Dismissal Procedures

II : United States[1]

In the United States there are virtually no general legislative restrictions on an employer's free right to terminate the employment relationship at any time.[2] The principal source of regulation in this connection rests in the appropriate provisions of collective bargaining contracts [3] covering dismissal and lay-off matters.

These collective bargaining contracts cover less than half of the over-all working population. However, in gauging their importance certain factors must be borne in mind. In the total labour force there are several millions of federal, state and local government employees, a vast percentage of whom are not covered by collective contracts but who are often afforded protection through civil service and other systems. Then, of course, there are large numbers of professional, executive, and managerial employees and self-employed persons. It should further be pointed out that even in unorganised sectors of the economy, i.e. where employees are not covered by collective bargaining contracts that restrict the employer's power to terminate the working relationship, often practices and procedures akin to those contained in collective contracts will be adopted voluntarily by employers. This occurs either because the employer thinks such policies are wise and just or because he thinks he can thereby stave off organisation of his employees.

In view of these facts this study is geared to typical procedures which obtain under collective bargaining contracts.

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[1] For the first in this series of articles devoted to dismissal procedures in various countries see " Dismissal Procedures—I : France ", in *International Labour Review*, Vol. LXXIX, No. 6, June 1959, p. 624.

[2] If there is neither a collective bargaining contract in force nor a bargaining representative selected by a majority of the employees, an employer and an employee are at liberty to make whatever individual contractual arrangements they desire, including those relating to the termination of the employment relationship (e.g. notice). If no such arrangement, express or implied, is agreed to or contemplated by the parties, then both the employer and the employee are largely free to terminate the relationship at will, and without suffering any legal consequences. See American Law Institute : *Restatement of the Law : Agency* (1933, with periodic supplements), sections 442 and 452. Cf. CLARK : *The Law of the Employment of Labor* (1911), p. 3. See also GOLLUB : *Discharge for Cause* (State of New York, Department of Labor Special Bulletin No. 221, 1948), p. 7. It should be noted also that some states have enacted legislation prohibiting dismissals based on considerations of race, colour, creed, or national origin. Further, see the section on " Special Cases : Union Activity " below.

Formal individual contracts of employment are relatively rare in the United States and are usually limited to executive and professional employees. Hence, they are not treated in this article.

[3] For purposes of clarity the term " collective bargaining contract " or " collective contract " is employed in this article in order to connote their contractual and legally binding nature. In practice, other terms such as " collective bargaining agreement ", " labour contract ", etc., are also used in the United States.

An understanding of certain elements regarding American collective bargaining should lead to a fuller appreciation of dismissal and lay-off procedures in the United States. Collective bargaining contracts are usually concluded between the union and the employer at the level of the undertaking. It must be stressed that when a union is recognised, either voluntarily or after official procedures, as the bargaining agent for a given unit, the union bargains for all employees in that unit, both union members and non-members. Concomitantly, upon conclusion of a collective bargaining contract between the parties, such contract applies to all members of the bargaining unit, both union and non-union.[1] Obligations arising under the collective contract are legally binding and enforceable in the regular federal courts.[2] However, since virtually all collective bargaining contracts provide for grievance and arbitration procedures, it is more common to seek redress for breaches of the contract through such procedures.[3]

It should be noted, when considering American collective bargaining contracts in general and dismissal and lay-off procedures under such contracts in particular, that specific over-all conclusions are frequently difficult. This difficulty is due to the existence of an unending number of collective contracts, virtually none of which contain identical provisions in the pertinent sections. The situation is further complicated by the lack of clear uniformity of arbitral decisions interpreting these provisions. However, examination and study of these provisions and decisions do give rise to a number of general conclusions, which are synthesised and discussed below.

This article first treats lay-offs and final termination procedures arising from business and economic considerations within the undertaking which are independent of the conduct, acts or omissions of the particular employees affected by the lay-off or termination. Next come the distinct dismissal procedures stemming from reasons related to the affected employee himself, i.e. disciplinary termination, sickness, etc. Following this is a section dealing with employees or situations that receive special treatment with regard to dismissal, lay-off or termination. The article concludes with a section devoted to the avenues of employee or union redress in the event of allegedly improper dismissal, lay-off or termination. At various points throughout the article clauses from actual collective bargaining contracts are quoted; these clauses should be regarded as merely illustrative.[4]

Termination or Suspension of Employment Resulting from General Business Reasons

In the event that an employer desires—usually for considerations of business operation of a temporary nature (seasonal or other non-permanent retrenchment in business activity, shortage of raw materials,

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[1] Labor-Management Relations Act, 1947, section 9 *(a)* : See I.L.O. : *Legislative Series*, 1947 (U.S.A. 2). A discussion of the Act and its historical background may be found in J. E. Lawyer : " The United States Labor-Management Relations Act of 1947 ", in *International Labour Review*, Vol. LVI, No. 2, Aug. 1947, p. 125.

[2] Labor-Management Relations Act, 1947, section 301 *(a)*.

[3] For discussion of these procedures see section on " Employee Redress : Grievance and Arbitration " below.

[4] For reasons of space these clauses have necessarily been selected on the basis of their brevity as well as their representative character.

mechanical breakdowns, etc.)—to suspend the work of some or all employees for a period of time, he may lay off surplus personnel. To this end collective bargaining contracts usually provide for the manner in which such lay-offs must proceed.

These same lay-off procedures (with possible modifications as regards consultation) will usually apply where the reasons underlying the suspension or termination of the working relationship are of a more permanent nature (plant shutdown, general retrenchment in business activities, the introduction of labour-saving machinery, i.e. automation, etc.). As with all other aspects of this question, provisions of collective contracts vary. Some contracts permit unequivocal termination while others might designate an affected employee as permanently laid off. And, frequently, contracts either make no distinction between permanent and temporary lay-off or make no mention of termination at all in this regard.[1]

Prior Consultation with the Union

Typically the general decision to lay off is solely within the discretion of the employer and within his "management prerogatives".[2] Some collective bargaining contracts require consultation with the union, and frequently consultation occurs even where the contract does not so provide. It is more likely in cases of permanent lay-off or termination that contracts will provide, especially where the introduction of labour-saving machinery is involved, for prior consultation with the union.[3] But, in any case the ultimate decision is almost invariably within the sole discretion of the employer without the necessity for approval or acquiescence by the union or any other party or agency.[4] Discussions with the union are usually limited to choice of procedures, especially where lay-off procedures are not clearly spelled out in the collective bargaining agreement.

> Whenever, in the judgment of the company, there exists an occasion for the adoption of a programme of mass or general lay-offs . . . of regular full-time and regular part-time non-supervisory employees of the company, the company agrees before proceeding with such programme . . . to—
>
> . . . Notify the union of its intention to introduce such programme and negotiate with the union in regard to the method or methods to be employed.
>
> The company shall determine the extent of the reductions required, the effective date or dates thereof, the exchanges, and the job classifications involved.
>
> If an agreement as to the method or methods to be employed in introducing such programme is not reached by the company and the union within 30 days from the date of such meeting, the company may then proceed . . . [to lay off workers according to seniority].[5]

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[1] See subsection on "Status of Laid-off and Terminated Employees and Benefits during Period of Unemployment" below.

[2] See U.S. Department of Labor, Bureau of Labor Statistics: *Collective Bargaining Clauses: Lay-off, Recall, and Work-Sharing Procedures*, Bulletin No. 1189 (Washington, D.C., 1956), p. 7.

[3] See E. HERZ: "The Protection of Employees on the Termination of Contracts of Employment", in *International Labour Review*, Vol. LXIX, No. 4, Apr. 1954, p. 313.

[4] See R. THEODORE: "Union Participation in Lay-off Procedures; Advance Notice of Lay-offs", in *Monthly Labor Review* (Washington, D.C.), Vol. 80, Jan. 1957, pp. 1-4.

[5] *Collective Bargaining Clauses: Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 7.

Notice

However, there are usually provisions requiring the employer, where feasible, to give notice to the union of the projected lay-off.[1] Many of these provisions require notice only in such situations where the lay-off may be reasonably foreseen in advance. It would seem that the majority of such provisions prescribe a notice period of one week or less.[2]

The company shall give written notice to the union of proposed lay-offs three days prior to such lay-offs unless they result from an emergency or the company has no prior knowledge of the need for the lay-offs.[2]

* * *

In the event of a lay-off the employer shall give the union five days' notice of the names and clock numbers of the employees to be laid off, unless prevented from so doing by circumstances or conditions beyond its control.[3]

* * *

In the event of a general lay-off the company shall furnish the chairman of the shop committee with 12 copies of the list of employees to be laid off, not less than 48 hours in advance of such lay-off. In the event of a lay-off arising out of a shortage of materials, or breakdown of equipment, notice of lay-off shall be given to the chairman of the shop committee as much in advance as possible.[3]

Selection of Employees to be Laid Off or Terminated

As a rule collective bargaining contracts contain provisions which dictate the manner in which employees must be laid off.[4] These provisions are usually based on seniority, the most junior employee (in length of service) within any seniority group being the first to be laid off.[5] (If termination is involved, the same procedures will normally apply.)

In case it shall become necessary for the employer to lay off one or more employees, seniority rules shall apply, within classifications; the employee who has been with the [company] the shortest length of time shall be the first to be laid off. . . .[6]

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[1] See " Union Participation in Lay-off Procedures ", op. cit., p. 4. Contracts more typically provide for notice to the union than notice to the affected employee or employees. Of course the union, in such a case, would in turn notify such employee or employees. Often notice of lay-off is posted on bulletin boards so as to make the information available to all.

[2] Ibid., p. 5.

[3] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 13.

[4] It should be noted that contractual lay-off procedures are often not found in industries where they are neither necessary nor expedient, e.g. in industries where workers are sometimes employed for specific jobs such as construction, long-shoring, transportation, etc. See R. PLATT, " Prevalence of Lay-Off and Work-Sharing Provisions ; Forestalling and Minimizing Lay-Offs ", in *Monthly Labor Review*, Vol. 79, Dec. 1956, p. 1388.

[5] For a thorough explanation and survey of seniority and allied procedures and problems, see J. W. BLOCH and R. PLATT : " Seniority and Bumping Practices ", in *Monthly Labor Review*, Vol. 80, Feb. 1957, pp. 177 ff. Often contracts will provide that all temporary and probationary employees be removed from the payroll before regular employees are laid off. See " Prevalence of Lay-Off and Work-Sharing Provisions ", op. cit., p. 8.

[6] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 16.

In the event of lay-offs, employees shall be laid off according to job classification, but plant-wide seniority shall govern, i.e. employees having the least plant-wide seniority in that particular job classification shall be laid off first and the employees having the most plant-wide seniority in that particular job classification shall be laid off last.[1]

Often the straight application of the principle of seniority will be tempered by lay-off provisions that also take into consideration such factors as skill and ability to perform the job.[2] In other words, in deciding who, among two or more employees, is to be laid off, an employer may weigh, to a greater or lesser extent, the relative competence at the particular job of the employees in question—along with their relative seniority. Consequently, if such be the case, a senior employee may be laid off in place of a junior employee where the senior does not have the requisite skill and ability to perform the work of the junior.

In all cases of recall, increase, or decrease of forces, the following factors shall be considered, and where factors (2) and (3) are relatively equal, length of adjusted seniority shall govern :

(1) Length of adjusted seniority as hereinbefore defined.

(2) Knowledge, skill, and efficiency on the job.

(3) Physical fitness for the job.[3]

* * *

In decreasing the working force in any department, length of continuous service shall govern where the employee possesses the qualifications to do the job efficiently.[3]

Seniority systems for lay-off purposes are many and varied. They may encompass in one seniority unit all the workers in an undertaking or the units may be broken down by departmental, occupational, or other groupings. When, for instance, the reasons for a lay-off affect only one department, the junior member of that department may be laid off even though he may be senior to a worker in another department.[4]

When lay-offs become necessary because of lack of work, seniority by departments shall apply ; that is, the last person hired shall be the first one to be laid off. . . .

In rehiring, the last person laid off in any particular department shall be the first rehired.[5]

* * *

When lay-offs are necessary because of lack of work the company will apply the principle of seniority within non-interchangeable occupational groups. . . .[5]

Modifying this latter consideration is the common contractual practice of " bumping ". Under bumping procedures, some of which are immensely complicated, generally speaking a junior employee who

[1] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 16.

[2] See " Seniority and Bumping Practices ", op. cit., pp. 178-180.

[3] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 16.

[4] " Seniority and Bumping Practices ", op. cit., p. 183. For a discussion of seniority and union and management attitudes towards seniority units and inclusion of considerations of skill and ability see R. L. ARONSON : *Lay-off Policies and Practices* (Princeton University, 1950), passim and particularly pp. 48 ff.

[5] *Collective Bargaining Clauses : Lay-off, Recall and Work-Sharing Procedures*, op. cit., p. 17.

is laid off in one department or occupational grouping may displace (sometimes at the option of the employee) a more junior employee in another occupational or departmental unit. Again concepts of skill and ability are often considered. Not infrequently this procedure can produce a chain reaction so that in a situation where only one or a few employees are to be laid off, a great many employees may be " bumped ".[1]

An employee laid off temporarily or permanently may exercise his seniority over the employee with the least seniority in any department whose work he is capable of handling, according to the following :

(1) In any classification in which the employee has had previous experience, or if his department is discontinued, he may exercise his seniority after having been laid off for five working days.

(2) In any classification other than that in which the employee has previous experience, he may exercise his seniority after having been laid off for ten working days.[2]

Status of Laid-off and Terminated Employees and Benefits during Period of Unemployment

Employees who are laid off do not lose their status as employees. They continue to be carried on the rolls of the employer for purposes other than payment of wages or certain other economic benefits (e.g. they continue to accrue seniority). In some collective bargaining contracts provision is made for lay-off pay or allowances although this is not very widely found. And in some cases certain fringe benefits (e.g. insurance) may be continued during a period of lay-off.[3]

The status of employees who are terminated or permanently laid off is sometimes ambiguous. If an employee may be terminated unequivocally under the collective contract in this situation, then, of course, the employment relationship is cut off. If the contract designates the affected employee as being permanently laid off or does not deal with the situation at all, the employee may retain some rights with regard to the employer for a period of time. As mentioned earlier, many collective bargaining contracts are silent on this point. However, a good number of contracts do provide that where an employee is laid off for longer than a given period he loses either his seniority status or any status whatsoever as an employee.[4]

Plant seniority shall be terminated for the following reasons : . . . continual lay-off for a period of two years.[5]

* * *

Seniority shall cease upon . . . lay-off of an employee for a period equal to the number of months of his continuous service since his most recent hiring date.[5]

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[1] For a full discussion of the practice see *Lay-off Policies and Practices*, op. cit., p. 17. Also " Seniority and Bumping Practices ", op. cit., pp. 184-185.

[2] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 25.

[3] See R. THEODORE : " Recall Procedures ; Work Sharing ", in *Monthly Labor Review*, Vol. 80, Mar. 1957, pp. 329 and 333. The author further points out (as discussed below) that in recent years additional rights, through collective bargaining, accrue to laid-off workers.

[4] Ibid., p. 333. Often the permissible period of lay-off prior to termination is predicated on the affected employee's prior length of service.

[5] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 31.

Seniority and the employment relationship shall be broken for the following reasons : . . . if the employee is laid off for one-half his or her length of service up to three years.[1]

It may be noted that termination of seniority, as mentioned in the above clauses, is tantamount to a termination of the working relationship, since the loss of seniority deprives an employee of recall and reintegration rights.

The lay-off rather than the termination method is often utilised inasmuch as there is always the possibility of a later expansion of personnel by the business.

It should be noted that during his period of lay-off, or upon termination, an employee is entitled to state unemployment insurance (provided that he meets the requirements laid down by the state law on the subject). In some cases he is also eligible for private benefits arising out of collective contracts. In this connection mention should be made of the relatively recent institution of supplementary unemployment benefit plans, principally in the automotive, steel and glass industries.[2] Under these plans laid-off employees are entitled to weekly benefits which supplement state unemployment benefits. The benefits are paid under plans that have been collectively negotiated and from funds that have been built up by means of stipulated contributions from the employer.

During his period of lay-off an employee may look for and accept other employment without jeopardising his seniority or re-employment rights or employment status vis-à-vis his regular employer. Indeed, an eligibility condition for receiving state unemployment benefits is usually that the unemployed applicant make efforts to find other employment that is suitable to his vocational background and status. However, either employment rights or seniority rights with the original employer are usually lost in the event that the laid-off employee does not return to his original employment when recalled by the employer pursuant to the collective contract.

If an employee is given at least three days' notice by a personal call or registered letter to report for work at a designated time and he does not return to work at that time the next employee on the seniority list may be called in like manner. If the junior employee returns to work before the senior employee, the senior employee shall not replace him but shall await the next call, and shall not be paid for reporting. If an employee is given such three days' notice to report in a second call, which shall be made by registered mail with return receipt requested, and does not return to work at the designated time, he shall be considered as having voluntarily quit. . . .[3]

In addition to state unemployment benefits and other possible benefits arising out of collective bargaining contracts, it is sometimes provided in contracts that employees who are terminated or permanently laid off are entitled to certain cash payments. These payments are

[1] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 31.

[2] For an explanation and discussion of these plans see Bureau of National Affairs : *Supplemental Unemployment Benefit Plans* (Washington, D.C., 1956). Also " Supplemental Unemployment Benefits in the United States ", in *International Labour Review*, Vol. LXXIV No. 5, Nov. 1956, p. 473.

[3] U.S. Department of Labor, Bureau of Labor Statistics : *Collective Bargaining Provisions : Promotion, Transfer and Assignment ; Lay-off, Work-Sharing and Re-employment*, Bulletin No. 908-7 (Washington, D.C., 1948), p. 49.

usually termed " severance pay " or " dismissal pay " and are aimed at helping the terminated employee to bridge the gap until the time he can find new employment. While no precise current statistics are available, such provisions appear in contracts probably covering no more than 25 per cent. of organised workers. A 1950 study of the United States Department of Labour disclosed that in a sampling of over 2,000 contracts only some 8 per cent. contained severance or dismissal pay clauses.[1] Severance pay plans are quite varied as regards the amount of the benefit. Some provide for a range of benefits based upon the employee's length of service, while others provide for a stated amount regardless of length of service. Still others have different bases for benefit payments.[2] Similarly, where pension plans exist, they often provide for vested benefits which entitle the employees who are eligible (usually by having a stated length of service) to receive some benefits even though they are terminated rather than retired.

When a department and/or a subdivision thereof is permanently shut down, meaning only the total and permanent discontinuance of operations therein . . . and not the fluctuations of operations, an employee whose employment is terminated as a result thereof shall be entitled to a severance allowance. . . . [3]

* * *

Severance allowances . . . shall be paid to employees . . . who are permanently dropped from the service because of a reduction in force arising out of the closing of a department or an entire plant, and when it is expected that they will not be re-employed.[3]

* * *

Employees laid off by the company for reasons beyond their control will be paid separation pay. . . . [4]

Recall and Reintegration

Concurrently with lay-off procedures, collective agreements usually provide for recall or reintegration procedures.[5] Typically these provisions, as is the case with lay-off provisions, provide that the order of recall shall be based on seniority, often with the same conditions as in the case of lay-off regarding skill and ability.

Reduction of the working forces shall be accomplished by the lay-off of employees by seniority in each work classification ; and in re-employment, the last employee laid off shall be the first to be called back to work in each work classification.[6]

* * *

Laid-off employees will be recalled to work in accordance with their seniority, the longest seniority employees being the first to be recalled, provided they are capable of performing the available jobs.[6]

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[1] " Dismissal-Pay Provisions in Union Agreements, 1949 ", in *Monthly Labor Review*, Vol. 70, Apr. 1950, p. 384.

[2] Ibid., pp. 385-387.

[3] U.S. Department of Labor, Bureau of Labor Statistics : *Collective Bargaining Clauses : Dismissal Pay*, Bulletin No. 1216 (Washington, D.C., 1957), p. 10.

[4] Ibid., p. 11.

[5] See " Recall Procedures ; Work Sharing ", op. cit., pp. 329-334.

[6] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 129.

In cases of lay-off and re-employment the following factors shall be considered, and where factors (1) and (2) are relatively equal, length of service shall govern :

(1) Length of service—viz.: seniority.

(2) Knowledge, training, ability, skill and efficiency.

(3) Physical fitness.[1]

Upon returning to the job after a lay-off the employee, of course, is not considered as a new employee but rather continues in his previous status with all rights that flow from it.

Alternatives to Lay-off or Termination

It should be further noted that some collective contracts provide that, prior to instituting a lay-off or terminating employees, efforts must be made to preserve the employment of those who would otherwise be laid off or terminated.[2] This is often accomplished through systems of work sharing [3] (by reducing the working hours of all employees and/or restricting overtime work) or by other means such as restricting the employer's right to subcontract work out to others during such periods if the work may be done by regular employees.

Except in emergency cases not to exceed two weeks, no overtime within a departmental job classification shall be worked while employees having seniority in that departmental job classification are laid off.[4]

* * *

The company agrees that it will not contract any work which is ordinarily and customarily done by its regular employees, if, as a result thereof, it would become necessary to lay off or reduce the rate of pay of any such employees.[5]

* * *

During slack periods the work in every department of the shop shall be divided as equally as possible among all workers of that department.[6]

* * *

The executive shop committee will be notified as soon as possible when a large-scale reduction of employment is anticipated. If requested by the union, management will meet with the executive shop committee for the purpose of discussing a division of hours among senior employees.[7]

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[1] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 129.

[2] See " Prevalence of Layoff and Work-Sharing Provisions ", op. cit., p. 1385.

[3] In a survey made by the United States Bureau of Labour Statistics in 1956 it was found that only approximately 4 per cent. of the collective bargaining contracts examined provided for some form of work sharing in lieu of lay-off. It was further found that such provisions were concentrated in the apparel industry, which accounted for some 80 per cent. of all employees covered by such clauses. Ibid., pp. 1387-1388. (It may be suggested that this concentration in the apparel industry is a natural concomitant of its being a seasonal industry with foreseeable peak and slack seasons.)

[4] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 3.

[5] Ibid., p. 4.

[6] Ibid., p. 35.

[7] Ibid., p. 9.

Frequently, even where such provisions are not contained in the collective agreement, the employer either on his own initiative or after consultation with the union may institute such procedures as an alternative to, or in mitigation of, laying off or terminating employees.

Termination Resulting from Reasons Connected with the Employee Himself

As opposed to termination or suspension based upon general business considerations, dismissals [1] predicated upon reasons connected with the employee himself, i.e. his conduct, malfeasance or nonfeasance, bring into play entirely different procedures under most collective bargaining contracts. As discussed above, in the former situation the employer may be challenged only on the manner in which the lay-off or termination has been effected and not on the basic decision to lay off or terminate. In dealing with the latter situation, the typical collective bargaining contract clause dictates that an employee may be dismissed only for just cause.[2]

Employees who have completed their trial periods shall be discharged for just cause only. The union shall have the right to challenge the propriety of any discharge and may present the matter as a grievance to be settled under the grievance and arbitration procedure in this agreement.[3]

* * *

No employee who has acquired seniority with the company under this agreement shall be discharged except for just cause. Upon the discharge of such employee, the company shall forthwith notify the employee's committeeman or the chairman of the shop committee thereof. If the union requests an immediate hearing on any grievance arising out of such a discharge, a meeting on such grievance will be arranged forthwith. Any grievance based upon such discharge shall be submitted to the industrial relations director in writing within eight (8) days thereafter. Otherwise, the employee and the union shall be deemed to have waived any objection to such discharge.[4]

Many contracts, though by no means the preponderance of contracts, contain listings, either inclusive, exclusive or exemplary, of the various items which constitute just cause or sometimes, more broadly stated, are adequate grounds for discharge.

The company may discharge an employee for just cause including, but not being limited to, the following:

Wilful disregard of or refusal to comply with general factory rules, dishonesty, incompetence, inefficiency, insubordination, intoxication, pilfer-

[1] In the United States the terms "dismissal" and "discharge" are virtually synonymous and are used interchangeably. In this article, save for quoted matter, the term "dismissal" will be employed.

[2] See J. F. Holly: "Considerations in Discharge Cases", in *Monthly Labor Review*, Vol. 80, June 1957, p. 684.

[3] U.S. Department of Labor, Bureau of Labor Statistics: *Collective Bargaining Provisions: Discharge, Discipline, and Quits; Dismissal Pay Provisions*, Bulletin No. 908-5 (Washington, D.C., 1948), p. 15.

[4] Collective Bargaining Contract between Mack Manufacturing Corporation (Plainfield Plant Shop) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W.) and its Local, No. 343, dated 19 October 1955, p. 43.

age, doing work in a negligent manner, spoiling work, damaging machinery or equipment, mis-statement on application . . . refusal to perform work assigned, or failure to abide by the terms of this agreement.[1]

The foregoing contract clause indicates generally the various types of employee conduct that could serve as the basis for dismissal. However, as discussed in some detail below, the question of whether the employer has validly based a particular dismissal on just cause is often carried through the grievance and arbitration procedures. Indeed, the determination of exactly what constitutes just cause has proved to be a most fertile field for arbitration cases. But it should be stressed that the initial dismissal decision is that of the employer and may usually be made by him unilaterally, subject to later challenge by the union in the form of a grievance. In other words, regardless of the conduct on the part of the employee that induces the employer to dismiss him, the union may take exception through the grievance procedures under the contract and the justness of the dismissal may be subjected to arbitral scrutiny.

Certain aspects of conduct on the part of employees that might lead to dismissal warrant some elaboration.

Instances of Conduct that May Constitute Just Cause for Dismissal

Violation of Plant or Works Rules.

Internal plant or works rules are usually drawn up by management and generally deal with such matters as discipline, safety, use of facilities and other items that do not come within the scope of the collective bargaining contract or which supplement the contract without running counter to it. Generally, violation of some of the more important rules or repeated violations of even minor rules could be the basis for dismissal. In effect some of the other aspects of conduct mentioned below might sometimes be included in plant rules but merit independent mention.

Incompetence.

There is little doubt, even if causes for dismissal are not enumerated in a collective contract, that the incompetence of the employee could constitute just cause for dismissal.[2] However, it is possible to find in some collective contracts provisions whereby employees who are incompetent to perform their assigned tasks may be afforded other work rather than or before being dismissed.[3]

Sickness or Injury of Employees.

Most collective bargaining contracts make specific provision for sick leave in the event that an employee is incapacitated to the extent that he cannot report for work. In the absence of such provision and where short periods of incapacity are involved, the test of just cause would not seem to be met.[4] In the event that an employee's sick leave

[1] *Collective Bargaining Provisions : Discharge, Discipline, and Quits ; Dismissal Pay Provisions*, op. cit., p. 4.

[2] See GOLLUB : *Discharge for Cause*, op. cit., p. 51.

[3] Ibid., p. 52.

[4] Ibid., p. 54.

is exhausted, or, where the contract does not cover the situation and a protracted period of incapacity is involved, it is not unusual for an employer's dismissal decision to be upheld, just cause stemming from the need for effective business management [1] as well as the employee's conduct.

The other facet of the question concerns the employee who, although able to report for work, proves to be physically incapable of doing his job, whether by virtue of permanent or temporary disability. In either case, by contractual prescription or at the discretion of the employer, the employee might be transferred to a type of work which he is capable of doing.

> Any employee who has been incapacitated at his regular work by sickness or injury may be employed by the company at other work in the plant which is available and which he is able to do, and every reasonable effort shall be made by the company to find such employment for him.[2]

In the absence of a contractual provision, however, just cause would probably exist with regard to the dismissal of a permanently incapacitated employee, whereas dismissal of a temporarily incapacitated employee would more likely be found not to be based on just cause.[3]

Absenteeism.

A special mention regarding absenteeism (unrelated to sickness or injury) is not inappropriate inasmuch as it is one of the major and most elusive disciplinary problems and has a direct effect on questions of efficiency and productivity. There is little doubt that excessive absences, even where each individual absence is not unauthorised, could constitute just cause for dismissal.[3] On the other hand, what the employer might think excessive might not be considered excessive on review if the employer's decision to dismiss is challenged by the union through the grievance and arbitration procedures. And even if an employee's absence record is unquestionably high, this might connote a condonation of the practice on the part of management. Hence, the question of prior warnings becomes a necessary consideration. Also, to have a dismissal upheld upon challenge, it behoves the employer to accord fair and consistent treatment in his handling of absenteeism cases. However, an employer who was formerly lax in his absenteeism policy is not precluded from changing such policy. But, again, such change must be accompanied by adequate notice and publication of the new and more stringent policy.[4]

It should be added that unauthorised absences are looked upon more severely and it is not unusual for even one such absence to constitute just cause for dismissal.

Prior Consultation with the Union

No definite conclusions can be drawn regarding whether or not the employer must consult with the union prior to taking his dismissal

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[1] See Eileen AHERN: "Discharge for Absenteeism under Union Contracts", in *Personnel Journal* (Swarthmore, Penn.), Vol. 32, 10 Oct. 1953, pp. 173-174.

[2] Collective Bargaining Contract between Mack and U.A.W., op. cit., p. 36.

[3] See "Discharge for Absenteeism under Union Contracts", op. cit., p. 174.

[4] Ibid., pp. 176-177.

decision. However, it would seem that there are relatively few collective bargaining contracts that make provision for consultation in such matters.[1] Where such provisions are found they would seem to apply more often to dismissals based upon other than disciplinary reasons (with the possible exception of absenteeism). And even in those cases where some form of consultation is provided for, the decision of the employer, at least in the first instance, is his own.

Notice

Usually no period of notice is required in the case of disciplinary dismissals. However, a dismissal based on incompetence or other non-disciplinary reasons might oblige the employer to afford the employee in question a certain period of notice.

Regular employees, either full or part-time, shall be given three days' notice of dismissal or discharge, or the equivalent pay, except when such dismissal or discharge has been for cause such as insubordination or disorderly or improper conduct.[2]

* * *

It shall be the company's policy to notify the union whenever an employee's discharge is imminent because his work is not satisfactory.[3]

Rights and Benefits Accruing to Employees upon Dismissal

Some collective bargaining contracts provide that employees who are dismissed for non-disciplinary reasons are eligible for certain termination benefits such as severance pay.

Termination wages upon discharge. An employee when discharged for unsatisfactory job performance [as defined below] shall receive a termination wage . . . equivalent to. . . .

Unsatisfactory job performance, including the following :

Failure to perform work in an efficient and workmanlike fashion.

Unsatisfactory accident record ; carelessness or negligence on the job which affects the safety of fellow workmen or which involves avoidable damage to property ; unsafe, unlawful driving.[4]

* * *

A termination allowance shall be paid to a regular or temporary employee whose service is terminated under any of the conditions outlined below :

. . . . . .

(3) As an inducement proposed, or agreed to, by the company to an employee to resign because of inability or unadaptability to perform properly the duties of the job, as distinguished from misconduct.[4]

On the other hand, it is common to find that collective contracts will not allow to employees dismissed for just cause any rights to severance pay or similar allowances that might otherwise attach to a termination

[1] See Bureau of National Affairs : *Basic Patterns in Union Contracts*, 4th edition (Washington, D.C., 1957), p. 40:4.

[2] *Collective Bargaining Provisions : Discharge, Discipline, and Quits ; Dismissal Pay Provisions*, op. cit., p. 13.

[3] Ibid., p. 12.

[4] U.S. Department of Labor, Bureau of Labor Statistics : *Collective Bargaining Clauses : Dismissal Pay*, Bulletin No. 1216 (Washington, D.C., 1957), p. 12.

of the work relationship. This is especially so where the just cause stems from misconduct on the part of the employee.

An employee discharged for cause forfeits all rights to and is not eligible for a service award.[1]

* * *

Dismissal pay need not apply to an employee discharged for dishonesty or in case of self-provoked discharge for the purpose of collecting dismissal pay.[1]

However, this usually does not affect the employee's eligibility for state sponsored unemployment benefits or for benefits arising out of welfare or pension plans to which the employee has either contributed or which contain " vesting " provisions.[2]

Special Cases

With regard to certain categories of employees or given circumstances, special procedures are applied in the area of dismissal and lay-off.

Union Activity

Under the terms of the Labour-Management Relations Act of 1947 it is an unfair labour practice for an employer to predicate a dismissal upon union activity or adherence on the part of employees.[3] Pursuant to appropriate procedures, if it is found that the dismissal was indeed so predicated, then the employer is obligated to reinstate with back pay the affected employee.[4] However, the Act does not protect activities such as instigating or taking part in unauthorised strikes or slowdowns. And a showing of such activities, usually being in violation of no-strike clauses in collective agreements, can support a dismissal in the arbitration process.[5]

Super Seniority

Further, with regard to union activity, it should be noted that many contracts provide so-called " super seniority " for union officials (union office holders, shop stewards, committee men, etc.). By virtue of this super seniority such employees are placed at the top of their seniority grouping and hence would be the last to be laid off.

Bargaining committee members and union officers shall head the plant seniority list. Stewards shall head the seniority lists in their respective zones. The above shall be continued at work as long as their constituents are working providing they are qualified to do the work available.[6]

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[1] *Collective Bargaining Clauses : Dismissal Pay*, op. cit., p. 13.

[2] Certain welfare and pension plans provide that vesting provisions are inapplicable where an employee is dismissed for misconduct.

[3] Section 8 *(a)* (1).

[4] Section 10 *(c)*.

[5] See " Considerations in Discharge Cases ", op. cit., p. 688.

[6] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 19.

Top company seniority for the purpose of lay-offs and restoration of forces shall be granted to local union officials at each plant on the following basis :

(1) The local union executive board (not to exceed 12) and one union representative for each 100 employees in the bargaining agency of the local union. Each local union will provide works management with a certified list of such union officials. The total number so certified shall not be changed oftener than every six months.

(2) The top company seniority provided in the foregoing shall be applied in the department in which the employee works.

No such seniority shall be exercised unless the union official is capable of doing a job which is available in his department.[1]

Super seniority is sometimes also afforded to key personnel.

Notwithstanding the [seniority] provisions . . . in the event of lay-offs due to a general reduction in force caused by curtailment of production, the company shall have the right, with the consent of the union, to retain for jobs employees who, by reason of their experience and ability, are needed for such jobs, regardless of seniority, and to re-employ employees who, by reason of their experience and ability, are needed for such jobs, regardless of seniority.[2]

* * *

Employees who, because of special training or ability, are essential to the efficient operation of the plant may be retained, transferred to other departments, or rehired if laid off, regardless of the [seniority] provisions . . . provided such employees are placed on jobs making use of such special training or ability.[2]

Military Service

Special consideration is also given to employees who are forced to leave their jobs when called into military service. Federal law [3] provides that, upon the conclusion of their military service, these employees shall be reintegrated into the work force of the undertaking in which they were previously employed. Further, upon re-employment they are entitled to as full rights with regard to such matters as seniority as they would have had if they had never left their employment. Additionally, many collective bargaining contracts supplement the military service provisions of the federal law in providing additional protection and benefits to affected employees.

Employee Redress : Grievance and Arbitation

In the event that a given lay-off or dismissal is considered by the union to violate the terms of the collective bargaining contract, the employer's action is almost always subject to challenge under the grievance and arbitration procedures provided for in the contract. Typically these provisions afford to a party aggrieved by an alleged breach of

[1] *Collective Bargaining Clauses : Lay-off, Recall, and Work-Sharing Procedures*, op. cit., p. 20.

[2] Ibid., p. 19.

[3] Title 50 App., United States Code, sections 459 *(b)*, 459 *(c)* (Universal Military Training and Service Act).

the agreement a means of recourse whereby the grievance is discussed by union and management representatives at various levels within the undertaking. It should be emphasised that whether the grievance concerns a single employee or many employees, it is processed by the union. And this holds true even where the employee or employees concerned are not members of the union. This would seem to be a concomitant to the above-mentioned [1] legal status of the union as the bargaining representative of all employees, both union and non-union. In the event that the question is not settled at any of the steps within the grievance procedure, most collective contracts provide for final recourse to binding arbitration.

However, it should be noted that arbitration in the United States is not compulsory. But if arbitration is agreed to by the parties, such agreement will be enforced by the courts.[2] This means that where a party refuses to submit to arbitration pursuant to the terms of a collective bargaining contract, the other party may petition the courts for an order directing the recalcitrant party to proceed to arbitration. The court will then examine the arbitration provision and other parts of the collective contract. If the court concludes that arbitration is appropriate under the terms of the collective contract, an order will be issued directing arbitration. Non-compliance with such a court order could subject the non-complying party to severe sanctions, i.e. contempt of court, which could involve a fine and even imprisonment. Furthermore, refusal to comply with arbitral awards could result in similar procedures and sanctions.

Arbitration is thought of as an alternative to either strikes or lockouts as a means of enforcing the terms of the agreement and hence usually exists side by side with a " no strike " (and " no lockout ") provision. It should be emphasised (as may be noted from the quoted clauses) that arbitration clauses virtually always limit the issues to be arbitrated to those arising out of the interpretation of the contract. Concomitantly the arbitrator is limited, in rendering his decision, to the terms of the contract. In other words, it is not any issue that can be brought to arbitration but only one related to an alleged breach of a contractual provision. Similarly the arbitrator is not at liberty to render his award on the basis of his own concepts of fairness, equity or any other criteria. His sole criterion must be the contract and his interpretation thereof.

Any dispute, claim, grievance, or difference arising out of or relating to this agreement shall be submitted to arbitration upon written notice of either party to the other party ; *Provided, however,* that the procedure set forth in XII [Grievance Procedure] has first been exhausted, where that is applicable. The parties agree to abide by the award, which shall be final and binding.[3]

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[1] See p. 66 above.

[2] Both agreements to arbitrate and arbitral awards are enforceable under state law in many states. Further, a recent Supreme Court decision (*Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957)) has held that agreements to arbitrate may be enforced under section 301 *(a)* of the Labour-Management Relations Act of 1947.

[3] U.S. Department of Labor, Bureau of Labor Statistics : *Collective Bargaining Provisions : Grievance and Arbitration Provisions,* Bulletin No. 908-16 (Washington, D.C., 1950), p. 85.

The arbitrator's authority shall be limited to matters involving the interpretation and application of the provisions of this agreement. The arbitrator may not modify, amend, or add to the term of this agreement.[1]

Lay-off and Recall

In the event that it is claimed that the employer has not followed the contractual procedures related to lay-offs, the union may file a grievance under the grievance procedures. The grievance is then processed through the various steps and, if not settled, may be taken to arbitration. In the arbitration procedure, as well as during the grievance procedure, the employer's judgment as to the decision to lay-off may not usually be challenged. It is only the manner in which the lay-off was effected (compliance with seniority and notice provisions, etc.) that may be brought into question. In the arbitration procedure if the employer is found not to have followed the contractual prescriptions, a binding award will be made in favour of the union. For example, if an employee was wrongfully laid off he might be reinstated with back pay for the period during which he was not working. If the notice requirements were not followed it might be ruled by the arbitrator or the arbitration panel that those employees who were laid off must be compensated for the period of inadequate notice.[2]

As with lay-off procedures any departure by the employer from the contractual provisions regulating recall would render him subject to a grievance claim with sanctions as mentioned above.

Dismissal

Employee redress in cases of allegedly wrongful dismissal lies in the fact that the employer's decision to dismiss is subject, in one form or another, to a grievance procedure and, as an ultimate possibility, to arbitration. In cases of dismissal collective contracts sometimes contain provisions that either permit certain of the steps in the grievance procedure to be by-passed or provide for special appeals procedures in order to handle the matter more expeditiously.[3]

When the dismissal is based on disciplinary reasons the issues in controversy are typically whether or not the employee has indeed committed the disciplinary infractions of which he is accused, whether the activities of which the employee is accused constitute just cause and, sometimes, whether the sanction is warranted by the offence. In some contracts the issue of whether the dismissal sanction is too extreme in view of the employee's alleged activities is foreclosed by a provision which states that the nature of the sanction is solely within the discretion of the employer.

Should the grievance over a discharge go to an umpire for final decision, the sole question to be determined by such umpire shall be the question of fact as to whether or not such employee was discharged for proper cause.[4]

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[1] *Collective Bargaining Provisions : Grievance and Arbitration Provisions*, op. cit., p. 89.

[2] It should be noted that contractual provisions for pay in lieu of notice may serve either as a penalty on the employer for failure to give notice or as as a means of allowing to the employer the choice of giving either notice or pay. See " Union Participation in Lay-off Procedures ; Advance Notice of Lay-offs ", op. cit., p. 7.

[3] See *Basic Patterns in Collective Bargaining*, op. cit., p. 40:5.

[4] *Collective Bargaining Provisions : Discharge, Discipline, and Quits ; Dismissal Pay Provisions*, op. cit., p. 18.

If such be the case then the arbitrator (or arbitration panel) is limited in his decision to determining whether the alleged activities have indeed been committed and to whether or not such activities on the part of the employee constitute just cause.

If the arbitrator is not precluded by the contract from examining the question of the severity of the dismissal sanction then that question will frequently be considered. And it is not unusual to find an arbitration award which provides a less severe penalty than dismissal (although it must be noted that some arbitrators, even if not precluded from doing so by the contractual provisions, feel that they have no right to question the severity of the sanctions).

Where the activities of the employee upon which the dismissal is based have not constituted a gross misdemeanour (e.g. theft, etc.), then, of course, considerations such as prior warnings, the past disciplinary and work record of the employee will be taken into account in the arbitral process.[1]

With reference to infractions of plant rules, arbitrators will usually consider whether employees have had notice of the rules, their consistency in application, their reasonableness and often whether there have been prior warnings.

Insubordination is more of a subjective item and arbitrators have often been hard put to it to decide whether a case of insubordination was not merely a clash of personalities between an employee and a supervisor.[2]

If the employee's competency is the basis for the dismissal it is not at all unusual for an arbitrator to call for specific data regarding the employee's work. And it behoves the employer to base his case upon a factual showing, for instance, of the given employee's quantity and quality of work output as contrasted with the norm or the average of his co-workers.[3]

If it is ultimately resolved that the employee has been wrongfully dismissed then the most typical redress is reinstatement with back pay or, if the employee chooses not to be reinstated, then merely a back-pay allowance.

The Arbitration Hearing and Selection of Arbitrators

As regards the arbitration hearing itself the procedure is usually quite informal. Either side may be represented by counsel but in a great percentage of cases attorneys do not appear. Strict rules of evidence such as obtain in a court of law are not looked to in an arbitration hearing. Each side presents its case through witnesses and, often, through written statements or briefs. The arbitrator often takes a more active part in questioning witnesses than would a judge in a legal trial. After the hearing the arbitrator will usually prepare an opinion and award, often taking a number of weeks to reflect on and research the issues and write his opinion (although written opinions are not always rendered).

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[1] It has been commented that these considerations will be taken into account by the arbitrator in determining both the culpability of the employee and the harshness of the sanction. See " Considerations in Discharge Cases ", op. cit., p. 684. See also *Discharge for Cause*, op. cit., pp. 37-38.

[2] See " Considerations in Discharge Cases ", op. cit., pp. 684-687 ; also *Discharge for Cause*, op. cit., pp. 9-51, 58-70.

[3] See " Considerations in Discharge Cases ", op. cit., p. 685.

The selection of the arbitrator rests essentially with the parties. He might be a permanent arbitrator designated by name or position in the collective bargaining contract itself. Alternatively, the contract may outline a method of selection.

In the event that any and all disputes, disagreements, controversies, or misunderstandings of any kind or character shall not have been satisfactorily settled within two (2) weeks after the initiation of conferences under clause 2 of this section, the matter shall be referred to an impartial arbitrator to be appointed by mutual agreement of the parties.[1]

* * *

Whenever it becomes necessary to select an arbitrator to hear and determine an arbitrable grievance or group of such grievances arising at the works covered by this agreement, the parties shall arrange a meeting for the purpose of making such selection. They shall first endeavour to agree upon such selection but if no agreement is reached they shall proceed forthwith to make the selection through a process of elimination. From the list of three (3) names appearing in section 11 next above, they shall alternate in striking one name. The opposing party (that is to say, the party which is not carrying the grievance to arbitration) shall strike the first name which is stricken and the moving party (that is to say, the party which is carrying the grievance to arbitration) shall strike the second name to be stricken. The name remaining shall represent the arbitrator to hear and determine such grievance or group of grievances.[2]

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[1] *Collective Bargaining Provisions: Grievance and Arbitration Provisions*, op. cit., pp. 98-99.

[2] Ibid., p. 99.