as procedural fairness.³⁴⁰ Further and as already discussed in some detail, the focus on process and the resulting practice of employers trying to insulate themselves from successful Unfair Dismissal claims, will impact negatively on employee perceptions of the disciplinary process and, consequentially, their employer. That is in a large part because employees will in such circumstances view their employer as “going through the motions” of a process without any real concern for the employee's interests.

Secondly, and focusing specifically on the compliance incentives, those incentives were unlikely to impact the behaviour of the employer (or the employee for that matter) until the employer had reached a conclusion that dismissal was the likely or inevitable outcome. That is because the incentive was only worth serious concern if an Unfair Dismissal claim was possible, and an Unfair Dismissal claim was only possible if the employee was likely to be and eventually was dismissed. In other words the incentive was unlikely to have any meaningful impact on dispute prevention or resolution during the early stages of the dispute spectrum (assuming the dispute or EDG issue has evolved over time, because we accept that not all instances of EDG will have a

³⁴⁰ See discussion in Chapter 3.

complex genesis). The incentives in the statutory procedure were not likely therefore to help achieve greater levels of fairness perception and OCB. That is because to achieve such an objective it is vital that the employer does everything they can reasonably do to prevent disputes evolving beyond the point where salvaging trust in the relationship and the potential for fairness perceptions is not possible. It is doubtful that the relationship of trust and fairness perceptions can be retained and maintained as between the parties in dispute, if a concern on the part of the employer to achieve fairness (albeit procedural fairness) only arises at a point in time when the drastic step of dismissal is being seriously contemplated.

Thirdly, the statutory procedure and the incentives to comply with the procedure were unlikely to aid fairness perceptions given that the prescriptive nature of the procedure would tend to dissuade the parties from seriously reflecting on the following question: what is the best approach for *us* to prevent and resolve disciplinary issues in *our* workplace? Further, the statutory procedure and the incentive would discourage the next level down of assessment which is that undertaken on a case by case, dismissal by dismissal basis, where the approach to disciplinary action should be flexible and adaptable to reflect that, potentially, each instance of disciplinary action or circumstance has its own unique features, which may require an adjustment of the employer's usual disciplinary process if fairness perceptions are to have a chance.

The discussion to this point regarding the statutory procedure brings us back to Teubner, and the earlier suggestion that the procedure resembled the kind of indirect regulation of social relations that might breed negotiation systems which, in turn, have the potential to overcome the challenges of structural coupling and, in the current context, achieve greater fairness perceptions. Any such resemblance is, however, and for the reasons explored above, superficial, and this perhaps points to a gap in Teubner's notion of procedural law. As has been described, Teubner suggests that the threat of legal sanctions presented by direct regulation like the law of Unfair Dismissal present enforcement deficits which can transform the enforcement system into a negotiation

system. Where this occurs the legal sanction is rarely if ever invoked, but rather it lurks in the background to the social relationship as a legally guaranteed power of negotiation within the self-regulating system of negotiation.³⁴¹ This conception of regulatory law can even warn against taking the implementation of law too seriously and recognises that ‘strict enforcement by the book’ often appears unreasonable and can be detrimental.³⁴²

Our concern with Teubner’s argument is perhaps only a matter of semantics, which points to the term ‘procedural law’ being an inappropriate label for the type of regulation Teubner is describing, because, as we have seen, regulation which attempts to create norms of procedure which are supported by sanctions for non-compliance, do not necessarily invite negotiations between the parties to the employment relation. Rather they can, because they are process-based, encourage strict adherence to the procedures as if there was some inherent value in process for process sake. This is almost certainly a semantic (as opposed to a substantive) gap in Teubner’s argument, at least as it applies to this thesis, given that it is possible to glean from Teubner’s wider discussion a concern not so much with the regulation of procedure, but rather with law creating the correct structural conditions that will allow for effective reflexive self-regulation to take root. The appropriate ‘structural conditions’ will not necessarily include the creation of procedural norms; the appropriate structural conditions will depend on the particular social objective which the law has been tasked to help achieve. In this case the objective is greater fairness perceptions and OCB leading to enhanced business competitiveness. That particular objective will not, for the reasons discussed, be achieved by laws which encourage the parties to the employment relation to follow a process for fear of being stung by what are predominantly financial sanctions in each instance of non-compliance with the process.

³⁴¹ Supra at note 320, 34.

³⁴² E Bardach and R Kagan, *Going by the Book – the Problem of Regulatory Unreasonableness* (Temple University Press, Philadelphia, 1982).

This concern with the law creating legal norms of procedure does not contradict the earlier acknowledgement that procedural fairness is an important factor, along with distributive and interactional justice, in achieving greater fairness perceptions at work. Procedural fairness is vitally important to achieving this objective but the perception that a process is fair will depend, perhaps more than any other factor, on employees being convinced that the procedure followed is genuine and likely to drive fair substantive outcomes. As we have seen during our discussions of fairness theory and OCB, fairness perceptions can be achieved where an employee has not obtained the distributive outcome they hoped for, provided they believe that the process which led to the outcome was fair. This re-emphasises the importance of creating an environment where process is not viewed by the parties purely as a means of avoiding legal sanctions. But how to achieve this is the question? The answer to that question causes us to look again at the reasons why employers in particular become acutely focused on process over substance when it comes to matters concerning EDG. The answer to that question inevitably points to the fear of legal sanctions, or the cost of defending legal actions, being the driving forces behind strict and blinkered compliance with processes which the law (including the Courts) suggests are the appropriate means of dealing with EDG.

8.5 Creating a regulatory framework for self regulation - negotiating systems and the enforcement deficit

The previous sections suggest that regulation which promotes adherence to a disciplinary process, that is prescribed by law, as a means of avoiding Unfair Dismissal liability, will not promote greater levels of fairness at work. In other words, such a regulatory model will not create the negotiation systems which drive the parties to create an approach to the management of EDG which is reflective of both parties' respective and mutual interests and which is more likely to generate fairness perceptions. So what does the 'correct' regulatory model look like? In other words, how can the law influence the parties to come together to create an approach to EDG that will maximise fairness perceptions? This brings us back again to Teubner.

8.5.1 Defining negotiating systems and the enforcement deficit

First, what do we mean by a ‘negotiation system’ in the current context of EDG? The negotiation system in relation to EDG exists at two levels. At one level it concerns a willingness and ability on the part of the employer and its employees to formulate their own methods and standards for the prevention and resolution of EDG related disputes. These methods and standards will reflect the unique characteristics of the particular workplace and the workforce to whom they will apply. At another level the negotiation system allows for a departure from the internally created methods and standards to reflect the peculiarities and complexities of each particular instance of EDG.

Secondly, you will recall Teubner’s prediction that a negotiation system will arise where there is an enforcement deficit and that, in certain instances, strict enforcement of regulation can be detrimental to the social system which the regulation is intended to benefit. This thesis argues that Teubner is correct, but it is important to define what we mean by ‘enforcement deficit’, particularly in relation to private law and regulation. We argue that an enforcement deficit arises where: a) neither party is able to ascertain with certainty the circumstances which must exist and the action they must take (or not take) if they are to avoid non-compliance and sanctions; and, b) the sanctions or other non-legal effects of non-compliance (e.g. costs) on the parties concerned are such that they are driven to settle or resolve the uncertainty by negotiating a desirable outcome.

We submit that there are certain instances of regulation where an enforcement deficit is desirable; there are others where it is not. Which case applies will depend upon the objective of the regulation in question, but it is rarely desirable for the law to strictly define the behaviour that will avoid non-compliance and sanctions, unless that behaviour is certain, or highly likely, to result in the realisation of the overriding objective that the regulation was enacted to achieve. That is because a rational individual will tend to take the clearly defined actions irrespective of whether those actions are aligned with

the policy objective, given that the individual's primary interest is likely to be avoiding the sanctions or other negative consequences that can flow from non-compliance, and that interest will be served by following the legally defined course. In other words, where compliance can be achieved by actions that do not match the policy objective, those actions will be taken, the objective will almost certainly fail, and the benefits that society might hope to achieve from the realisation of the objective will be dashed.

8.5.2 Achieving effective negotiation systems for EDG – removing escalation paths to the tribunal and creating compliance incentives

It is argued that regulation of EDG to maximise fairness perceptions requires the creation and maintenance of an enforcement deficit in the terms defined above. Without that deficit the parties cannot be expected to come together in a negotiation system that is likely to result in greater fairness perceptions and OCB. That must be the case given the complexity and variety of circumstances that attach to each instance of EDG. In other words, as we have argued on several occasions in this thesis, it is not possible to prescribe in law the behaviour that is permissible and impermissible in relation to disciplinary and grievance matters, while taking into account the associated complexity and variety of circumstance that attach to each. Any attempt to do so will create a level of rigidity that will defeat the objective of achieving fairness perceptions via effective reflexive self-regulation. But to create the desirable enforcement deficit it is necessary to move away from the practice followed by the tribunals and Courts of focusing attention on a defined set of procedures.

If maximising fairness perceptions is the goal, it is necessary to create a regulatory structure which encourages employers and employees to believe that the enforcement mechanism (e.g. the tribunals and Courts) will challenge managerial prerogative and rigorously assess the substantive fairness of a dismissal, or other instance of EDG, including issues of distributive and interactional fairness. Moreover, that willingness of the tribunals and Courts to effectively investigate substantive liability in relation to EDG must be

reinforced by targeted sanctions and remedies for non-compliance which directly address the issue in dispute, coupled with a preparedness to apply those sanctions and remedies. But is this possible or practicable? No, appears to be the answer.

First, the tribunals and Courts will tend to resist any attempt to effectively legislate for their intrusion into the realm of managerial prerogative. For reasons that we have explored, the common law Courts and tribunals are reluctant to address issues of substance in relation to EDG because, according to Collins, their traditions encourage abnegation rather than intervention in the realm of managerial freedom of action.³⁴³ Secondly, this resistance on the part of the tribunals to robustly challenge managerial prerogative will be extremely difficult to overcome because, we argue, the tribunals and judges are simply not equipped to undertake the complex inquiry that would be necessary if they are to convince the parties to the employment relationship that, as third party adjudicators, they can and will effectively assess all aspects of fairness.. The complexity and challenge that would inevitably confront the tribunals, should they be asked to judge EDG disputes with a view to encouraging fairness perceptions, is apparent from the following real life example.

An employee is dismissed for poor performance. The genesis of the dismissal is complex to say the least. When the employee started with the employer they were told that they would be promoted within 6 months, once they had obtained some practical experience of their role. It transpired that the employee and her manager did not get-on for personal reasons, and the manager lobbied senior management not to promote the employee. The employee was not promoted, although the reasons given to support that decision were unrelated to the efforts of the manager. The employee was bitter and de-motivated and her performance suffered to such an extent that she was placed on a performance management programme. Eighteen months later she was dismissed for ongoing poor performance. She did not bring a claim for Unfair Dismissal, but let us assume that she did. A tribunal

³⁴³ Supra at note 178.

concerned with promoting fairness perceptions and OCB would have to concern itself with the complex background to the dismissal. The tribunal would have to ask whether the employer had done enough to prevent the circumstances leading to the dismissal and whether, having done so, the decision was fair or unfair. The tribunal would have to consider the promise made to the employee and whether that caused the poor performance and, if it did, should that render the dismissal unfair? But this level of inquiry and supervision by the Courts and tribunals is not possible or advisable. There is so much that the employer might have done or not done to prevent and then resolve the circumstances leading to the dismissal. Also, the reasons for the poor performance may have been considerably more complex and involve more than just the promised promotion and the actions of the manager. The employee may have been having difficulties in her private life or she may have simply decided that the job was not satisfying enough for her, but she was not motivated or confident enough to search out a new position. A tribunal, with very little insight to these complex issues, cannot be expected to judge the fairness of a dismissal with reference to such factors.

But if the tribunals and the Courts cannot effectively assess substantive fairness, they are likely to revert to focusing their assessment on what they can assess - procedural fairness. Such a reversion will undermine the enforcement deficit and render it less likely that the regulation of dismissal (or, more broadly, EDG) will effectively drive the employer to negotiate methods of dealing with disputes, and resolutions of actual disputes, that employees in particular will consider are fair.

There is a further complexity to consider. The existence of an enforcement deficit will not lead perfectly to effective negotiating systems that always result in fair outcomes, and the avoidance of relationship damaging disputes that would otherwise be escalated to the tribunals. In spite of the enforcement deficit, there will be cases (particularly dismissal cases) where the employer's behaviour will be challenged by the employee. While their former colleagues may believe that dismissal was fair, it will be difficult for employees to accept that it was fair for their employer to take the action of dismissing them from

service. Few people are likely to accept that their behaviour or performance was so poor as to warrant the drastic action of dismissal. In those circumstances there is every chance that the dismissed employee will bring a claim for Unfair Dismissal. This assessment is given added weight when we apply escalation theory to the discussion.

This thesis discusses escalation theory in more detail in the following chapter, but for now it is worth understanding that the theory predicts that people who feel aggrieved, and whose grievances are not resolved to their satisfaction, will tend to escalate their grievances where they are presented with an opportunity to do so. But that opportunity will tend to be taken without rational reflection on the merits of their grievance and the likelihood that it will eventually be determined in their favour.³⁴⁴ This creates a dilemma for a regulatory approach which aims to create effective negotiating systems. There will always be a risk that the adoption of a negotiation system will not prevent escalation of the dispute, which in turn compromises the perceived value of such a system, and reduces the likelihood of its adoption. In other words, the employer will be less likely to adopt and genuinely apply the system in a way that is likely to increase fairness perceptions, if they believe that their employee may still file a claim in the tribunals if the outcome of the negotiation is contrary to the employee's wishes. There is, therefore, a case to be made that the tribunals and the Courts should have limited oversight of matters relating to EDG so as to encourage the employer in particular that genuine adherence to the negotiation system can resolve the employee's grievance once and for all. The challenge is of course creating an incentive for the employer to genuinely adopt the system, and to avoid the employer taking advantage of the fact that their actions are no longer subject to oversight by the tribunals. Addressing these challenges is the central focus of the next chapter.

³⁴⁴ *Infra* at note 348.

8.6 Summarising the appropriate regulatory model

The preceding discussion suggests the boundaries of a new regulatory model for EDG. It is argued that all the law can hope to achieve is a framework of indirect regulation that encourages the parties to self-regulate EDG in a manner which is reflexive and flexible enough to adequately account for the particular circumstances that attach to each instance of EDG. Any such indirect regulation must encourage a reflexive approach to EDG which focuses on the total concept of fairness (i.e. procedural, distributive and interactional) and does not limit its regulatory interest to procedural fairness only. Further, and perhaps most significantly, we suggest that it may not be prudent to enforce any indirect regulatory framework via the traditional mechanism presented by the tribunals and the Courts. That is because, we argue, the tribunals and the Courts do not want to, and are not able to, effectively assess fairness in a manner that is likely to be perceived as fair by both parties.

CHAPTER 9: A NEW REGULATORY MODEL TO ACHIEVE FAIRNESS AT WORK AND OCB

This chapter suggests a new model for the regulation of EDG. It draws upon the arguments made in earlier chapters about the shortcomings of current regulation as a vehicle for greater fairness perceptions, and the suggestions made about a suitable regulatory approach. The proposed model adapts the “safe-harbour” approach to regulation which applies in other areas of law. In short we suggest an approach to the regulation of EDG which reduces or eliminates the employer’s liability in relation to EDG if they can acquire accreditation from an agency based on set criteria. An employer will only gain accreditation if they can in essence demonstrate that they have certain methods and practices in place for managing EDG; methods and practices that accord with established substantive requirements and principles which, if followed, are likely to lead to fairness at work, and therefore a higher degree of fairness perceptions. These requirements and principles will permit the parties considerable scope to comply with the accreditation criteria in a way that best suits them. If the employer achieves accreditation it will not thereafter be subject to the jurisdiction of the tribunals and the Courts in relation to potential claims concerning the broad issue of EDG. That is the carrot of the regulation. If they do not achieve the requirements of accreditation they will be subject to a more stringent set of employment rights that are more rigorously enforced by the employment tribunals. That is the stick of the regulation.

9.1 A radical new model which creates a “safe harbour” for employers

The new regulatory model must be radical. It must provide a degree of freedom of action for the parties to the employment relation, but within a legal framework which directs the employer in particular to take action that is concerned to achieve fair outcomes in the context of EDG. The radical aspect of the regulatory model is that it will prevent the tribunals and the Courts from being able to rule on the legality of the employer’s actions in every instance of

behaviour that would presently give rise to a potential claim. For example, the employer will be able to dismiss an employee who has been in service for 3 continuous years, and the dismissed employee will not be permitted to bring a claim for Unfair Dismissal. Once they have exhausted their internal options, the Employee will have no further recourse to challenge the dismissal. In short, employers will be immune from certain claims relating to EDG, including dismissal. We should also say at this point that the model would apply equally to issues of redundancy. We have not discussed economic dismissals directly, but the issues, challenges and principles we have explored apply equally to circumstances where an employee is being dismissed for economic or business reasons.

This regulatory model adopts and adapts the safe harbour approach to regulation. Broadly stated a safe harbour is a form of regulation that reduces or eliminates a party's liability under law, providing that party has achieved compliance with certain principles or standards set down in the regulation. Regulators may include safe harbour provisions in regulation to insulate organisations or individuals from excusable violations of the regulation, or to incentivise the adoption of desirable practices. As suggested above, it is the latter explanation or justification for a safe harbour approach that has been adopted in this thesis.

An example of the safe harbour approach in practice is the EU Directive 95/46/EC on the protection of personal data. The Directive, inter-alia, prohibits European organisations from transferring personal data to overseas jurisdictions with weaker privacy laws. There is, however, a safe harbour agreement between the European Commission and the US Department of Commerce which enables US organisations to join a safe harbour list to demonstrate their compliance with the Directive. These organisations are thereafter able to receive personal data from the EU in circumstances where the transfer of information would otherwise contravene the European adequacy test for privacy protection. To legitimately gain a position on the safe harbour list each organisation must voluntarily commit to comply with certain principles contained in the Directive, including that: individuals must

be informed that their data is being collected and how it will be used; individuals must have the ability to opt out of the collection and transfer of their personal data; transfer of data to third parties may only be made to other organisations that also follow the data protection principles; reasonable efforts must be made to prevent loss of collected information; data must be relevant and reliable for the purpose of its collection; individuals must be able to access the information held about them and correct any inaccuracies in the information; there must be effective means of enforcing these rules. Organisations must be certified to enter the safe harbour and must re-certify every 12 months. Each organisation can perform a self assessment to verify that it complies with the safe harbour principles, or it can engage a third party to perform that assessment.

Some of the apparent strengths and weaknesses of the safe harbour approach taken in relation to the Directive are instructive as we attempt to build a new regulatory model for EDG. The obvious strength of the approach in the context of our discussion is its reliance on principles as opposed to strict procedures. In this way the parties moored in the safe harbour are free to devise their own methods and systems for achieving adherence to the data protection principles. This provides an opportunity for the organisations in question to, for example, adapt existing processes and internal ways of working to meet the requirements of the safe harbour, thereby avoiding the time, effort and possible cost that would flow from building new ways of working to ensure compliance with a prescription qualifying procedure. In other words the organisations concerned are able to be reflexive to a point in devising an approach to comply with the requirements of the safe harbour. Further, the use of principles as opposed to prescribed processes focuses the parties' attention on achieving substantive outcomes rather than just process adherence. The organisations are required, for example, to find a way of ensuring that personal information is not lost. Whatever is the method adopted to achieve adherence to that principle, such adherence must be achieved. It is not enough to follow a process unless the process achieves substantive compliance with the principle. Further, provided the organisations are set up to comply with the data protection principles, in the safe harbour

they are able to transfer and store personal information free from the risk and uncertainty associated with the trans-Atlantic transfer of information that may or may not be protected information.

There are, however, several weaknesses in the set up and functioning of the safe harbour agreement. Studies have shown that there are a number of organisations within the safe harbour that are not compliant with the principles. For example, a number of organisations did not, according to one study, appear to comply with principle 7 which requires those organisations to engage an independent dispute resolution provider for the purpose of handling disputes relating to the other principles.³⁴⁵ Further, the same study indicates that of the 1,597 organisations on the safe harbour list at the time of the study in 2008, only 348 of them meet even the most basic requirements of the safe harbour framework. For example, many of the organisations did not have a public privacy policy, or the policy failed to make mention of the safe harbour.³⁴⁶ A key cause of these weaknesses appears to be the failure of the administrative bodies that have responsibility for the safe harbour to establish mechanisms to enforce the requirements of entry and to monitor compliance. Aligned with this weakness is the right of the organisations to self-certify and self-re-certify that they are qualified to enter the safe harbour. That right, coupled with an absence of compliance monitoring and robust enforcement, is likely to lead to organisations taking advantage of the benefits of the safe harbour when they are not qualified to do so.

9.2 A requirement to be accredited for fairness in return for immunity

The protection for employees in the new regulatory model proposed in this chapter will come from the requirement that all employers must qualify to benefit from the safe harbour or immunity contained in the regulation. All employers will be permitted to apply to an appropriate agency for accreditation as an immune employer; they will not be entitled to self-certify

³⁴⁵ C. Connolly, *The US Safe Harbor – Fact or Fiction?*

http://www.galexia.com/public/research/assets/safe_harbor_fact_or_fiction_2008 (14)

³⁴⁶ Ibid, 1.

their right to enter the safe harbour. Whether or not the employer is able to achieve accreditation will depend on whether they meet certain criteria concerning the methods, practices and systems that the employer has in place to achieve fairness in relation to EDG. Where an employer is unable to meet the criteria they will continue to be subject to the jurisdiction of the tribunals and Courts, but the laws relating to EDG which the tribunals and Courts are required to enforce will be more stringent than current regulation. All employers who fail the test for immunity will be entitled to resubmit for accreditation. Further, all employers who are accredited only obtain accreditation for a limited period of time (perhaps 2 years) following which time they must resubmit an application to have their accredited status renewed.

In short this regulatory model will work to incentivise employers to put in place an approach to EDG that is likely to maximise fairness perceptions, by removing the risk that their behaviour in each instance of EDG will be subject to scrutiny by the tribunals. Providing employers meet the accreditation criteria they will need not worry that, for example, their decision to dismiss an employee will be judged as unfair and that they will have to incur the cost (financial and non-financial) of defending a tribunal claim. That is the carrot to comply with the accreditation requirements. The stick is the more rigorous regulatory approach to enforcing stringent direct employment protection regulation, which will include harsher sanctions for non-compliance. The key to the success of the model will be the criteria and the effective measurement and application of the criteria by the agency which is established to undertake this task. The criteria must, of course, provide the potential to drive the employer to focus attention on achieving a workplace that is more attuned to the prevention of unfair treatment and to the effective resolution of disputes when they arise.

What are the criteria likely to include? We have already suggested a number of possible elements throughout this thesis and it is appropriate at this stage to discuss those and others in an effort to build a picture of the proposed regulatory model. The accreditation criteria will not attempt to direct specific behaviour or processes that an employer must follow in relation to EDG.

Rather the model will establish certain principles of behaviour that are intended to help guide the employer and its employees to develop practices that will in turn result in fair treatment. Also, the model will require the employer to establish certain internal structures and a forum that will support, apply and enforce the principles of fair treatment and the approach that the employer has adopted to align itself with the fairness principles. This conception of the new regulatory model will gather practical meaning as our discussion progresses.

9.3 The accreditation criteria – principles over process and the challenge of escalation

The preceding discussion has taught us some important lessons to take forward as we build the accreditation criteria. Several of those lessons are worth emphasising at this stage. First, to repeat, the criteria should not become process obsessed but must encourage adherence to certain principles that are likely to lead to fairness perceptions. As with current regulation of EDG, an internal approach to EDG that leads managers to go through a checklist of steps when responding to employee grievances for example, is in danger of dissuading managers from exploring the substance of the grievance. Such an approach is likely to result in an approach to EDG which views process as an end in itself, and this is inconsistent with achieving the true objective which is greater levels of fairness perception and the benefits that flow from realising that objective. Which is not to say that the employer will not, in the end, and to comply with the principles contained in the criteria, develop a process or series of processes to handle instances of EDG? A number of studies have identified that the existence of and access to EDG processes can have beneficial consequences for employers that desire to indicate to their employees that the employer is fair. Literature from the US predicts that the presence of EDG processes can result in lower quit rates and higher levels of productivity (although such studies do not suggest that such

processes by themselves, and without genuine and meaningful application, can realise these benefits).³⁴⁷

The second lesson learned concerns the importance of devising an approach to EDG which aims to prevent disputes or, where prevention is not possible, to resolve disputes early before they irreparably damage the relationship. This vital requirement or principle may, yet again, point to the importance of avoiding process obsession when developing the accreditation criteria. Achieving early resolution of EDG related disputes might be made more difficult if the employer has in place a rigid and extensive EDG process involving multiple meetings, hearings and appeals. That is because the employee may, where an extensive process exists, be inclined to rigorously pursue their grievance in accordance with the process, in a manner that tends to lead the dispute further and further along the dispute continuum. This is contrary to the desirable policy objective of fairness at work which, as we have discussed, prefers a quick resolution of grievances, albeit one that may substantively go against the employee. Support for this analysis can be found in the application to EGD of the psychological theory of escalating commitment.

The theory of escalating commitment predicts that when individuals invest resources in a course of action and receive feedback that the course of action is not succeeding, they become more committed to that course of action, and more likely to invest additional resources in its pursuit.³⁴⁸ Psychologists have explained escalation behaviour with reference to self-justification and cognitive dissonance.³⁴⁹ Cognitive dissonance research suggests that people suffer mental discomfort when they act in a manner that is contrary to their publically held beliefs. In such circumstances individuals will tend to alter

³⁴⁷ C. Ichniowski and D. Lewin, 'Grievance Procedures and Firm Performance' in M Kleiner et al (eds) *Human Resources and Performance of the Firm* (159, 177-79); and, C Ichniowski 'The Effects of Grievance Activity on Productivity' (1986) 40 *Industrial and Labour Relations Review* 75, 86.

³⁴⁸ J. Polster, 'Workplace Grievance Procedures: Signalling Fairness but Escalating Commitment' (2011) 86 *New York University Law Review* 638, 638.

³⁴⁹ J. Brockner 'The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress' (1992) 17 *Acadamey of Management Review* 39, 39.

their behaviour or express beliefs as a remedy for the mental discomfort.³⁵⁰ If we apply this thinking to EDG it is arguable that when a grievant invests time and, more importantly, personal credibility in filing a grievance that is rejected in the first instance, they will predictably respond to the rejection by utilising the opportunities at their disposal to further the grievance as a means of self justification. Such an opportunity is likely to come in the form of an appeal. Further, if the appeal is unsuccessful the employee will tend to escalate the grievance to any additional point of appeal if one exists (e.g. the employment tribunals).³⁵¹ This practice of escalation can also be understood as a way of employees saving face in front of their managers and colleagues by attempting to prove the correctness of their position.³⁵²

This notion that employees tend to escalate rejected grievances where the opportunity exists to do so, gains further support from anecdotal evidence and decision dilemma theory. Studies relying on anecdotal evidence warn that the formal grievance procedure tends to result in employees repeatedly discussing and arguing their case. This rehashing of the argument can have the effect of intensifying the employee's sense of grievance which can, in turn, make the grievance more difficult to resolve.³⁵³ In short, anecdotal evidence suggests that grievance rejection tends to increase employee commitment to their grievances and "general wisdom holds that grievances become more difficult to settle as they progress from lower levels of the grievance procedure, and grievants are more likely to believe that the outcome of grievances settled at the upper levels are inequitable."³⁵⁴ Decision dilemma theory also explains why formal grievance procedures are particularly conducive to escalation. Formulated by Michael Bowen, decision dilemma theory suggests that people

³⁵⁰ D. Linder, J. Cooper and E. Jones 'Decision Freedom as a Determinant of the Role of Incentive Magnitude in Attitude Change' (1967) 6 *Journal of Personality and Social Psychology* 245, 245.

³⁵¹ Supra at note 348, 653.

³⁵² Ibid, 654.

³⁵³ J. Swann "Formal Grievance Procedures in Non-union Plants" (1981) 26 *Personnel Administration* 66, 68.

³⁵⁴ Supra at note 348, 657.

escalate, not in response to negative feedback, but in response to equivocal feedback.³⁵⁵ As Polster argues³⁵⁶:

Grievance denials can be conceptualised as equivocal feedback because when a grievance is denied, the grievant can appeal to a higher level official who is likely more removed from the controversy. Grievants may therefore attribute the initial feedback – the denial of the grievance – not to the grievance’s lack of merit, but to the information level or partiality of the decision maker. Grievants may therefore become more committed to their grievances and choose to invest additional resources in appeals.

The writer’s personal experience of representing employees during internal grievance and disciplinary proceedings suggests that extensive and rigid procedures can present a further barrier to early resolution of disputes, beyond employee escalation concerns. That barrier results from the reluctance of some managers and HR advisers to halt procedures where the opportunity exists for them to do so, and where the circumstances of the dispute or grievance suggest that the opportunity to cease proceedings should be taken. In certain circumstances managers can be reluctant to take a decision which brings a process to a halt for fear of “getting the decision wrong” or because they do not feel comfortable or empowered enough to accept the responsibility of preventing an employee from pursuing their concerns to the next level of the procedure. A real example helps to explain this point. An administrative employee in a large public sector organisation accused her manager of inappropriately touching her during a work function. The employee raised a complaint with the employer’s HR department in accordance with the employer’s grievance procedure. This HR department conducted an informal discussion with the complainant pursuant to level 1 of what was a 5 stage grievance procedure. At each stage of the process it was for the HR department, and the advisor appointed to manage the grievance, to make a decision about whether or not to advance the grievance. If the decision was made not to advance the grievance at any stage, the employee had a right to appeal that decision. It became evident very early in the process that the employee’s complaint was false because the subject of the complaint was not present during the work function in question, but was in fact out of the

³⁵⁵ M. Bowen “The Escalation Phenomenon Reconsidered: Decision Dilemmas or Decision Errors?” (1987) 12 *Academy of Management Review* 52, 61.

³⁵⁶ Supra at note 348, 655.

country. Nevertheless, at every stage in the process, the decision was taken to escalate the grievance to the next level. The final level was a formal disciplinary panel of senior management at which written evidence and cross examination was required and for which the parties had legal representation. In the end the employee charged was found innocent. Despite this finding the subject of the complaint felt himself aggrieved by the process such that he brought a grievance of his own, which progressed to level 4 of the procedure at which stage he resigned. During the level 5 hearing of the original grievance the HR manager responsible for the grievance said that she had advanced the grievance through the various levels because she “thought that something new might come out” and she could not believe that someone would make such a complaint if it was not true.

The preceding discussion of grievance and dispute escalation suggests that a model for the regulation of EDG which aims to encourage fairness at work and the preservation of relationships, should aim to minimise or eliminate the application of rigid disciplinary and grievance procedures that involve multiple levels and opportunities for escalation and appeal. The regulation should encourage the use of flexible and informal methods of grievance and dispute resolution that are adaptable to the circumstances of the dispute or grievance (including the personalities involved). This approach is also consistent with research which indicates that the resolution of grievances and disputes are more easily reached during informal oral discussions.³⁵⁷

There is, however, one further point to consider. It is all very well to “de-formalise” and simplify an approach to EDG, but not to the extent that doing so inhibits or discourages employees in particular from raising their grievances and concerns. In other words the approach to dealing with EDG must provide a clear, if simple and informal or flexible, mechanism for raising concerns which employees are sufficiently confident in and aware of, and therefore willing to use.

³⁵⁷ H. Graham and B. Heshizer (1979) 30 *Labour Law Journal* 427, 431.

9.4 Creating the accreditation criteria

As suggested in the discussion above concerning the use of safe harbours, an approach to setting the criteria that is consistent with the policy objective of fairness perceptions, will focus on creating principles and a framework for the handling of EDG issues. This includes the principle of putting in place the conditions that will encourage the early raising of concerns and will avoid damaging and unnecessary escalation of disputes and grievances. A simple process or guidance regarding who to speak to and when may well suffice in terms of articulated procedure, but the essential success feature of any approach to handling EDG is, it is argued, fundamentally rooted in the need for people who are capable enough and informed sufficiently to deal with EDG in a manner which is consistent with the policy objective. That is less about the process and the rhetoric surrounding the process, and more about having capable people to implement and administer the approach. Those people should be able to apply the principles that make up the framework in a way which maximises the likelihood that the handling of each dispute will be quick and that each dispute will be resolved in a manner that the employee and their colleagues looking on consider to be fair. For example, rather than providing managers with a process to follow, a central concern of the employer's approach to EDG should be to ensure that their managers are equipped with the "soft" skills necessary to resolve employee concerns (or at least they should have access to people who have such skills). This focus on creating the essential fundamental foundations for a successful approach to EDG that looks beyond the written policy and process documents, that are a feature of so many workplaces, is apparent in the accreditation criteria that are developed in what follows.

9.4.1 The training and learning criteria

The first set of criteria relates to training and awareness of principles, rights and obligations. It is vitally important that employers and employees are aware of their rights and obligations under the new regulatory model. It is also essential that managers and employees are adequately trained about the

meaning and application of those rights and obligations. The rationale for this training is not difficult to comprehend. An individual (a manager or an employee) or the employer's organisation as a whole, cannot expect or be expected to comply with an organisation's established practices and principles, rights and obligations, relating to EDG, if they do not fully understand those factors and their application. If those factors are not followed the parties cannot hope to obtain the benefits that are expected to flow from their application (i.e. greater levels of fairness and OCB). The training would seek to overcome two associated problems that appear in relation to employee and manager awareness of current legal rights and obligations. First, a significant proportion of employees are not aware of their legal rights and obligations relating to EDG. A 2005 study found that 10% of employees surveyed (a proportion of whom had managerial responsibilities) did not know that an employer must have a fair reason to dismiss an employee.³⁵⁸ Further, the same study discovered that 28% of the survey respondents did not know that employers were under a legal obligation to follow a grievance process (the survey was undertaken during the currency of the mandatory Statutory Grievance Procedure).³⁵⁹ The 2005 survey also uncovered that only 28% of respondents felt they knew the detail of the Unfair Dismissal law³⁶⁰, while a mere 22% of respondents were comfortable that they understood the detail behind the right to have a set of grievance procedures.³⁶¹ Behind this lack of awareness is a further issue that was explored in the 2008 Fair Treatment at Work report.³⁶² A number of employees are mistaken about their rights and their employer's obligations. For example, the 2008 report highlighted areas where the employees surveyed believed that their employer had certain obligations when in fact they did not. Those perceived obligations included not to discriminate due to appearance, to consider a request for flexible

³⁵⁸ J. Casebourne, J. Regan, F. Neathey and S. Tuohy, *Employment Rights at Work – Survey of Employees 2005* (Employment Relations Research Series No. 51) 158. The awareness of legal rights and obligations appeared to improve from the time of the 2005 survey, to the 2008 Fair Treatment at Work Survey (supra at note 312).

³⁵⁹ J Casebourne, J Regan, F Neathey and S Tuohy, *Employment Rights at Work – Survey of Employees 2005* (Employment Relations Research Series No. 51) 157.

³⁶⁰ Supra at note 358, 158.

³⁶¹ Ibid, 157.

³⁶² Supra at note 312.

working to care for an elderly relative, to permit the carrying over of unused holidays, to grant unlimited amounts of unpaid holiday each year.³⁶³

The lack of understanding and misunderstanding of employment rights has important consequences for our policy objective of enhanced fairness perceptions. For example, an employee who has a broad understanding that their employer has certain obligations not to discriminate against its staff, but does not understand the detail behind that right, may be inclined to fill the gaps in their understanding with certain false assumptions about the legal right. This is consistent with the earlier explanation of Fairness Heuristic Theory (FHT)³⁶⁴ which focuses “on the cognitive limitations involved in processing relational information and explains how fairness information serves as an aid in making sense of the plethora of interpersonal stimuli we must face in our daily lives.”³⁶⁵ Fairness information would include information about each party’s legal rights and obligations. Where such information is not available or is unknown, studies in the area of FHT suggest that substituting one’s own false assumptions about that information can result in fairness perceptions or judgements being inaccurate and unwarranted. That inaccuracy may in turn cause an employee to form a negative view about their employer, or to behave in a manner that is not justified or that is contrary to how they would have behaved had they been accurately informed.³⁶⁶ Take for example an employee who mistakenly believes that their employer must not discriminate against them on the basis of their appearance. The employee is given a warning for consistently wearing ear-rings at work when the wearing of ear-rings is against company policy. The employee takes the warning and does not challenge it by bringing a tribunal claim. He does not want to go through the aggravation of bringing a claim while he remains employed and he wrongly believes that it is necessary to pay for a lawyer to represent him in the

³⁶³ Ibid, 20, 21.

³⁶⁴ See discussion in Chapter 3.

³⁶⁵ R. Cropanzano and D. E. Rupp, ‘An Overview of Organizational Justice: Implications for Work Motivation’, in L. W. Porter, G. A. Bigley and R. M. Steers (eds) *Motivation and Work Behaviour* (McGraw Hill: London, 2003) 82, 89.

³⁶⁶ K. Van den Bos, R. Vermunt and H. A. M. Wilke, ‘Procedural and distributive justice: What is fair depends more on what comes first than on what comes next’ (1997) 77 *Journal of Personality and Social Psychology* 95.

tribunal. The employee suggests to their manager that he is being discriminated against, but his manager disagrees. The employee is steadfast in their belief because he has been given the information about his rights by a friend who he trusts. The employee is upset and humiliated. He feels demotivated and has lost trust and confidence in his manager and his employer. His work output declines and he eventually resigns to take up a new role.

The training requirement or criteria extends beyond legal rights and obligations to the employer's internal policies and procedures relating to EDG (we talk more about the creation, and the principles behind the creation, of those policies and procedures below). In particular, employees (including managers) must be trained on the meaning and interpretation that will be applied to the employer's policies and processes, including how they will function in practice, and the respective obligations of employees and managers and other functions within the business (e.g. HR). This training would also include training for line managers regarding how to better manage their reports in a way that minimises the risk of grievances arising in the first place, or at least helps prevent their escalation beyond the early stages of the dispute spectrum. This training requirement, and the need to achieve certain levels of competency in relation to the subjects taught, should be included in each manager's performance plan and part of their performance assessment should involve determining how well they measure up against the required competencies. Indeed the extent to which all training is understood by the recipients of the training must be measured and where comprehension falls short of what is required, the training should be undergone again. Further, all training must be refreshed and updated to reflect desired changes that are identified by managers and employees as part of an ongoing improvement programme which aims to enhance fairness at work. The extent to which training programmes are adequate will be assessed as part of the accreditation process by the responsible agency.

Training is in part about extending knowledge of all matters relevant to the prevention and resolution of EDG disputes. The dissemination of knowledge and information about matters relevant to EDG must be consistent and focused

on the principles that have been agreed by the parties as the guiding principles of EDG prevention and resolution in their workplace. That will be a requirement of accreditation. In this regard that information must be communicated regularly via various media and forum (e.g. team and department meetings, handbooks, email communications from senior management, intranet etc). Further, employees and managers must be encouraged to seek out advice when they are not clear about their rights and obligations in relation to EDG. To this end each organisation must have a central point of knowledge and advice concerning such matters - a guardian or owner of the EDG related principles, policies and processes that apply in the organisation. For larger organisations that guardian may well be the HR function. Further, the existence and role of this guardian must be communicated effectively (which partly means regularly) throughout the organisation. The aim is that questions or concerns regarding EDG related issues are raised internally in the first instance, to ensure they are dealt with consistently and in a manner which is in keeping with the organisation's specific principles of fairness. Success will be measured in part by the extent to which employees use this internal function, and it will be a significant departure from the current practice of many employees. For instance, the 2005 Employment Rights at Work survey discussed above found that a large proportion of employees go outside of the employer organisation to obtain information about their legal rights and obligations. In fact 58% of respondents to the survey said that they went in the first instance to an external source (including the CAB, the internet, a friend or relative).³⁶⁷

9.4.2 The representation and governance criteria

Where the employee is not comfortable raising their issues with the employer's guardian, they must have available to them a representative to whom they can appeal for advice. The provision of representation is a further requirement of accreditation. Employees must have access to representation for knowledge and advice, representation at grievance and disciplinary

³⁶⁷ Supra at note 358, 134.

meetings and discussions, as an advocate for their interests during the negotiation and implementation of policies and processes relating to disputes, and in relation to the updating and monitoring of compliance with those policies and processes. The rationale behind the importance of representation is in part to encourage the accurate dissemination of information about rights and obligations (legal and internal). It is also aimed at encouraging employees to raise their concerns as early as possible. If concerns are raised to the representative, that body can assist the employee with how best to deal with the concern. It may be that sound advice will resolve the matter without the need to pursue it further. In different circumstances the representative may be able to raise the concern with the internal guardian on behalf of the employee in an effort to find a resolution. An alternative resolution may be that the guardian encourages the employee to raise the matter directly with their line manager. That may be enough to resolve the issue. It is interesting to note in this context that empirical evidence suggests strongly that employees who seek advice from a manager or a trade union representative are more likely to find what the employee perceived to be a positive outcome to their problem. Specifically, employees who consulted a manager or a trade union were twice as likely to find what they considered to be a fair outcome, than those that did not.³⁶⁸

Further, the 2008 Fair Treatment at Work Report suggests that those employees who discuss their issue with their employer (either face to face or over the phone) were approximately 80% more likely to reach what the employee considered was a successful outcome than those that did not have such a conversation.³⁶⁹ Of additional relevance is the 2004 report on employment representation in grievance and disciplinary matters. This report found that disciplinary sanctions and dismissals were less likely to occur at workplaces with higher levels of trade union density. This was bolstered by the presence of specialist HR managers and was particularly evident where

³⁶⁸ Supra at note 312, 122.

³⁶⁹ Ibid, 122.

employee representatives trusted their management counterparts.³⁷⁰ By contrast, those employees who did not resolve their problems internally, but instead made an application to the tribunal, were around 25% less likely to resolve their problem in what they considered to be a positive way.³⁷¹ This conclusion compares with the outcome of the 2008 Survey of Tribunal Applications, which found that 21% of claimants who were *successful* at tribunal were not or not at all satisfied with their case outcome, while 92% who were *unsuccessful* were not satisfied.³⁷² These findings emphasise the importance of encouraging employees to raise their concerns with their representative or their manager. If this is achieved, we can anticipate a resulting increase in the number of grievances that are resolved early and in a manner that the employee considers to be fair. The guarantee of a representative will help achieve this objective. These findings also support the need for effective training of managers and representatives to ensure that they are adequately able to deal with employee concerns when they are raised. One might reasonably predict that the percentage of positive outcomes discussed above will increase where there is a constant representative who is effectively trained.

The role of the representatives will also include formulating the principles, policies and procedures that will apply in the particular workplace (including roles and responsibilities and guidance on flexibility and options for resolution). This is a vital component of the new regulatory approach. It is essential that employees have an effective and persistent voice in the creation and ongoing development and improvement of an organisation's approach to preventing and resolving workplace disputes. This thinking is reflected in the current ACAS Code which requires the involvement of employees in the building of disciplinary and grievances processes. The importance of employee involvement in this sense stems from the notion that employees are far more likely to perceive their employer's approach to EDG as being fair, if that approach amounts to the faithful following of policies and processes that

³⁷⁰ R. Saundry and V. Antcliff, *Employee representation in grievance and disciplinary matters – making a difference?* (Employment Relations Research Series no. 69) 12, 30-39.

³⁷¹ *Supra* at note 312, 122.

³⁷² *Supra* at note 294, 87.

the employees were intimately and meaningfully involved in developing. This reasoning makes sense if we revisit earlier discussions regarding how employees make fairness judgements. In particular, the proponents of fairness theory suggest that perceptions of unfairness occur when an individual is able to hold another person responsible for a situation which threatens their psychological or material wellbeing. The employee will be able to make that judgement when they imagine that there are other possible outcomes that would have caused them less damage, and the person responsible for making the decision *could have* and *should have* acted differently.³⁷³ It is the ‘*should have*’ component of this model which is particularly relevant in the current context. It will be increasingly difficult to make an unfavourable *should have* judgement if the employer’s actions reflect an approach to resolving EDG disputes which the employee (or their authorised representatives) have been instrumental in developing. That is in part because the meaningful involvement of employees in the creation of EDG principles, policies and processes will go some way to ensuring that those policies and procedures are more likely to reflect what the employees’ believe is a fair approach to handling employee grievances and disciplinary issues. Provided those policies and processes are faithfully adhered to, perceptions of unfairness should be minimised and positive perceptions of fair treatment should increase.

This leads to another role for the representative. They will play an important function as the monitor or gatherer of information relating to compliance and non-compliance with the agreed principles, policies and practices. This is a significant function for the obvious reason that it is all very well to have agreed policies etc, but the value of those policies as an agent for fairness is very much dependent on the employer’s adherence to the standards of behaviour and practice contained therein. In fact, failure to adhere to agreed policies and practices may well result in a higher level of unfairness judgements than might apply following non-adherence to employer imposed standards given that, using the language of fairness theory, such non-

³⁷³ R. Folger and R. Cropanzano, ‘Fairness Theory: Justice as accountability’, in J. Greenberg and R. Folger (eds) *Advances in Organizational Justice* (New Lexington Press: Lexington, 2001) 1.

compliance emphasises the employee's focus on the *should have* assessment (i.e. the employer *absolutely should have* complied with the practices that we mutually agreed). The representative must therefore be tasked with tracking and recording instances of actual and alleged non-adherence to the agreed policies. They should raise those non-compliances with the employer for resolution. The representative will encourage employees to raise concerns regarding the employer's (including managers') failure to follow the agreed approach. That encouragement will also form part of the training and obligation of managers. These allegations of non-compliance will be submitted for audit by the accreditation agency when the employer's accreditation is up for review. This point leads to the next requirement of accreditation.

The employer must establish a governance mechanism for EDG which includes a joint committee of employer and employee representatives. The committee will meet regularly to discuss alleged non-compliances with agreed practice and to explore improvements to the organisation's approach to managing EDG. The committee must include suitably senior individuals from the employer's organisation; individuals who are able to make decisions about important issues relating to the management of EDG. Exactly who those individuals are might depend on the size of the organisation. A small employer may be expected to include its Managing Director on the committee while a large multi-national corporate employer may run several committees which govern local workplaces in different geographies (this would reflect the potential variability of the issues that are important to different locations and different groups of workers). Each local committee might include the local head of operations. The employee representatives might include individuals that represent different parts of the business and levels of the organisation's structure. For example, the committee of a medium size manufacturing business might include employee representatives from production, sales, procurement, and head office. This reflects one of the principles relevant to selecting employee representatives, which is that the committee as a whole must be able to effectively represent the varying interests of the employer's employees.

The final point above begins to address the question of who is able and capable to represent employees. Recognised unions would potentially play a role, as would non-recognised unions where the employees concerned conclude that union representation is appropriate and desirable. The various reports that we refer to above clearly indicate the value of unions in the effective and early resolution of employee grievances and disciplinary matters.³⁷⁴ But given the lack of union coverage in modern British workplaces, it will be necessary to look beyond trade unions to find suitable employee representatives. Those representatives may come from within the employer's workforce and where they do, they will be elected by their colleagues. An alternative source of representatives may be a state funded body of employee representatives. The rules relating to the process and handling of representative elections will be provided by regulation. Further practical support for employees and employers concerning the holding of elections will be provided by an external agency. Further, employee representatives must be fully trained in the requirements of their role (as must employer representatives). Such training may also be supported or provided by an external body (e.g. the accreditation agency or ACAS). Again, the size and membership of the committee will be dictated by the size and geographical spread of the employer, and the need to ensure that the committee fairly represents the spread of different groups of employees that the employer employs. For a very small business, it may be appropriate that the entire workforce sits on the committee.

9.4.3 The negotiated approach to managing EDG

The governing committee, once established, will agree a "principles of working" document that will govern how the committee will co-operate to, in the first instance, agree the organisation's approach to managing EDG. Beyond the initial development of the approach, the document will set out the timing of committee meetings and any standing agenda items, and it will

³⁷⁴ See, for example, Fair Treatment at Work Survey 2008 (supra at note 312).

provide mechanisms for the ongoing improvement of the organisation's approach to managing EDG. The committee will go on to develop the initial principles, policies and processes that will govern the organisation's management of EDG. A failure to agree the processes and policies for the handling of EDG will result in the employer being unable to gain accreditation.

Those policies etc must be submitted for accreditation, along with a record of the election process and outcome (endorsed by the committee, but subject to audit by the accreditation agency). The precise nature of the agreed approach and its specific terms will be left to the committee to agree, but they must align with certain key principles and objectives. Those principles and objectives may include the following.

The parties to the employment relationship are committed to:

1. Achieving an approach to managing EDG that employees and employers believe is fair;
2. Faithfully following the approach in relation to all instances of EDG;
3. Proactively encouraging managers and employees to raise their concerns and problems early with their reports or manager or representative (as the case may be);
4. Ensuring that problems and concerns are dealt with promptly, bearing in mind the specific nature of the issue and the individuals concerned;
5. Ensuring that all policies, rules and processes relating to EDG are clearly communicated to all concerned;
6. Ensuring that any process relating to EDG is simple and flexible and avoids the risk of unnecessary escalation;

7. Ensuring that all managers are appropriately trained in the handling of EDG;
8. Ensuring that all concerned are appropriately trained about their rights and responsibilities as they apply to EDG;
9. Ensuring that compliance with the agreed approach to the management of EDG is adequately monitored and that records are kept regarding allegations of non-compliance;
10. Ensuring that all representatives represent their respective constituencies in good faith and to the best of their ability;
11. Ensuring that the procedures for the handling of grievances and disciplinary matters should be agreed by the committee;
12. Ensuring that all policies and procedure relevant to EDG are reviewed and updated by agreement of the committee, in keeping with the objective of continuous improvement;
13. Ensuring that the committee members must work in good faith to agree the procedures and must use their best endeavours to reach an agreement;
14. Ensuring that the procedures for the handling of EDG must be written and should reflect the following principles:
 - a. The desire to resolve matters informally by discussion where possible;
 - b. All decisions about the outcome of disciplinary and grievance matters will be taken by agreement with the employee if possible, otherwise those decisions will be for the employer to make;

- c. The employer's decision must not be taken until they have gathered the relevant information;
- d. The allegations or concerns at issue must be clearly articulated to the employee (in the case of disciplinary action), or to the employer (in the case of a grievance);
- e. The employee must be given a full and real opportunity to respond to any allegations against him or her;
- f. The employee should be entitled to have a support person of their choice at all meetings to discuss grievances or disciplinary matters;
- g. The decision-maker must keep an open mind to the outcome;
- h. The employer must always genuinely and in good faith provide an explanation of why they have reached their decision (including why they have not decided to take any alternative action that is suggested by the employee);
- i. Employers should always explore options other than dismissal and dismissal should be the last resort and any disciplinary or other action taken should be proportionate;
- j. The procedures and policies applicable from time to time must be in writing and easily accessible and available for all employees and managers to review;
- k. The parties to any instance of EDG should be prepared to explore and agreed departures from the written procedures where they feel that is appropriate;

1. A written record should be kept of all EDG matters that extend beyond informal discussions;
 - m. All records must be stored by the employer and made available to employees and the agency auditor upon request.
15. Ensuring that they develop a set of behaviour and performance standards that are applicable to their particular workplace, including an indication of which of those standards are particularly important for the organisation and the employment relationship and why;
16. Ensuring that they explore in good faith engaging an external provider of mediation or conciliation services where the parties cannot reach agreement on matters relating to EDG (such mediation may be provided by the tribunals or ACAS or some other body established by the state).

9.5 Measuring the employer's approach for accreditation and the issue of small employers

Generally speaking this list of principles, and the preceding criteria, address many of the essential aspects of EDG dispute prevention that we have suggested are missing under the current regulatory regime (e.g. the early raising of grievances, flexibility of process, third party intervention is inappropriate, solutions to problems should directly address the problem etc). The accreditation agency will review the employer's adherence to these principles and the other criteria discussed above when determining whether the employer should be immune from certain potential liabilities under common law and statute that apply to EDG. When undertaking a review or audit of the employer's adherence to the fairness principles, the agency will consider the records kept of compliance or non-compliance with the criteria, interviews with members of the committee, records of disciplinary and grievance matters, training records, and any other information that the agency considers is relevant (this may include interviews with employees and

managers who were involved in certain grievance or disciplinary matters). The review will involve the agency comparing the specific performance of the employer and its managers against a number of performance levels and key performance indicators that will be developed for that purpose. The assessment will take into account key dependencies, including, most significantly, the extent to which employees and their representatives have complied with their obligations on which the employer's compliance is dependent. The assessment will also take into account the employer's history of performance against the criteria (in the early days this may involve assessing the employer's past record of tribunal claims).

Where the employer does not pass the accreditation assessment, they will remain subject to the current law relating to Unfair Dismissal and grievances, but with certain changes made to bolster the impact of the law, and to increase the incentive for employers to meet the accreditation criteria. In particular, the current law will be altered to address many of the shortcomings that we have addressed in the preceding chapters. They include: a greater willingness on the part of the tribunals to challenge the employer's substantive reasons for dismissal, an increase in the frequency of re-instatement orders, an escalation in the level of financial remedies (including awards for non-pecuniary loss), the introduction of an award similar to the New Zealand compliance order.

It is possible that small employers will find the demands of accreditation beyond them because of the effort involved in meeting the criteria and the limited internal resources they have available to achieve compliance. It may be possible to overstate any such difficulty, but it is important to acknowledge. This is particularly so given that a large number of the claims brought to the tribunals involve small employees, who represent a large proportion of workplaces in Britain.³⁷⁵ It may be possible to relax the accreditation criteria for small employees in-so-far as that criteria demands considerable internal effort to achieve, while at the same time bolstering aspects of the criteria that

³⁷⁵ In the 2008 ETS Survey (supra at note 294) conducted for BIS, 44% of the of the tribunal cases considered involved workplaces with less than 25 employees, which accounts for 34% of workplaces (24).

make use of external resources. For example, it may be possible to relax for small employers some of the training requirements contained in the criteria, while at the same time increasing ease of access for small employers and their employees to external support agencies, such as a mediation service (we discuss the significance of mediation as part of this process below). In doing so the State helps to overcome the small employer's lack of internal resource, thereby avoiding or mitigating any risk that the effectiveness of the new regulatory model will be compromised because its requirements are relaxed for small employers.

9.6 The role of mediation

The discussion above considers the potential risk associated with dispute escalation and emphasises the importance of quick and informal resolution of EDG issues and disputes where possible. This principle is reflected in the example criteria listed above (e.g. there is no principle insisting on a right of appeal but there is an emphasis on simple and quick procedures for dispute resolution). This desire for informal and speedy dispute resolution requires further examination. This principle must not result in an approach to EDG that appears to be or is dismissive of EDG issues. The settled approach to resolution must provide an effective means of resolving disputes which promotes the policy objective of fairness, fairness perceptions and OCB. Importantly, the approach must encourage employees to present their concerns to a person within the organisation who can set in motion a simple approach to resolving each dispute; an approach in which the employees have confidence. In this regard early access to third party mediation support is likely to be an important feature of the accreditation criteria. In other words, state funded mediation should be available in appropriate cases (particularly for small employers and their employees) where the initial informal attempt at resolution has been tried but has failed.

It is possible to make a case for mediation on the basis that it can, by reducing the conditions that tend to cause escalation, promote the maintenance of relationships, which is an essential characteristic of OCB and, therefore, a

desirable feature of the new regulatory model that is proposed in this thesis. In this way mediation contrasts with adversarial type dispute processes which tend to focus on the right and wrong of a claim or complaint, and the apportionment of blame or culpability. Polster makes the point that legal literature, while not explicitly referring to escalation theory, does nevertheless recognise that adversarial dispute processes (e.g. litigation or internal tribunals) applied to ongoing relationships, such as an employment relationship, tend to intensify conflict and are counterproductive.³⁷⁶ Not surprisingly, therefore, scholars of dispute resolution frequently advocate the use of mediation for a variety of situations in which the parties in dispute are likely to desire that their relationship be maintained, including ongoing employment relationships.³⁷⁷ Specifically, mediation can mitigate the risk of “face loss” or loss of credibility that tend to associate with escalation. For example, the resolution of a dispute is likely to involve concessions which might be perceived by the grievant as a “sign of weakness” which the employee for example will be psychologically inclined to avoid. During mediation the mediator can indicate that compromises are appropriate and the parties can, as a result, attribute responsibility for concessions to the mediator, thereby avoiding the perception of face-loss and minimising the danger of escalation.³⁷⁸ Transformation mediation in particular may be a desirable feature of any adopted approach to resolving EDG disputes. In transformation mediation, mediators avoid any assessment of the merits of the parties’ respective claims, focusing instead on fostering interaction and communication and encouraging each party to conceptualise the dispute from the other party’s perspective.³⁷⁹ By doing so, transformation mediation may, according to Polster, prevent escalation in the following way³⁸⁰:

The self justification explanation for escalation posits that people invest additional resources to reverse a failing course of action in order to reduce the mental discomfort that comes from

³⁷⁶ Supra at note 348, 665.

³⁷⁷ Ibid, 665-666, notes 162-167.

³⁷⁸ D. Pruitt and D. Johnson, “Mediation as an Aid to Face Saving in Negotiation” (1970) 14 *Journal of Personality and Social Psychology* 239, 239.

³⁷⁹ L. Blomgren Bingham et al “Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace” (2009) 14 *Harvard Negotiation Law Review* 1,13-14 and 23.

³⁸⁰ Supra at note 348, 667.

having chosen such a course. Because this discomfort comes from a threat to peoples' self-conceptions as capable decision makers, the discomfort can also be reduced by boosting peoples' self-conceptions. Research suggests that when decision makers have the opportunity to affirm values that they hold important, their self-conceptions can be boosted and escalation reduced. Transformation mediation can offer an opportunity for affirmation through its twin goals of empowerment and recognition. When they are empowered in transformation mediation, parties appreciate their own skill and resources. This appreciation is heightened when their situations and perspectives are recognised by the opposing party... Transformation mediation aims to "shift [parties] back to a restored sense of strength/confidence in self".

Polster also highlights field research which positively points to the effectiveness of mediation as a means of reducing the escalation of employee grievances. He refers specifically to a program of transformation mediation, implemented by the United States Postal Service, which had the effect of decreasing formal employee Equal Employment Opportunity Commission complaints by 40%.³⁸¹

It is also arguable that the availability and willingness of the employer to use mediation will signal to employees a desire on the employer's part to be fair, thereby increasing the likelihood of fairness perceptions in relation to EDG. As Polster explains³⁸²:

In both mediation and traditional grievance procedures, employees are able to challenge employer actions. In mediation, employees may not have the benefit of multiple levels of appeal as they would in a grievance procedure; however, they are able to take a more active role in the reconciliation process. This is especially true in transformation mediation, where employees, along with employers, control the structure of mediation. Research has suggested that employees find these procedures fair. For instance, researchers evaluating the Postal Service transformational mediation program found that on a five point Likert scale – with five being "highly satisfied" – employees rated the mediation process with a mean that exceeded four and one half.

Of course mediation is not the absolute solution to the problem of regulating for fairness and OCB. Concerns have been expressed that mediation can restrict the autonomy of the parties and that the mediator's own assumptions about an appropriate settlement can disproportionately reflect in the outcome of the mediation.³⁸³ This is contrary to the policy objective of enhanced fairness perceptions because such a result will depend upon the employee feeling that their interests and their input to the resolution process has

³⁸¹ Ibid, 668.

³⁸² Ibid.

³⁸³ R. Dingwall and D. Greatbatch "Who is in Charge? Rhetoric and Evidence in the Study of Mediation" (1993) *Journal of Social Welfare and Family Law* 367.

substantively influenced the process and the outcome. In a similar sense Neale and Smart highlight the danger that mediation might function in practice as a form of social control, especially in asymmetrical relationship such as the employment relationship:

Mediation is not value-free. It operates (at present) only marginally in the shadow of the law but centrally in the shadow of social welfare ideology. Indeed it may operate as 'a cover for value laden tampering with family life' with mediators exerting subtle pressure on clients to conform to current welfare notions.³⁸⁴

A further concern regarding the role of mediation in the resolution of employment disputes relates to the perceived imbalance of bargaining power between employers and employees. Several studies have suggested that the mediator must understand and respond to any power imbalance between the parties if the mediation is to be effective.³⁸⁵ A failure on the part of the mediator to address the power imbalance between the parties can, or so the story goes, result in the stronger party taking unfair control over the mediation to the detriment (real or perceived) of the weaker party.³⁸⁶ For example, Hunter and Leonard have suggested that in sexual harassment cases, which often arise in situations where there is purported to be a power imbalance, the opportunity may exist for intimidation or influence.³⁸⁷ This power imbalance presents a dilemma for the mediator who may be tempted to intervene in favour of the weaker party, but who is at the same time concerned to maintain their unbiased role in the process. Yet doing nothing and remaining passive may make fair outcomes (including outcomes that the employee considers to be fair) all the more difficult. That is because passivity on the part of the mediator may have the effect of perpetuating or bolstering the power disparity.

It is, therefore, possible to be critical of mediation as a solution to workplace disputes and the challenge associated with achieving higher levels of fairness

³⁸⁴ B. Neale and C. Smart "Good and Bad Lawyers? Struggling in the Shadow of the New Law" (1997) 19 *JSW & FL* 383 in A Diduck and F Kagnanas, *Family Law, Gender and the State: Text, Cases and Materials* (Oxford: Portland, 1999) 354.

³⁸⁵ M. Shaffer "Divorce Mediation: A Feminist Perspective" (1988) 46 *Toronto Faculty of Law Review* 162, 179.

³⁸⁶ C. Dolder "The Contribution of Mediation to Workplace Justice" (2004) 33 *ILJ* 320, 335.

³⁸⁷ R. Hunter and A. Leonard *Sex Discrimination and Alternative Dispute Resolution: British Proposals in the Light of International Experience* (London: Sweet and Maxwell, 1997).

perceptions, however, we should recall the point made in chapter 4: the goal of the regulatory model proposed is to *maximise* the likelihood of dispute resolution which the parties (employees in particular) perceive as being fair. In other words this is not a search for perfection; it is a calculated endeavour to evolve an approach to EDG that is significantly more likely than the current regulatory approach to grow partnerships at work and enhance competitive performance. Mediation, with its non-adversarial focus and capacity in theory and practice to maintain relationships rather than damage them, appears attractive as one element of the proposed regulatory model. Further, the positive experience of mediation in organisations such as the United Postal Service, where mediation has resulted in an increased level of early conflict resolution, suggests that dismissing mediation as being an inappropriate, or risky element of the new regulatory model, is an overly cynical stance to adopt.³⁸⁸ Which is not to say that the mediation approach adopted by the new regulatory model should not seek to address some of the potential shortcomings of mediation as a mechanism for achieving fair and speedy dispute resolution? For instance, the writer's experience of the New Zealand Mediation Service suggests that there is a difference between good mediators and not so good mediators. Understanding a model of mediation that is best suited to the objective of fairness perceptions and early resolution, and deploying mediators who are capable of delivering that model, will be important. Also, acknowledging the importance of representatives at mediation, and ensuring effective representation, is likely to be another significant feature of the new regulatory model. Effective representative will help overcome the challenges associated with the imbalance of power between the parties that is discussed above, including the mediator's dilemma concerning whether or not to address any power imbalance thereby threatening their neutrality. The existence and effectiveness of representation in relation to EDG is, as outlined above in some detail, an important aspect of the overall regulatory model.

³⁸⁸ L. Bingham and D. Pitts "Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project" (2002) 18 *Negotiation Journal* 135, 144.

There are also valuable lessons to be learned from the use of mediation as a central component of employment dispute resolution in other jurisdictions. In New Zealand, for example, the State run and funded Mediation Service exists to provide mediation support in relation to all “employment relationship problems”.³⁸⁹ Employers and employees are free to seek mediation assistance from the Mediation Service to resolve any and all differences arising between them that relate to the employment relationship; it is not necessary that the dispute must also give rise to a potentially actionable legal claim (e.g. breach of contract or unjustifiable disadvantage) before mediation assistance can be sought. Statistics from the New Zealand Department of Labour concerning the effectiveness of employment mediation suggest that it has been successful as a mechanism for resolving EDG and other employment claims and disagreements in New Zealand. Susan Corby, writing before the instigation of the Mediation Service when mediation was one function performed by the New Zealand Employment Tribunal, quoted that from 1996-97, 59% of cases lodged in the Tribunal were settled through mediation.³⁹⁰ Such statistics are, however, for our purposes, of marginal value. They do not educate us about the impact of the mediation process on the employment relationship and fairness perceptions.

Dolder suggests that the approach to mediation in New Zealand might be in danger of losing focus on the peculiarities of each dispute and the parties involved, preferring instead to apply a “one size fits all” approach to mediation that is concerned about doing a deal and moving on to the next case.³⁹¹ If Dolder is correct the New Zealand approach might represent a lesson in how not to apply mediation in the context of a new regulatory model. However, this might be overstating matters because, from the writer’s own experience of the Mediation Service and many of its mediators, the Mediation Service can and does function as a vital facilitator of positive, and often inventive, outcomes for both parties in a large number of cases; outcomes that are very much tailored to the peculiarities of a particular dispute.

³⁸⁹ Employment Relations Act 2000 (NZ).

³⁹⁰ S. Corby, *Resolving Employment Rights Through Mediation: The New Zealand Experience* (London: Institute of Employment Rights, 1999).

³⁹¹ C. Dolder “The Contribution of Mediation to Workplace Justice” (2004) 33 *ILJ* 320, 329.

Nevertheless, it is the case that the Mediation Service has become, in a large number of disputes, little more than a forum for achieving a settlement (usually financial) of a complaint which releases the employer from potential litigation risk and liability. But, it is argued, this should not detract from the potential value of mediation per-se. Rather this perception of the Mediation Service as a “dealmaker” may reflect that a large number of disputes are reaching the Mediation Service at a point on the dispute spectrum when maintenance of the relationship is unlikely and not desired by the parties. In such circumstances it is inevitable that mediation becomes about how to end the relationship as soon as possible. The writer’s experience of representing parties in more than 100 mediations is that, where the Mediation Service is engaged early, it has a positive impact on devising solutions that focus on protecting or repairing the relationship and that are sustainable. It is also the writer’s experience that early engagement of the Mediation Service is the result of the employee in particular being encouraged to try mediation by their representative. Perhaps, therefore, a vital lesson from the New Zealand experience is the importance of encouraging early consideration of mediation as a dispute resolution option and, again, the importance of the representative in encouraging and supporting the employee to use mediation.

9.7 Should certain claims be excluded from the immunity and consequences?

While this thesis argues that the new regulatory model should apply in respect of all types of EDG related claim, it accepts that some readers may object to a blanket application, preferring instead that certain complaints be excluded from the safe-harbour. Those critics may argue that certain kinds of claim should not be removed from the jurisdiction of the Courts for reasons of public policy. Such claims may include those involving alleged breaches of certain fundamental human rights, including all claims under the Equality Act 2010 and other claims which can be viewed through the lens of “strict liability”. An example of this strict liability type claim might be a failure to pay wages where the question of fault does not arise and where the employer should not, or so the argument goes, be presented with the opportunity to refuse payment,

because they know the employee is prevented from bringing a claim to recover the unpaid wages.³⁹² A regulatory model which does not encompass certain employment rights may, in the end, apply to Unfair Dismissal claims, breach of contract claims, and all other claims relating to allegations of unfair treatment. This will capture a very significant proportion of the claims that would otherwise be brought to the tribunal (this is apparent for the tribunals' statistics on the types of claims submitted for acceptance in the past three years).³⁹³ The reduction in the number of Unfair Dismissal and breach of contract claims in particular should have the added benefit of reducing the costs of the tribunals' service and ACAS. That saved expense could be channelled to support the new model (including the cost of the accreditation agency and a mediation service). But the point to make is that any decision to remove certain claims from the scope of the safe harbour is unlikely to negatively impact on the capacity of the regulation to achieve its policy objectives.

It is anticipated that the introduction of the new regulatory model would have the effect of reducing the number of claims that are not subject to the immunity. That is because the employer's approach to managing EDG should not distinguish between EDG issues that might lead to a potential tribunal claim because they relate to a legal right that is excluded from the immunity, and those that cannot result in a claim because their subject matter would cause the employer to be immune from such a claim. In other words, the benefit of the new system and approach to EDG should extend to limit the number of claims brought against accredited employers, irrespective of the nature or legal classification of that potential claim. That is, it is argued, the inevitable and necessary outcome of an internal practice that focuses on the requirement to be "fair" in general terms. There is simply no practical reason for the employer to try and treat potentially non-immune EDG issues with reduced concern for fairness. And, in any event, the accreditation requirement would not distinguish between immune and non-immune disputes and issues.

³⁹² A. Bogg "Bournemouth University Higher Education Corporation v Buckland: Re-establishing Orthodoxy at the Expense of Coherence?" (2010) 39 *ILJ* 408, 412.

³⁹³ <http://www.employmenttribunals.gov.uk/Publications/annualReports.htm>

The parties will be required to comply with the new regulatory model and their internally agreed approach to EDG in relation to *all* matters concerning EDG in the broadest sense of the term. For instance, the accreditation agency will not disregard claims of sex-discrimination when assessing whether an organisation should be accredited; such claims will be factored-in to the assessment. This will inevitably encourage fairness in relation to the immunity exceptions because the immunity incentive applies equally to the excluded claims *and* claims to which the immunity does apply (e.g. Unfair Dismissal).

The flip side of the employer's response to the immunity is of course the employees' reactions. There may be a risk that employees will attempt to bypass the immunity in relation to certain complaints, by formulating claims under different legal headings. For example, an employee may claim sex discrimination because they are unable to bring a general claim for Unfair Dismissal. The employer will, in that case, be forced to pay the cost of having to defend that claim, which in turn compromises the value of the effort and expenditure that went into achieving accreditation. But this thesis argues that it is possible to overstate the risk of employees bringing false claims for a number of reasons. First, as we suggest above, the number of non-immune claims should reduce because the accredited employer is following a better and fairer approach to the handling of all EDG matters.

Secondly, formulating a claim in, for example, sex-discrimination when that claim is in reality one of Unfair Dismissal, will not be simple. It is not a straightforward exercise to build a claim under the Equality Act when the evidence and circumstances do not support that claim. The tribunals will be alert to that fact and they should be able to weed-out such cases in the preliminary stages of proceedings. Claimants who pursue such claims should also be put on notice that they may be subject to a costs award, and generally the tribunals should be encouraged to be more robust in their approach to claims that have no apparent merit. Where on the other hand the case proceeds because of an exclusion and because there is *prima-facie* evidence to support the claim, there can be no argument from the employer, because that is

consistent with the scheme of the new regulatory model. Again, the employer should be working hard to avoid circumstances that might give rise to claims of, for example, unlawful discrimination, because they want to avoid the risk of losing their immunity.

Thirdly, if there are to be exclusions from the immunity, many of those exclusions will be either narrowly defined in terms of the circumstances that may give rise to a cause of action, or they will be clear in their application to the extent that there is very little chance of the claim substituting for something that it is not. For example, some current grounds for automatic Unfair Dismissal claims may be excluded from the immunity, but they arise in very particular circumstances. Those circumstances would have to be present if the employee is to have any chance of pursuing (let alone successfully pursuing) a claim for Unfair Dismissal on an excluded ground. Take for instance a claim of automatic Unfair Dismissal under TUPE. An employee is unlikely to pursue such a claim unless the surrounding circumstances include a business transfer as defined in the Regulations. Further, consider claims for non-payment of wages, or a failure to provide an entitlement to annual leave. It is not conceivable that an employee would get any distance in the tribunals if they bring a claim for non-payment of wages, without what should be straight-forward evidence of non-payment to support such a claim. Finally, well trained employee representatives or other legal advisors are likely to persuade employees about the merits of their potential claims and the extent to which a claim is subject to the immunity. This should lower the rate of spurious claims. Moreover, recall the earlier discussion that indicated the lack of evidence to support suggestion that the ‘vexatious’ litigant is a common creature.

CHAPTER 10: CONCLUSION

This thesis argues that the regulation of EDG should be refocused on encouraging reflexive self-regulation as the preferred approach to preventing and resolving disputes concerning grievances and disciplinary issues. In other words, the parties should be encouraged to come together and negotiate outcomes to EDG related issues and disputes without recourse to adversarial internal or external dispute procedures. Moreover, such resolution should take place early and use a method that is quick, flexible and likely to avoid the relationship damaging consequences of grievance and dispute escalation that are discussed in the previous chapter.

Such a refocusing of current regulation has the potential to drive higher levels of trust and fairness perceptions amongst employees, reduce poor performance and misconduct, and increase employee productivity. These positive outcomes have in turn the potential to drive improved business competitiveness in Britain. This is a bold and optimistic objective which would cause regulators to shift from the traditional view of labour law as a mechanism first and foremost aimed at protecting employees against exploitation by the economically more powerful employer. This does not mean, however, that the new law would not protect employees from unfair treatment and subject them to increased levels of exploitation. Such an outcome would of course defeat the purpose of the regulation. The new model for EDG regulation should in fact have the potential to provide more effective protection of employees than current regulation. In particular the new regulatory model should improve the likelihood that employment disputes will not escalate beyond the point of no return, leaving the employee with the undesirable option of bringing legal action against their employer, in the uncomfortable surroundings of an employment tribunal. The new regulatory model should protect employment relationships in a manner that the current model does not, although the primary objective of the model is not employment protection, but is instead enhanced business competitiveness.

Regulating in a way that increases the employee's perception that their employer is fair should encourage the benefits of partnership and OCB leading to greater business competitiveness, but such an approach requires an understanding of how employees judge fairness. This thesis argues that it is vital in this regard for any regulatory model to recognise and account for the complexity of fairness judgements and, in particular, that employees make such judgements by weighing issues of distributive, interactional and procedural fairness in different measure depending on the circumstances of the dispute. Any regulation of EDG that hopes to promote fairness perceptions must be prepared therefore to facilitate, in the context of resolving EDG issues, a balancing of all aspects of fairness.

One of the main shortcomings of current regulation is the failure of law and the Courts (e.g. the law of Unfair Dismissal) to effectively address all elements of fairness. Current law and the application of that law tends to focus on procedural fairness which is unlikely to encourage fairness perceptions, and may in fact have the opposite effect as employees assess that their employer is following a process for process sake or to avoid legal liability, without any real concern for the employee's interests. A further shortcoming of current regulation is its focus at the end of the dispute spectrum. And, presently the law tends to prohibit extreme or narrowly defined behaviour (e.g. Unfair Dismissal, extreme behaviour that breaches the implied term of trust and confidence, discrimination etc). The law does not provide a general duty on the employer to be fair. As such, the employee can be genuinely aggrieved concerning matters about which the law has nothing to say, but which, nevertheless, have a negative impact on the employee's perception of their employer, and which can lead to the type of negative outcomes that are discussed in chapter 2 of this thesis (e.g. poor and unproductive job performance).

This narrow application of regulation might be addressed by new rules directing the tribunals and the Courts to take a more holistic approach to judging fairness, but such regulation is unlikely to drive greater levels of fairness perception. This thesis argues that greater levels of fairness

perception are more likely to be achieved by discarding direct regulation of EDG (i.e. telling the parties what they can and cannot do in particular circumstances) in favour of indirect regulation which establishes a framework or set of conditions which, if adopted by the employer, are likely to encourage the kind of behaviour which will spawn greater levels of fairness. That framework should encourage the parties to negotiate and agree outcomes to EDG disputes that reflect the peculiarities of their particular workplace, and the specific instance of EDG. Further, provided the employer is adhering to the regulatory framework by adopting the methods and principles set out in the regulation, they will be immune from the jurisdiction of the tribunals. That is the carrot of adherence and such a regulatory approach reflects a practical assessment about the capacity of the Courts and the tribunals to encourage fairness perceptions.

The limitation of the Courts and tribunals to encourage fairness perceptions rests in part with their inability to make effective judgements about substantive fairness that the parties to the employment relationship are likely to assess as being fair (i.e. even if tribunals and the Courts were willing to more holistically judge fairness, this thesis argues that they are not capable of doing so). Moreover, providing a potential adversarial route to the tribunals gives rise to the dangers of escalation and the refusal of the employee to compromise their grievance. Removing that route is more likely to encourage effective use of the internal and reflexive approach to resolution that is encouraged by the new regulatory framework.

In the final analysis regulating to achieve greater levels of fairness perceptions is not an exact science. All that can be hoped for is the creation of conditions in which the parties are likely to deal with EDG related issues in a manner which employees will perceive as being fair. If these conditions can be established and maintained there is strong academic support, discussed in this thesis, for the view that greater levels of employee productivity and OCB will follow. At the very least the negative consequences of perceived unfairness will be avoided. In the current challenging economic climate, and bearing in mind the interdependent and competitive global market in which all nations do

business, it is argued that such an objective is a legitimate and desirable objective of regulation.

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