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Chapter 1

INTRODUCTION

This short book is intended as a contribution to the literature on comparative labour law, a subject which, thanks to the influence of the late Otto Kahn-Freund and other scholars, has attracted growing attention in recent years. It is hoped that the study will be of some practical use to those concerned with the application on the dismissal laws of one or more of the jurisdictions covered, as the book consists of a statement of the basic principles and rules relating to dismissal within each of the three regimes, followed by a chapter containing assessments and conclusions.

Two obvious questions present themselves at the outset: why choose the concept of dismissal for comparative study, and why, given this initial choice, select for this purpose the jurisdictions of France, Great Britain and Quebec?

DISMISSAL AS AN INTERNATIONAL PHENOMENON

Several reasons justify a comparative study of dismissal laws at the present time. In the first place the post-war period has seen fairly widespread international acceptance of job security as a primary social goal: for example, since 1963 Recommendation 119 of the International Labour Organisation has embodied the principle that there shall be no termination of the employment relationship without good cause related either to the qualities of the worker or the needs of the enterprise, and, to take another example, the Organisation for Economic Co-operation and Development's guidelines for the conduct of multinational enterprises requires reasonable notice of, inter alia, dismissals to be given to the representative of employees, as well as co-operation with such representatives and governmental authorities in order to mitigate the effects of such action. There are at least two

ways in which job security may be maximised by government intervention: either by the provision of financial assistance in the form of employment subsidies and the like which are designed to assure stability for those in employment and the provision of employment opportunities for those who have no work, or (and this is the possibility relevant to the present study) intervention which results in legislative controls on the termination of the employment relationship. Such controls will, to a varying degree, limit the traditional discretion enjoyed by employers to decide who will work for them and for how long, and their effect may be to declare unlawful dismissals motivated on certain grounds seen as inadequate, as well as requiring, as a preliminary to dismissals, the observance of procedures designed to ensure that the decision to dismiss is taken and implemented in optimal conditions. Also, of course, such legislation will accord remedies to those who have been dismissed in circumstances other than those prescribed. Both substantive and procedural controls on the termination of the employment relationship at the instance of the employer may properly be studied in a comparison of dismissal laws.

Concern for the promotion of job security has not remained the exclusive province of international agreements and standards. One of the striking features of the last decade has been the enactment of important reforms affecting the regime of unfair dismissal in a large number of jurisdictions - between 1963 and 1974 there were improvements in protections against unjustified termination of employment in over 20 countries.[1] Given the marked tendency towards statutory regulations of dismissals, a comparative study may help not only in evaluating progress already made, but also in identifying the objectives for future reform. In this connection, there is a further reason for mounting a project such as this at the present time. The International Labour Organisation is in the process of adopting a Convention and Recommendation on the subject of termination of employment at the initiative of the employer, and the standards there embodied should shortly provide a new yardstick for the evaluating of national regimes.[2]

Although the concept of dismissal itself is readily understandable on both a national and international level (another reason for a comparative study), legislative intervention in this area may take a surprising variety of forms. The

difference between substantive and procedural controls is one important variable which has already been mentioned. Other questions which may be asked of any one system include the following: (1) What distinctions, if any, are made between workers in public and private employment, (2) What procedures exist to allow for pre-trial conciliation between parties, (3) Is the forum used for disposing of disputed dismissals the ordinary courts, specialised labour tribunals, or private arbitration, (4) Does the system require the prior approval of dismissals by state authorities, (5) To what extent are existing legal institutions (e.g. the common law of contract) important in the operation of the law, (6) Do the sanctions available to the wrongfully dismissed worker include reinstatement against the wishes of the employer?

The replies to these questions will vary greatly from one regime to another, and at this point it is appropriate to turn to the selection of France, Great Britian and Quebec for the comparative study.

THE CHOICE OF THREE JURISDICTIONS

It would be disingenuous not to acknowledge, first of all, the role played by the happy accident of friendship - the idea of co-operation came first to the authors and the choice of subject second. That said, there are good reasons for the selection. Each system draws on a different legal heritage, and also on a different industrial relations background; it follows that the solutions advanced and problems encountered tend to be different too. The first and perhaps most obvious comparison lies between France and Great Britain, between the approach of the civilian and common lawyer. The many fundamental differences of principle which separate these two great legal families are reflected in the specialised context of dismissal law - one need only allude to the distinction drawn between dismissals in the public and private sectors in France, or the fact that in that country the process of conciliation forms an integral part of the jurisdiction of the labour courts concerned with dismissals. At the same time, the two systems have much in common. Both share the phenomenon of a recently introduced statutory framework for dismissal law, and both operate specialised labour tribunals which draw on the skills of judges who have practical experience of industrial relations to adjudicate on the legitimacy of contested dismissals. Perhaps even

more important is the fact that both countries recognise a sharp distinction between collective and individual labour law, and place the problem of dismissals firmly in the latter. In Britain, the well-known comment of Kahn-Freund's on the role of the contract of employment as the "corner-stone" of the industrial relations system was not made with reference to dismissal law (indeed, it antedates the introduction of the current statutory regime) but it might well have been. For, although the decision of what is and is not "unfair" here does not depend on the contractual propriety of the act of dismissal, the institution of contract remains vital to the law, for not only does it define the field of application of the statutory protections, but it also determines the operation of a number of crucial concepts within the notion of dismissal itself. In France too the legal system has a strongly individual flavour - the jurisdiction of the conseils de prud'hommes, the labour courts which have exclusive competence in the area of private sector dismissal, being expressly limited to conflicts arising out of the individual employment relationship.

Although there are many differences of principle as well as of degree and detail between French and British dismissal law, it is probably true that these essential similarities are more striking and that an observer acquainted with the working of one would have little difficulty in acquiring an understanding of the other.

Quebec presents peculiarities of its own. Here one is concerned with provincial institutions which function within the larger context of the Canadian constitution. Not only does this give a wholly different scale to the practical application of the law (a working population of roughly three million, as opposed to 21 and 25 million in France and Britain)but it also means that there are fundamental divisions between different sources of legal authority. In the field of employment certain dismissal law enjoys federal status, but applies only to selected groups of workers; this exists alongside such provincial legislation as the Quebec Labour Code. The background is one of substantive law firmly placed in the civilian legal tradition but applied by Courts that form part of a judicial order modelled, in many respects, after British tradition. However, such a dual system of common law has been virtually superseded in labour matters by legislation facilitating the practice of collective bargaining, essentially at the level

of the undertaking according to the North American model, as well as establishing labour standards, some of which have a considerable bearing upon the act of dismissal. As we have seen, French and British systems see dismissal as part of the individual employment law, and place considerable importance upon the device of the contract of employment. Quebec, following in this respect the approach of United States labour law, ascribes minimal importance to the device of the individual contract of employment. Another fact which has profound implications for the regulation of dismissals concerns the nature of the machinery for resolving the conflict between employer and employee. Under Quebec law a typical legal response would be the submission of the contested dismissal to an arbitrator whose essential function is to satisfy himself of the existence of a just and proper cause for dismissal. This form of third-party intervention could usefully be compared to either the French Conseils de prud'hommes or the British Industrial Tribunals. It has often been pointed out for instance that it is no part of the jurisdiction of the latter to substitute its judgment of the facts for those of the employer who has initiated the dismissal. In Britain, the process of deciding industrial conflicts by arbitration is well established - but usually for those of a collective nature.

Enough has been said to indicate the range of differences between the three jurisdictions to be studied, and something of their content. As a preliminary to the statement of the substantive law of each, a word may be said concerning the content of the three national accounts. Each author was free to report on his own system as he thought fit, and to emphasise whatever aspects struck him as important or interesting. No attempt was made to follow a common list of questions. But the three reports were prepared in collaboration, and there have been modifications and additions in the light of problems perceived as significant in the systems with which comparison is made.

NOTES

1. Termination of Employment : General survey of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4B), International Labour Conference, 59th Session, General 1974, para. 161.

2. See B. Napier, "The replacement of Recommendations 119 - work in progress" (1982) Industrial Law Journal.

PART TWO: BRITAIN

Chapter 2

THE SIGNIFICANCE OF DISMISSAL

The following overview of dismissal in Britain today aims to summarise and comment upon the principal contexts in which the unilateral termination of the employment relationship at the instance of the employer is governed by statutory or judge-made law. The omission of any study of extra-legal responses to the phenomenon of dismissal (such as actual or threatened industrial action by trade unions) is dictated by the boundaries within which the present analysis takes place. It would be wrong to assume that the legal remedies are the only ones available in the case of a dismissal, or that recourse to law is likely to provide the best, in the sense of the most desirable from the point of view of the individual who has suffered dismissal. But the present work is concerned with the legal dimensions of dismissal and accordingly it is these alone which are summarised here.

In order to study the law of dismissal it is necessary to consider a variety of different regimes (such as wrongful dismissal, unfair dismissal, redundancy and discrimination) which are, to a varying extent, self-contained and which in practice are often separately taught. In each of these regimes the concept of dismissal has a central role to play and, indeed, the establishing of the legal fact of dismissal is often a prerequisite to the application of the particular regime. The main exception is discrimination. While, for example, there can be no operation of the rules of wrongful dismissal or unfair dismissal without a dismissal having first been established, the body of rules relating to sexual and racial discrimination in employment may be activated by a range of different types of behaviour on the part

of the employer, dismissal representing only one (albeit very important) instance of such types of conduct.

In the following pages there is some discussion of the institutions and agencies which administer these various regimes, but no claim is made to present a comprehensive account of the many different legal rules which are concerned with the fact of dismissal. The study seeks merely to indicate their main features.

The point of departure is the proposition that dismissal is a precondition for the application of many of the legislative measures regulatory of the individual employment relationship. So important are these measures, that much attention has been devoted to establishing what is the precise legal content of a term which had a primarily factual connotation. This has been encouraged (and rendered more necessary) because of the existence of two concepts of dismissal in contemporary law: common law and statutory. The definition of statutory dismissal extends what is understood by the word in common language and the common law and, before examining how this is done, it is necessary to say something about the general legal background.

Individual employment law in Britain today requires the study of two regimes, common law and statutory. The common law, which is the older, is essentially drawn from the field of contract, and it may be said that it provides the residual legal backcloth to the employment relationship. The statutory regimes, which is largely the creation of the last twenty years, is specific in a way in which the common law is not. The former applies to a limited number of areas where, it would be fair to say, the legislature has been convinced that the equivalent common law rules (where these existed) were inadequate to protect the workers' interests. Where there is a potential conflict between a rule of common law and a statutory provision, the latter usually prevails, at least if this has the effect of strengthening the position of the worker vis-à-vis his employer; it is characteristic of the different measures designed to raise the 'floor of rights' of individual workers that they cannot be excluded through the medium of the contract of employment in a way prejudicial to the interests of the worker. There are, however, many aspects of the employment relationship (for example, the right to be paid wages for services rendered) which fall outside the scope of legislative intervention, and

this means that here the common rules continue to be important. But we shall see that the common law is important for another reason too: not infrequently the concepts of the common law are incorporated within the statute-given rights, so that, even in the elaboration of these rights the common law is incidentally, but critically, important. A final point to bear in mind is that the common law is administered by the ordinary civil courts, whereas jurisdiction over statutory rights is usually placed in the hands of the specialised industrial courts known as industrial tribunals.[1] But again this distinction is not as clear-cut as it appears at first sight, for a statute-given right may envisage a remedy which is essentially one of the common law, and exercisable before an ordinary civil court, and an industrial tribunal, in the course of its hearing of a statutory claim, may be called upon to interpret and apply rules of the common law.

1. THE MEANING OF DISMISSAL

A. Common Law

Dismissal is the termination of the employment contract at the instance of the employer. As such it falls to be distinguished from other ways in which the contract may come to an end. Events such as the death of one of the parties, the mutual agreement of the parties to separate, or resignation by the employee all terminate the employment contract, without giving rise to a dismissal in law. Dismissal may be accomplished with or without the giving of notice by the employer, and where no notice is given the dismissal is usually described as "summary".

Before the introduction of statutory protections, the only remedy (except in a very few special situations involving public employment or office)[2] open to someone who had been dismissed was for him to sue his ex-employer for the alleged breach of his contract of employment constituted by the dismissal. This, of course, presupposed that the dismissal itself had been preceded either by no notice, or by a period of notice shorter than that provided for by the terms of the contract. The question in issue was whether, in such circumstances, the employer's action was contractually justified and over the years the judges (for this was an area in which legislation played no part) developed a collection of rules and principles to provide the answer. The general principles developed in the