

UNFAIR DISMISSALS IN AUSTRALIA: DOES ARBITRATION FAVOUR THE EMPLOYER OR EMPLOYEE?

Abstract

The Workplace Relations Act 1996 provides statutory protection against unfair dismissal for employees under federal jurisdiction. This research involves an empirical analysis of decisions dealing with complaints of unfair dismissals under this legislation over a 4-year period to determine the factors associated with arbitrators' (Commissioners employed by the Australian Industrial Relations Commission) decisions to uphold or deny complaints and to award a particular remedy.

Research findings conclude that that certain variables significantly influence the decisions of arbitrators. It also confirms the fear of some legal experts that lack of procedural fairness will not feature as significant variable in the unfair dismissal equation because of the lesser emphasis placed on it by this legislation in contrast to its predecessor (Industrial Relations Reform Act, 1993).

This research will prove useful to the main stakeholders (employers, HR/IR managers, employees, government, employee advocates, unions, employer associations, arbitrators and academics) of the employment relations scene.

INTRODUCTION

In Australia, federal unfair dismissal provisions had been in operation from March 1994, when Parliament under the Labor Government amended the Industrial Relations Act 1988 (IR Act) by passing the Industrial Relations Reform Act 1993 with a new Part VIA relating to termination of employment (Blackford, 1999:217). The amendments contained the most comprehensive protections against unfair dismissal ever seen in Australia (Howell, 1998:63).

The significant number of arbitration cases surrounding employer-initiated termination of employment reflects the pursuit of employees' individual rights and justice in the workplace. The Workplace Relations Act 1996 (WR Act) introduced major changes to the federal law relating to the protection of employees against unfair dismissal from their employment including further restricting the already limited relief available to employees who have been unfairly dismissed (Lawrence, 1998:53). Many workers have been excluded altogether from the operation of the WR Act. These factors are reflected in the very drastic reduction in the number of applications for relief under federal legislation since the WR Act came into effect. In the period from 31 December 1996 to 3 October 1997, 5222 federal unfair dismissal applications were made, compared with 11,196 applications during the same period in 1996 (Howell, 1998:66). This represents a 51% decline. It may be argued that this was the primary objective of this legislation. It is worth noting that not all applications proceed to arbitration. A good number are discontinued, others are turned down by the AIRC due to lack of merit (for example outside the prescribed time limits for application), while others are settled during mediation provided by the AIRC. Only a fraction of the applications proceed all the way to arbitration.

The study aimed at gaining an insight into how the Commissioners of the Australian Industrial Relations Commission (AIRC) in their capacity as arbitrators exercised arbitral jurisprudence in the course of interpreting the unfair termination provisions of the WR and its effects on outcomes.

UNFAIR DISMISSALS AND CURRENT STATE OF RESEARCH

It comes as no surprise that employers' decisions to terminate the services of employees for misconduct, incompetence or redundancy are challenged in significant numbers through arbitration or via the courts. While the employer's right of termination is an acknowledged prerogative of management, no such exercise of management authority impacts adversely on an employee as does the termination of employment. In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For employees in many situations dismissal is a disaster. For some employees it may mean breaking up a community and uprooting of homes and families. Others, particularly older employees, may be faced with the greatest difficulty in finding jobs (Report of the Donovan Royal Commission on Trade Unions and Employer Associations, 1965-78:142).

Relatively few academic studies have been conducted in the area of unfair dismissals in the United Kingdom, Canada and New Zealand even though claims against unfair dismissals form a

significant portion of employee grievance arbitration. There is a dearth of research in Australia as well.

This study will contribute significantly to the body of knowledge of Australian industrial relations specifically in the area of unfair dismissals under the current federal legislation (WR Act). Until now very little is known about how well the relatively recent piece of legislation is influencing arbitration outcomes in relation to unfair dismissals. There is some anecdotal evidence that the present legislation is far less employee-friendly than its predecessor, the Industrial Relations Reform Act, 1993 (Cth).

It would be useful to be able to determine what approach arbitrators will take when considering the appropriate remedy for proven unfair dismissal. It is important to gain an understanding of the circumstances that lead to the awarding of reinstatement as opposed to monetary compensation. Where reinstatement is ordered, what length of suspension is compensated? This is another key question. Length of suspension is the period between the date of dismissal and the date of reinstatement. Whenever monetary compensation is awarded, what factors influence the approach taken by the arbitrators? How is the quantum of monetary compensation reached?

This research will provide statistical evidence to provide a clearer picture in relation to this matter.

LEGAL AVENUES FOR PURSUING UNFAIR DISMISSALS

In Australia, three legal avenues are available to employees against unfair dismissal (termination of employment at the initiative of the employer). These avenues, the employees they cover and the third party neutrals charged with deciding the outcome are as follows:

Legal Avenues Available to Employees

LEGAL AVENUES	EMPLOYEES COVERED	THIRD PARTY NEUTRALS
The Common Law	All	Judges
Federal Law – The WR Act	Generally all except those specifically excluded by the WR Act	Commissioners of the Australian Industrial Relations Commission (AIRC)
State Law	Employees covered by State law	Arbitrators of Employment Tribunals provided by State or Territory Governments

The first legal avenue available to dismissed employees is common law (Macken, O’Grady and Sappideen, 1997: 2-3). The courts are generally the avenue for senior managers whose termination from employment is neither covered by a specific statute nor by a collective agreement (Grubb and

Naughton, 1992:913). However, the pursuit of wrongful dismissal action through the courts can be costly in terms of time and litigation fees and is only worthwhile for employees who can expect enough damages to make the action worthwhile.

The second legal avenue governing dismissal is Federal law. The WR Act conferred unfair dismissals jurisdiction on the Australian Industrial Relations Commission (AIRC). The numerous decisions of the Commissioners of the AIRC acting as arbitrators forms the jurisprudence of this regime (Lawrence, 1998:53).

The third legal avenue arises from the provisions of the WR Act which sends non-federal award employees back to their state jurisdictions with the exception of Victoria which transferred most of its industrial power to the Commonwealth (Wheelwright, 1999:122, 177) in 1996.

The scope of the study is limited to the second legal avenue, that is unfair dismissals under the WR Act. In each of the legal avenues governing unfair dismissal, judges and arbitrators have adopted a theory or interpretation of what constitutes unfair dismissals based upon the actions of employer, actions of employees, history of the employee's employment with an employer and other relevant factors that may impact upon the employment relationship. In addition, certain remedies have been awarded to unfairly dismissed employees.

RESEARCH APPROACH

Data for empirical analysis was collected from unfair dismissal case decisions rendered by the AIRC. These cases on unfair dismissals were obtained from the on-line AustLII Databases. This site on the Internet is provided by the Australian Legal Information Institute (AustLII) Federal Government of Australia (URL:<http://www.austlii.edu.au/databases.html>) and provides a free database of cases determined by the AIRC amongst others.

Decisions dealing solely with the preliminary objections regarding the AIRC's jurisdiction to hear the case or extension of time applications was excluded from the study. Such jurisdictional issues include disputes as to whether complainants met the eligibility requirements of the statutory protection.

There were 684 cases of arbitration decisions ranging from 25 to 75 pages each in length available as the total population for this study. Initially, the whole population of cases was grouped into different industry type in accordance with the industry classification of the Australian and New Zealand Standard Industrial Classification (ANZSIC available at <http://www.abs.gov.au/Ausstats/abs@nst/Lookup/NT00014E8A>).

Rigorous and robust research requires a sizeable sample. It was determined that half of this population (see below) of each industry or 342 cases would be sufficiently representative sample.

Summary of Sample of Arbitration Decisions by Year

Year of Award	No of Cases	%
1997	85	24.9
1998	118	34.5
1999	103	30.1
2000	36	10.5
Total	342	100.0

The next step involved ensuring that there was a level of randomness in selecting samples of the 17 industries. With this aim, every second case listed in each industry grouping was selected for analysis. In other words, 50 per cent of all cases in each industry grouping was selected for analysis. The advantage of this data set is that it yields a reasonable number of cases for analysis over a four-year period and across all industries. The details of the selected sample are shown below:

Sample by Industry

Industry	No. of Cases	%
Agriculture, Fishing & Farming	3	0.9
Mining	21	6.1
Manufacturing	66	19.3
Electricity, Gas & Water	4	1.2
Construction	18	5.3
Wholesale	9	2.6
Retail	35	10.2
Accommodation & Restaurants	20	5.8
Transport & Storage	33	9.6
Communications	18	5.3
Finance & Insurance	5	1.5
Property & Business	45	13.2
Govt. & Defence	15	4.4
Education	12	3.5
Health	14	4.1
Culture & Recreation	17	5.0
Personal and Other	7	2.0
Total	342	100.0

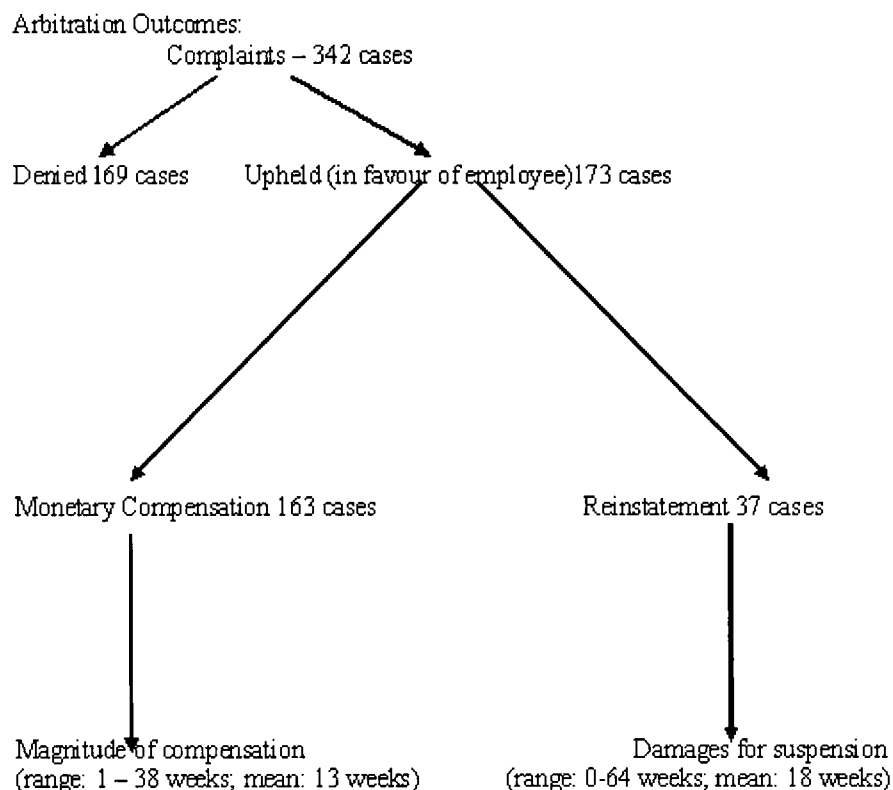
Dependent Variables

The research objectives with respect to unfair dismissals and remedies require investigation covering four dependent variables:

1. complaint of unjust dismissal denied (decision favoured the employer) or upheld (decision favoured the employee);
2. the remedy awarded (in cases where the complainant is either reinstated or awarded monetary compensation);
3. the amount of damages (salary in weeks) awarded to compensate for the length of suspension (period between dates of dismissal and reinstatement) where reinstatement is ordered; and
4. the amount of monetary compensation (salary in weeks) awarded where employee is not reinstated.

These variables are illustrated below in the conceptual model for this research.

Figure 1 – Conceptual Model of the Research



The Figure 1 shows the possible outcomes from the arbitration process. A complainant may be reinstated without penalty (that is, no suspension), which would result in an award of full backpay. Where a penalty such as suspension without pay is imposed, it may result in partial or no backpay, depending on the length of suspension ordered. The length of suspension would generally not extend beyond the date of the arbitrator's decision.

Monetary compensation, for complainants not reinstated, is usually awarded in lieu of number of weeks of remuneration. Occasionally, a lump sum figure is awarded based on remuneration and other relevant factors specific to each case. The dependent variables identified above will be logically examined in this study.

Independent Variables

Under section 170CG(3) of the WR Act, for a dismissal to be fair there must be a valid reason. The valid reason is similar to just cause principles under common law. Section 170 CG(3) specific requirements are:

- (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements to the employer's undertaking, establishment or service;
- (b) whether the employee was notified of that reason; and
- (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
- (d) if the termination related to unsatisfactory performance by the employee – whether the employee had been warned about the unsatisfactory performance before the termination; and
- (e) any other matters that the Commission considers relevant.

Further under section 170 CH (2) the AIRC is required to have regard to all the circumstances of the case in awarding an appropriate remedy including:

- (a) the effect of the order on the viability of the employer's undertaking, establishment or service;
- (b) the length of the employee's service with the employer;
- (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated;
- (d) the efforts of the employee (if any) to mitigate the loss suffered by the him/her as a result of the termination; and
- (e) any other matter that the AIRC considers relevant.

Independent variables were expected to be associated with the primary dependent variable (complaint denied or upheld). Independent variables were also expected to influence the other dependent variables. Most independent variables examined in respect to the primary dependent variable are those considered to be the just cause principles (Davies and Freedland, 1984:428-32) under common law..

These variables are grouped into the following categories:

1. the type of offence;
2. characteristics of the complaint; and
3. characteristics of the employer.

Other independent variables included in the study were derived from common law's just cause principles which related to the employer's actions and section 170 CH 92) above. These were expected to be positively associated with complaints being upheld by arbitrators and include: failure to administer warnings (Nicholson v. Heaven and Earth Galleries 1994 cited in Wheelwright, 1999:134-5), to employees dismissed for non-disciplinary (e.g. redundancy), reasons (Windsor Smith v. Liu & Ors, 1997), absence of a culminating incident, improper promulgation of work rules (Atkins v. Telstra Corp. Ltd, 1998), unequal treatment, provocation, condonation (Eden, 1990), and lack of procedural fairness (failure to conduct a reasonable investigation, failure to hold a fair hearing and give employees an opportunity to explain their actions [Perrin v Des Taylor Pty Ltd, 1995]).

FINDINGS AND ANALYSIS

Both logistic and ordinary regression models (using SPSS program) were applied for the purposes of this study. It is worth noting that regression analyses reveal relationships among variables but do not imply that the relationships are causal (Tabachnik and Fidell, 2001:115). Demonstrating cause is a logical and experimental exercise rather than a statistical exercise. Strong relationships between variables could emanate from different sources, including the influence of other variables that were not measured for inclusion in the regression analyses (Morgan and Griego, 1998:158).

Another issue that has more to do with theory rather than statistics is the question of which variables to include in the analyses. For example, which dependent variable is to be used and how it is to be measured? Also, which independent variables are to be used and how are they to be measured? Further, if one already has some independent variables in an equation, which independent variables should be added to the equation for the most improvement in the equation? Tabachnik and Fidell (2001:116) suggest that the answers to these questions can be provided by theory, astute observation and good hunches. Their suggestions have been adopted in this study. The literature review, previous research, the researchers knowledge of the cases (gained from reading the cases) in the sample, their own previous research, and their significant professional experience in this particular area of employment relations guide the selection of variables in this study.

Complaints Upheld Or Denied

The analysis begins with the first dependent variable 'AWARD', that is whether a complaint was upheld or denied and the predictor variables associated with the decisions of arbitrators to uphold or deny the employee complaints. Table 1 below starts with overall descriptive statistics.

Table 1 – Complaints Upheld Overview

(n=342)

Year of award * complaint upheld Crosstabulation

		complaint upheld		Total	
		no	yes		
Year of award	1997	Count	41	44	85
		% within Year of award	48.2%	51.8%	100.0%
		% within complaint upheld	24.3%	25.4%	24.9%
1998		Count	58	60	118
		% within Year of award	49.2%	50.8%	100.0%
		% within complaint upheld	34.3%	34.7%	34.5%
1999		Count	52	51	103
		% within Year of award	50.5%	49.5%	100.0%
		% within complaint upheld	30.8%	29.5%	30.1%
2000		Count	18	18	36
		% within Year of award	50.0%	50.0%	100.0%
		% within complaint upheld	10.7%	10.4%	10.5%
Total		Count	169	173	342
		% within Year of award	49.4%	50.6%	100.0%
		% within complaint upheld	100.0%	100.0%	100.0%

Table 1 shows the frequency and percentage of complaints denied versus complaints upheld for all the 342 cases for the 4-year period 1997 to 2000. Overall, 50.6% of the complaints were upheld, that is the arbitrators ruled in favour of the employee. Conversely, 49.4% of the total cases were denied, that is, the arbitrators' ruling favoured the employer. When each year is examined individually, it appears that the same trend is true, that is there is an approximate 50:50 ratio between cases ruled in favour of the employee and those favouring the employer

It appears that overall both employers and employees had an equal chance of winning (or losing) their cases in the 4 years covered by this study. The next stage involves examining variables that possibly influenced arbitrators' decisions using descriptive statistics. Table 2 commences this exercise.

For employees whose complaints were upheld, it is necessary to investigate the proportion who were reinstated and those who were not reinstated but instead awarded compensation. A cross-tabulation output in table 2 displays this statistics by displaying the breakdown of employees reinstated and the number of employees who were not reinstated but received compensation

only. Out of the total of 173 employees who were successful in having their complaints upheld, 37 were reinstated whilst 136 were awarded compensation only.

Table 2 – Complaint Upheld to Reinstatement Ratio

(n=173)

complaint upheld * reinstated Crosstabulation

Count		reinstated		Total
		no	yes	
complaint upheld	yes	136	37	173
Total		136	37	173

Next, table 3 displays the frequency of employee characteristics (offences, disciplinary record, behavioural aspects, occupation classification and gender) as well as employer characteristics (actions taken by employer and industry classification) for all the 342 cases.

Table 3 – Descriptive Statistics for 342 Dismissal Cases, 1997-2000

VARIABLES	FREQUENCY	%
Offences		
Excessive absenteeism	9	2.6
Absent - no permission	45	13.2
Quit/resigned/redundancy/abandonment/ill/incapacity	127	37.1
Negligent	19	5.6
Employee excluded by WR Act	20	5.8
Insubordination	29	8.5
Dishonest	64	18.7
Unsatisfactory performance	107	31.3
Alcohol/drugs/gambling	17	5
Incompatibility with other employees/supervisor/customers	72	21.1
Violation of rules	152	44.4
Conflict of interest, threat/assault on management/ fellow employee/ customers/public	17	5
Employee's Record		
1. Prior suspension without pay	0	0
2. Prior written warning	76	22.2
3. Prior oral warning	39	11.4
4. No reference to employee's record	1	0.3
5. Clean – no prior discipline	226	66.1
Number of years of service - mean = 4.98 years	-	-

Table 3 - continued		
Employee - Other Behavioural Aspects		
Pattern of misconduct/incompetence	108	31.6
Premeditated misconduct	116	33.9
Remorse/apology	32	9.4
Compassionate/economic hardship circumstances	58	17
Rehabilitative potential present	95	27.8
Employee's Occupation		
1. Unskilled	40	11.7
2. Skilled	150	43.9
3. Clerical	50	14.6
4. Sales	43	12.6
5. Professional/Technical	32	9.4
6. Administration/Management	27	7.9
Gender		
Male	243	71.1
Female	99	28.9
Employer's Characteristics		
Failure to warn of unsatisfactory performance	48	14
Failure to apply progressive discipline	43	12.6
Lack of procedural fairness	115	33.6
Improper promulgation of rules	33	9.6
Unequal treatment of employee in administering discipline	7	2
Provocation by employer/other employees	13	3.8
Condonation of similar behaviour by other employees	6	1.8
Employer's Industry		
1. Agriculture, Fisheries & Farming	3	0.9
2. Mining	21	6.1
3. Manufacturing	66	19.3
4. Electricity, Gas & Water	4	1.2
5. Construction	18	5.3
6. Wholesale	9	2.6
7. Retail	35	10.2
8. Accommodation and Restaurants	20	5.8
9. Transportation and Storage	33	9.6
10. Communications	18	5.3
11. Finance and Insurance	5	1.5
12. Property and Business Services	45	13.2
13. Govt. and Defence	15	4.4
14. Education	12	3.5
15. Health	14	4.1
16. Culture and Recreation	17	5.0
17. Personal Services and Others	7	2.0

In interpreting these statistics, it must be noted that each individual case may have one or more of the employee characteristics (with the exception of gender and job classification). For example, an employee may have been 'absent without permission' as well as 'dishonest'.

Under employee 'Offences' the highest frequency is in 'violation of rules' followed by 'quit/resigned/redundancy/abandonment/illness and incapacity', 'unsatisfactory performance', and 'incompatibility with other employees or supervisor'. The other items worth noting may be those with smaller double-digit percentages such as 'absent without permission' and 'dishonesty'.

Under 'Employee's Record', it is interesting to note that about two-thirds (66.1%) of the employees had no previous record of being disciplined. Under 'Employee- Other Behavioural Aspects', it is worth noting that employees displaying a pattern of misconduct/incompetence and intentionally committing an act of misconduct ('premeditated misconduct') have high frequencies (31.6% and 33.9% respectively). The next stage involved logistical regression analysis.

To identify significant independent variables in relation to the first dependent variable – 'AWARD' (that is employee's complaint upheld or denied), the 'Enter' method was used. All independent variables selected are added to a single regression model. This step produced the outputs displayed in tables 4 and 5.

Table 4 – All Variables In Equation for Award

(n=342)

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1	ABSENT(1)	-1.061	1.428	.551	1	.458	.346
	ABSENTWP(1)	.587	1.029	.326	1	.568	1.799
	NEGLIGNT(1)	.855	1.095	.611	1	.435	2.352
	NODISMIS(1)	.993	.857	1.342	1	.247	2.699
	EXCBYACT(1)	1.972	1.158	2.899	1	.089	7.186
	INSUBORD(1)	-.632	.837	.571	1	.450	.531
	DISHONST(1)	2.230	1.154	3.730	1	.053	9.296
	PERFORM(1)	.643	.718	.802	1	.370	1.902
	ALCDRUGS(1)	-.555	1.125	.243	1	.622	.574
	ATTITUDE(1)	.372	.775	.231	1	.631	1.451
	RULES(1)	.003	.733	.000	1	.996	1.003
	OTHER(1)	16.552	2574.591	.000	1	.995	15438840
	RECORD	.206	.302	.464	1	.496	1.228
	SERVYR	.065	.029	4.915	1	.027	1.067
	GENDER(1)	.344	.467	.543	1	.461	1.411
	PATTERN(1)	1.465	.944	2.407	1	.121	4.326
	PREMEDIT(1)	1.129	.803	1.980	1	.159	3.094
	YSREMORS(1)	1.239	1.223	1.026	1	.311	3.451
	FAILDISP(1)	-4.221	1.482	8.109	1	.004	.015
	FAILWARN(1)	-3.526	1.156	9.308	1	.002	.029
	PROC_ERR(1)	-35.039	3637.482	.000	1	.992	.000
	WORKRULE(1)	-3.628	1.449	6.271	1	.012	.027
	UNEQTRMT(1)	-21.360	11333.099	.000	1	.998	.000
	PROVOKE(1)	-21.337	8197.565	.000	1	.998	.000
	CONDONE(1)	-14.116	12407.413	.000	1	.999	.000
	Constant	76.080	18872.882	.000	1	.997	1.10E+33

a. Variable(s) entered on step 1: ABSENT, ABSENTWP, NEGLIGNT, NODISMIS, EXCBYACT, INSUBORD, DISHONST, PERFORM, ALCDRUGS, ATTITUDE, RULES, OTHER, RECORD, SERVYR, GENDER, PATTERN, PREMEDIT, YSREMORS, FAILDISP, FAILWARN, PROC_ERR, WORKRULE, UNEQTRMT, PROVOKE, CONDONE.

Table 4 confirms that there are only 5 significant predictors (from which the prediction of 89.8 per cent was made in table 4), that is, those with p values of .05 or less. These predictors are DISHONEST (.053) SERVYR (.027), FAILDISP (.004), FAILWARN (.002), and WORKRULE (.012). The next logical step would be to construct a reduced model with only these 5 significant predictors in order to determine whether these predictors remain significant. Tabachnik and Fidell (2001:116) state that the general goal of regression is to identify the fewest independent variables necessary to predict a dependent variable (where each independent variable predicts a substantial and independent segment of the variability in the dependent variable). Therefore, using the 'Enter' method a new logistic regression equation was constructed with the 5 predictors. Table 5 below is an output from this stage of the analysis.

Table 5– Significant Variables for Award

(n=342)

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1	DISHONST(1)	1.835	.465	15.603	1	.000	6.268
	SERVYR	.026	.021	1.490	1	.222	1.026
	FAILDISP(1)	-4.295	1.064	16.285	1	.000	.014
	FAILWARN(1)	-3.552	.765	21.536	1	.000	.029
	WORKRULE(1)	-3.212	.824	15.209	1	.000	.040
	Constant	8.625	1.518	32.295	1	.000	5570.735

a. Variable(s) entered on step 1: DISHONST, SERVYR, FAILDISP, FAILWARN, WORKRULE.

Table 5 shows that when a logistic regression is run for the 5 predictors only, ‘SERVYR’ is showing up as insignificant (.222) while all the other 4 predictors remain significant. As this model included an insignificant predictor, another regression analysis is necessary with the exclusion of ‘SERVYR’.

Table 6 shows the outputs for the remaining 4 significant predictors:

Table 6 – Variables in Equation Using Reduced Model for Award

(n=342)

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1	DISHONST(1)	1.827	.462	15.638	1	.000	6.215
	FAILDISP(1)	-4.344	1.071	16.462	1	.000	.013
	FAILWARN(1)	-3.526	.767	21.138	1	.000	.029
	WORKRULE(1)	-3.215	.820	15.372	1	.000	.040
	Constant	8.792	1.516	33.614	1	.000	6579.010

a. Variable(s) entered on step 1: DISHONST, FAILDISP, FAILWARN, WORKRULE.

In table 6, the value of Exp(B) gives the “odds ratio”, which is the increase (or decrease if the ratio is less than one) in odds of being in one outcome category when the value of the predictor increases by one unit (Tabachnick and Fidell, 2001:548). Odds ratios of greater than 1 show the increase in odds of an outcome of 1 (the ‘response’ category) with a one-unit change in the predictor. In this model for the dependent variable ‘AWARD’ the following interpretations apply:

- for the predictor ‘DISHONEST’(Exp(B) of 6.215), which means that where an employee was found to be dishonest, the odds of the complaint being declined rather than upheld are over 6 times as much as where an employee was not dishonest;
- FAILDISP – where the employer fails to carry out progressive discipline, the odds of the employee’s complaint being upheld increases by 98.7% (1-.013);
- FAILWARN – where an employer fails to warn an employee of unsatisfactory performance, the odds of the employee’s complaint being upheld increases by 97.1% (1-

- .029); and
- WORKRULE – where there is improper promulgation of workrules by the employer, the odds of the employee's complaint being upheld increases by 96% (1-.040).

These are interesting statistics as they give an indication of the predictors that are highly likely to affect the decision-making of an arbitrator in relation to upholding or denying an employee's complaint. Dishonesty by an employee is almost certain to swing a decision in favour of the employer whereas failing to apply progressive discipline, failing to warn of unsatisfactory performance, and improper promulgation of work rules on the part of the employer are shortcomings that are likely to swing the decision in favour of the employee.

Remedy: Reinstatement

The second dependent variable is damages (measured in weeks of remuneration) awarded to those employees who were reinstated, that is, employees who were returned to employment with their employers after arbitrators upheld their complaints. In total 37 employees out of the 173 employees (refer to table 2 above) who were successful in having their complaints upheld were reinstated. Cross-tabulation in Table 7 illustrates the number of weeks of suspension ("SUSPSN" – number of weeks between dismissal and reinstatement) in the first left column in relation to damages (weeks of remuneration awarded) that the 37 reinstated employees received in other columns.

- to account for compensation already paid to the employee prior to termination, for example, sums in-lieu of notice or redundancy payments (where the termination was disguised as a redundancy); and
- the employee was culpable to a certain extent and therefore warranting a punitive reduction to reflect this culpability.

The above explanation also holds true for all the 7 cases with no compensation being awarded for the period of suspension.

Table 8 below shows summary statistics. The minimum number of weeks of damages awarded was 0 weeks while the maximum awarded was 64 weeks with a mean of 17.57 weeks. The minimum suspension was 4 weeks while the maximum was 100 weeks with a mean of 30.7 weeks. The standard deviation denotes the spread of the data.

Table 8 – Descriptive Statistics of Number of Weeks of Damages

(n= 37)

Descriptive Statistics					
	N	Minimum	Maximum	Mean	Std. Deviation
time-dismissal to reinstatement-weeks	37	4	100	30.70	19.473
no of weeks	37	0	64	17.57	16.290
Valid N (listwise)	37				

- The next stage is to carry out a regression analysis for the second dependent variable, that is ‘DAMAGES’ awarded to 37 employees who were reinstated. This involved using the ‘Enter’ method to determine the variables that were significant. An ordinary regression analysis is appropriate here because the dependent variable ‘DAMAGES’ is numerical rather than binary. The output from this analysis is discussed below.

The output produced is shown as Table 9 below. It shows that only one significant predictor has a p value of less than .05, that is, SUSPENSN (time interval between dismissal and reinstatement in weeks).

Table 9 – Coefficients for all Predictors of Damages

(n= 37)

Coefficients^a

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	3.860	19.812		.195	.847
	SERVYR	-.418	.384	-.223	-1.091	.288
	YSREINST	-10.200	18.081	-.173	-.564	.579
	GENDER	13.043	10.533	.252	1.238	.229
	JOBCLASS	1.005	2.486	.076	.404	.690
	YSCOMPSN	3.957	5.033	.123	.786	.441
	YSREMORS	-14.666	7.360	-.312	-1.993	.059
	CONFLICT	1.933	7.449	.044	.260	.798
	JOBGONE	-16.560	15.223	-.233	-1.088	.289
	NOFNDJOB	-4.435	11.095	-.086	-.400	.693
	BROKDOWN	-5.307	15.994	-.103	-.332	.743
	LABMKT	21.859	17.119	.221	1.277	.216
	SUSPNSN	.641	.155	.766	4.146	.000
	YSMITIGT	5.676	8.158	.171	.696	.494
	YSFAULT	8.081	6.449	.240	1.253	.224
	NEWJOB	-15.385	9.235	-.394	-1.666	.111

a. Dependent Variable: no of weeks

Again, similar to AWARD, this significant predictor is analysed in a new regression model leaving out all the other insignificant predictors. The outputs from this analysis in the form of tables 10 and 11 are discussed below.

Table 10 –Coefficients for Damages

(n= 37)

Coefficients^a

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	2.519	4.150		.607	.548
	SUSPNSN	.490	.115	.586	4.278	.000

a. Dependent Variable: no of weeks

Table 10 shows the regression equation output with the significant predictor SUSPNSN only and it confirms that it is a very significant predictor of damages paid to reinstated employees. The unstandardized coefficients are the coefficients of the estimated regression model. In the present model, the estimated 'DAMAGES' = 2.519 + 0.49SUSPNSN. It states that the expected damages ('DAMAGES') is equal to 2.519 + 0.49 x SUSPNSN. Say for example an employee's time of suspension ('SUSPNSN') is 20 weeks, the predicted damages ('DAMAGES') would be 2.519 + 20 x 0.49 = 12.319 or about 12 weeks. Table 13 below explains further the influence of this predictor.

Table 11 – Model Summary for Damages

(n= 37)

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.586 ^a	.343	.325	13.388

a. Predictors: (Constant), SUSPNSN (time-dismissal to reinstatement-weeks)

Table 11 reports the strength of the relationship between the model and the dependent variable. R, the multiple correlation coefficient, is the linear correlation between the observed and model-predicted values of the dependent variable. Its fairly large value indicates a strong relationship. R Square, the coefficient of determination, is the squared value of the multiple correlation coefficient. R square (.325) indicates the proportion of the variability in the dependent variable (DAMAGES) which is accounted for by the multiple regression equation. In other words, 32% of the variability in the dependent variable 'DAMAGES' results from the predictor variable 'SUSPNSN'.

Remedy: Compensation

The third and final dependent variable is 'COMPENSATION' (measured in weeks of remuneration awarded) awarded to those employees whose complaints were upheld but were not reinstated. In total 136 employees out of the 173 employees (refer to table 2 above) who were successful in having their complaints upheld were awarded compensation only. In other words, the 136 employees were not reinstated. Cross tabulation in Table 12 shows the number of weeks ('TIME' - time interval between dismissal and decision in weeks) the employee had to wait between dismissal and the date of award of compensation as indicated in the first left column in relation to the number of weeks of compensation (number of weeks of remuneration) awarded to the employee (shown in the other columns).

Table 12 – Number of Weeks of Compensation

(n= 136)

Time lapse between termination & decision-weeks * no of weeks Crosstabulation

Count	no of weeks of damages																																						Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	16	18	19	20	22	23	24	26	31	34	38														
Time lapse between term-ination & decision in weeks	13							1			1		1	1																						4			
17			1	1		1			1			4	3	1	1																					13			
22		1	2		1					1		1			2					2		1														11			
26	1	1		3	1	2		4			1	2	2	1			1	2	1				2													20			
30			1	1		2		3	1			2	2		1								5		1											12			
35				2	3			1					1		2							1		1												12			
39							1	1		2			2		2				1	1			4													14			
43	1		1		2																															5			
48		2		1				2				1		1									2													9			
52		1		1		1		1					2										3													9			
56				1			1															1	2													5			
61										1													2													6			
69				1	1												1					3														6			
78																							1														1		
117	1																																				1		
186					1																																1		
Total		3	5	5	11	9	6	2	13	2	4	2	10	13	4	8	1	2	4	4	1	1	23	1	1	1	1	1	1	1	1	1	1	1	1	136			

It is clear here that there is scant evidence of correlation between compensation awarded and ‘TIME’.

It is also clear that in most cases, the arbitrators stuck to compensating the employee with the maximum of 26 weeks allowed by legislation. However, there are 3 cases where this has been exceeded and this can be explained by reading the cases to examine the reasons cited by the arbitrators. These 3 cases relate to redundancies where the arbitrator awarded further compensation over and above redundancy payments already made by the employer. The compensation figures in these 3 cases therefore include redundancy compensation already paid to the employee. This may be seen as punitive by the employers but from the arbitrator’s viewpoint it may be seen as further industrial justice for employees who for some reason or other cannot be reinstated. The fact that the employee could not be reinstated for a variety of reasons influenced the arbitrator to award the maximum possible compensation to the vindicated employee.

There are number of cases where employees were not awarded the full compensation for the time that they had to wait between dismissal and the decision of the arbitrator. From reading the cases, it is not clear as to why the arbitrator chose not to award the full compensation in some cases whereas in others, the formula prescribed in section 170 CH(2) has been applied.

Table 13 below shows that the minimum number of weeks of compensation awarded was 1 week while the maximum awarded was 38 weeks with a mean of 13.21 weeks. The minimum ‘waiting period’ (‘TIME’) between termination and decision of the arbitrator was 13 weeks while the maximum was 186 weeks with a mean of 36.45 weeks. The standard deviation denotes the spread of the data.

Table 13 – Descriptive Statistics for Compensation

(n= 136)

Descriptive Statistics

	N	Minimum	Maximum	Mean	Std. Deviation
no of weeks	136	1	38	13.21	8.592
Time lapse between termination & decision-weeks	136	13	186	36.45	20.100
Valid N (listwise)	136				

The next stage involves regression analysis for ‘COMPENSATION’ (measured in weeks of remuneration awarded) and its predictors. Again as in the case of ‘DAMAGES’ for reinstatement, ‘COMPENSATION’ is a quantitative rather than a binary variable and therefore a linear regression model is appropriate.

Table 14 – Coefficients for all Predictors of Compensation

(n = 136)

Coefficients^a

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	12.469	2.268		5.499	.000
	SERVYR	.367	.129	.234	2.843	.005
	GENDER	-.265	1.427	-.015	-.186	.853
	JOBCLASS	-.082	.442	-.015	-.185	.853
	NEWJOB	-.917	1.970	-.048	-.465	.642
	NOFNDJOB	.816	2.172	.033	.376	.708
	TIME	.134	.152	.073	.881	.380
	LABMKT	7.261	3.835	.160	1.893	.061
	YSMITIGT	2.146	1.817	.125	1.181	.240
	YSFAULT	-6.630	1.407	-.385	-4.711	.000

a. Dependent Variable: COMPENSATION - no of weeks

Table 14 shows the output for the regression analysis with all predictors for the dependent variable ‘COMPENSATION’. Only 2 predictors are significant, that is ‘SERVYR’ and ‘YSFAULT’. Again as before with ‘DAMAGES’, it is necessary to run a regression model with only these 2 significant predictors. The outputs for this model are shown in tables 15 and 16 below.

Table 15–Coefficients for Significant Predictors of Compensation

(n = 136)

Coefficients^a

Model	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
1 (Constant)	14.488	1.061		13.661	.000
SERVYR	.331	.124	.210	2.673	.008
YSFAULT	-6.280	1.356	-.364	-4.633	.000

a. Dependent Variable: COMPENSATION- no of weeks

Table 15 shows the regression output with the significant predictors YSFAULT and SERVYR only and it confirms that the two predictors are very significant predictors in relation to compensation paid to employees (whose complaints were upheld but were not reinstated to jobs with their previous employers).

In the present model, the estimated ‘COMPENSATION’ = 14.488 + 0.331SERVYR – 6.280YSFAULT. It states that the expected compensation is equal to 14.488 + 0.331 x SERVYR – 6.280 x YSFAULT. Say for example an employee’s years of service were 5 years (‘SERVYR’) and the employee was to a certain extent culpable (YSFAULT), the predicted compensation would be 14.488 + 0.331 x 5 – 6.280 = 9.863 or about 10 weeks. The ideal situation from the employees viewpoint would then be where the employee is completely vindicated, that is YSFAULT = 0 and therefore there is no erosion of compensation as a result. It is also clear, that every year of service adds a factor of 0.331 weeks of compensation for the employee whose complaint was upheld but who was not reinstated. Table 16 below explains further the impact of these predictors.

Table 16 – Model Summary for Compensation

(n=136)

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.422 ^a	.178	.165	7.849

a. Predictors: (Constant), YSFAULT, SERVYR

Table 16 reports the strength of the relationship between the model and the dependent variable. R, the multiple correlation coefficient, is the linear correlation between the observed and model-predicted values of the dependent variable. Its reasonably high value indicates a good relationship. R Square, the coefficient of determination, is the squared value of the multiple correlation coefficient. R square (.178) indicates the proportion of the variability in the dependent variable (COMPENSATION) which is accounted for by the two predictors (‘YSFAULT’ and ‘SERVYR’) in the multiple regression equation. In other words, 18% of the variability in the dependent variable ‘COMPENSATION’ results from the predictor variables ‘YSFAULT’ and ‘SERVYR’.

CONCLUSION

This research presents empirical evidence with regard to the 3 central dependent variables (complaint upheld or denied, reinstatement or monetary compensation, and magnitude of damages awarded to those reinstated) in relation to arbitrator's decision to uphold or deny a claim of unfair dismissal. Both descriptive and regression analysis has been presented in this regard and therefore this study is statistically rigorous.

In summary, for the first dependent variable 'AWARD' (employee's complaint upheld or denied by arbitrator) the following are worth noting:

- 51% were upheld;
- 21% of those upheld were reinstated while the remaining 79% were awarded compensation only;
- the significant predictors were employee dishonesty, failure by employer to warn employees of performance shortcomings, failure of employer to apply progressive discipline, and improper promulgation of work rules by the employer.

With the second dependent variable, that is damages awarded to reinstated employees, the one and only significant predictor was the period of suspension for the employee.

For the final dependent variable which is compensation awarded to employees not reinstated although their complaints were upheld), the significant predictors were the employee being at fault and the employee's duration of service.

Implications of the legislation for employers depend on the interpretation of the results of this study. Given that overall 51% of the unfair dismissal complaints by employees were upheld by arbitrators, it could be said that from the employers' perspective unnecessary expenditure may have been incurred from the date of termination to the date of the decision of the arbitrator. The expenditure may come in the form of legal advice and representation, time of staff involved etc. Additionally, the pending action may cause adversity towards the employer by existing staff and unions. The cost of this adversity is not really quantifiable in dollar terms but needless to say it will impact on productivity somewhere along the way in the continuum of industrial relations.

No doubt, factors other than merit may influence the parties to proceed to arbitration. However, it is reasonable to assume that the probable outcome is an important consideration in making that decision. Accordingly it could be argued that in light of the fact that 51% of complaints were upheld, a change in employer industrial relations practices is necessary, especially if employers desire a majority of decisions to favour them.

Given that the research shows some measure of predictability in terms of the factors considered by arbitrators in making their decisions, there may be strategic implications for the way employers respond to employee misconduct in the workplace. To some extent, arbitrator decisions may force employers into reshaping processes that relate to performance management, discipline and termination.

Specifically, employer response to an employee's wrongdoing should include consideration of the nature of the offence, the employee's record and the length of service prior to resorting to dismissal. The employer must observe the statutory requirements of section 170 CG(3) and this is best met by administering a fair and robust system of progressive discipline. One area requiring improvement is the necessity to sufficiently document warnings and counselling as well as provide necessary training for employees so that they can attain the standards expected by the employer. Employers must make the necessary policy changes to ensure that supervisors/managers are trained in the administration of progressive discipline. Compliance with policy needs to be constantly monitored by employers as well.

An important point to recall is that the number of dismissed employees who actually pursued unjust dismissal complaints under this legislation is unknown. If it is a small proportion, employers may well weigh the risk of arbitration against any major change in practices.

Another factor to be considered in weighing the risk of arbitral intervention in the decision to dismiss is the number of cases that are settled prior to arbitration. As this information is unavailable, it is difficult to advise employers on the overall picture of unfair dismissals with this part of the puzzle missing. It is suggested that employers seek alternative mechanisms to arbitration to alleviate the considerable time delays in arbitration decisions. Such alternative mechanisms could be to establish an internal employee-employer committee consisting of persons with more in-depth knowledge of the workplace than third party arbitrators who have little knowledge of the dynamics of a particular workplace.

Statutory protection under the WR Act also has important implications for employees covered under this legislation. For employees, offences such as dishonesty reflect badly in the eyes of the arbitrators. Long serving employees can expect their length of service to be taken into consideration in the calculation of compensation. Where employers fail to apply progressive discipline or where there is improper promulgation of work rules by the employers, employees can expect a swing in their favour in the decision of arbitrators. The study clearly shows that the WR Act, unlike its predecessor (IRR Act 1993), has lead arbitrators to treat procedural fairness as a technical irregularity and thereby has provided reduced protection to employees. The empirical analysis shows that lack of procedural fairness is clearly not a significant factor in influencing the decision of the arbitrator. This confirms earlier suspicions by legal experts such as Chief Justice Murray Wilcox (Wilcox, 1997: 84) that the new legislation will denigrate the traditional importance of procedural fairness in the process of fair dismissal of employees. Employees cannot rely on lack of procedural fairness by employers to be a factor that would swing arbitrators' decisions in their favour. Employees may wish to lobby their politicians and unions to restore the importance of procedural fairness in future legislation or even incorporate it into employment contracts such as enterprise agreements and AWAs (Australian Workplace Agreements).

Employees can take heart from the fact that 51% of the decisions of arbitrators went against the employers. However, there is a downside to this fact in that only a small proportion (21%) of the successful employees were reinstated. Although, the WR Act like its predecessor (IRR Act, 1993) retains reinstatement as the primary remedy, the results show that compensation is highly likely to be granted over reinstatement by arbitrators. The fact that 79% of successful employees

were only granted compensation seems to indicate that compensation rather than reinstatement is the primary remedy.

Finally, the tendency to award monetary compensation far more frequently than reinstatement could be viewed as a deficiency in the arbitral regime from the employee's perspective. The unavailability of reinstatement as a remedy is seen as a major deficiency of the common law regime. Statutory protection was intended to bridge this gap by providing reinstatement as a primary remedy.

However, if arbitrators overwhelmingly rule against reinstatement then it begs the question of whether the law in letter form differs from the law that is dispensed. No doubt, this research will be useful information for employers, HR/IR managers, employees and employee advocates, unions, employer associations, arbitrators, politicians and academics.

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