EMPLOYEE MISBEHAVIOUR IN AUSTRALIA: THROUGH THE LENS OF UNFAIR DISMISSAL ARBITRATION

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ABSTRACT

This thesis delves into the most contentious aspect of the power dynamics in the employment relationship: managerial prerogative to dismiss an allegedly misbehaving employee in order to maintain business viability, against the employee's right to respectful, dignified and just treatment; and to remain within the employment relationship. Central to this thesis is the concept that workers can appeal management's treatment of them, by pursuing an unfair dismissal claim through to binding arbitration. This thesis advances scholarship about the influences of the misbehaviour act itself, the worker's explanation for such behaviour and the managerial dismissal process, on the arbitration decision. It also informs scholars about a range of personal and demographic characteristics pertaining to the worker, the employer and the arbitrators themselves, that moderate these influences.

Methodology: Using a quantitative research method, 565 misbehaviour-related, unfair dismissal arbitration decisions made by Australia's federal industrial tribunal between July 2000 and July 2010 were examined. This accounted for *all* misconduct-related dismissals *arbitrated* during that period. Through a content analysis, each tribunal decision was converted to count data for analysis using logistic regression.

Theoretical advancements: This investigation produces a model of misbehaviour-related, unfair dismissal arbitral-decision making that successfully infuses **employee deviance** theory founded in organisational behaviour scholarship, with theories on **arbitral decision-making** in the industrial relations setting (Bemmels 1988a, 1988b, 1990a, 1990b, 1991a, 1991b; Chelliah & D'Netto 2006; Gely & Chandler 2008; Nelson & Kim 2008; Ross & Chen 2007). A major discovery is that the **employee deviance typology** (Bennett & Robinson 2000), which was verified for measuring employee deviance by organisational behaviour scholars (Stewart et al. 2009), also provides a suitable framework for categorising any variety of employee misbehaviour acts to measure their influence on disciplinary actions directed at workers in an industrial relations context. Further theoretical insight occurred in relation to the concept of a 'conflated rationale' within the **employee explanation typology** (Southey 2010) which was successfully incorporated as an influential factor in the arbitral decision-making model. The impact of the quality of the employer's actions in administering a dismissal on the arbitration decisions demonstrated consistency with the **theories of distributive, procedural and interactional justice** (Brown, Bemmels & Barclay 2010; Greenberg 1990; Rawls 1972, 1999) with the added insight that distributive justice appears to have a stronger emphasis on the determination of arbitration decisions, followed closely by procedural and interactional justice.

Broad theoretical insights were further collected in relation to **attribution theory** whereby the investigation did not support the contention that externally-attributed causes (explanations involving workplace-related triggers for the behaviour) would be the most successful defence for a worker. The investigation corroborated **exit-voice theory** (Budd & Colvin 2008; Hirschman 1970; Luchak 2003) within the arbitral decision-making context, clearly indicating that workers benefit most when they use a third party advocate to represent their 'voice from without' following their ejection from the employer-employee relationship. Also corroborated by the results of the research was the **award orientation theory** (Crow & Logan 1994) which is the extent to which an arbitrator determines decisions that either favour management or the union, on the premise that people have a subliminal preference for the

philosophical stance of either union or management. The findings also have implications for the gamut of **gender theories** (Cooper 1997; Hartman et al. 1994; Luthar 1996; Moulds 1978; Staines, Tavris & Jayaratne 1974) used to deduce hypotheses about the interacting influence of the arbitrator's gender and applicant's gender.

Findings: Major findings of the analysis are that aggressive acts against individuals influence the arbitrators to sustain the employer's punishment more so than property related misdeeds; suggesting people are valued over property. Workers who provided explanations for their behaviour that canvas two, and particularly three themes – addressed in Southey's typology as a 'conflated rationale' – destabilises the worker's explanation to the point that arbitrators are more likely to sustain the dismissal. Further, the arbitral decision-making process is a stepped process demarcated by the arbitrator's initial assessment of the employer's respect for distributive justice when choosing dismissal as a disciplinary action. To this end, a previous misbehaviour incident recorded against the worker improves the employer's justification to dismiss. However, misjudgements in distributive justice see arbitrators reversing the dismissal. If distributive justice is appropriate, arbitrators assess, next, the employer's application of procedural justice when performing the actual dismissal of the worker. Unlike distributive justice, arbitrators exhibit a small amount of tolerance for errors in procedural justice. In particular, heinous offences have potential to offset the employer's obligation to offer a worker time to respond to an allegation.

To improve their chance of a favourable arbitration decision, Australian workers should use either legal counsel or union advocates to present their claim to the arbitrators, yet employers are unlikely to receive similar advantages if they rely on advocacy services. Workers are supported most effectively by union delegates *before* the actual dismissal, rather than seeking this support from colleagues, friends or family. Save for women in managerial and professional work, a positive bias towards women workers, in general, appears to be at play. Workers with longer service periods, workers from the private sector and those with lower skill sets can anticipate tougher arbitration outcomes compared to workers with shorter service periods, those dismissed from the public sector, or those in higher skilled occupations. Finally, as arbitrators determine more unfair dismissal decisions they become more likely to support the employer's decision to dismiss a worker. And it appears arbitrators may be influenced by predispositions reflected in their previous employment with either employer or union organisations.

Practical implications: A range of policy and practical implications arise from the findings. Some of these implications include: developing a national policy to reduce personally aggressive behaviours by promoting workplace cultures that reinforce the societal intolerance for personally aggressive acts. Improving public perceptions of tribunal neutrality via the annual publication of arbitration decision metrics for each tribunal member according to the type of claim and whether it was upheld or overturned. As advocacy offers benefits at the arbitration table, a policy of tribunal appointed advocates being made available for workers and employers that meet a set of hardship criteria, could improve the utility of the tribunal services. And finally, if the misbehaviour constituted production deviance, political deviance or property deviance *and* no other recorded occurrence of misconduct exits on the employee's record, all parties may be best served if management avoid immediate dismissal and instead issues a written warning to the worker.

CERTIFICATE OF DISSERTATION

I certify that the ideas, work, analyses, results and conclusions reported in this dissertation are entirely my own effort, except where otherwise acknowledged. I also certify that the work is original and has not been previously submitted for any other award, except where otherwise acknowledged.

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Professor Ronel Erwee, Principal Supervisor — Date

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Dr Dennis Rose, Associate Supervisor — Date

DEDICATION

- For the daughters in the world -

&

- Lorraine Maud Zeller -
(1942-1988)
my beautiful mother

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Refereed journal articles

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Southey, Kim (2010) A typology of employee explanations of misbehaviour: an analysis of unfair dismissal cases, *Journal of Industrial Relations, 52 (1)*, Sage Publications, pp. 81-102.

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CHAPTER 1

INTRODUCTORY CHAPTER

1.0 Introduction

The fiercest sanction which backs up managerial authority to direct the workforce (is) the power of dismissal.

H. Collins, 'Justice in Dismissal', 1992

It is an extraordinary situation in a free society for one individual to have the legal right to impose punishment on another in what amounts to a private system of justice.

H. Wheeler and J. Rojot, 'Workplace Justice', 1992

The opening quotes recognise the superior power of employers in the employment relationship and their ability to impose the severest penalty on employees that misbehave – terminate the employment relationship. The extremity of the decision to terminate a worker was recognised by Haiven (1994, p. 79), who equated the act of dismissing an employee to that of an employer executing 'industrial capital punishment'. To offset the employer's power, an employee may be in a position to allege an unfair dismissal and involve a third party arbitrator to resolve the claim. This leads to the purpose of this thesis, which is to identify influences on arbitral decision-making over unfair dismissal claims from workers who have been terminated from their employment due to misbehaviour. This purpose is achieved by examining arbitration decisions by members of Australia's federal industrial tribunal when they determine such claims.

The reason for this thesis is to develop an understanding of the influences on arbitral decision-making in the Australian context, to inform workers, unions, employers, industry and political bodies about the effect that employee misbehaviour has on the arbitrator's expectation that the employer should maintain the employer-employee relationship. At its foundation, this thesis extends our knowledge of the attributes influencing the arbitration decisions beyond those prescribed in present arbitral decision-making models by Nelson and Kim (2008), Gely and Chander (2008), Ross and Chen (2007), Chelliah and D'Netto (2006) and Bemmels (1990a, 1991a, 1991b).

The value of this thesis is twofold – theoretically and practically. Theoretically, it advances employee misbehaviour and arbitral decision-making theories particularly in relation to how the type of misbehaviour, the employee's explanation for such behaviour and the employer's dismissal process, influences the arbitration outcome. From a practical perspective, this thesis informs stakeholders in the employment relationship about factors at play which tend to make dismissal either more or less appropriate as a method to address employee misbehaviour. In addition, new insights about the performance of the arbitral decision-making operations by Australia's national industrial tribunal may be of interest to industry bodies, employers, unions, legal firms, consultants and political parties.

The author's curiosity to pursue this research topic arose over a decade ago during a period of professional practice involving the investigation, counselling and discipline of employee transgressions, some of which resulted in conciliation conferences and one of which resulted in an arbitration hearing for unfair dismissal. Moving beyond this preliminary inspiration, in this thesis, the author draws upon organisational behaviour theories and arbitral decision-making theories to design a model. This model provides for statistical analysis concerning the unfair dismissal arbitral decision-making process in relation to situations where an employee's misbehaviour was considered so serious that he or she was dismissed from the workplace.

1.1 Background to the research

To consider first the employee misbehaviour aspect of this thesis, it is known that frontline employees through to executive managers are capable of behaving in a destructive way that is injurious to themselves, co-workers, or the organisation as a whole (Baron & Neuman 1996; Bennett & Robinson 2000; Griffin & O'Leary-Kelly 2004). For example, when individuals attend work under the influence of alcohol or drugs or do not wear appropriate safety gear on the job, they put primarily *their own* welfare at risk. Alternatively, individuals can cause harm or distress *to co-workers* through acts of verbal abuse, anger, physical violence, gossiping, bullying and harassment. Actions of this nature are classified as 'interpersonal deviance' (Robinson & Bennett 1995). Further still, an individual can cause harm *to the wider organisation* by engaging in behaviours such as working slow, theft, sabotage or

destruction of company property. This type of behaviour is classified as 'organisational deviance' (Robinson & Bennett 1995). Chapter 2 contains an analysis of scholarship describing employee misbehaviour with a view to deriving a definition of misbehaviour for this thesis.

In relation to the unfair dismissal arbitral decision-making aspect of this thesis, it is known that a variety of factors influence the likelihood of whether an arbitrator will award some form of remedy to a dismissed worker. Models by Nelson and Kim (2008), Gely and Chandler (2008), Ross and Chen (2007), Chelliah and D'Netto (2006) and Bemmels (1990a, 1991a, 1991b) considered a range of elements affecting arbitration cases pertaining to unfair dismissal. Chapter 3 contains a discussion of these models. However, these models have not yet considered the influence of the type of misbehaviour committed by the employee and the employee's subsequent explanation for his or her behaviour on the arbitrator's decision. Chapter 4 discusses the results of piecemeal research on potential influencing factors in the arbitral decision-making process which will inform hypothesis development for statistical analysis.

Whilst the research problem seeks insights about misbehaviour within an unfair dismissal, arbitral decision-making context - which immediately associates the problem with industrial relations - this thesis 'borrows' theoretical constructs from the organisational behaviour literature (Strauss & Whitfield 1998, p. 22) to examine the elements of arbitral decision-making. The use of organisational behaviour theory in deductive industrial relations research – as occurs in this thesis - is being used increasingly in industrial relations research (Strauss & Whitefield 1998). This thesis uses the following organisational behaviour related theories to explore areas of influence on arbitrators when determining unfair dismissal claims: the employee deviance typology (Robinson & Bennett 1995); and the employee explanation typology (Southey 2010b); retributive justice (Mahony & Klass 2008); Heider's attribution theory (Martinko 1995); cognitive bias (Tversky & Kahnemann 2000); exit/voice (Cappelli & Chauvin 1991; Hirschman 1970); gender effects (Bemmels 1991b; Eveline 2005; Nagel & Hagan 1983); organisational justice (Brown, Bemmels & Barclay 2010; Greenberg 1990); and formal/informal human resource management (Earnshaw, Marchington & Goodman 2000; Kotey & Slade 2005).

1.2 The research problem and research questions

This thesis is designed to improve our knowledge about how employee misbehaviour is tolerated by arbitrators when dismissed workers seek recourse through Australia's industrial arbitration process. As such, the objective of this thesis is:

> ***To identify factors influencing the arbitral decisions of members in Australia's federal industrial tribunal when they determine unfair dismissal claims from workers who have been terminated from their employment due to 'misbehaviour'.***

A distinctive feature of industrial relations research is that it aims to understand socially defined problems (Strauss & Whitfield 1998). This thesis deals with the socially defined problem of balancing managerial prerogative to dismiss a misbehaving employee in order to maintain business viability, against the employee's right to respectful, dignified and just treatment when dismissed due to misbehaviour or alleged misbehaviour. Davis (2009, p. 171) states '*if a substantial award of compensation is given when an employee's dignity has been violated, it can be regarded as clear condemnation by society of the employer's behaviour*.' With this in mind, it appears arbitrators' decisions pertaining to misbehaviour in the workplace set the public standard (Donaghey 2006) and reflect societal values (Thornicroft 1989; Wright 2002) for how tolerant employers and unions must be towards employees who engage, or who are believed to have engaged in misbehaviour.

It is contended that an arbitration decision is the product of the arbitrator's predicament of having to balance a range of decision elements (Nelson & Kim 2008) which in this thesis are: the type of misconduct; the worker's explanation for engaging in the behaviour; and the procedural fairness shown towards the employee by their employer during the investigation and dismissal process. To date, there is limited understanding of how industrial arbitrators make their decisions (Bingham 1996; Klass, Mahony & Wheeler 2006) particularly in cases where the employee has been dismissed because of misconduct, and even less so within the Australian context (Chelliah & D'Netto 2006; Southey 2008a). This investigation responds to the call to provide disputing parties with empirical research identifying the factors influencing arbitrators in their considerations of employee petitions against employer

decisions to dismiss them from their job (Blancero & Bohlander 1995). To this end, the research objective will be addressed by means of three major questions and four sub-questions, each seeking insights into the factors at play during arbitration. These questions are:

1.2.1 Research question one

RQ1: ***How does the type of misbehaviour in which the worker engaged influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

The investigation draws from the four categories of employee misbehaviour depicted in Robinson and Bennett's (1995) typology: production deviance, property deviance, political deviance and personal aggression. Chapter 4 contains the hypotheses developed for statistical testing to predict how each of these four categories of behaviours might influence an 'overturn' or 'uphold' decision. The dynamics of retribution theory (Mahony & Klass 2008; Miceli 2003; Zaibert 2006) and the impact of an apology from the worker, service periods and previous offences (Bemmels 1990a; Nelson & Kim 2008) are considered in the development of testable hypotheses for this question.

1.2.2 Research question two

RQ2: ***How does the explanation provided by the dismissed worker influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

The investigation draws from the three categories of employee explanations which employees are likely to call upon to defend acts of misbehaviour, described in Southey's (2010b) typology: workplace related; personal-inside; and personal-outside explanations. Chapter 4 outlines the hypotheses developed for statistical testing to predict how well each of these three categories of explanations might influence an 'overturn' or 'uphold' decision. These hypotheses incorporate the dynamics of process theories pertaining to attribution theory (Leopold, Harris & Watson 2005; Martinko 1995) and cognitive bias (Tversky & Kahnemann 2000) in their deduction.

1.2.3 Research question three

RQ3: ***How does the dismissal procedure used by the employer influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

Chapter 4 outlines the hypotheses developed for statistical testing which are informed by two primary sources. First, Blancero and Bohlander's (1995) typology that describes six categories of reasons given by arbitrators for reversing or softening the disciplinary action of management: lack of evidence; ignoring mitigating circumstances; too severe punishment; lack of due process; management contributed to the conduct; lax or inconsistent policies. Second, the validity and procedural justice demands contained in Australia's Federal industrial legislation by which arbitrators in the federal tribunal must abide. It is suggested both these sources reflect the dynamics of process theories pertaining to distributive, procedural and interactional justice (Folger & Skarlicki 1998; Greenberg 1990; Greenberg & Alge 1998; Greenberg & Baron 2007).

1.2.4 The sub-research questions

The four sub-questions consider moderating variables that potentially influence the arbitration decision. These sub-questions are:

Sub-question (a): *Is the arbitration decision influenced by the presence of expert advocates representing the parties?*

Chapter 4 contains the hypotheses developed to consider whether the arbitration decision is affected by the presence or absence of advocates to represent the employee's unfair dismissal claim and/or the employer's defence. These hypotheses incorporate the dynamics of exit/voice theory (Hirschman 1970) in their deduction.

Sub-question (b): *Is the arbitration decision influenced by characteristics of the dismissed worker?*

Chapter 4 contains hypotheses to test for moderating characteristics about the worker that may influence the arbitrator's assessment of the unfair dismissal claim. These potential moderating variables reflect previous research into arbitral decision-making

pertaining to the worker's: gender (Bemmels 1990a; Southey 2008b) and occupational skill level (Cappelli & Chauvin 1991; Caudill & Oswald 1992; Southey 2008a).

Sub-question (c): *Is the arbitration decision influenced by characteristics of the arbitrator?*

Chapter 4 also contains hypotheses in relation to the moderating effects of characteristics about the arbitrator that may influence his or her assessment of the unfair dismissal claim. These potential moderating variables are selected on the basis of previous research in arbitral decision-making pertaining to the arbitrator's: gender (Bemmels 1990a); experience and award orientation (work background) (Bemmels 1991a; Bingham & Mesch 2000; Crow & Logan 1994; Nelson & Kim 2008; Southey & Fry 2010).

Sub-question (d): *Is the arbitration decision influenced by characteristics of the employer?*

Finally, Chapter 4 contains hypotheses considering potential moderating characteristics about the employer that may influence the arbitrator's assessment of an unfair dismissal claim. The characteristics identified in the arbitral decision-making literature include: the presence of human resource management expertise and use of formal disciplinary processes which can be a reflection of the size of the employer's business (Earnshaw, Marchington & Goodman 2000; Kotey & Slade 2005; Mazzarol 2003); the type of industry in which the business operates (Head & Lucas 2004; Klass, Brown & Heneman III 1998); and whether it is a public or private sector operation (Boyne et al. 2010; Kirschenbaum, Harel & Sivan 1998).

1.2.5 The conceptual model

Figure 1.1 is a conceptual model depicting the dependent variable as the 'arbitration decision'. It also depicts the three main research questions, each addressing a separate independent variable and the four sub-questions, each addressing a set of moderating influences on the dependent variable. This conceptual model shows that an arbitration decision about the dismissal of employee due to misbehaviour, is a function of the type of employee behaviour, the employee's explanation for such

behaviour, and the process used by the employer to dismiss the worker. Chapter 4 contains a thorough explanation of the dynamics of this conceptual model.

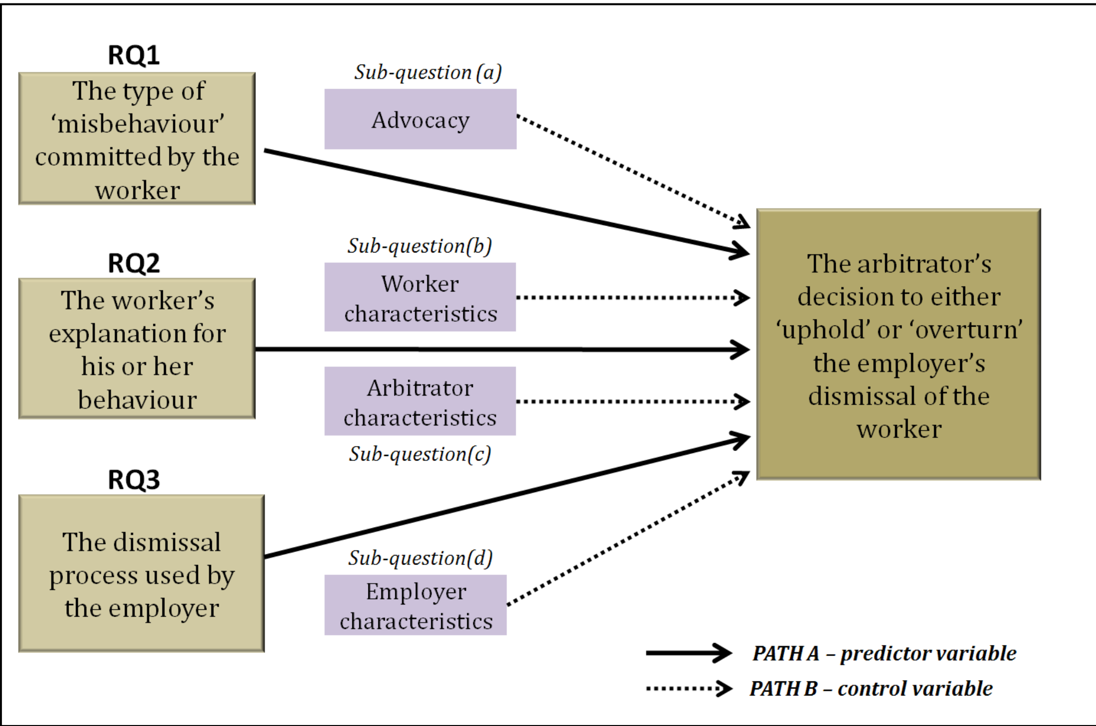


Figure 1.1 *Conceptual model of the arbitral decision process regarding unfair dismissal claims from workers dismissed due to misbehaviour*

(*Source:* Developed for thesis)

1.3 Assumptions underpinning this study

The first major assumption influencing this thesis pertains to the unitarist and pluralist ideologies that exist within the choices employers make when managing their industrial relations (Ross & Bamber 2009). Unitarism and pluralism (Fox 1971) describe competing IR philosophies that underpin how employers and workers approach the employment relationship.

To explain further, human resource or organisational behaviour experts might view it as an employer's prerogative to dismiss a worker if the employer decides the worker behaved in a manner so serious that the employer no longer wanted to provide a job to the worker: '*the decision to terminate for a particular reason (or no reason) ... is a private right exercised pursuant to contract'* (Donaghey 2006, p. 6). This management prerogative and ejection of a 'dishonourable employee' (Watson 2008,

p. 214), reflects a unitary frame of reference towards the employment relationship which is generally adopted by human resource management and organisational behaviour scholars. The unitarist ideology in the workplace context values the existence of a common interest between management and workers, and aims to avoid fundamental conflicts of interest (Fox 1971). Further, it is management (or employers) that have the power to decide how to best serve this common interest. Generally, those with a unitarist perspective would advocate that arbitration tribunals are an unnecessary means of resolving conflict between employers and employees (Harley 2004, p. 320).

Opposite to the unitarist view is the pluralist ideology of 'loyal opposition' and is generally adopted by industrial relations scholars (Watson 2008). Pluralists view the relations between workers and employers as one of:

> ... structured antagonism .. in the sense that no matter how harmonious their relations, there is always a latent conflict between them of pay, working conditions and other terms of employment ... conflict is an inherent feature of the employment relationship that is caused by the nature of the relationship rather than by the institutional arrangements regulating it (Harley 2004, p. 320).

A major assumption of industrial relations theory is the conflict of interest between workers and employers in the employment relationship and that these parties, with varying priorities, agree to collaborate in social structures that can facilitate their bargaining positions (Dabscheck 1983a; Kochan 1998). Although employers have the right to establish rules of conduct, when it comes to exercising their rights to punish transgressions by employees via dismissal, the pluralist mechanism would advocate that when '*management acts the union reacts'* (Blancero & Bohlander 1995, p. 618). Unfair dismissal arbitration caters for the union reaction - or pluralist response - by providing an avenue for the dismissed worker to seek a hearing on his or her dismissal with a neutral third party. In Australia, it is not a voluntary process whereby the employer can elect whether or not to respond to the claim. Instead, the unfair dismissal conciliation and arbitration processes summon the employer to justify its decision to dismiss the worker.

Therefore, the significance of these two perspectives for articulating the research problem is that the dismissal of a transgressing worker pits a typically unitarist action

taken by an employer against a mechanism of a pluralist framework, that is, regulation of the employer's action through arbitration by an industrial tribunal.

The second major assumption of this thesis is that the positivistic paradigm and quantitative methodology used in this research, will result in a pragmatic, 'positive' model, as opposed to an ideological, 'normative' model (Posner 1984), of the unfair dismissal arbitration process in relation to misconduct as it is occurring in Australia. This research will measure what is happening in workplaces and arbitration hearings, as drawn from arbitration documents, so that we have a picture of 'where we are' as opposed to 'where we ought to be' (Dabscheck 1999, p. 16) in our dealings with employee misbehaviour and dismissal. This positive model provides a sound reference point for discussion about normative models of managing the impact of misbehaviour on the employment relationship. At the same time, the statistical model developed provides knowledge about how arbitrators are likely to respond to different misbehaviours and the subsequent process followed by employers in dismissing a worker. Whilst this study has an underlying positive assumption, paradoxically it at times examines normative statements by arbitrators in the form of their 'value judgements' about what should have, or should have not happened during the investigation and dismissal process.

A third assumption of this thesis follows in the tradition of Dabscheck's (1983b) analysis of the arbitral decisions by Sir William Kirby, where it is assumed that the sentiments written in the decisions investigated in this study are accurate reflections of the arbitrators' beliefs at the time of recording their decisions, meaning '*the real reasons and motivations for (his) decisions were not hidden from public view'* (Dabscheck 1983b, p. xii). In this thesis, the integrity of the unfair dismissal decisions that have been documented by the arbitrators is not under question. This thesis examines the 'value judgements' of arbitrators (Dabscheck 1983b). Thus it is essential to assume that each decision is a credible account of the arbitrator's genuine position. Though, having stated this assumption, *it has not prevented* the consideration of whether bias exists among the arbitrators. For instance, the concept of 'unconscious prejudice' contends that bias is not obvious to the perpetrator, and can exist in spite of the decision maker believing they are not prejudiced (Mason 2001).

A fourth assumption, related to the third assumption, is that arbitrators' decisions are 'rational' decisions. Rational decisions are those which are consistent and where the most beneficial option is selected within specified constraints (Robbins, Millett & Waters-Marsh 2008, p. 151). This definition permits one to consider that 'rational' decisions would also be 'consistent' decisions. The importance of assuming that the arbitrators make rational decisions is that it supports the author's pursuit of the positivistic 'measurement' of arbitral decision-making by finding the commonalities in how arbitrators respond to termination of an allegedly misbehaving worker's employment, within the legislative constraints in which arbitrators operate.

Finally, a note is to be made about the broad economic framework that is assumed to exist in the background of this thesis. It is assumed that the employment practices and dismissal processes of interest in this thesis occur within the context of a 'competitive market economy' or 'developed market economy' (Bamber, Lansbury & Wailes 2004). A competitive market economy describes those countries where the demand for goods and services by consumers is balanced against the supply of goods and services by producers and where the price paid is independently determined (Arrow & Debreu 1954). To apply this theory to the workplace setting, it assumes employers (the buyers of labour) aim to maximise their investment in their staff resources and the employees (the sellers of labour) are incentivised to give their best effort. As there are many buyers and sellers of labour in the labour market, no *single* entity controls the price and conditions of labour or the supply of labour.

Also implicit in this thesis is that the dismissal practices under examination occur in a country competing in the global economy. Labour market efficiency and institutional involvement (along with a range of other societal components) improve the level of a country's global competitiveness (World Economic Forum 2010) and positive ambitions in these areas is assumed in this thesis. Labour market efficiency, which in part is 'the ability to shift workers rapidly and at low cost' (World Economic Forum 2010, p. 7), is reflected in this thesis' interest in an employer's decision to dismiss an employee whose behaviour is assessed as a threat to the business. Institutional involvement is reflected in an industrial tribunal's arbitration of unfair dismissal claims, fettering the freedom of employers to manage their business as they see appropriate. Government interventions need to be sound and fair

as they can impose additional costs to business and slow economic development if their interactions are bureaucratic, over-regulated or, in the worst case, corrupt (World Economic Forum 2010). Thus, in the background of this thesis, it is assumed that an efficient and flexible labour market is a national goal, supported by government policy and institutions geared towards positively influencing competitiveness and growth.

1.4 Justification for the research

The employment relationship is a central focus for investigators in industrial relations, industrial psychology, industrial sociology, labour law, human resources management and labour history (Wheeler & Rojot 1992). Therefore, '*improving our understanding of the fundamentals of this relationship could be useful for any and all of these fields*' (Wheeler & Rojot 1992, p. 3). It appears that limited research exists on what happens to the employee-employer relationship after an employee engages in misbehaviour. Research that has occurred has focused on the impact of misbehaviour on: individual employees (Hershcovis & Barling 2010); group cohesion (Wellen & Neale 2006); and business unit performance (Dunlop & Lee 2004). This study recognises the breakdown of the employer-employee relationship that occurs due to acts of misbehaviour, and subsequent restorative efforts made by a third party. It is in this capacity that this study advances our understanding of the employer-employee relationship. This is an investigation that links the employee deviance literature with the arbitral decision-making literature.

Employee misbehaviour is a reality for Australian workplaces. For example, the Australian Bureau of Statistics reported that 56,900 (9.1 percent) of male-perpetrated physical assaults had occurred in the workplace in the preceding 12 month period, and further, that 13,700 (20.6 percent) of female to female physical assaults happened in the workplace (ABS 2005b). In the Australian Public Service, 17 percent of staff surveyed reported they had been victims of harassment or bullying by colleagues in the previous 12 months (Australian Public Service Commission 2009). Meanwhile, small businesses in the retail sector where found to be incurring 64 incidents of employee theft and 8 incidents of employee fraud for every 100 businesses surveyed (Taylor & Mayhew 2002). And as a final example, the impact of

alcohol consumption on productivity related costs for Australian businesses was estimated to be $3.6 billion in 2004–2005, with six percent of workers attending the workplace, at least once, under the influence of alcohol, according to the 2004 National Drug Strategy Household Survey (Australian Drug Foundation 2009; Pidd & Roche 2009).

Specifically, this research contributes new knowledge on several fronts: theoretically, methodologically, practically, politically and internationally. Each of these contributions is explained next.

The major theoretical advancements occur in the areas of organisational behaviour theory related to employee deviance, and industrial relations theory on arbitral decision-making. Typically the focus of research into employee misbehaviour has been concerned with, first, describing different types and contexts of misbehaviours, for example, identifying behaviours considered deviant (Bennett & Robinson 2000; Hollinger & Clark 1982; Robinson & Bennett 1995), expressing anger in the workplace (Domagalski & Steelman 2005), doing personal business at work (D'Abate 2005), sexual harassment perpetrators (Lucero et al. 2003), incivility between workers (Montgomery, Kane & Vance 2004) and absenteeism among salaried professionals (Raelin 1986). Secondly, other misbehaviour researchers have focused on isolating individual and organisational antecedents of misbehaviour, for example, sabotage in the service industry (Harris & Ogbonna 2002), power as a trigger to deviant behaviour (Lawrence & Robinson 2007), and work practices influencing deviant behaviour (Domagalski & Steelman 2005; Leck 2005; Litzky, Eddleston & Kidder 2006).

This thesis breaks from these common tracks of research and contains work that contributes, first, to our theoretical understanding of the *explanations* employees provide in defence of their misbehaviour. It appears this is an area of research that has not yet been investigated by other researchers. It is noted that the author’s conceptual work on employee explanations of their misbehaviour, and which forms part of this thesis, was published during PhD candidacy in the Journal of Industrial Relations, 2010. This thesis progresses this descriptive, conceptual model to empirical testing.

Second, this thesis advances theory by presenting a model of misbehaviour-related, unfair dismissal arbitral-decision making that infuses employee deviance theory (Bennett & Robinson 2000, Robinson & Bennett 1995) founded in organisational behaviour scholarship, with theories on arbitral decision-making in the industrial relations setting (Bemmels 1988a, 1988b, 1990a, 1990b, 1991a, 1991b; Chelliah & D'Netto 2006; Gely & Chandler 2008; Nelson & Kim 2008; Ross & Chen 2007). This model furnishes new knowledge as to how different kinds of misbehaviour are tolerated by arbitrators. This is critical knowledge because the impact of arbitration decisions, and the subsequent importance of understanding the arbitration process, was identified by Mills and Dalton (1994, p. 59) in their statement:

> While relatively few cases reach the arbitration level (i.e., most disputes are resolved at an earlier stage), such cases are of immense influence. Arbitration cases are precedent setting. Not only do they provide clear guidance to those who might subsequently pursue a grievance case to this final level, but they also instruct the hundreds of thousands of grievances filed annually.

Importantly, from a pure industrial relations perspective, this research contributes to our understanding of employment arbitration which is "*a challenging field that in many ways is still in its infancy. We are still trying to answer basic questions about the general characteristics of this dispute resolution system*" (Colvin 2009, p. 11).

The methodological contribution of this research responds to the call for organisational researchers to describe organisational and interpersonal deviance using non self-report data (Dilchert et al. 2007; Stewart et al. 2009). Misbehaviour in the workplace is an area of research where the construct being measured is low, base-rate behaviour and often covert, which poses difficulties in sourcing data that is reliable (Ahart & Sackett 2004; Bennett & Robinson 2003; Vardi & Weitz 2004). Much of the research in this area relies on surveys where the respondent records their propensity to engage in specific acts of misbehaviour given a set of circumstances, or to self-report acts of misbehaviour. Researchers cite the need to undertake research into deviance using unobtrusive or non-self reporting data sources in order to reduce non response bias and distortion from self reported data sources (Bemmels & Foley 1996; Dilchert et al. 2007; Griffin & Lopez 2005; Spector 1994; Stewart et al. 2009).

From a political perspective, the rights of employers and employees in termination of employment and the subsequent access for the Australian worker to seek redress for their dismissal was described as a 'political football' since its introduction by the Keating Labor government in 1993 (Forsyth et al. 2008, p. 235). The protection of unfair dismissal rights is an important issue to Australians. This was demonstrated by the protests during the brief but tumultuous WorkChoices era of the Howard government when small business employees (of less than 100 workers) were denied unfair dismissal rights, whilst employers could dismiss a worker for *any* operational reason (Forsyth et al. 2008). Australians value job security and whilst the majority of Australians will not make an unfair dismissal claim, the unfair dismissal conciliation and arbitration processes provides a measure of job security (Peetz 2007).

Wheeler and Rojot (1992, p. 3) assert there is always public interest in justice and in *'employees being free from arbitrary and oppressive treatment, whether at the hand of government or private persons'*. The arbitration of termination of employment processes, as it exists under Australian legislation, *'introduces a measure of public interest to a private right which would otherwise be regulated only by the common law'* (Donaghey 2006, p. 6). This means that employers have the right under contract law to dismiss a worker, yet the just execution of such rights, are judged by Australia's industrial tribunals (primarily Fair Work Australia) thus setting a widely applicable public standard of how employers are to behave toward employees in matters of dismissal. Due to the significance of the unfair dismissal arbitration process to Australians generally, this study contributes knowledge about the influencing factors on unfair dismissal arbitral determinations as it occurs in Australia's federal industrial tribunal. As the data covers a ten year span of decisions, it appears to be the largest study to date on unfair dismissal cases determined by Australia's federal industrial tribunal (the AIRC and FWA). For policy makers engaged in the practical work of making laws, this research identifies the vulnerable and lesser vulnerable workers in Australian workplaces.

From a labour law perspective, Australia's current federal industrial legislation, The Fair Work Act 2009 (which was amended in 2012) (and its predecessor, The Workplace Relations Act 1996) empowers the arbitrator to consider whether a dismissal was 'harsh, unjust or unreasonable'. Notably, the concepts of harsh, unjust

and unreasonable are not defined in either Act, forcing arbitrators (generally known as commissioners) to make difficult assessments on the appropriateness of a dismissal. Consequently, this '*imprecise question tends to allow a degree of subjectivity and impression into the conclusion reached*' (Donaghey 2006, p. 202). The following quote well articulates this issue for Australian arbitrators determining cases of employee misconduct.

> The process of determining whether, in all the circumstances, the Commission will determine that the dismissal was harsh, unjust or unreasonable can be fraught with uncertainty. This uncertainty often arises in cases where considerations of the gravity of an employee's misconduct must be weighed against the conventions of what is often, somewhat misleadingly, referred to as procedural fairness. Such cases are particularly problematic because they involve the further difficulty arising from differences of opinion (between applicants and respondents, as well as between members of the Commission) regarding what sort of conduct constitutes grounds for dismissal (Ronfeldt 1998, p. 24).

This quote highlights the challenge for Australian arbitrators to decipher the facts from the sentiment, ascertain the procedural process, assess the justness of the dismissal according to the severity of the employee's actions, assess the integrity of each party's evidence, whilst anticipating what might be a possible re-assessment of their decision by their colleagues in the case of an appeal. To improve our understanding on these deliberations, the investigation in this thesis presents a model of factors influential in determining a claim.

From an HR/IR practitioner and union perspective, this thesis informs such stakeholders of behavioural issues that may be occurring in the workplace, and whether dismissing the employee is the appropriate response. *'Practically, managers need to know what the law is in order to follow it. Trade unionists and other worker representatives need this knowledge in order to insist effectively on lawful behaviour by managers'* (Wheeler & Rojot 1992, p. 2). This thesis provides these parties with insight into the arbitration outcomes when considering termination or preparing defences for unfair dismissal hearings. Insights will be garnered about the circumstances in which dismissal may be an appropriate or inappropriate response to misconduct. For instance, if a particular type of behaviour or explanation tends to influence the overturning of the employer's decision, it may be more appropriate to manage the misbehaviour in ways other than termination such as job reassignment or

training. Alternatively, if a particular behaviour or explanation is regularly upheld by the arbitrator as an offence worthy of termination, it may confirm dismissal as a reasonable approach to managing misconduct by employees.

At an international level, Wheeler and Rojot (1992) noted that the challenge of effectively dealing with justice issues in the employment relationship increases exponentially as both business and labour cross national boundaries in the global economy. This thesis provides a reference source about Australian arbitral assessments of employee unfair dismissal claims as a basis for international comparison. The body of evidence from one country can provide guidance for other countries.

1.5 Methodology

The research reported in this thesis is both exploratory and descriptive in nature. Exploratory research occurs where there are very few previous studies for which to refer on the matter under investigation (Collis & Hussey 2003). In this thesis, the interest lies in identifying whether there are particular types of misbehaviour, and whether there are particular types of explanations for engaging in misbehaviour, associated with favourable or unfavourable arbitration decisions for the dismissed employee. Whilst previous research has been conducted into arbitral decision-making, there is little that has occurred on it that takes into account the influence of a range of misbehaviours or employee defences. This research then progresses beyond an exploratory focus to a descriptive focus as it will ascertain a fuller set of variables that influence the unfair dismissal arbitration decisions. Descriptive research identifies the characteristics of particular problem or issue (Collis & Hussey 2003).

The remainder of this section provides a brief introduction to the research paradigm and research process used to investigate the research question. Complete details of the methodology and research process are provided in chapter 5 on ‘methodology’. However, to appreciate the contents of this thesis from the outset, an explicit point is made that this research is underpinned by a positivist or traditional research paradigm. The positivist paradigm is congruent with the overall assumption in this thesis that it presents a ‘positive model’ of arbitral decision-making over unfair

dismissal claims, as opposed to the 'normative model' of what ought to happen when arbitrators determine claims. The 'positive model' assumption was discussed in section 1.3.

The positivist research paradigm has two major design implications in this thesis. First, a positivist researcher collects data in a form that is quantitative, detached and objective, to address the research questions (Collis & Hussey 2003; Leedy & Ormrod 2001). The 2011-12 annual report of Australia's federal tribunal states that it received 14,027 claims from employees dismissed for reasons that included misbehaviour. In the same year, the tribunal resolved 551 cases by arbitral determination as most cases were resolved through or incidental to the conciliatory processes of the tribunal (FWA 2012). This research draws upon the population of misconduct-related unfair dismissal arbitration decisions of the federal tribunal, the Australian Industrial Relations Commission (AIRC) and Fair Work Australia (FWA) between July 2000 and July 2010. (Note, from 1 January 2013, the federal tribunal was retitled to the Fair Work Commission (FWC)). These dates represent the time from which the decisions commenced electronic publication through to the most recent decisions available at the time of collecting the data. With the focus on claims where the employee was dismissed for misconduct, the ten year period yielded 565 arbitration decisions suitable for analysis.

The federal level tribunal decisions of FWA and the AIRC, as opposed to state tribunal decisions, are examined due to their online availability and because the federal tribunal is the predominant tribunal in Australia covering at least 75 percent of the Australian workforce since the Work Choices reforms in 2005 (Stewart 2009, p. 8). The industrial relations labour law methodologist, Andrew Frazer (1999, p. 90) suggested that a quantitative approach is an appropriate research method for understanding 'how a tribunal will decide a similar issue in the future'. Accordingly, each 'industrial case' is treated as an 'event' and converted to quantitative data for statistical analysis (Frazer 1999). In this thesis an 'industrial case' equates to each unfair dismissal claim that proceeds to arbitration and its subsequent arbitral decision. The methodology chapter explains the process undertaken to access the arbitration decisions and conduct a content analysis of them in order to collect raw data for statistical testing.

Second, a positivist paradigm means this thesis addresses each research question by deducing it into a series of variables and hypotheses, using previous literature as a guide (Neuman 2003). Logistic regression analysis is performed to statistically test the hypotheses and subsequent viability of the conceptualised arbitral decision-making depicted in Figure 1.1. Logistic regression is appropriate for analysing data that is categorical, frequency-type data *and* where the dependent variable is binomial, for example, successful/not successful (Agresti 2002; Lindsey 1995). In this thesis, the binominal dependent variable is that the arbitrator either upholds (employer's favour) or overturns (worker's favour) the employer's decision to terminate. The reason for using logistic regression is discussed in the fifth chapter on 'methodology' and the results of the hypotheses testing via logistic regression are presented in the sixth chapter.

The last point concerning the methodology used in this thesis, is to elucidate a reply to those social science scholars who dismiss the positivist paradigm and quantitative methodologies out of concern such approaches promote findings with 'spurious and misleading exactitude' (Strauss & Whitfield 1998, p. 17). This critique of the positive paradigm suggests that quantitative analysis lacks validity in the social science setting. In response, this study mines the narratives of actual arbitration decisions pertaining to employee misconduct in genuine workplace settings. It takes advantage of the insights available in qualitative, narrative material for quantitative analysis (Frazer 1999; Hodson 2008). The benefit of this method is that multiple cases of misbehaviour incidents are unobtrusively examined (Trochim 2006), from several perspectives (the employee, the employer, the arbitrator). These discussions have occurred under Oath in a quasi-legal setting, providing some assurance that the accounts of the misbehaviour and dismissal incident are accurate (Southey 2010b). The methodology chapter further addresses validity and reliability issues associated with the quantitative paradigm.

1.6 Outline of this thesis

This thesis consists of seven chapters as shown in Figure 1.2. After the introductory chapter, chapter 2 and chapter 3 both contain a review of the scholarship into employee misbehaviour, arbitral decision-making and issues specific to the

Australian context. Chapter 4 contains individual hypotheses pertaining to the conceptual model. Chapter 5 describes the research methodology, with chapter 6 reporting the results of the hypothesis testing. Chapter 7 discusses the results and their implications before concluding the thesis by indicating future research opportunities.

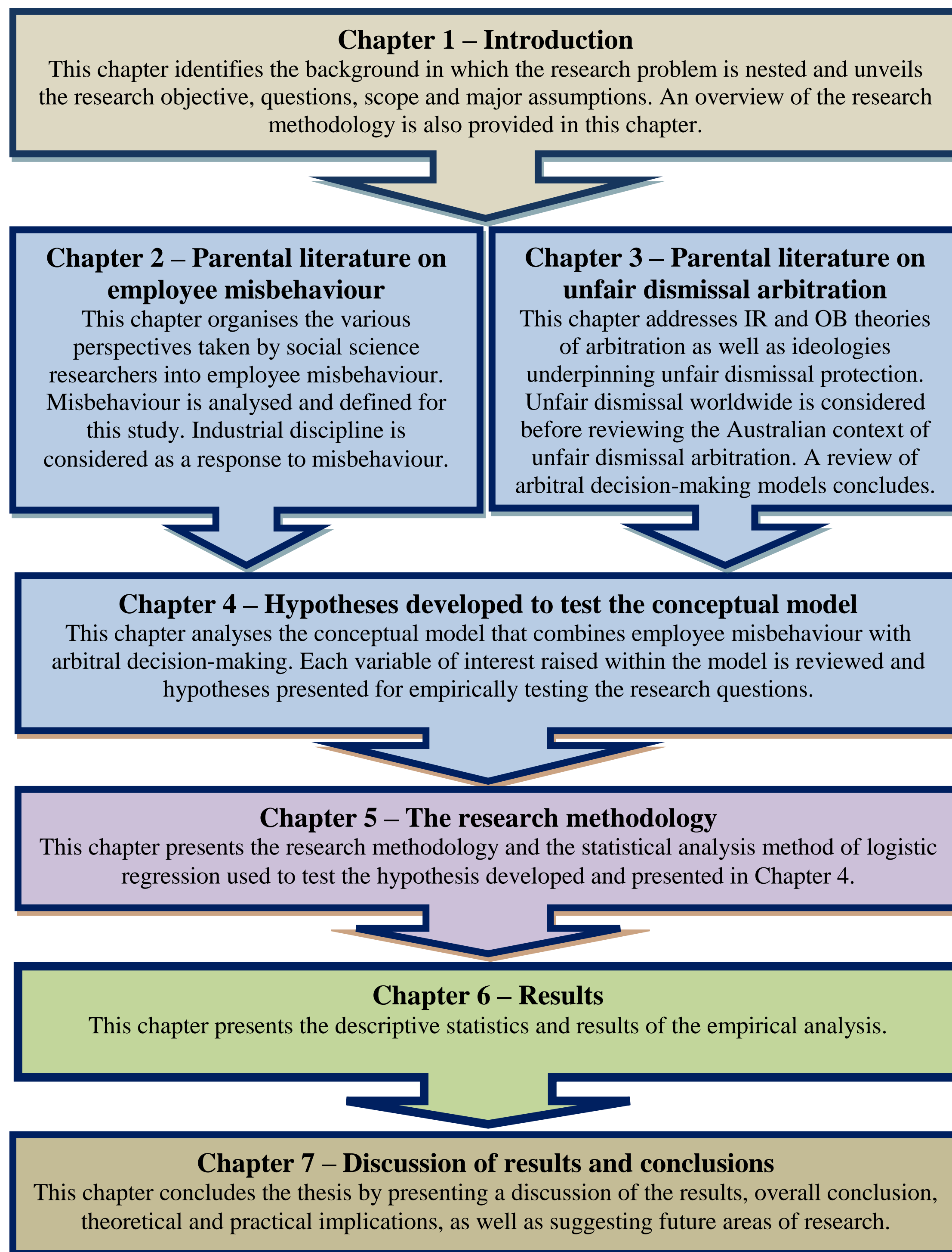


Figure 1.2 *The structure of this thesis*

1.7 Definitions

Key terms used throughout this thesis are presented in Table 1.1. These explanations provide a quick reference for terms and concepts associated with the study. Chapters 2 and 3 provide additional discussions on the constructs of misbehaviour, unfair dismissal and arbitration.

Table 1.1 *Terminology used throughout this thesis*

Term	Explanation
AIRC	Australian Industrial Relations Commission – this was Australia's federal industrial tribunal until the passing of the Fair Work Act 2009, when it was replaced by Fair Work Australia (FWA).
applicant	The dismissed worker who made a claim through either the AIRC or FWA. May also be referred to in this study as the 'grievant'.
arbitrator	In the context of this study, this is the person with the authority in either FWA or AIRC who makes the binding decision on the unfair dismissal claim. See also 'commissioner'.
arbitration	This is the 'final means of resolving disputes' (Bemmels 1990a) whereby the decision made by the arbitrator is binding on all parties.
arbitration outcome (or arbitration decision)	The arbitrator's determination that is ultimately in favour of the aggrieved employee or alternatively, favourable to the employer. Also referred to in the study as a 'decision'. Decisions favourable to the employee capture where the arbitrator orders any of the following: reinstatement/re-employment, reinstatement with backpay and/or continuity of service, or financial compensation for lost wages only.
commissioner	Government appointees of the AIRC/FWA (and now FWC) responsible for hearing unfair dismissal claims. Also referred to in this study as the 'arbitrator'. They can instead bear the titles of deputy president, senior deputy president, or vice president.
discipline / industrial discipline	A course of action taken against an individual when he or she fails to conform to the rules of the industrial organisation of which he is a member (Jones 1961). Considered in this thesis as either a punitive-authoritative style or a positive-corrective style.
federal tribunal	Australia's national industrial relations tribunal installed through federal industrial relations legislation, with the authority to determine unfair dismissal claims. (See also FWC, FWA, AIRC.)
FWA	Acronym for Fair Work Australia. This was Australia's federal level industrial tribunal that replaced the Australian Industrial Relations Commission (AIRC) in 2009.

(continued over)

Term	Explanation
FWC	Acronym for Fair Work Commission. This is Australia's current federal level industrial tribunal. From 1 January 2013, it was renamed from Fair Work Australia under the Fair Work Amendment Act 2012.
grievant	See 'applicant'
misbehaviour (or employee misbehaviour)	Single or multiple incidents committed by one or more employees that, **in the opinion of the employer**, are worthy of the perpetrator(s) dismissal from the workplace.
respondent	The employer responsible for the dismissal.
state	State level government in Australia (as opposed to federal government)
the State	Under industrial relations theory, the government, as a player in the industrial relations system that 'sets up the framework of rules, policies, and institutions (such as tribunals and commissions) by which employers, their unions and organisations seek to accommodate their differences' (Alexander, Lewer & Gahan 2008, p. 17)
The Act	This refers to Australia's federal level industrial relations act, titled 'The Fair Work Act (2009)' (the FWA Act) subject to minor amendments made by the Fair Work Amendment Act 2012. The 2009 Act was introduced by the Rudd Labor Government. The previous federal Act was the 'Workplace Relations Act (1996)' (the WR Act) which was introduced by the Howard Liberal Government and was reformed by the 'Workplace Relations Amendment (Work Choices) Act 2005.
unfair dismissal	Unfair dismissal occurs when an employee's work contract is terminated by his or her employer for reasons which are considered harsh, unjust or unreasonable (CCH Australia Ltd 2005).

(*Source:* Developed for thesis)

1.8 Research scope

This section outlines the boundaries of this research and is supplementary to the key assumptions discussed in section 1.3 and limitations discussed in section 1.9 (Perry 1998). This section aims to clarify the 'population' about which the findings in this research are made (Perry 1998, p. 14) by highlighting the following five parameters about the research subjects. First, the research subjects in this investigation are Australian workers, Australian employers, Australian unions, and Australian federal industrial tribunal arbitrators. The data collected stems from accounts of Australian workers who lost their job because, in their employers' opinion, they engaged in

behaviour warranting termination of their employment. Subsequently, this study reflects the population of workers accessing the arbitration services of the federal industrial tribunal in Australia, resulting in a study that cuts across industries, occupations, skill levels and gender.

Second, the type of unfair dismissal claim investigated in this study relates only to arbitration cases determined by the AIRC/FWA (which is now the FWC) by a single arbitrator (commissioner). To avoid double-counting decisions, it excludes 'appealed' decisions which occur before a 'full bench' of three commissioners (Southey 2008a). The Fair Work Commission is the current title for the federal level industrial tribunal, although each Australian state, except Victoria, also has a state tribunal that conciliates and arbitrates unfair dismissal claims [Victoria surrendered its industrial powers to federal jurisdiction (Sappey et al 2006)]. Further, this investigation does not examine 'adverse action' claims under the Fair Work Act's general protection provisions. Adverse action claims can be pursued by a worker if they believe they were terminated on discriminatory grounds, because of industrial activity, temporary absence due to illness or injury, or for making a complaint or inquiry. Although conciliated by the FWC (and FWA previously), binding determinations are made by the Federal Magistrates Court (FWC 2013c). The decisions of interest in this study are those made by an industrial *tribunal* over unfair dismissal claims, which are distinct from civil claims pursued through tort law and determined by common law courts for damages resulting from a dismissal.

Third, the focus of this research concerns acts of misbehaviour committed at the ***individual*** level within the workplace. This is described as the micro level of analysis where the misbehaviour is enacted by an individual or a small group of colluding individuals (Ashforth et al. 2008), with the intention to either benefit oneself or to inflict minor to considerable damage or destruction, regardless of whether it is underhand or obvious (Vardi & Weitz 2004). This micro level of analysis is referred to, colloquially, as the 'bad apples in a barrel' (Ashforth et al. 2008; Burke 2009; Wellen & Neale 2006; Zyglidopoulos & Fleming 2008).

This means that outside the scope of this research are the macro-level studies aimed at organisational-wide misbehaviour: the 'bad barrels' (Ashforth et al. 2008; Burke

2009; Zyglidopoulos & Fleming 2008). The 'bad barrel' studies involve actions that may be committed by individuals or groups within the workplace but with the organisation and or owners/shareholders getting the primary benefit (Vardi & Weitz 2004). These activities include acts of pollution, price-fixing and collusion and are commonly referred to in the literature as corruption, corporate crime or corporate deviance (Pinto, Leana & Pil 2008). Also outside the scope are the industry-level studies of misbehaviour, or, those concerned with the 'bad orchards', for example, the financial services industry for churning insurance policies (Burke 2009).

Fourth, also encompassing a macro-view of organisational behaviour are acts of organised, overt, industrial resistance (Collinson & Ackroyd 2005) which occur in the form of strikes, petitions, no-confidence votes and mail-outs initiated by employee representatives, typically unions. Acts such as these are not within the scope of this thesis.

Finally, acts of employee misbehaviour are distinguished in this study from unsatisfactory work performance by an employee. There are employees dismissed from their work due to their inability to effectively execute their job demands to an expected performance standard (Tovey & Uren 2006). Poor job performance is associated with employees experiencing problems with: skills, knowledge; incentive; motivation; and/or resources to successfully meet job demands (Rossett 1987). Unsatisfactory performance is not 'misbehaviour' and outside the scope of this thesis.

1.9 Limitations

Limitations are matters in the design of the research that are beyond the researcher's control (Perry 1998). Limitations in relation to the research method are discussed in chapter 4. This thesis cannot address events where an employee either abandoned a claim, or settled his or her claim at conciliation. Between July 2000 and June 2010, an average of 7,449 unfair dismissal claims were lodged each year, resulting in average of 178 substantive unfair dismissal arbitration decisions each year (refer to Table 3.6). Based on these averages, full arbitration finalised around 2.4 percent of the claims. Around 75% of the claims were deemed to have been 'settled' via conciliation by the AIRC (Southey 2008a) with an increase to 81% by FWA in 2009-

2010 (FWA 2010b). Public records are not available for unfair dismissal conciliation hearings as they are 'private conferences' (FWA 2010b).

Another limitation results from the Australian context of the investigation where influences from government legislation may hinder generalisation to other countries. For example, the Australian legislation identifies which Australian workers can – and cannot - access the federal tribunal to lodge an unfair dismissal claim. Consequently, the factors influencing the arbitration decisions in Australia may not translate directly to another country's arbitral decision making over misconduct, as Australian arbitrators are exposed to a pool of eligible employees which may differ internationally. Features of the Australian context are noted in tandem with the hypotheses developed throughout chapter 4. These Australia-specific discussions will serve as reminders of the omnipresent cultural and legislative parameters of this thesis.

1.10 Chapter 1 conclusion

This chapter presented the underpinnings of this thesis. It first apprised the reader of its objective to ascertain the significant influences on the decisions of Australian arbitrators when they determine unfair dismissal claims from workers dismissed from their employment on the basis of misbehaviour. Inspired by the recent portrayal of arbitral decision-making in the literature, a conceptual model of possible influences was presented. This conceptual model integrates three main research questions and four sub-questions that categorise the possible range of factors influencing the arbitration decisions: the type of misbehaviour; the explanation given by the employee; the process used by the employer in dismissing the employee, the role of advocacy, and moderating characteristics of the arbitrator, worker and employer. It was noted that a positive assumption underlies this research and additional assumptions, scope and limitations pertaining to the research were identified. Discussion was devoted to justifying this research on the basis of its theoretical, methodological, practical, political, and potential international contribution. Preliminary information about the quantitative methodological approach was provided, the structure of this thesis was presented and definitions for major terms outlined. The following six chapters now present this research.

A PREFACE TO THE LITERATURE REVIEW CHAPTERS

The literature review appears across three chapters in this thesis. Perry (1998) recommends including a diagram of the literature review to guide the reader. In view of this, Figure 2.1 charts the arrangement of the literature review.

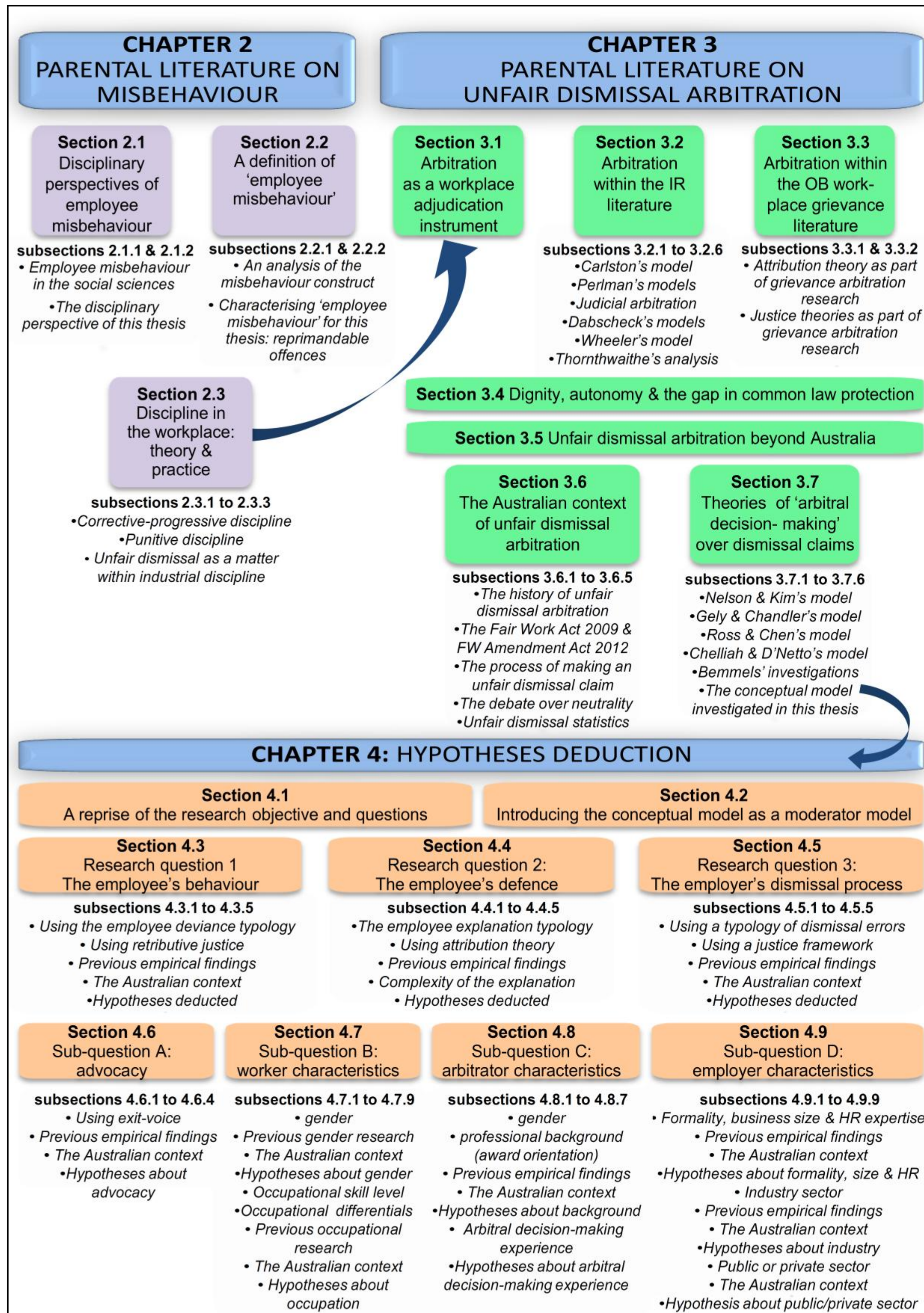


Figure 2.1 *Guide to the literature review chapters*

CHAPTER 2

PARENTAL LITERATURE ON EMPLOYEE MISBEHAVIOUR

2.0 Introduction

The initial two chapters of this three chapter literature review demonstrate the role of the parent disciplines and the theoretical and practical background within which the research problem is nested (Perry 1998). The research question brings into play two conceptual frameworks, employee conduct that is considered misbehaviour, and the arbitration of unfair dismissal claims. Accordingly, chapter 2 addresses employee misbehaviour; and chapter 3 addresses the unfair dismissal arbitration literature. chapter 4 explicitly relates to the research questions and discusses theories and findings of previous researchers to deduce testable hypotheses.

This chapter commences with a discussion locating employee misbehaviour research within the social science literature, in order to isolate the research problem within the broad range of existing disciplinary perspectives (Ellem 1999b). The reasons for embracing the perspectives of industrial relations and organisational behaviour to investigate the research questions are also discussed. This chapter then proceeds to examine the descriptive literature regarding misbehaviour by analysing the 'misbehaviour' construct through the organisational behaviour and industrial relations lens, with the aim to define 'misbehaviour' for this study. This chapter concludes by commenting on research that has dealt explicitly with the impact of misbehaviour on the employment relationship.

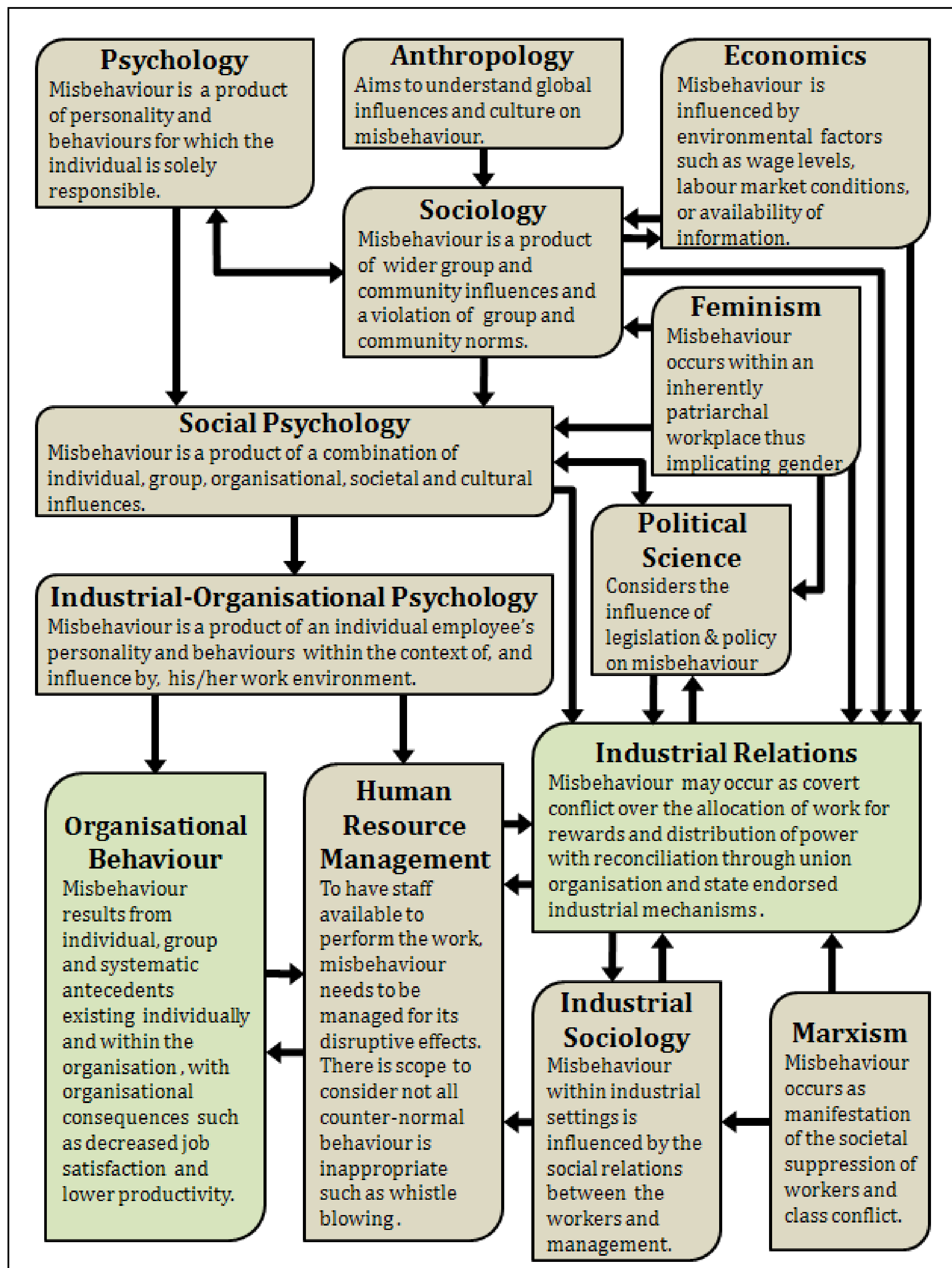
2.1 Disciplinary perspectives of employee misbehaviour

The parental theories of misbehaviour in the workplace are the focus in this section. The social sciences hosts a diversity of disciplines and movements which collectively contribute to the study of human behaviour (Williams, Guiffre & Dellinger 2010b) with potential to provide 'societies with a full repertoire of approaches to societal problems' (Schwartz-Shea 2006, p. 210) and 'enlightened development' through its reflections and analysis of society (Schatzki 2006, p. 127). Whilst it is impossible to incorporate every social science disciplinary perspective of employee misbehaviour into the design of this study, it would be misguided to ignore the special interests and

paradigms that exist amongst social scientists that also contribute to understanding the research problem (Desrosiers et al. 2002; Ellem 1999b; Rogelberg & Brooks-Laber 2002; Schwartz-Shea 2006). Further, Dufty (1999, p. 195) suggests that the author of an industrial relations thesis '*should acknowledge the possible relevance of factors outside the frame of reference encompassed by the discipline you have chosen*'. Therefore, the purpose of this section is to acknowledge that a range of theoretical perspectives towards employee misbehaviour exist beyond the industrial relations and organisational behaviour underpinnings in this study. This discussion contributed to this research in two ways. First, it provided a frame of reference for identifying relevant and irrelevant discussions during the literature review process. Second, at the point of concluding this research, this discussion illuminated the way to acknowledge broader disciplinary implications so that our understandings of employee misbehaviour can extend beyond a parochial disciplinary point of view.

2.1.1 Employee misbehaviour in the social sciences

Figure 2.2 illustrates the author's conceptualisation of 13 discipline perspectives of employee misbehaviour and inter-relations that exist amongst them. This diagram does not capture the full complexity of the social science disciplinary network, a feat which may be impossible to capture in a single diagram. Instead, it reflects the author's interpretation of the co-existence of disciplines contributing to the evolution of scholarship. For instance, up to the 1960s, economics, industrial relations and human resource management scholars had integrated interests, after which the human resource scholars moved away from economics and industrial relations macro/institutional focus in their pursuit of understanding the individual employee aspect of employment relations by drawing on psychology theory (Kaufman 2002). Whereas, industrial relations scholars tended to draw on sociology theory in the 1970s, economics in the 1980s, and developed an interest in psychology during the 1990s which continues into the new millennium (Wood 2000).



Source: Developed for thesis and based on discipline descriptions from: (Collinson & Ackroyd 2005; Dore 2005; Gunderson 2001; Hollinger & Clark 1982; Petzall, Abbott & Timo 2007; Richards, James 2008; Scott & Jehn 2003; Society for Industrial and Organizational Psychology Inc 2007; Tansey 2000; Vardi & Weitz 2004; Vaughan 1999; Zyglidopoulos & Fleming 2008)

Figure 2.2 *Conceptual diagram of disciplinary perspectives of employee misbehaviour, within the social sciences.*

The ensuing discussion briefly reflects on the contribution of the disciplines, as depicted in Figure 2.2, towards employee misbehaviour research.

(i) Psychology

Psychology is about understanding the human mind which regulates behaviour which is 'an indispensable part of the equipment for work in any of the (social) sciences' (McDougall 1919, p. 5). The psychological view on misbehaviour in the workplace is that it is abnormal and avoidable (Collinson & Ackroyd 2005) and therefore controllable, or at least amenable to modification. To the psychologist, misbehaviour is seen as irrational behaviour committed by individuals. Misbehaviour research taking a psychological perspective tends to consider the influence of personal mediators on misbehaviour, such as: self-esteem (Ferris et al. 2009); personality traits (Bolton, Becker & Barber 2010); motivational traits (Diefendorff & Mehta 2007); degree of self control (Marcus & Schuler 2004); personal ethical ideology (Henle, Giacalone & Jurkiewicz 2005); personal attitudes (Bolin & Heatherly 2001); negative affectivity (Aquino, Lewis & Bradfield 1999; Penney & Spector 2005); general mental ability (Marcus et al. 2009); and personal demeanour (Driskell & Salas 2005).

(ii) Sociology

Sociologists aim to understand the communal arrangements human beings make amongst themselves, as well as how they are organised by others in society, with the hope of assisting people to cope and adjust in an ever-changing world and to sustain families and community (Beilharz & Hogan 2006; Watson 2008). In terms of dark-side behaviours, sociologists aim to know how the 'environment' contributes to misconduct, the environment being the organisational setting, structure and processes, as well as the wider societal context (Vaughan 1999).

Sociologists might view misbehaviour as a form of resistance to a *particular* managerial practice or behaviour (Collinson & Ackroyd 2005) which distinguishes it from the industrial sociological and Marxist perspectives that hold the view there exists a prevailing opposition between management and workers, *generally*. Investigations into the sociological influences on misbehaviour include: deviance as a response to injustices by management (Hollinger & Clark 1982; Kelloway et al. 2010); supervisors as a source of conflict (Bruk-Lee & Spector 2006), intimidation by management (Zoghbi Manrique de Lara 2006); positive and negative management behaviours (Litzky, Eddleston & Kidder 2006); perceptions of pay inequity

(Greenberg 1990); conflicting role expectations in professional workers (Raelin 1986); frustration caused by the job (Fox & Spector 1999); and workplace sexuality (Williams, Guiffre & Dellinger 1999). An informative essay on the perspectives of sociologists interested in misconduct occurs in the work by Diane Vaughan (1999).

(iii) Anthropology

The distinction between the research activities of anthropologists and sociologists is that anthropologists extend their observations of society to foreign races and cultures whilst sociologists focus their attention to understanding the arrangement of people closer to their home environment (Locke & Golden-Biddle 2002). National cultural influences identified in Hofstede's five values of national culture (1993), have been used in misbehaviour studies, where researchers suggesting that a country's level of power-distance, collectivist-individualist and uncertainty avoidance can influence the frequency and tolerance of workers that deviate from societal-influenced workplace norms (Bennett & Robinson 2003; Getz & Volkema 2001; Taggar & MacDonald 2005). Kim et al. (2008) also took an anthropological perspective in their study of cultural differences and offense-types variances between US and South Korean workers, as did Cooper's investigation of cultural intelligence and employee assessments of co-worker behaviour in multinational organisations (Cooper, Doucet & Pratt 2007). Intercepting with the economics discipline is Balsa and French's (2009) study of the potential consequences of abusive drinking on the labour market in less developed countries.

An additional point of anthropological relevance is that the literature on misbehaviour concerns mainly western perspectives of misbehaviour, even when describing those research projects undertaken in non-western cultural settings (Collinson & Ackroyd 2005). Dore (2005) identifies the dominant assumption that behaviours and models from the US/UK are normative, with other cultures viewed as deviant. This highlights the potential opportunities for anthropologists to explore misbehaviour outside Anglo-Saxon perspectives.

(iv) Economics

Economics involves the study of production, markets and wealth and the influence of government policy on the marketplace (Encyclopaedia Britannica 2010a). It examines the decisions people make when they are faced with constraints in relation

to environmental factors such as time, budget and availability of information – as opposed to considering psychological variables influencing decision-making (Gunderson 2001; Kaufman 2002). The disciplines of economics and industrial relations have been closely associated since the early 20th century, where issues falling within the industrial relations domain – such as high employee turnover, low work effort and poverty level wages – were researched primarily by (labour) economists (Kaufman 2002). More recently, 'personnel economics' integrates economics, industrial relations and human resource management as scholars seek to measure the benefits and costs of the internal labour market of the firm (Gunderson 2001). Examinations of employee misbehaviour from an economic perspective might consider the influence of wage levels or the availability of skills in the labour market on the frequency of misbehaviour, or the overall costs of misbehaviour for business.

(v) Social-psychology

Operating from a premise that humans are born with a mind that is raw and 'non-moral', social psychologists aim to understand how the 'complex mental life of societies' shape and develop the individual human mind (McDougall 1919, p. 24). The central tenet of social psychology is the concept of social influence, which refers to the omnipresent effect that people have on our behaviour, thoughts, feelings and attitudes (Aronson, Wilson & Akert 2005). Social psychologists investigate both negative and positive human behaviours that are triggered by social influences, and recognise the impact of cultural and social traditions on human behaviour. A number of social-psychology concepts have been adapted for use by other disciplines, for example, within the workplace context, job satisfaction and organisational citizenship behaviour (also known as pro-social workplace behaviour) are used by organisational behaviour theorists and human resource management theorists to inform management practices (Baron & Bryne 2000).

Social-psychologists believe that misbehaviour can be committed by potentially anyone, given the right social conditions, thus they aim to explore the social systems in which individuals become 'corrupt' (Zyglidopoulos & Fleming 2008). Examples of social-psychology research into employee misbehaviour include: Sims (2002) investigation of social bonding theory on rule breaking by employees; Domagalski and Steelman's (2005) examination of the effects of supervisors, co-workers and

subordinates on the expression of anger; and Penney, Spector and Fox's (2003) work that combined job stressors with individual personality as predictors of counter-productive behaviour.

(vi) Industrial-organisational psychology

The discipline of industrial-organisational psychology applies psychological theory to the workplace environment and draws much of its theory from the field of social psychology, as well as psychometrics, motivation, learning and personality (Society for Industrial and Organizational Psychology Inc 2007). Its origins are associated with early twentieth century Taylorism, or scientific management, in which the workforce is deployed to maximise efficiency and eliminate duplication through narrow jobs tasks and intensive supervision (Taylor 2005). In the post war era, criticisms of Taylorism for its dehumanisation of work saw rise to the humanist movement in which scholars discussed the need and benefit of providing jobs which engaged people with their work. These schools of thought are parental to the human resource management, organisational behaviour and organisational development disciplines of today. The research and practice areas for industrial-organisational psychologists is extensive, but includes areas such as job analysis, job design, recruitment and selection, work motivation, team performance and reward to mention only a few. An example of research into employee misbehaviour from an industrial-organisational perspective might include, for example, the influence of psychological contract breach on workplace deviance (Bordia, Restubog & Tang 2008). The following two sections will examine the closely aligned discipline areas of human resource management and organisational behaviour, and their perspective of employee misbehaviour.

(vii) Human resource management

Underpinned by a unitarist ideology, the aim of human resource management is to implement systems that engineer high levels of employee commitment where employees are seen as assets or resources (Geare, Edgar & McAndrew 2006; Thompson & McHugh 2002). HRM scholars conceptualise the employment relationship as one of high trust and 'symbiotic' in nature (Riley 2005, p. 16) and it typically involves the human resource manager through to line managers and supervisors in people management activities related to job design, recruitment,

rewarding and disciplining, training and career development, teamwork and continuous improvement. Researchers aim to characterise 'good' jobs or human resource systems with a view to developing best practice methods for people management in the workplace (Scott & Jehn 2003, p. 248). Studies that have investigated employee misconduct from a human resource perspective include: the influence of job security and career development opportunities on misbehaviour (Huiras, Uggen & McMorris 2000); managing incivility through human resource development (Reio & Ghosh 2009); preventing workplace violence (Mack et al. 1998); appropriately treating whistleblowers (De Maria 1999); pre-selection honesty testing predicting employee deviance (Lasson & Bass 1997); managing workers who waste-time (Martin et al. 2010); distributing rewards and using employee assistance programs, supervisor training and quality communication channels to reduce employee deviance (Everton, Jolton & Mastrangelo 2007); and deterring employee theft (Tomlinson & Greenberg 2007).

(viii) Organisational behaviour

Organisational behaviour (OB) is the study of human behaviour in organisations according to three levels of analysis: the individual; the group level and the system/structure level, with the goal of improving organisational effectiveness (Robbins et al. 2011). Traditionally, organisational behaviour aims to improve an organisation's effectiveness by focusing on identifying positive employee behaviours and providing methodologies for managers to encourage such behaviours. Recent literature also recognises that understanding 'dark side' organisational behaviours also informs our understandings of organisational effectiveness (Griffin & O'Leary-Kelly 2004; Vardi & Weitz 2004). Organisational behaviour draws on a range of social science disciplines, in particular: psychology; sociology; social psychology; anthropology and political science (Robbins et al. 2011). Research related to employee misbehaviour from an OB perspective would include studies of managerial power on workplace deviance (Lawrence & Robinson 2007; Sims 2010); revenge in response to procedural and interpersonal injustice (Jones 2009); quality of the work experience (Hollinger & Clark 1982); ethical climate and codes of conduct (Andreoli & Lefkowitz 2009); and quality of supervision (Dineen, Lewicki & Tomlinson 2006).

(ix) Industrial-sociology

According to Etzioni (1958) industrial sociology concerns organisations that exist primarily for an economic reason, which are organisations that function to produce goods and services, to exchange them or to organise and manipulate monetary processes, such a industries and financial institutions. This is in contrast to organisations with goals that, by nature, are cultural (churches, schools, universities), political (government departments, unions) or integrative (such a clubs, volunteers organisations). Within these industrial workplaces, industrial sociologists seek to understand the relationships amongst the production systems, labour and environment. In the last century, industrial sociology has moved beyond machine-paced production and now further incorporates work processes based on self-production (Hassard 1989). Since the second world war, a range of theoretical frameworks have been developed by industrial sociologists to characterise industrial organisations and their social relations, such as: Braverman's labour process theory; the Tavistock Institute of Human Relations' systems thinking; Weber's ideal type of bureaucracy; Marx's discussions on wage labour; and Durkheim's theory on the division of labour (Brown 1992).

Industrial sociologists take a particular interest in misbehaviour that has negative implications for the quality and quantity of work to be accomplished, that is, production deviance (Hollinger & Clark 1982). Their interests in misbehaviour are underpinned by the premise that workers put forth effort and engage in behaviours that they believe are reasonable for the wages received. Consequently, misbehaviour forms part of the 'practical readjustment of the wage-effort exchange' (Collinson & Ackroyd 2005, p. 310). Examples of misbehaviour research from an industrial-sociological perspective are: manufacturing personal works on the factory floor (Anteby 2003); engaging in personal business on the job (D'Abate 2005); time banditry (Martin et al. 2010); and sabotage behaviour (Ambrose, Seabright & Schminke 2002).

(x) Feminism

Feminism can be considered an umbrella term to cover a range of theories, beliefs, social movements and research paradigms, which has applicability to the social science disciplines. It is concerned with the experience of women, with particular

interest in the oppression and unequal treatment of women (Beilharz & Hogan 2006). Amongst themselves, feminists writers splinter into a range of factions, from 'pro-sex feminism' advocating liberating sexual expression to the sexual oppression of 'radical feminism' (Williams, Guiffre & Dellinger 1999). The misbehaviour literature reflecting the female dimension appears under the term 'gender studies' (Richards, James 2008) and broadens the perspective to include female instigation of sexual actions in the workplace. Gender studies expose the gendered nature of workplace-power relations and promote the importance of gender and sexuality when examining employee misbehaviour (Collinson & Ackroyd 2005). Examples of feminist or gender studies on employee misbehaviour would be the examination of misbehaviour in female dominated workplaces (Pringle 1988); characteristics of sexual harassers (Lucero et al. 2003); and boundaries of acceptability according to gender and race (Montgomery, Kane & Vance 2004).

(xi) Political science

Political scientists aim to arrive at theories that explain the behaviour of individuals and groups within political organisations that form, or contribute to, a country's governmental authority (Tansey 2000). In addition to mainstream empirical research, some political scientists explore and critique ideology and political theory surrounding bureaucracy and democracy, and as such, might be considered the philosophers of social sciences (Kettler 2006). Conflict and power theories are examples of political science theories adopted by other disciplines such as organisational behaviour, industrial-sociology, industrial relations and human resource management (Robbins, Millett & Waters-Marsh 2008). Studies, such as those by Williams and Dutton (1999); Preston, Sampford and Bois (1998) and Philp (2006) have a political science perspective in describing corruption and negative behaviours of stakeholders in the political area, such as by politicians, journalists and lobbyists, that can be detrimental to individuals, public servants and/or employing organisations.

(xii) Industrial relations

A textbook definition of industrial relations is to study '*the way in which pay, working conditions and work itself are determined and performed by employers, managers and employees'* (Sappey et al. 2009, p. 2). Succinctly, industrial relations

is: *'an area that begins with work and income, but ultimately is to do with politics and power'* (Ellem 1999a, p. 78). This quote highlights that the scope of industrial relations is wide, thus some scholars limit their interest in industrial relations to a micro perspective that focuses on the interactions between employers and employees, employer associations and unions at the workplace level (Petzall, Abbott & Timo 2007). This type of industrial relations perspective intersects with the social psychology paradigm because it investigates the individual and small group interactions in the workplace. Other industrial relations scholars pursue a line of investigation that takes a macro view of stakeholders in the employment relationship that incorporates the impacts and influences of politicians, government agencies, tribunals, employer associations, and unions on the workplace as well influences from the local/national/international community (Petzall, Abbott & Timo 2007).

An industrial relations scholar's perspective of employee misbehaviour is to understand how management policies influence such behaviour and the impact of union representation (the labour movement) and legislation. Industrial relations scholars and industrial sociologists share the premise that the 'effort bargain' in which the level of effort to be expended by the worker in exchange for his/her wage is not explicitly set in the contract of employment but fixed through social norms (Collinson & Ackroyd 2005; Richards, James 2008).

Studies into misbehaviour from an industrial relations perspective would address issues such as: unorganised conflict during enterprise bargaining (Sapsford & Turnbull 1993); absenteeism as an alternative form of conflict (Sapsford & Turnbull 1996); unorganised and unconstitutional conflict (Bean 1975; Dobson 1993); management's conduct in disciplinary situations (Cooke 2006; Fenley 1998); resistance to managerial monitoring by call centre workers (Barnes 2004; Russell 2008; Taylor, P. & Bain 2004; Townsend 2005; van den Broek 2002); employee resistance through blogs (Richards 2008); employee resistance through Mars' framework of workplace crime (Thornthwaite & McGraw 2012); and formal resistance and instances of misbehaviours (van den Broek & Dundon 2012).

(xiii) Marxism

Central to Marxist thought is society's class structure, where power sources are hidden by the owners of economic resources and means of production (the bourgeoisie), traditionally the owners of the factories, which in today's language generally translates to the employers (Dabscheck 1983a; Hyman 2006; Petzall, Abbott & Timo 2007; Williams 1992). It focuses on the suppression of, and negative outcomes, for the workers (the proletariat) and the competition amongst the capitalists to control the means of production. Marxist theorists believe that it is inevitable that the working class organise themselves in ongoing rebellion against the control of the capitalist class. Scholars viewing employee misbehaviour from a Marxist perspective suggest that such behaviour will always be prevalent in the workplace as a manifestation of employees' adversarial resistance to managerial control and ownership of the means of production (Vardi & Weitz 2004).

Industrial relations texts typically indentify Marxism as a radical approach to industrial relations (Petzall, Abbott & Timo 2007; Watson 2008). Marxism has registered on the radar of misbehaviour researchers but it appears mainstream application of the Marxist perspective of misbehaviour has not generally occurred amongst researchers. This is possibly because we cannot clearly identify the suppressed working class and powerful capitalist class in advanced industrial societies (Petzall, Abbott & Timo 2007). Secondly, the Marxist focus on intra and inter class conflict only provides a narrow perspective for explaining misbehaviour as an outcome (Ackroyd & Thompson 1999a), meaning that an employee that steals company property may be motivated by (Marxist) rebellion, but could equally feel compelled by personal needs of financial distress. In any event, the Marxist perspective calls us to consider the influence of the entire societal class structure as a potential variable in the pursuit of describing and understanding misbehaviour in the workplace.

2.1.2 The disciplinary perspective of this thesis

By choosing a particular discipline one makes a value judgement and '*implicitly decide[s] that the other aspects of the problem are inconsequential, or at least are less important'* (Dufty 1999, p. 194). The previous sub-section discussed a range of

social science disciplines that could support research into understanding the workplace misbehaviour phenomenon. Thus, the current section contains a justification for applying industrial relations and organisational behaviour perspectives to this research. It is recalled that this study concerns the treatment of unfair dismissal claims by employment arbitrators, where the employee was dismissed for misbehaviour, as reflected in the recounted objective of this study:

> ***To identify factors influencing the arbitral decisions of members in Australia's federal industrial tribunal when they determine unfair dismissal claims from workers who have been terminated from their employment due to 'misbehaviour'.***

As the research question involves 'arbitral decision-making' by an *industrial tribunal*, it suitably places the research question within the industrial relations discipline. Moreover, industrial relations theorists tend to assume that a conflict of interest exists between workers and employers in the employment relationship, although different thoughts exist about the source, scope and the management of these conflicts (Kochan 1998). Industrial relations has within its ambit of interest the operations of the institutions of industrial relations, such as union organisations, political parties, government bodies, and employer associations (Wood 1978, 2000). Consequently, dismissed employees that appeal the termination actions of their employer using the support of industrial bodies such as unions and/or industrial tribunals exemplify a pluralist ideology in action.

Achieving an understanding of 'employee misbehaviour' is an interdisciplinary issue, and for this reason, challenging to isolate the most relevant literature for this study. However, with its strong multi-disciplinary foundations of psychology, sociology, anthropology, political science and organisational-psychology, the organisational behaviour discipline inherently gives scope to incorporate theory from a range of other disciplines yet with an express focus on people's behaviour in organisations. Organisational behaviour embraces a unitarist ideology as it, '*investigates the impact that individuals, groups and structure have on behaviour within organisations for the purpose of applying such knowledge towards improving an organisation's effectiveness*' (Robbins, Millett & Waters-Marsh 2008, p. 9). The HR dimension also has an inherent presence in this study with the discipline's

unitarist ideology towards managing employees, which is reflected in management's termination of an employee due to their conduct.

2.2 A definition of 'employee misbehaviour'

To advance this thesis, it is necessary to explain what is meant by the term 'employee misbehaviour'. In this thesis, 'employee misbehaviour' is the umbrella term used to nominate the broad range of constructs appearing in the literature that describe employee misbehaviour. The following sub-section considers the definitions of misbehaviour found in the literature to arrive at a single definition that summarises what 'employee misbehaviour' means for this thesis.

2.2.1 An analysis of the misbehaviour construct

At an intuitive level, one assumes the concept of misbehaviour in the workplace would be straightforward to define by suggesting it means engaging in behaviour that offends or hurts other people within a workplace context. Such a frank definition has not been identified in the literature with scholars developing a fragmented range of definitions, each with a semantic twist, to capture the dimensions of misbehaviour in the workplace (Ackroyd & Thompson 1999a; Bennett & Robinson 2003; Collinson & Ackroyd 2005; Griffin & O'Leary-Kelly 2004; Kidwell & Martin 2005; Lefkowitz 2009; Neuman & Baron 2005; Richards, James 2008; Vardi & Wiener 1996).

It is argued that a complicated range of definitions have evolved as researchers attempted to either develop broad-ranging, umbrella definitions, such as 'dysfunctional behaviour' (Griffin & Lopez 2005), 'insidious workplace behaviour' (Greenberg 2010) or 'counter-productive behaviour' (Spector & Fox 2005, 2010) whilst others have formed definitions that apply to particular sets of behaviours, such as time banditry (Martin et al. 2010), workplace incivility (Penney & Spector 2005; Reio & Ghosh 2009) or workplace violence (Griffin & Lopez 2005; Neuman & Baron 2005). As a result the overlap amongst misbehaviour constructs is extensive. This criticism is supported by academic commentary that the definitions of misbehaviour are either ambiguous or lack parsimony (Bowling & Gruys 2010; Griffin & Lopez 2005; Neuman & Baron 2005; Raver 2007; Richards, James 2008) with different constructs owning the same types of behaviour (Ashforth et al. 2008;

Branch 2008; Spector & Fox 2005). As one example, deliberately working slow fits the definitions of organisational retaliatory behaviour, counter-productive work behaviour, organisational deviance, dissent, and insidious work behaviour.

The theoretical premise of each workplace misbehaviour definition is also a veritable feast, for instance, employee behaviours that are identified in the literature as 'deviant' are those involving:

> ... the voluntary behaviour of organizational members that has the potential to cause harm to the organization or to those within, and in so doing violates significant performance enhancing norms (Bennett et al. 2005, p. 111).

This definition of deviant behaviour requires the violation of an organisational or societal norm. Yet, such a requirement is not identified in the definition of employee behaviours that are seen as 'counter-productive'. Counter-productive work behaviours (CWB) are described as:

> Volitional acts that harm or are intended to harm organizations or people in organizations. Included are acts of aggression, hostility, sabotage, theft and withdrawal (Spector & Fox 2005, p. 151).

Whilst the CWB construct is thought to capture the broadest range of negative behaviours in the workplace (Neuman & Baron 2005), according to Spector and Fox (2005) it overlaps with constructs of deviant behaviour by Bennett and Robinson (2000, 2003; 1995); workplace aggression (Fox & Spector 1999) and retaliatory behaviour (Skarlicki & Folger 2004). Yet unlike deviant behaviour and workplace aggression, a feature of the CWB is that it is *not necessary* that the transgressor intended to cause harm to co-workers or the organisation (Spector & Fox 2005). For example, a person using sick-leave due to a missed promotion may not have 'harmful' intentions. In this example, taking sick leave aligns more closely with the definition of 'organisational retaliatory behaviour' whereby misbehaviour aims to 'punish' the target as opposed to 'harm' the target. Employee retaliatory behaviours are:

> ... reactions by disapproving individuals to organisational misdeeds. They are behaviours that demonstrate censure toward either the misdeed, the doer or both (Skarlicki & Folger 2004, p. 384).

This means an employee engages in retaliatory behaviour to restore a sense of equity or justice by punishing the organisation for acts of injustice, regardless of whether they are genuine or perceived injustices in the eye of the perpetrator. The aim to retaliate or punish can manifest in actions such as damaging equipment, absenteeism, working slow, spreading rumours and conducting private business during work.
To demonstrate the complexity of constructs, and the nuances among them, Table 2.1 lists 16 definitions of misbehaviour-related activity by workers, identified in the literature. Supporting this table is Appendix 1 which provides a summary analysis of these 16 misbehaviour constructs across a range of dimensions. For instance, underpinned by their discipline paradigm (as discussed in section 2.1.1.), scholarship varies in terms of what motivated the behaviour, the target of the behaviour and who or what determined if the behaviour was inappropriate.

The author decided not to identify misbehaviour as simply one of the constructs appearing in Table 2.1. Instead, misbehaviour will be treated as a broad construct for which there are a number of analogous behaviours (Andreoli & Lefkowitz 2009; Jex et al. 2010). The reason for this decision lays, primarily, in the nature of this study. This study is cross-institutional, cross-organisational and cross-occupational; therefore a wide assembly of misbehaviour constructs is appropriate. Additional reasons for considering the misbehaviour construct as a multi-dimensional variable in this thesis are provided next.

Table 2.1 *Definitions of 'employee misbehaviour' in the literature*

1. Anti-social behaviour	***2. Counter-productive work behaviour (CWB)***	***3. Deviance (organisational / employee)***	***4. Organisational retaliatory behaviour***
Any behaviour that brings harm or that is intended to bring harm to an organisation, its employees, or to the organization's stakeholders (Giacalone & Greenberg 1997)	Wilful behaviours by employees that have the potential to harm an organisation, its members or both (Krischer, Penney & Hunter 2010)	Intentional acts initiated by org. members that violate norms of the organisation and have the potential to harm the organisation or its members (Bennett & Robinson 2003)	Adverse reactions to perceived unfairness by disgruntled employees toward their employer (Skarlicki & Folger 2004)
5. Organisational misbehaviour	***6. Workplace incivility***	***7. Organisational resistance***	***8. Dysfunctional behaviour***
Pervasive and for the most part, intentional work related behaviour mostly (yet not necessarily) which defies and violates shared org. norms and expectations, and/or core societal values and standards of proper conduct (Vardi & Weitz 2004)	Low-intensity deviant (rude, discourteous) behaviour with **ambiguous intent to harm** the target in violation of workplace norms for mutual respect (Pearson, Andersson & Porath 2005)	Action, inaction or process whereby individuals within a power structure engage in behaviours stemming from their opposition to, or frustration with, enactments of power. Deviant behaviour is one such form of resistance (Lawrence & Robinson 2007)	Motivated behaviour by an employee or group of employees that has negative consequences for an individual within an organisation itself (Griffin, O'Leary-Kelly & Collins 1998)
9. Workplace violence	***10. Workplace aggression***	***11. Mobbing***	***12. Unethical behaviour***
Instances of direct physical assault or threats of physical assault (Griffin & Lopez 2005) Covert forms of aggression (Baron & Neuman 1996)	Any behaviour directed by one or more persons in the workplace toward the goal of harming one or more (or the entire organisation) in ways the targets would want to avoid (Neuman & Baron 2005)	Harassing, offending, socially excluding someone or negatively affecting someone's work ... repeatedly over a period of time ... escalating until the victim ends in an inferior position (Zapf & Stale 2005)	Any organizational member action that violates widely accepted (societal) moral norms (Kish-Gephart, Harrison & Trevino 2010)
13. Corruption	***14. Insidious workplace behaviour***	***15. Non-compliant behaviour***	***16. Serious misconduct***
Pursuit of interests by one or more org. actors through the intentional misdirection of organisational resources or perversion of organisational routines (Lange 2008)	Intentionally harmful, legal, subtle but pervasive forms of deviance repeated over time (Edwards & Greenberg 2010)	Approaching non-task behaviours (as opposed to focal task behaviours) in a way that produces negative implications for the organisation (Puffer 1987). Conceptually opposite to 'pro-social behaviour'.	Wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment (Donaghey 2006)

First, scholarship on employee behaviours from what Griffin and O'Leary-Kelly (2004) coined the 'dark side' of organisational behaviour, and the variety of behaviours that occur in this dark side, is all within the same general realm (Kidwell & Martin 2005). Particularly important to this PhD research is to not use one particular misbehaviour construct over another otherwise the single construct will limit the investigation unnecessarily. For instance, 'counterproductive behaviour' and 'organisational misbehaviour' require the act to be intentional. The implication of such definitions is that cases where employees either claimed they made a mistake or denied their involvement would need to be excluded from the study. As another example, 'deviance' requires the employee to violate an organisational or societal norm. Thus, it would be questionable whether to include situations where employees engaged in behaviour to which line supervisors turned a blind eye – such as taking home waste product. The employee engaged in behaviour 'tolerated' by the line supervisor and by default, was a behavioural norm for the shopfloor, yet unlikely for the wider organisational context.

Second, whilst studies that investigate either antecedents and triggers of specific behaviours, or behaviours occurring within specific contexts may require a concise definition of the behaviour they are isolating (Bowling & Gruys 2010), it may be that a wide assembly of misbehaviour constructs is appropriate for understanding the impacts of misbehaviour in the workplace from an employer's disciplinary perspective. Apart from 'serious misconduct' (No. 16) in Table 2.1, the remaining misbehaviour definitions were developed from either the perspective of the perpetrator such as 'retaliatory behaviour', or the victim such as 'mobbing'. In this thesis, with its emphasis on arbitral assessments of decisions by employers to dismiss workers on misconduct grounds, misbehaviour incidents are primarily identified by the solitary fact that the workers engaged in a form of behaviour that their *employers deemed* to be unacceptable. These behaviours can include *any* of the misbehaviours defined in Table 2.1. Thus from an employer's perspective, the definition of misbehaviour demands a theoretically wide construction of elements.

Fifteen of the sixteen definitions in Table 2.1 were obtained from the organisational behaviour literature which reflects a range of psychological and sociological influences. The sixteenth definition – serious misconduct – originated in common

law and was promulgated by Australian industrial legislators. Yet, 'serious misconduct' is not suitable for defining misconduct in this thesis for two reasons. First, the 'serious misconduct' construct requires the behaviour to be committed by a worker with 'wilful intent'. Second, it requires behaviour that has caused 'serious results or risk'. This type of definition provides a normative guideline for determining if an employee's misbehaviour should warrant dismissal. However, provision needs to be made in this investigation for situations where the behaviour was neither wilful nor caused serious results or risk *yet the employer still sanctioned a dismissal* on the employee. Thus, for this PhD research, it becomes necessary to broaden the industrial relations construct to incorporate behaviours that have been defined in the organisational behaviour literature that incorporate characteristics of being less severe in nature and which also cater for unintentional behaviour.

2.2.2 Characterising misbehaviour for this thesis: 'reprimandable offences'

On the basis that no single construct of misbehaviour from Table 2.1 captures appropriately all dimensions of misbehaviour that might prompt an employer to discipline a worker, the concept of '*reprimandable offences'* is proposed. Reprimandable offences are defined as:

> *Single or multiple incidents performed by one or more employees for whom the employer enforces either disciplinary action or dismissal. In making its determination, the employer considers the intentions and motives of the perpetrator(s) for engaging in the behaviour, along with the frequency, intensity and consequences of the behaviour.*

This definition has scope to cater for misbehaviour that could be either a single incident, or multiple incidents occurring over time, which was perpetrated by either an individual employee or groups of employees whereby the target of the behaviour could range from a colleague or colleagues (including supervisors), to a colleague's property, or directed toward the organisation's property, clients, suppliers or business in general. It incorporates acts that were either deliberate or unintentional due to ignorance or a mistake, where the motives that underlie the behaviour can range from wanting to cause harm, retaliate, restore justice, or alternatively, the perpetrator may have been naive to the fact that they are engaging in inappropriate behaviour. It caters for behaviour that is severe enough in nature that it harms or exposes workers or the organisation to risk, however, this is not a mandatory pre-condition for the

behaviour to be judged unacceptable by the employer. Finally, it is not a condition of the definition that the actor must have violated a social or organisational 'norm' in order for the behaviour to be judged unacceptable by the employer.

This section culminated in characterising what 'misbehaviour' means in this thesis, from a synthesis of existing misbehaviour constructs. The next section considers managerial responses to employee misbehaviour by specifically focusing on parental theories of industrial (or workplace) discipline. Theories of industrial discipline are parental to this study as arbitration by a third party has an essential role in the disciplinary process to provide a neutral avenue to receive and resolve employee dissent at being punished by the employer's ultimate act of power: dismissal (Haiven 1994).

2.3 Discipline in the workplace: theory and practice

Relevant to this thesis, with its focus on dismissal due to misbehaviour and arbitration, is the concept of discipline in the workplace. How the concept of industrial discipline relates to the context of this thesis will now be clarified, before exploring punitive and corrective discipline in the workplace context. This section begins by considering global applications of discipline in cases of employee misbehaviour and concludes by locating the role of unfair dismissal arbitration within industrial discipline.

Industrial discipline of an individual worker has been defined as '*some action taken against an individual because he is failing to do what is expected of him'* (Jones 1961, p. 3). The industrial or workplace discipline literature describes methodologies for reprimanding employees such as oral warnings, written warnings, suspensions, demotions, fines and, at the pinnacle, dismissal as the severest sanction an employer can administer to a worker (Collins 1982b, 1982a, 1992; Fenley 1998; Jones 1961). Disciplinary theorists describe industrial discipline along a spectrum of approaches, with 'corrective-rehabilitative' at one end and 'punitive-retributive' at the other extreme. Blends of these pure approaches tend to occur in the workplace, for instance, Rollinson et al. (1997, p. 285) described the 'deterrence' approach where management use punishment to '*highlight* [to the employee] *the adverse*

consequences of any future role transgression' in the belief a punitive action can have corrective outcomes. In order to illuminate the contrasting disciplinary styles that occur in theory, the two seminal philosophies of 'corrective-rehabilitative' and 'punitive-retributive' are considered in the following sub-sections. However, before progressing to these sub-sections, two brief points of clarification are made to set the parameters of this discussion.

First, workplace or industrial discipline, in the context of this thesis, differs from the concept of the 'disciplinary regime' or 'group discipline' which is the control agenda implemented by management to assert its authority over workers (Edwards & Whitston 1989; Ferner 2003; Haiven 1994; Sisson & Marginson 2003). For instance, a 'direct or coercive'/'management through control' regime involves techniques such as clocking-on and clocking-off, surveillance technology, low autonomy and peer pressure tactics. Conversely, 'co-operative or hegemonic'/'management through commitment' regimes use methods such as incremental pay and flexible work (Haiven 1994; Sisson & Marginson 2003). Whilst the collective nature of the disciplinary regime adopted by management may resonate with mechanisms used to discipline individuals, such as a 'hardline' management regime using punitive discipline (Fenley 1998, p. 352), this thesis addresses industrial discipline from the perspective of the disciplinary practices dealt to *individuals* within the workplace on the basis of his or her *'personal deviation from standards generally accepted by other employees'* (Mellish & Collis-Squires 1976, p. 171).

Second, the concept of 'punishment', whilst related, is not addressed specifically in this section. Punishment is '*the presentation of an aversive event or the removal of a positive event following a response which decreases the frequency of that response*' (Kazdin in Arvey & Ivancevich 1980, p. 123). The nexus between discipline and punishment is that '*discipline* is the attempt to reduce the frequency of a particular behaviour through the application of various forms of *punishment*' (Greer & Labig 1987, p. 509). Punishment theorists, such as Skinner and his seminal 1957 reinforcement theory, engage with the psychology of punishment to understand the variables that influence the effectiveness of punishment. Instead, this section focuses on the disciplinary style applied by management towards acts of misbehaviour, rather than the semantics of issuing a punishment and variables affecting its delivery.

2.3.1 Corrective-progressive discipline

Corrective disciplinary practices aim to reform an employee's behaviour (Fenley 1998; Huberman 1964; Wheeler 1976). This concept divorces itself from ideas of sanctioning and punishing the employee and is associated with principles of co-operation and responsibility (Fenley 1998; Haiven 1994; Wheeler 1976). Dismissal, due to its terminal nature, falls outside the parameters of corrective discipline (Fenley 1998) as termination has no corrective value and is viewed as a penal response to employee behaviour or poor performance. That said, the practice literature assumes that corrective and/or progressive discipline is appropriate only for resolving performance issues or less offensive behaviour and generally contain the rider that behaviours that are 'heinous', such as theft or physical abuse, constitute gross misconduct and dismissal would be appropriate (Heery & Noon 2001; Holley, Jennings & Wolters 2009, p. 529; Huberman 1964; O'Reilly & Weitz 1980).

The human resource practice literature appears to favour the corrective approach to discipline. The normative HR perspective reflects that the employer's desire to correct an employee's behaviour is the reason for pursuing disciplinary action and that it can improve workplace efficiency by: setting examples of appropriate behaviour; educating employees about the rules of the firm; and maintaining respect for supervisors (Holley, Jennings & Wolters 2009). Practitioners of corrective discipline recommend a 'progressive' or 'positive' approach to administering discipline in the event an employee repeats a similar offence (Fenley 1998; Holley, Jennings & Wolters 2009; Huberman 1975; Lawson 1998).

Progressive discipline is not viewed as a negative process or course of punishment. Instead, each time the offence occurs, the seriousness of the offence is impressed to the employee – initially with oral and then written warnings before proceeding to suspensions, with or without pay – whilst being given opportunities to correct the work behaviour. More recent 'revisionist' or 'accommodative-participative' views of progressive discipline incorporate a role for the employees (with union assistance for lower skilled workers) to 'power with' management and with incentives for being motivated and self-disciplined to improve behaviour (Campbell, Fleming & Grote 1985; Chelliah & Tyrone 2010, p. 107; Cooke 2006, p. 690; Fenley 1998; Franklin &

Pagan 2006). Termination – the ultimate sanction – occurs only after the corrective process has been exhausted, and essentially signals the corrective process was a failure. Termination indicates, as Fenley (1998, p. 354) suggested, the employee is 'recognised' as being at odds to the legitimate aims of the business, and where Huberman (1975, p. 7) suggested the dismissal is '*but a preventative act to steer clear of predictable future trouble'*.

The major criticism of the traditional view of progressive discipline is that it reinforces the power and hierarchy of management over workers (Chelliah & Tyrone 2010), which is evident with dismissal the final stage of the progressive disciplinary road. Edwards and Whitston (1989, p. 4) refer to it as merely *'wield(ing) the big stick less'* and Jones (1961, p. 4) states that '*superficially there appears to be little difference between the corrective approach and that of retribution ... the corrective approach connects the penalty with the purpose of the punishment, and fitting the penalty to the individual's personality'*. Simply, Jones has described progressive discipline as a calibrated form of punitive discipline. As well, it operates on a paradoxical, perhaps flawed, thesis that performance or behaviour will improve in spite of harsher treatment (Fenley 1998). Whilst advocated as more appropriate than punitive discipline, whether corrective discipline changes behaviour is debatable (Cooke 2006), with findings that, whilst pleasantries surrounding the disciplinary process might lessen negative emotions arising during the process, it is still unclear if it can be credited with changing behaviour (Greer & Labig 1987).

2.3.2 Punitive discipline

Alternatively, punitive or retributive discipline relies on the authoritarian power of the employer to enact punishment on the employee as a deterrent to the transgressor (if he or she is not dismissed) and co-workers from committing the same offence. It favours harsh and irregular penalties such as summary dismissal, severe reprimands and public humiliation or shaming (Cooke 2006; Fenley 1998; Mellish & Collis-Squires 1976; Wheeler 1976). Haiven (1994) suggests managers using a punitive disciplinary approach will engage in limited or no consultation with the individual worker or the worker's representatives and will prefer to use dismissal over less harsh forms of punishment. Given corrective discipline is theorised as the 'humane'

and ‘good for business’ form of discipline (Haiven 1994, p. 75), it leaves one to conclude that the opposing approach of punitive discipline would be the inhumane and detrimental to business approach to discipline. Clearly, this concept is divorced from the educational ideals of ‘corrective’ discipline and the literature reflects little support for it as an approach to employee discipline with a search of industrial discipline material unsuccessful in locating papers advocating the use of punitive discipline over its alternatives. Yet in practice, the presence of dismissal reversals by arbitrators, suggest that punitive discipline is well subscribed by employers.

An international comparison of employer responses to misbehaviour was the subject of an investigation in workplace justice by Wheeler and Rojot (1992). Admittedly, this study was conducted twenty years ago, but a more recent comparative study of this scale (involving ten countries) using a similar research method, was not identified during the literature searches for this thesis. This study informed this thesis as it addressed misbehaviours toward the ‘serious’ end of the scale and the disciplinary tactic that employers in each country would have most likely adopted towards the employee. Table 2.2 contains a summary of the likely employer responses to six different acts of misbehaviour from the ten countries. The point was made previously that even the corrective discipline literature suggests the use of dismissal ‘as a last resort’ (Cooke 2006, p. 690; Haiven 1994), and all the scenarios except ‘off duty conduct’ ended with the dismissal of the worker. The majority of the responses were also punitive in nature as they were considered to warrant instant or summary dismissal.

Before discussing the output of Table 2.2, a caveat is noted that Wheeler and Rojot’s study reflected the opinion of only one expert in the field from each participant country. Further, the challenge of attempting a one-size-fits-all approach to describe a misbehaviour incident is that the respondents could not take into account additional factors and mitigating circumstances that could change the outcome. Such limitations must be born in mind as the following points concerning Table 2.2 are made.

Table 2.2 *Summary of findings in Wheeler and Rojot's (1992) international study on anticipated employer responses to* ***serious*** *acts of employee misbehaviour*

Country / Number of offences	Form of misbehaviour					
	Verbal defiance towards a supervisor	Arriving at work under the influence of alcohol or illicit drugs	Theft of product (not waste) from employer	Instigating a physical fight causing injury to other party	'Off-duty' behaviour incriminating for employer's business	Three days of un-notified absence
Australia *1st offence*	warning	warning	instant dismissal	instant dismissal	warning	dismissal with notice
subsequent offences	instant dismissal	progressive warnings then dismissal	/	/	progressive warnings then dismissal	/
Belgium *1st offence*	instant dismissal	instant dismissal	instant dismissal	instant dismissal	instant dismissal	warning
subsequent offences	/	/	/	/	/	instant dismissal
Canada *1st offence*	warning	warning	instant dismissal	instant dismissal	dismissal unlikely	warning
subsequent offences	instant dismissal	warning	/	/	dismissal unlikely	not discussed in study
France *1st offence*	dismissal with notice	dismissal with notice	instant dismissal	instant dismissal	limited impact	warning
subsequent offences	/	/	/	/	limited impact	dismissal with notice
Germany *1st offence*	warning	warning	dismissal with/ without notice	instant dismissal	dismissal with notice	warning
subsequent offences	dismissal with notice	dismissal with notice	/	/	/	dismissal with notice
Israel *1st offence*	dismissal with/ without notice	limited impact	instant dismissal	instant dismissal	dismissal with notice	written warning
subsequent offences	/	limited impact	/	/	/	dismissal after several weeks of absence
Italy *1st offence*	instant dismissal	monetary fine/ suspension	instant dismissal	instant dismissal	dismissal unlikely	monetary fine
subsequent offences	/	fine or suspension	/	/	dismissal unlikely	dismissal
Spain *1st offence*	warning or suspension	warning	dismissal	dismissal	limited impact	dismissal
subsequent offences	dismissal	dismissal	/	/	limited impact	/
UK *1st offence*	warning	counselling & warnings	instant dismissal	instant dismissal	dismissal	warning
subsequent offences	dismissal	progressive warnings then dismissal	/	/	/	dismissal
USA *1st offence*	suspension without pay	suspension without pay	dismissal	dismissal	dismissal if harm is *proven*	warning
subsequent offences	dismissal	suspension without pay	/	/	/	progressive warnings then dismissal

Explanatory notes:

Warning – study did not qualify if these were to be written or verbal, but had punitive intent
Instant dismissal – no notice period nor payment in lieu of notice period (summary dismissal)
Dismissal with notice – paid notice period or payment in lieu of notice period
Dismissal – study did not qualify whether the dismissal was likely to be instant or with notice

Source: Developed for thesis from (Wheeler & Rojot 1992, 'Workplace Justice: Employment Obligations in International Perspective', University of South Carolina Press)

Wheeler and Rojot (1992, p. 366) arrived at one rudimentary principle they considered applied in each country surveyed: employees '*must avoid behaviours that materially damage the functioning of the employment relationship'* suggesting that any behaviour that frustrates the employer-employee relationship may irreparably damage it. On that note, it appears that all ten countries unanimously support dismissal on the first offence where a worker engaged in theft or instigated a physical fight and inflicted injury. Thus, there appears to be consensus value amongst the nations that theft and physical violence in the workplace is not to be tolerated and to be dealt with via an authoritative, punitive disciplinary approach. Nonetheless, beyond these two scenarios several notable differences in managerial responses to misbehaviour occurred.

The first point to note is that the widest variation occurred in the disciplinary action pertaining to attending work under the influence of alcohol or other illicit drug. Attending work under the influence of alcohol was likely to attract dismissal in France, on the first offence. Alternatively in Israel, being under the influence of alcohol at work was unlikely to result in disciplinary action of any serious consequence, even in a subsequent offence. In between these two extremes are the remaining countries that inclined to accommodate this behaviour by making an allowance for whether alcoholism, as an illness, was a cause for the behaviour and taking a progressive approach toward it by first issuing warnings. A comparable point can be made about the '*off duty conduct incriminating the employer's business*' scenario. This scenario also reflected a variation in disciplinary approaches from instant dismissal in Belgium to having limited impact on the employment relationship in France, Spain, Italy and possibly Canada. So from these two scenarios alone it can be seen that France was the harshest in terms of drunkenness yet most lenient in terms employee conduct outside work hours. Such variations between national systems of justice suggest disciplinary approaches are a reflection of unique national factors, suggesting a globally agreed tolerance for workplace misbehaviour may not exist. The following points continue to support this suggestion.

The second point noted is that Belgium was most prominent in using instant dismissal for the first offence, with the study suggesting Belgian employers would take this approach in five of the six misbehaviour scenarios. At the opposite end is

the Canadian employer who is likely to administer immediate dismissal in only two of the scenarios. Thus one can speculate on the evidence in the Wheeler and Rojot study that a progressive (potentially corrective) approach was most evident in Canada and a punitive approach most evident in Belgium (with France and Israel close behind in equal seconds) with remaining countries operating somewhere between these two points of reference.

Thirdly, three types of punishment are most likely to be used across the ten countries: castigatory warnings; dismissal with notice; and instant dismissal. It is noticeable that only Italian employers impose financial penalties on their employees by fining workers for transgressions in relation to attending work under the influence of alcohol and unapproved absenteeism. Meanwhile, managers in the USA were the only employers likely to use suspension without pay as a penalty for either verbal defiance toward a supervisor or attending work under the influence. It is recognised that suspension without pay still has monetary implications for the employees, not unlike the fines imposed by Italian employers.

It is proposed that the multiplicity of management responses to misbehaviour reflects the various societal norms and cultural values existing in different countries influencing which behaviours were considered most detrimental to the functioning of the employment relationship (Collinson & Ackroyd 2005; Richards, James 2008). Culture is thought to help define the boundaries of acceptable behaviour in an organisation (Franklin & Pagan 2006). A brief example of a unique cultural characteristic within a country that reveals itself in the country's workplace environment would be the employee commitment evidenced in Japan and where management call workers '*shain*' – a word without a western language counterpart – recognising them as members of a community of like minded people (Kuwahara 2004, p. 289). Kuwahara further suggests that 'adaptability', a characteristic of Japanese society, is reflected in its employment relations in terms of loosely worded job descriptions and lack of rigid work rules compared to those found in other developed market economies. Thus it is argued that the country's culture and values contribute to the public standard influencing arbitrators and tribunals and strengthens the justification for examining, within this thesis, Australian patterns of arbitral decision-making.

2.3.3 Unfair dismissal as a matter within industrial discipline

Having outlined the possible disciplinary approach an employer might adopt towards misbehaviour and international variations, this section will be finalised by clarifying the relationship between unfair dismissal and industrial discipline. So far it has been noted that dismissal is the harshest sanction for managers using a 'punitive' disciplinary style, and for want of a better term, an 'escape clause' for those using a 'corrective' disciplinary style. And Wheeler and Rojot's (1992) international study reveals that, whilst one can detect nuances in cultural values, immediate dismissal appears to be adopted consistently for similar acts of misbehaviour. Subsequent to the disciplinary practice of terminating an employee's engagement with the organisation, unfair dismissal laws allow for the review of the employer's disciplinary action with a view to balancing the employer's liberty to discipline, against the rights of the less empowered employee. Collins (1982a, p. 78) describes the extent to which the existence of unfair dismissal rights might influence an employer's disciplinary behaviour:

> ... the law of unfair dismissal cannot effect a total cure. It is limited to dismissals and so can have at most an indirect impact upon lesser disciplinary measures ... Nevertheless, the law of unfair dismissal has persisted because it apparently reduces the intensity of the contradiction in the liberal ideal of freedom of contract by taming the employer's power to take the severest of disciplinary measures.

This quote suggests that whilst unfair dismissal laws are narrow in their ambit to intervene in disciplinary matters within workplaces, the presence of these laws may have a wider sobering effect on the industrial disciplinary structure within firms and society generally. Riley (2005) offers similar sentiments suggesting that the financial remedies that may be ordered against defaulting employers provide an educative effect on employers in developing policies to ensure fair dealing with employees. The introduction of unfair dismissal laws across industrialised countries has contributed to employers formalising their disciplinary practices into written policies and procedures, giving warnings and keeping records according to their understanding of the legal requirements (Mellish & Collis-Squires 1976).

Yet within these formal disciplinary systems, Franklin and Page (2006, p. 65) suggest there exists two sets of rules: the officially sanctioned disciplinary system;

and the intangible, informal system or the '*operating culture prescribing acceptable behaviour for how work really is done*'. Unless these two codes are fully aligned and supervisors have the disciplinary style to match, the dissonance may well result in inconsistent disciplinary actions within the same organisation. Add to the mix that each supervisor's disciplinary style is influenced by his or her coping and problem solving skills (O'Reilly & Weitz 1980) and personality and demographic attributes (Martocchio & Judge 1995). Nonetheless, tribunals expect employers to exhibit consistency in their disciplinary actions and at the same time allow for mitigating circumstances (Mellish & Collis-Squires 1976). This leads one to consider whether consistent disciplinary actions are an achievable feat given the variables arising from the formal and informal rules, supervisor characteristics and mitigating circumstances. These conflicting circumstances provide scope within the arbitral decision-making process for differences in values to arise between an arbitrator's and employer's assessment of a disciplinary situation. Consequently, it is argued that this predicament adds to the dialectic underlying this thesis: that arbitration decisions pertaining to misbehaviour in the workplace set the public standard (Donaghey 2006) and reflect societal values (Wright 2002) for how tolerant employers and unions must be towards employees who engage, or who are believed to have engaged in misbehaviour.

2.4 Chapter 2 conclusion

The concept of employee misbehaviour was described from a range of disciplinary perspectives, demonstrating the interest of social scientists in the concept. Defining the concept of employee misbehaviour for this thesis was burdened by the diversity of academic opinion and common usage. To resolve this, the author described the idea of 'reprimandable offences': employee behaviours that result in discipline or dismissal because the employer judged it to be unsatisfactory behaviour. It was pointed out that this definition differs from the existing range of organisational behaviour and industrial relations definitions which included either intentional motivations, norm-breaking criteria, or serious results or risk to qualify as misbehaviour. A definition was required that could cater for behaviours that may have less serious consequences but were still judged by the employer to warrant some form of sanction. It was posited that the definition of *reprimandable offences* is

inclusive of any conceivable act of misbehaviour. This provides an advantage over the constraints existing in the current misbehaviour definitions characterised in the literature, any of which if used, would limit various misbehaviour incidents from studies pertaining to disciplinary management of misbehaviour.

Section 2.3 introduced the concept of industrial discipline because discipline is the logical response to employee misbehaviour. Corrective progressive discipline and punitive discipline were considered as opposing approaches to discipline in the workplace. It was identified that both corrective and punitive disciplinary approaches can involve dismissal. Within the corrective paradigm dismissal may be used when all else fails while within the punitive paradigm, dismissal is enacted more readily. Next, Wheeler and Rojot's international study was reviewed to obtain insight on the use of dismissal as a punishment to serious acts of misbehaviour across ten countries. It was argued that a 'global sense' of tolerance was not evident as the countries observed various calibrations of punishment for the same offence. Finally, the discussion made the connection between industrial discipline and the matter of unfair dismissal protections and suggested that unfair dismissal hearings provide a forum for employees to have the disciplinary action of their employer reviewed. It was concluded that, in light of prevailing formal and informal organisational cultures, combined with the attributes and personality traits of supervisors, employers are challenged to make consistent and appropriate disciplinary decisions, in line with the societal values and public expectations reflected in the decisions of arbitrators.

CHAPTER 3

PARENTAL LITERATURE ON UNFAIR DISMISSAL ARBITRATION

3.0 Introduction

This chapter of the literature review addresses the unfair dismissal arbitration literature, from seven perspectives. First, it will define the concept of employment arbitration. Second, it reviews the industrial relations literature on theories of arbitration, before, thirdly considering arbitration as a part of the organisational behaviour, workplace grievance literature. Fourth, the discussion then considers the ideological propositions of autonomy and dignity that need to be afforded to workers in the face of dismissal and how common or civil law lacks such protection. The fifth perspective considers unfair dismissal arbitration as it occurs globally and sixth, within the Australian context. The seventh perspective contains an analysis of process theories of arbitral decision-making over dismissal claims.

3.1 Arbitration as a workplace adjudication instrument

The task of defining 'arbitration' within the workplace setting is more straightforward than the complicated task of defining employee misbehaviour contained in chapter 2. This thesis investigates arbitration pertaining to the involuntary termination of the employment relationship and the literature appears consistent in its conceptualisation of such arbitration. A textbook description of arbitration within an Australian workplace context is:

> 'a more formal (and often public process) that involves adjudicating between competing claims. It is used only if conciliation fails to produce an agreed outcome ... arbitrations could sometimes resemble court proceedings. But the tribunal (is) required to act quickly and avoid technicalities, and it (is) not strictly bound by laws of evidence' (Stewart 2009, p. 10).

Peer-reviewed publications similarly reflect arbitration's role in settling a dispute or claim by defining arbitration as:

> The definitive stage of a workplace dispute resolution process from which the disputing parties are bound to accept a neutral third party's absolute determination over who was right and who was wrong (Bemmels 1990a; Budd & Colvin 2008).

Clearly, arbitration serves an adjudication function for disputing parties (Carlston 1952). Placed within the context of an unfair dismissal claim, arbitration provides a disciplinary forum '*designed to take certain disputes out of the workplace to a less volatile venue where they could be resolved not by force and economic coercion but by due process and juristic deliberation*' (Haiven 1994, p. 79). This means arbitration is a quasi-judicial arrangement involving the intervention of an authorised third party playing the role of the 'judge' to resolve a dispute, and where both parties agree to abide by the determination of the arbitrator. However, arbitration judgements are not to be confused with judicial decision-making by judges in formal law courts. An arbitrator resolves a dispute according to his or her *'sense of the strength of the conflicting interests'* whereas a judge will *'apply the relevant norms according to their meaning or purpose'* (Collins 1982a, p. 89). More specifically, in unfair dismissal, the arbitration process typically involves the arbitrator hearing the respective positions of each party while holding the employer '*to a kind of moral standard in its dealings with the employee*' (Donaghey 2006, p. 6).

Another difference between arbitral decision-making and formal judicial decision-making, is the source of their jurisdiction (Donaghey 2006). In Australia, arbitrators exist as a member of an industrial tribunal with jurisdictional parameters set by state or federal industrial legislation, whereas a judge operates within the jurisdiction of the law courts and will look to law to first determine if a right or obligation exists under the common law. The benefit of arbitration over formal law courts is that it offers a faster resolution and lower costs than traditional judicial processes (Bethel 1993; Brown 2004; Riley 2005). In addition, section 3.4 will discuss how arbitration is better equipped to deal with remedying unfair dismissal and the limitations of formal courts in dealing with 'unfair' treatment in the termination of employment.

Arbitration can be used to address either 'rights' or 'interest' disputes pertaining to the formal and substantive rules associated with awards and collective bargaining in order to break deadlocks between management and organised labour (Brown 2004; Dabscheck 2004). Whether an unfair dismissal claim is a 'rights' or an 'interest' dispute varies according to a country's industrial relations framework. Rights disputes occur where unfair dismissal occurs as a protected right under legislation. An interest dispute is more likely to occur where the unions and employers rely on

enterprise level grievance processes whereby the arbitrator *'imposes a settlement by reference to collective interests'* over the rights of the individual employees and management (Collins 1982a, p. 90). In Australia, unfair dismissal provisions exist within the Fair Work Act 2009 that sanctions the federal industrial tribunal to treat unfair dismissal claims as 'rights' disputes (Acton 2010) allowing the tribunal to act constitutionally. At the core of an unfair dismissal dispute is whether the dismissed worker has the 'right' to be either reinstated or compensated.

Now that arbitration has been characterised, it is timely to review the parental literature describing the role of workplace arbitration, first from the perspective of industrial relations scholars and secondly, as part of the workplace grievance literature developed by organisational behaviour scholars. These perspectives are addressed in sections 3.2 and 3.3 respectively.

3.2 Arbitration within the industrial relations literature

This section outlines theories describing the character of industrial arbitration by reviewing descriptive theories that prescribe the *raison d'être* for arbitration in the industrial relations system. Only Wheeler's theory describes unfair dismissal arbitration specifically. The remaining theories refer to workplace arbitration generally, with the inference that unfair dismissal disputes would be one from a range of workplace disputes requiring arbitration.

Before addressing these theories, a general assumption underlying them is that the arbitrator appears to be motivated by undertones of either judiciary duty or politics (Cockfield 1993; Dabscheck 1980, 2004; Romeyn 1980). The judicial thesis is that arbitrators will offer a *just* hearing to arrive at a *just* solution to the dispute regardless of the power and resources available to either party. Whereas the political thesis suggests arbitrators will decree a solution acceptable to both parties that also ensures the survival of the arbitrators' institution. Dabscheck (1980) envisaged that political arbitration requires the consent of both parties and can occur in rights or interest disputes. This requirement for consent effectively eliminates unfair dismissal arbitration from the political thesis assumption. This is because unfair dismissal

occurs *without* the permission of both parties on the basis it is a rights dispute initiated by the employee, to which the employer is compelled to respond.

Having established there is a judicial assumption underpinning unfair dismissal arbitration, the discussion will now analyse the arbitration theories according to their inherent frame of reference. As discussed in the introductory chapter, this thesis is unpinned by an assumption that unitarist and pluralist forces are at play in the dismissal and arbitration processes. Therefore, some of the theories view the arbitration function as reinforcing managerial prerogative or alternatively, providing a stage for constructive conflict. Other theories present the 'neutral' perspective which one might expect to infiltrate arbitration theories, as the definition of arbitration itself involves intervention by a neutral, third party.

Table 3.1 displays the author's assignment of the theories presented in this section, according to their predisposition, with justification for each allocation provided as each theory is discussed.

Table 3.1 *Partiality towards either the workers' or employers' position inherent in arbitration theories*

<table>
<tr><th>SUPPORTIVE OF WORKER</th><th>NEUTRAL FOCUS</th><th>SUPPORTIVE OF EMPLOYER</th></tr>
<tr><td colspan="2">Carlston's 'communication channel' arbitration</td><td>Wheeler's 'authoritarian' arbitration</td></tr>
<tr><td>Wheeler's 'corrective' arbitration</td><td>Perlman's 'administrative' arbitration</td><td>Thornthwaithe's analysis: 'containment function'</td></tr>
<tr><td>Wheeler's 'humanitarian' arbitration</td><td>Perlman's 'autonomous' arbitration</td><td></td></tr>
<tr><td>Thornthwaithe's analysis: 'surveillance, validation and regulatory functions'</td><td>Dabscheck's 'accommodative' arbitration</td><td></td></tr>
<tr><td></td><td>Dabscheck's 'activist' arbitration</td><td></td></tr>
<tr><td></td><td>Judicial arbitration</td><td></td></tr>
</table>

(*Source:* Developed for thesis)

3.2.1 Carlston's 'communication channel' model of arbitration

Carlston (1952) theorised that labour arbitration is a 'social instrument' that offers an additional channel of communication between employers and employees where institutional grievance procedures have failed to resolve a conflict. Arbitration occurs as a judicial investigation outside of court, unfettered by evidence rules, with particular emphasis on the skill and expertise of the arbitrator. Arbitration is viewed as an extension of a formal, legal contract yet it is different from normal contractual arrangements, as the specific terms are not known other than identifying the mode of settlement in the event of a relationship breakdown. This heralds an emphasis on the uniqueness of arbitration for each hearing with the view that arbitrators' rule solely for the parties concerned and not the wider community as maintained by formal law courts.

In Carlston's model, several conditions need to exist to ensure societal confidence in the labour arbitration process. Firstly, as arbitration is non-judicial, the State has a role to install legislation, tribunals or arbitration service providers to ensure that the arbitration decisions have the ambit to be binding on parties. Secondly, the person engaged as the arbitrator must offer skill and expertise and be unequivocally aware of the specific industry/workplace context with which he or she is confronted. Finally, an arbitration decision relates solely to the parties before it – suggesting there is no place for precedent that can be applied to any other institutional settings other than the institution for which the decision was made. It is on this last point that the practice of arbitration by Australia's federal tribunal differs significantly. It is not uncommon for Australian arbitrators to cite opinions from other cases and jurisdictions in their decisions. As just one example, in *Ford v Vita Group Ltd* [2010] FWA 4630, Commission Conner referred to *Perkins v Grace Wordwide (Australia) Pty Limited* [(1997) 72 IR 186] (an Industrial Relations Court of Australia case) in considering loss of trust and the practicality of reinstatement.

In relation to Table 3.1, and the sensitivity towards either employers or workers, Carlston's theory tends to waiver between worker sensitivity and the importance of the neutrality of the arbitration process. The theoretical emphasis on context-specific arbitral decision-making and appropriately equipped arbitrators suggests neutrality.

Whilst the theory's further emphasis on the provision of a formal voice mechanism to the workers to check managerial prerogatives tends to also flavour this theory with a protective approach towards workers. Accordingly, in Table 3.1, Carlson's theory has been allocated across both dimensions.

3.2.2 Perlman's 'administrative' and 'autonomous' models of arbitration

Perlman (1954) investigated the operations of Australia's federal industrial tribunal from the perspectives of employer and unions in the pastoral, coal and stevedoring industries and compared it to legalistic arbitration models in the US. Perlman developed a dichotomous theory of arbitral operations reflecting two extremes. The first concept is 'administrative arbitration' where he noted the willingness of employers and unions to have arbitrators set standards for their industry. The second approach is 'autonomous arbitration' where the employers and unions use arbitral intervention only as a last resort. As to which mode of arbitration occurs depends on market competitiveness and/or labour market conditions in which the industry operates.

'Administrative arbitration' occurs if both the employer and unions are threatened by competitors in an industry that draws on a labour market of diverse workers. Faced with uncertainty, the parties appeal to the arbitrators to administer their industry. This means the arbitrator takes on the role of economic regulator, as explained by Perlman (1954, p. 208):

> From their pens and judgments have flowed a widening series of judicially-legislated decrees, including the principles of the basic wage, of quarterly adjustments, of annual leave with pay, and of long service leave ... What has developed is a belief that the judges and commissioners should administer industry, that they must for reasons of social efficiency assume a legislative mantle, or, in the words of one judge, they must function as the "economic dictators" of Australia.

If it occurs that the unions and management are both strong and resourceful, it is likely they will prefer to engage in bi-partisan bargaining. Arbitral assistance or ***'autonomous arbitration'*** is only sought when the parties are unable to come to an agreement, with both parties presenting strong positions to the arbitrator for a final determination. Perlman (1954, p. 209) explains:

> By and large the partisans of group autonomy and autonomous arbitration assume sufficient economic resiliency to permit a relatively great degree of unfettered bargaining. In any case these practitioners tend to refrain from direct intervention until the parties have clearly formulated their positions and realized that a bi-partite developed compromise is not possible.

Perlman finalised his theory of autonomous arbitration by reasoning that arbitrators require 'intellectual agility' (1954, p. 213) in the challenge of moving back and forth between the two approaches, depending on the circumstances and views of the parties seeking arbitration. Dabscheck (1981, p. 431) similarly describes ***'accommodative arbitration'*** where the arbitrator hands down a decision reflecting the command position of the parties, acting as a 'rubber stamp' to their demands. These three modes of operation are classified in Table 3.1 as 'neutral' as each scenario suggests the unions and employers are at ease to call upon the arbitration process to resolve troublesome situations, with the arbitrators implementing whichever approach is required. This theory left a gap for a third mode: where arbitral intervention is not welcomed by one or both parties – and is likely the case from the employer's perspective in the situation of unfair dismissal arbitration. The following theory on 'judicial' arbitration can occur without the consent of both parties.

3.2.3 'Judicial' arbitration

'Judicial' arbitration involves the arbitrator making a determination based on *only* the evidence presented to him or her by the parties (Dabscheck 1980; Perlman 1954; Romeyn 1980). It could be said that the premise of the judicial arbitration model is to prescribe an ideal methodology which should be used by the arbitrator to arrive at a decision, as opposed to the other arbitrational theories which describe the intention of arbitral intervention. Under judicial arbitration, the arbitrator will not base any part of his or her decision on personal knowledge about the industry or parties, or on interests and facts not established in the record of hearings. The following quote captures the parameters of judicial arbitration:

> When (arbitrators) yield to the principle of compromise they wrong not only both parties to the dispute, but they impair the effectiveness of arbitration as a judicial method of settling labor disputes. . . there is but one way to try a case on its merits, and that is to try it on the basis of the record made before the arbitrator. That record must be an orderly record. The parties must be guaranteed that only relevant and material evidence will go into the record.

> They must be protected in their right to cross-examine those who submit evidence against them. They must be given an opportunity to present their cases in an orderly fashion, and an opportunity to answer their opponent's case in an orderly fashion. Such guarantees involve both substantive and procedural rights. In fact, I know of no way of protecting the parties in respect to such rights, except in accordance with the generally accepted rule of court procedure, which we apply in all of the arbitration cases (Morse 1940 in Perlman 1954, p. 211).

Arbitrators operating within a judicial paradigm do not view it as their role to reach a compromise in their decisions – as is the case in the administrative and activist arbitration models. With its focus on the quality of the evidence and case made before the arbitrator, it instead complements the autonomous arbitration model which assumes skilled advocacy by the parties appearing before the arbitrator. The assumption of neutrality that underpins judicial arbitration positions it within the 'neutral' category in Table 3.1.

3.2.4 Dabscheck's 'activist' model of arbitration

Dabscheck (1983b, 2004) studied the activity of Australian tribunal president and industrial court judge, Sir William Kelly and developed the model of '***activist arbitration***'. The arbitration process exists as a triad of advocators: the union, the employer; and the arbitrator, each trying to convince the other two parties that their position serves the best interests. However, the arbitrator is motivated to stay in touch with the demands of the other two parties, as being at odds may find the arbitrator faced with resistance measures from the opposing parties, either singularly or in joint force. For instance, in Australia, dissatisfied employer associations worked to reduce the federal tribunal's influence in employment regulation by proactively pursuing the implementation of enterprise bargaining (Dabscheck 2001, 2004; Sheldon & Thornthwaite 1999). It appears Dabscheck (2004, p. 397) demonstrated a 'neutral' perspective of the arbitration process in the development of this theory, as evidenced by his statement: *'... tribunals have not been 'captured' by union principles ... the successes of arbitration have been due to arbitrators being flexible and adaptable in fulfilling the diverse and changing needs of the parties'*. In this sense, arbitrators sustain their role in the industrial relation system by meeting the needs of their clientele: union and management, over fulfilling their own ambitions to influence industrial relations.

3.2.5 Wheeler's 'industrial discipline' model of unfair dismissal arbitration

Wheeler (1976) contended that arbitration existed as a conduit for ***'industrial discipline'***. Industrial discipline was defined to mean *'some action taken against an individual when he fails to conform to the rules of the industrial organization of which he is a member'* (Wheeler 1976, p. 237). Wheeler described similarities between industrial discipline and psychological punishment theory suggesting that arbitrators and punishment theorists deal with the same subject matter, just in different languages. For instance, in the industrial setting, corrective discipline with its aim to reform a wayward worker by imposing progressively harsher penalties was viewed as equivalent to psychological punishment theorists' use of a persistent 'noxious stimulus' (Wheeler 1976, p. 241) to deter undesirable behaviour.

At the outset of Wheeler's theory, the decision to dismiss an employee is described as 'authoritarian' punishment resulting from either previous, unsuccessful corrective action, or because the gravity of the offence warranted immediate dismissal. Arbitrators are empowered to review the punishment and administer their own industrial discipline which Wheeler categorised into three types: corrective, authoritarian; and humanitarian. Corrective arbitration would occur if the arbitrator overturned a dismissal on matters of intensity, intent, policy knowledge, honest mistakes or in concern for the worker. Authoritarian arbitration is signalled by arbitrators that primarily have a rule enforcement agenda and focus on administrative effectiveness and as such uphold the employer's decision to dismiss a worker. Humanitarian arbitration occurs when the arbitrator is concerned less with rules and focuses on the intentions of the offender *and* over-turns management's decision to terminate the worker.

It is noted that there appears to be a significant overlap between the humanitarian and corrective categories. As such, both are assigned 'supportive of worker' in Table 3.1 due to investment in the reformative efforts of the employee or to redeem the employee altogether. In contrast, the authoritarian arbitration style is a maxim for managerial prerogative to punish via termination and allocated as 'supportive of employer' in Table 3.1.

3.2.6 Thornthwaite's analysis of bureaucratic structures

Thornthwaite (1994) analysed the role of specialist industrial tribunals (along with other bureaucratic structures) as a mode of government intervention for regulating labour. Thornthwaithe's analysis identified four roles performed by bureaucratic, interventionist structures. First, they perform a containment function for individual grievances which may cause disruption in the workplace. Second, they perform a surveillance function with opportunities to monitor applications of policies and procedures. Third, they perform a validation function by either endorsing the actions of management or alerting unions to managerial weaknesses. Fourth, they perform a regulatory function by applying legislative interpretations to managerial policies and processes. Thornthwaithe (1994, p. 289) suggests that government invented tribunals and authorities legitimise managerial control yet also *'provide workers with some clarity and certainty in the employment relationship, and enable workers to challenge the arbitrary exercise of managerial discretion'*. For this reason, Table 3.1 reflects both worker and employer focus for arbitral bodies, with the containment function more likely to support an employers' endeavours to maintain productivity in the light of industrial disquiet and the surveillance, validation and regulatory functions providing a scaffold for workers to broach the power position of the employer.

To conclude this section, the neutral perspective of judicial arbitration provides an appropriate arbitration theory to explain the role of the arbitrator in unfair dismissal arbitration. Meanwhile, Thornthwaite's regulatory and containment functions and Wheeler's three models of arbitration situated the unfair dismissal arbitrator with preferences for providing either a humanitarian, corrective attitude toward the dismissed worker, or an authoritarian attitude that supports the employer's prerogative to terminate the employment contract. Unfair dismissal arbitration, as a rights dispute, is likely to be a hostile process for the competing parties, and while a number of the theories were considered to have the 'neutral' focus to accommodate the inter-party hostility, it appears administrative, autonomous, accommodative and activist models are suited only to interests disputes that involve party consent to the process, which is unlikely in unfair dismissal arbitration. Furthermore, Australian industrial arbitrators adjudicate not only unfair dismissal claims, but a range of other

interest and rights disputes; as such, they may regulate their arbitrary style depending on the type of case before them and their personal philosophies and/or objectives.

This section considered arbitration within the jurisprudence literature concerning industrial regulation. Beyond such a framework, organisational behaviour theorists operate within the perspective that workplace arbitration occurs as micro-element of behaviour within organisations, specifically as an aspect of the employee grievance process. Organisational behaviour scholars seek to explain the grievance process by using organisational behaviour theories to describe and predict the behaviours of the parties involved. The following section considers arbitration from this perspective.

3.3 Arbitration within the OB workplace grievance literature

An unfair dismissal claim, and arbitration of it, is within the scope of the 'workplace grievance' process – a process of interest to organisational behaviour scholars. This section outlines briefly the workplace grievance literature that addresses, as one of its dimensions, employee complaints against involuntary termination of their employment. This section adapts material published during candidacy by the author in a refereed article in the Australasian Journal of Business and Social Enquiry, (Southey 2010a). The full journal article reviewed and consolidated organisational behaviour theories that have been used to investigate the employee grievance process and suggested additional theories that could support grievance research. However, to address the arbitral decision-making lens of this thesis, the following material has been refined to present theoretical research into the *arbitration* aspect of workplace grievances.

Attending work can come with the unfortunate complication of experiencing unfavourable conditions or occurrences in the workplace. As a consequence, a ***workplace grievance*** may be raised where an employee feels his or her rights under a workplace agreement, award, organisational policy or practice have been violated by his or her employer or a representative of the employer (Cappelli & Chauvin 1991; Hook et al. 1996). To deal with such grievances, organisations can have in place a formal ***grievance process*** for an employee or a group of employees to appeal alleged unjust treatment or disciplinary action by an employer (Bemmels 1990a; Dalton &

Todor 1985a; Nurse & Devonish 2007). In addition to resolving a grievance in-house, a grievance process can include third party intervention or 'alternate dispute resolution' (ADR) procedures in the form of mediation, conciliation and/or arbitration (Brown 2004; Miceli 2003; Posthuma & Dworkin 2000). The grievance literature identifies third parties with authority to resolve grievances as any of the following: industrial and common law courts, industrial tribunals, commissions or government identified advisory bodies (Brown 2004; Rollinson et al. 1996).

One can argue therefore that unfair dismissal claims and arbitration of such claims fall within the ambit of the grievance literature because the termination of an employee's contract can result in an employee invoking a grievance. Notwithstanding, from a pure workplace grievance perspective, an unfair dismissal claim occurs outside the organisation's formal grievance procedures – because the ex-employee now exists outside the jurisdiction of the organisation's rules and regulations. However, Dalton and Todor (1985a), Bemmels (1991a) and Klass, Mahony and Wheeler (2006) specifically include in their research into grievance activity, employee initiated appeals against their termination of employment, regardless of the finer point that the dismissed employee no longer attends the workplace.

Understanding the influences on workplace grievance outcomes has captured the attention of organisational behaviour researchers, yet Gordon and Miller (1984, p. 141) concluded that theory was 'almost entirely absent in the diverse literature on grievances'. It appeared little changed over the course of the next decade when Bemmels and Foley (1996) authored a further comprehensive literature review of grievance research and once again noted a largely 'a-theoretical' approach to it. In an effort to theoretically underpin future grievance research, Bemmels and Foley (1996) classified workplace grievance research into four elements of the grievance process: grievable events; grievance initiation; grievance processing; and evaluation of the grievance experience. From there they recommended social science theories, largely drawn from the organisational behaviour discipline. which could support research in each of these elements. See Table 3.2 for Bemmels and Foley's suggestions.

Table 3.2 *Examples of social science theories applicable to grievance procedure Research*[*]

Grievance Topics	Applicable Theories
Grievable Events	Management Style and Behaviours; Contract Complexity
Grievance Initiation	Expectancy Theory; Exit-Voice Theory; Reactance Theory; Attribution Theory; Procedural/Distributive Justice
Grievance Processing	Expectancy Theory; Attribution Theory; Escalating Commitment; Prospect Theory; Decision Dilemma Theory
Subjective Evaluations of Grievance Procedures	Agency Theory; Procedural/Distributive Justice; Equity Theory

(*Source*: Bemmels & Foley 1996, p. 381)

[*] *See* Southey 2010b 'Employee Grievance Research Through an Organisational Behaviour Framework', *Australasian Journal of Business and Social Enquiry*, vol. 8 for a discussion of the theories listed in this table and their applicability to grievance research

With the aim of unfair dismissal arbitration to absolutely resolve an employee grievance, it would be best placed within the 'grievance processing' and 'evaluation' stages of Bemmel and Foley's classification. At this point it is worth considering the theories listed in Bemmel and Foley's table that have so far been used to investigate arbitration within the employee grievance process: attribution theory and justice theories. Aspects of these theories (attribution and justice theories) will be revisited in chapter 4 as they contribute to the theoretical deductive approach for developing the hypotheses for statistical testing.

3.3.1 Attribution theory as part of grievance arbitration research

Attribution theory was introduced by Heider (1958) when he instigated the philosophy of attributing the behaviour of an individual to a 'cause' which influences one's judgement of that behaviour. The literature has evolved to categorising the 'cause' into three areas: internal and controllable (the behaviour occurred based on the person's level of effort); internal and uncontrollable (the behaviour occurred because the person lacked resources or ability) and external causes (the behaviour occurred because of issues outside the person's control, thus they are not at fault). Bemmels (1991a, 1994) used attribution theory to examine how arbitrators decide on dismissal cases by assigning either internal or external attributions for the behaviour. The investigation found that experienced arbitrators are more likely to make internal causal attributions than their less experienced counterparts. It was also found that

experienced arbitrators were more confident in judging the individual (internal causes) as personally responsible. That is, they tended to reject external causes as the reason for the offence and as such handed down decisions that directly impacted the individual. Whereas, less experienced arbitrators tended to make external attributions for the employee's behaviour and consequently tended to mediate a 'middle ground' decision.

3.3.2 Justice theories as part of grievance arbitration research

Scholars have applied theories of justice to grievance processing from three perspectives: 'procedural justice', 'distributive justice', and 'retributive justice'. First, procedural justice is said to occur when the process for making a decision is perceived as fair by the recipients of that decision (Rawls 1972). This demands transparent and unbiased decision-making. It calls the employer and arbitrator to follow 'natural justice' principles that should include a full investigation of the issue or grievance, providing an opportunity for the parties to respond to all allegations and for that response to be given due consideration (Alder & Henman 2001; Mac Dermott 2002). Further, an organisation's adoption of procedural justice principles is evident if it adjudicates workplace disputes by using clear and accessible processes such as ombudsmen, appeal systems, union-management grievance processes and open door policies (Dalton & Todor 1985a). In terms of resolving an unfair dismissal claim, an employee's acceptance of the outcome of a dismissal hearing will be enhanced if the employee believes the procedure was fair (Klass 1989). And further, Klass, Mahony and Wheeler (2006) asserted that decision makers (arbitrators) are influenced not only by the strength of evidence against the employee, but also by the procedural compliance by the employer.

Second is the principle of distributive justice. Distributive justice refers to the delivery of a fair outcome for all parties concerned, particularly in economic terms and importantly, that the person given the judgment considers it fair (Rawls 1972). Thus distributive justice has implications for distributing financial rewards and benefits, training and promotion opportunities, work timetabling and not surprisingly, disciplinary actions. Similar to Klass' findings on procedural justice, Dalton and Todor (1985a) also found acceptance of a grievance outcome is

positively related to the employee's perception that the result possessed distributive justice.

The third justice principle examined in the grievance literature is retributive justice. Retributive justice addresses the rhetorical question: what can be done for the victim and to the harm-doer to remove or deal with an injustice (Darley & Pittman 2003). In the context of workplace grievances, retributive justice relates to the decision-making rationale of an adjudicator (be it an member of management or an external arbitrator) in that he or she will attempt to restore justice to those harmed or those who complied with norms, as opposed to those who deviated from their obligations or accepted norms (Vidmar 2001 in Klass, Mahony & Wheeler 2006). The application of this theory in grievance research is that arbitral rulings are more likely to support the employer's decision to terminate the worker's employment where the employer produces strong evidence of the dismissed employee's misconduct to support the employer's retaliatory action of dismissing the employee (Klass, Mahony & Wheeler 2006). And in reverse, arbitrators are more likely to find in favour of the employee in an effort to alleviate any injustice served upon the worker if they consider the employer committed any injustice during the dismissal process.

The previous two sections established theories of arbitration from an industrial relations perspective and organisational behaviour perspective. Scholars have also discussed ideological grounds for providing unfair dismissal protections to workers. The ideals of maintaining dignity and autonomy for workers are discussed in the next section. At this point, the literature transitions from a theoretical discussion of arbitration towards a practical orientation.

3.4 Dignity and autonomy and the gap in common law protection

This section discusses how common or civil law contracts are fundamental to the employment relationship, yet common law does not protect employees from the employer behaving unjustly in a dismissal process. It explains the intervention of the State to address this vulnerability, and the principles of dignity and autonomy that corroborate the State's intervention to keep the exchange between the employer and employee on just terms.

The employment relationship involves the exchange of a person's labour for payment from the employer. For the exchange of his or her labour, an employee can anticipate, within a market economy framework, to be paid a fair day's pay for that day's labour (Collins 1992). This exchange is the fundamental common law contract underpinning the employment relationship (Compton, Morrissey & Nankervis 2002). However, the common law contract of the employment relationship can be set apart from the commercial transactions more typically associated with common law contracts involving the exchange of goods or services for payment.

First, the employment relationship is different due to its unique 'relational elements' which obliges both parties to a degree of trust and good faith dealing as they resolve aspects of the relationship which may change as circumstances change (Riley 2005). Common law has its limits determining when behaviours arising from relational changes would constitute a breach of contract (Pittard 1994). For instance, a bus driver that loses her or her driver's licence has negatively compromised the employment relationship, but the case would not be the same for a salesperson at a retail outlet where a driver's licence was not an essential condition of their job. Thus the common law process of applying precedent is complicated by the contextual variety of the employment relationship.

Second, the common law stance towards the termination of an employment contract is concerned purely with whether the contract was terminated – rightly or wrongly – in accordance with the express terms of the contract, for example, whether or not the employer observed notice periods. In such cases, a court judge ruling under common law can hold the employer accountable for 'wrongful' dismissal of a worker, which means the worker was terminated in breach of the contract of employment. Yet in arriving at such a decision, it is anticipated a judge will not or cannot place any weight on whether the dismissal was conducted in a just and fair manner (Pittard & Naughton 2010; Stewart 2006). Although this may change as Gray (1994) suggests Australia is behind other common law countries in incorporating fairness dealing as an *implied term* of the employment contract. The courts in Britain and New Zealand have held that both parties will act in a manner that maintains the confidence and trust between them, which implies the employer should act fairly if considering a dismissal. But, this interpretation is yet to occur in Australian courts, based on a

recent case which highlights the Court's limitation to deal with harshness or unfairness. In *Griffiths v Rose* [2011] the Federal Court of Australia (FCA) ruled in favour of the employer (the Department of Resources, Energy and Tourism) for dismissing an employee who used a work-issued laptop computer to view pornography, at home. The FCA judged it to be a legitimate dismissal as the computer was the employer's property and as such they had the right to tell the worker what he could and could not do with it. However, the Court, knowing its limitation that it could not consider the harshness of the dismissal, still recognised a level of harshness. It commented, 'many would think that the Commonwealth's resources could be better utilised on activities other than the zealous pursuit of (the employee) over something he did in his own home which is not against the law' (CCH 2011, p. 1). Had the Court the jurisdiction to take into consideration the harshness and justness of the manner in which the dismissal was administered; one might surmise the outcome of this case would be different.

Finally, employees do not earn absolute private ownership (Collins 1992) or 'property rights' (Pittard & Naughton 2010) over jobs in exchange for their labour, as they can expect with a house or car for which property ownership occurs via the exchange of money or other item of value. To use a metaphor, employees own the income from the fruit of their labour – but they do not own either the fruit they pick or the tree that grows the fruit (Collins 1992). This is atypical to other commercial contracts where ownership rights transfer between the parties. Again, this point of difference limits a judge's ambit under common law to provide job security beyond rudimentary contract compliance. It also highlights the power of the employer under common law, as they are the party that actually retain 'ownership' of the jobs. Although it is noted that Riley (2005) argues Australian common law has potential to be developed to regulate employment security for workers – in the absence of further State protection.

Whilst it has been established that employees do not have property rights over their jobs, they are entitled to operate under the knowledge that their job is secure – at least whilst they and their employers are in a position to meet the cornerstone of the employer-employee exchange of a 'fair day's work for a fair day's pay'. Responsive to the shortfalls of common law contract to provide effective job security, the State

can intervene to provide employees with protection-enhancing rights to balance or restrain the managerial prerogative of employers to determine when they make jobs available (Collins 1992; Gray 1994; Pittard 1994). Thus, employment legislation and neutral third party interventionist mechanisms (Brown 2004) such as the conciliation and arbitration functions of Australia's industrial tribunals, are State endorsed processes supplementing the common law employment contract for regulating the exchange between the employer and employee – on just and fair terms.

Unfair dismissal regulation is not about transferring job ownership to employees. Instead it is designed to protect the less powerful worker in the employment relationship by prohibiting employers from *unjustly* terminating the contract of employment. According to Collins (1992) employee dignity and employee autonomy are the two closely aligned founding principles that substantiate State intervention, via legislation, to discourage employers from unjustly terminating an employment contract.

The first principle, 'dignity', asks employers to appreciate each employee's *'independent moral worth and respect for each person's attempt to bring meaning to their life through work'* (Collins 1992, p. 16). Dignity obliges employers to be cognisant of the financial, emotional and reputational hardship employees are likely to suffer when dismissed involuntarily from their job. The principle of dignity expects the employer to be procedurally fair when determining whether to continue to provide a place of employment to a worker or workers. In essence, employers should balance their right to exercise their power over the allocation of jobs to achieve the most efficient outcomes for their business, against the welfare concerns for the employee. A further comprehensive discussion on the dimensions of dignity across the facets of the employment relationship and employee's work life was also published by Bolton (2011). For brevity, the seminal work of Collins is discussed.

The second principle, 'autonomy', emphasises that people's jobs highly influence how they define their status in life, that is, '*work establishes meaning in their life*' (Collins 1992, p. 18). For this reason, it impresses upon employers to consider three responsibilities, notably within the limits of a sustainable business operation. First, autonomy asks that employers keep open the opportunity for a person to keep

working as access to work provides a person access to other meaningful experiences in life. Further the *quality* of the work opportunity is key to providing autonomy. This leads to the second responsibility: employers must be clear about workplace rules so that a person does not inadvertently break the rules and lose their work opportunity. Third, workplace rules should only regulate employees to the point of efficient operation of the business as over-regulation restricts worker autonomy. Collins argues that a harsh workplace where the person works in fear or poor conditions, limits a person's autonomy as much as not having work at all. Ideally, a workplace that values autonomy for its workers provides jobs that have a fair level of job security, promotion opportunities, a variety of challenges and room to use initiative, so that a person is empowered to be the master of his/her own life.

Although not using the word explicitly, the concept of autonomy was reflected by Epstein (1984) where he identified the impact that arbitrary dismissal has on the remaining employees and their sense of security:

> If co-workers perceive the dismissal arbitrary, they will take fresh stock of their own prospects, for they can no longer be certain that their faithful performance will ensure their security and advancement. The uncertain prospects created by arbitrary employer behaviour is functionally indistinguishable from a reduction in wages unilaterally imposed by the employer (Epstein 1984, p. 968).

Although Epstein's writings indicate his opposition to wrongful discharge rights, even still, his quote recognises that a worker's autonomy moves beyond individual boundaries and is assessed collectively by employees within a workplace. In his quote, he reminds employers that they must be aware that when they execute a dismissal in a harsh or unjust manner toward a single employee, as a by-product it penalises the remaining employees' sense of trust because they can envisage the same treatment happening to them. In a way, they too feel punished. Epstein equates this loss of faith to that of having their wages reduced, which may be an arguable point, but certainly the sentiment of this statement is to not underestimate the negative impact that arbitrary dismissal has on the remaining employees. This quote is not suggesting employers refrain from dismissing a seriously transgressing employee. It is important that employees causing dysfunction in the workplace are removed – with dignity – because a dysfunctional worker also infringes on the autonomy and dignity rights of the remaining engaged and loyal employees. The

implications of the principles of dignity and autonomy is that they bind employers in their responsibility for maintaining the balance between productive efficiency and the employees' rights to dignity and autonomy when considering the involuntary termination of an worker's employment contract (Collins 1992). It is such a balance which arbitrators' gate-keep by remedying employers' decisions that are unevenly weighted toward the economics of the business.

An example of how both dignity and autonomy can be eroded can be found in women dismissed from their jobs under the Work Choices legislation. Women reported feelings of embarrassment and social withdrawal such as not attending church (Baird, Cooper & Ellem 2009). Where alternative work was found it was without equivalent benefits, particularly in terms of predictability of work hours, which impacted childcare arrangements (Baird, Cooper & Ellem 2009). Such experiences reflect that a sudden (and potentially harsh) dismissal can undermine, firstly, the dignity of the workers because in this example they endured personal hardship through emotional and social withdrawal. And secondly, their autonomy because even though some found another job, they were no longer as empowered to plan and navigate their life as they had previously.

This section outlined the shortfall in common law to offer protection from unfair dismissal and how the ideals of dignity and autonomy provide moral motivations for State intervention to stipulate supplementary unfair dismissal protections through its legislation. The next two sections address the adoption of unfair dismissal policies from the perspective of other developed market economies and Australia, respectively.

3.5 Applications of unfair dismissal arbitration beyond Australia

The arbitration of unfair dismissal claims is a phenomenon that extends beyond the Australian context. This section will first identify the position of the united international body that provides guidance on labour relations, the International Labour Organization (ILO) toward employer obligations regarding dismissal. The discussion will then move its focus to comparing the different mechanisms across countries that provide an appeal process for dismissed employees.

The Termination of Employment Digest prepared by the International Labour Office, Geneva in 2000, is a compendium of 72 countries' approaches to providing termination of employment protections to its citizens (Antoine et al. 2000). This Digest details countries that view protection against dismissal as part of a broader human right to job security and as such have given reference to employment security in their Constitutions. According to Antoine et al. (2000) these countries include Argentina, Bolivia, Brazil, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, South Africa and Venezuela. In addition many countries have statutory protections against unjust or unfair dismissal providing reinstatement and/or compensation to unduly dismissed workers. Countries that fall into this category include: Argentina; Austria; Bulgaria; Canada; Quebec; Chile; Germany; Hungary; Italy; Mexico; Netherlands; New Zealand; Poland; Singapore; Spain; Sweden; Tanzania; United Kingdom; and Vietnam.

The ILO (2009, p. 14) reported that as January 2009, 34 countries had legislatively ratified the three core requirements of ILO Convention 158, Recommendation 166 on Termination of Employment. Table 3.3 lists these 34 nations. Notably, there are 177 member countries in the ILO (Bamber, Lansbury & Wailes 2004, p. 330) which means less than one fifth of member nations have incorporated the ILO guideline into legislation, although it is clear from the preceding paragraph that member countries frequently practice similar notions as the ILO guideline in their legislation.

Table 3.3 *Countries that have incorporated ILO Convention 158 on termination of employment into legislation (as at January 2009)*

Antigua and Barbuda, Australia, Bosnia and Herzegovina, Cameroon, Central African Republic, Democratic Republic of the Congo, Cyprus, Ethiopia, Finland, France, Gabon, Latvia, Lesotho, Luxembourg, The Former Yugoslav Republic of Macedonia, Malawi, Republic of Moldova, Montenegro, Morocco, Namibia, Niger, Papua New Guinea, Portugal, Saint Lucia, Serbia, Slovenia, Spain, Sweden, Turkey, Uganda, Ukraine, Bolivarian Republic of Venezuela, Yemen, Zambia.

Source: (International Labour Organization 2009)

The three core ILO obligations placed upon employers under Convention 158 are to provide the employee with a valid reason for termination, a notice period, and the right of appeal. Relevant to this thesis is the 'right of appeal' dimension. Article 8,

paragraph 1, of the Convention expects that ‘a *worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator’* (ILO 2009, p. 9). The Convention offers a degree of flexibility as to how these core requirements are to be implemented. The ILO Panel of Experts at its 79th Session commented on the uptake of Convention 158 amongst ILO’s member countries (ILO 2009, p. 44).

> The Committee wishes to note that many more countries than those that have ratified the Convention give effect to its basic principles, such as notice, a pre-termination opportunity to respond, a valid reason and an appeal to an independent body. Most countries, be they ratifying countries or otherwise, have provisions in force at the national level that are consistent with some or all of the basic principles of the Convention. The Committee notes that the principles of the Convention are an important source of law for labour courts and tribunals in countries that have or have not ratified the Convention. At its present session, the Committee noted with satisfaction the rulings handed down in March 2006 and July 2008 by the Court of Cassation in France directly applying the Convention. As an example of a non-ratifying country, the Committee notes from information supplied to it that the courts in South Africa have used the Convention in developing its jurisprudence.

One of the commonalities in the comparative literature on termination of employment is that countries appear to distinguish between economic dismissals and summary dismissal. Economic dismissals occur due to operational requirements of the business with employees provided statutory protections such as mandatory notice periods and consultation with employees and unions (Forsyth 2009; Stieber 1980; Wheeler, Klass & Mahony 2004). However economic dismissals are not the focus in this thesis.

Immediate or summary dismissal is any dismissal that occurs without paid notice provided by the employer. In this thesis, the interest is in the summary dismissals occurring on the basis of gross or flagrant misconduct for which the employer cannot be expected to continue the employment relationship (Stieber 1980; Wheeler, Klass & Mahony 2004). Also of interest in this thesis is the *third* alternative, where the employer gives paid notice of the dismissal, despite the misconduct. However, paid notice is more likely when performance issues trigger the dismissal. Be it an economic dismissal, summary dismissal or dismissal with notice – it can result in an ‘unfair dismissal’ claim if unfair dismissal rights exist within the country.

From a global perspective, there is a wide variation in forums within which unfair dismissal claims are resolved. Claims are determined by formal law courts in most European and Nordic countries such as Belgium, Germany and France, Italy, Spain, Finland, Sweden and Norway. This is possibly due to legislative restrictions combined with ease in accessing the ordinary or labour courts (Eaton 2000; Finkin 2008; Wheeler, Klass & Mahony 2004). Ease of access occurs, for example, in Germany, where employees tend towards self representation before the labour court. A judge attempts conciliation in the first instance, but if unsuccessful, a hearing occurs before three judges: a qualified judge and two lay judges representing employer and employee perspective (Finkin 2008). Thus in Germany, arbitration cannot be substituted even if the individual contract were to provide for it (Finkin 2008).

In Norway, Italy, Finland and the United States, specialist labour or industrial courts do not exist and workers appeal through the ordinary courts (Klass, Mahony & Wheeler 2006; Wheeler, Klass & Mahony 2004). Other countries, use both ordinary and labour courts, such as Sweden where individual grievances – made through a union – are handled by, initially, regional lower civil courts with the specialist National Labour Court as the final determinate for all labour disputes (Hammarstrom, Huzzard & Nilsson 2004). In France, 'wrongful' dismissal is considered a matter of 'public policy' as it violates the law and thus cannot be subject to arbitration and instead are heard by the *conseil de prud'hommes*, a public institution consisting of lay judges with bipartiate (employer/employee) presence at hearings. The decisions of this body can be appealed to a civil court, which occurs in about 60 percent of decisions by the *conseil de prud'hommes* (Finkin 2008).

In contrast, quasi-judicial arbitration is the (potentially) less expensive and more convenient resolution method used in the United Kingdom, Canada, the United States, South Africa and Australia (Eaton 2000; Wheeler, Klass & Mahony 2004). Countries using arbitration as its preferred unfair dismissal dispute resolution mechanism can provide the arbitration forum via State appointed industrial tribunals or private providers. For instance, in the United Kingdom, the Employment Rights (Dispute Resolution) Act 1988 empowered an independent body, the Advisory, Conciliation and Arbitration Service to offer accessible, speedy and informal

resolution services as an alternative to the stress and expense of the industrial tribunal (ACAS 2009; Colling 2004; Wheeler, Klass & Mahony 2004).

The United States forum for appealing dismissal decisions is via private arbitration, which is arbitration provided by mutually agreed, hired arbitrators from professional arbitration societies. Finkin (2008, p. 167) calls it 'justice for hire' to distinguish it from 'public justice' under State sponsored tribunals and courts. Private 'employment arbitrators' hear claims from non-represented employees whilst union represented workers appear before 'labor arbitrators' (Klass, Mahony & Wheeler 2006). The United States, is a unique example of an advanced market economy that is absent of statutory legislation protecting workers from unfair dismissal. Instead, residual influences of the laissez-faire polices of the American courts up to the 1930s still mean the United States embraces 'employment at will' policies (Finkin 2008). Thus workers only have recourse if a dismissal was unlawful in terms of violating a statute (such as anti-discrimination statutes) (Klass, Mahony & Wheeler 2006). Some US employers go beyond statutory protections, undoubtedly where there is union presence, and install a 'for-cause' standard in collective agreements or employment contracts that specify termination must be for a cause.

Countries in Asia also tend to favour arbitration over formal court resolution. South Korean legislation established its Labour Relations Commission (LRC) that can conciliate, then move to 'tripartite' mediation (employer, worker and public) before arbitrating disputes (Park & Leggett 2004). Japan appears to resolve issues informally with issues rarely requiring arbitration, but it does have central and local labour relations commissions (Kuwahara 2004). Singapore has a Labour Commissioner that will investigate unfair dismissal claims, if conciliation fails, and make a binding decision which can include reinstatement or compensation (Antoine et al. 2000). However, Malaysia uses a specialist industrial court as its forum for termination of employment disputes (Wheeler, Klass & Mahony 2004).

The treatment of dismissal and avenues of appeal are fluid dimensions within the global industrial relations regime. Dismissal protections in Italy, Spain and Ireland have been strengthened, whilst protections have been weakened in UK, France and Germany (Eaton 2000). Not to mention that Australia's unfair dismissal protections

have been particularly turbulent over the last decade. It is proposed that a part of the reason for this variety and fluidity could be the morphing of public policy agendas considered favourable to economic growth by each country's government, in a world of contrasting economic fortunes amongst its nations. Frenkel and Harrod (1995) explained that the public policy agenda in more industrially advanced countries is concerned with providing business and labour relations structures conducive to innovation, high standards of quality, equity and customer responsiveness. Whereas in newly industrialised nations and developing countries it is change management that forms the central feature of public policy that implicates its industrial relations structures and instruments.

3.6 The Australian context of unfair dismissal arbitration

This section outlines unfair dismissal arbitration within the Australian context. The reason for summarising relevant features of the Australian context is that it underpins an improved understanding of the research problem by providing information on issues that, whilst relevant to the research, are not specifics of the research question (Cavana, Delahaye & Sekaran 2001). As this study is situated within the unfair dismissal aspect of Australia's arbitration framework, this section analyses the industrial environment of this study which in turn assists the reader to appreciate the scope of the study (Perry 1998). This section first provides an historical overview of the Australian industrial legislation dealing with unfair dismissal arbitration. This is followed with a discussion concerning the ongoing debate in Australia about the neutrality of its Federal industrial tribunal. This section concludes with statistics describing arbitral decision-making trends by the federal tribunal.

3.6.1 The history of unfair dismissal arbitration

With Federation occurring in 1901, Australia has had a shorter timeframe to legislatively organise its industrial relations compared to industrialised countries in the UK, US, Europe and Asia, yet this has not prevented it from adopting a distinctive and fluid approach toward industrial regulation. During the 1900s, Australia's industrial relations landscape was distinct from the rest of the industrial world for three reasons: first, the dual operation of state and federal industrial tribunals to regulate the employment relationship (Dabscheck 1998; Stewart 2009);

second, the power of the federal tribunal to administer compulsory arbitration to settle industrial disputes (Walker 1970); and third, the consequent influence of these tribunals on the national economy (Brown 2004). The original, 1904 federal legislation installed a collective industrial system with unions on one side, employer and employer associations on the other side, and a third-party industrial tribunal to engage in the conciliation and arbitration of disputes (Cooper & Ellem 2008).

The early federal tribunal, except for its ability to 'entertain' claims and 'recommend' reinstatement of either unfairly or unlawfully dismissed workers, was prohibited from performing the judicial function of arbitrating unfair dismissal cases raised by individual employees (O'Donovan 1976, p. 639). Nevertheless, throughout the 20th century, it eventually came to dominate the unfair dismissal system with authority to resolve individual claims raised by employees. Oddly enough, the story of the federal tribunal gaining jurisdiction over unfair dismissal arbitration ran contradictory to the federal tribunal's fading arbitral role in other aspects of the employment contract, such as wage fixation and dispute resolution. Such arbitration now plays a secondary role to enterprise bargaining (Alexander, Lewer & Gahan 2008). To discuss this paradox would detract from the focus of this thesis. Instead, Appendix 2 contains an account that traces the slice of industrial relations history pertaining to the evolution of Australia's system of *unfair dismissal* arbitration.

The discussion in Appendix 2 describes how Australia's industrial relations environment has moved from being highly regulated via a myriad of detailed industry awards, compulsory arbitration and centralised wage setting mechanisms, through to the current, largely deregulated system of 'modern' simplified awards and enterprise agreements unpinned by a dominant piece of federal legislation: the Fair Work Act 2009. It has taken over a century for Australia to develop a national system for providing unfair dismissal protections to workers. It was destined to be complicated by a variety of factors, such as early interpretations of the federal government's authority under the Constitution Act to legislate directly on individual employment matters, combined with reluctance from the High Court to grant power to a federal tribunal to make quasi-judicial decisions that award remedies to unfairly dismissed workers.

3.6.2 The Fair Work Act 2009 and Fair Work Amendment Act 2012

This sub-section describes the present federal system of unfair dismissal protection. First, it will outline briefly the unfair dismissal protection provisions of the Fair Work Act 2009, before discussing the implications of that Act in determining which employees are granted unfair dismissal protection under its legislation. It will finish with an explanation of Australia's current unfair dismissal claim process in the federal jurisdiction and minor implication of the Fair Work Amendment Act to the unfair dismissal process.

The Fair Work Act 2009 and the instalment of Fair Work Australia – a new federal tribunal: In late 2007, the Labor government was returned to power under Rudd's leadership. One of its major election platforms was its 'Forward with Fairness' policy that largely aimed to unwind the restrictive Work Choices legislation including employee access to unfair dismissal claims. The newly elected government legislated for fresh industrial relations laws, the *Fair Work Act 2009*. Among its changes was the introduction of ten national employment standards, a simplified award system called 'modern awards' and replacement of AWAs with enterprise agreements that could involve union representation (Sutherland & Riley 2010).

In terms of unfair dismissal, Part 3-2, of the Act prescribed the 'Unfair dismissal' provisions. Under this Part, Section 385 provided unfair dismissal protection to employees if a dismissal was: 'harsh, unjust and unreasonable' and it was not a genuine redundancy. Further, Section 394 placed the responsibility for settling unfair dismissal claims on Fair Work Australia (FWA), a new federal tribunal replacing the Australian Industrial Relations Commission (AIRC) in January 2010. The Labor government's opinion was that appointments to the AIRC were unbalanced with the previous Howard government drawing, in the main, people with employer related backgrounds (Gillard 2007b; Rudd & Gillard 2007). Described by the Labor government as an independent industrial umpire with teeth (Gillard 2008a), Fair Work Australia replaced the AIRC, Australian Industrial Registry, Australian Fair Pay Commission, Fair Pay Commission Secretariat, Workplace Authority (Gillard 2008b). FWA was promoted as a 'one stop shop' for industrial relations advice, help

and compliance. FWA members were divided into four industry panels and were allocated issues that arose in their allocated industries. This means, most members were exposed to dealing with termination of employment matters for their allocated industry.

The Small Business Fair Dismissal Code: Section 388 of the Act introduced a fair dismissal code for use by businesses with fewer than 15 employees. Southey (2008a) and Chapman (2009) explained the following about this Code: The Small Business Fair Dismissal Code (Department of Education Employment and Workplace Relations 2008) allows an employee to be dismissed without warning in instances of serious misconduct with examples of theft, fraud, violence or serious breaches of safety rules listed in the Code. Otherwise, dismissal can occur only on the basis of the employee's conduct or capacity to do the job. In this circumstance, the Code requires the employee to be warned that a dismissal is imminent if no improvement occurs. Whilst the warning does not have to be in writing, the Code places a requirement on the employer to allow the employee the opportunity to respond to the warning and to assist the employee via training to improve his/her performance. The Code allows for the employee to have a representative present during discussions, provided the representative is not a hired, legal professional. Finally, the Code places onus on the small business owner to substantiate compliance with the Code in the event the employee makes a claim. To assist with this aspect of the Code, a checklist was developed for employers to guide them in a fair and compliant dismissal process before FWA. Use of the checklist is not mandatory, but recommended to be completed and retained in the interests of the employer.

Coverage of the unfair dismissal provisions in the Fair Work Act 2009: Sections 382-384 of the Act set out which employees in Australia are covered by the federal provisions. In essence, the provisions apply to any employee hired under the terms of a modern award, enterprise agreement, or by a 'national system' employer - which includes the majority of businesses in Australia (FWO 2012), provided he or she does not earn more than the high-income threshold prescribed by the Act. Table 3.4 clarifies which workers are covered and those that fall outside this coverage. Employees not covered by the Fair Work Act are generally protected by relevant state unfair dismissal provisions, or in the case of 'contractors', common law claims

as they do not fit the definition of an 'employee'. (Definitions and usage of 'contractors' in Australia's labour market is discussed in Vandenheuvel & Wooden (1995) and Waite & Will (2001).)

Table 3.4 *Coverage of the unfair dismissal protections of the Fair Work Act 2009*

Workers covered	Workers not covered
▪ Workers *employed* in the State of Victoria, the Northern Territory and Canberra ▪ Workers *employed* in waterside, maritime or flight crew officers engaged in interstate or overseas trade or commerce ▪ Workers *employed* by the Commonwealth Government or a Commonwealth authority ▪ Workers *employed* in private enterprise in New South Wales, Queensland, South Australia or Tasmania ▪ Workers *employed* in local government in Tasmania ▪ Workers *employed* by a constitutional corporation in Western Australia (including Pty Ltd companies)	▪ workers in a state government in New South Wales, Queensland, Western Australia, South Australia and Tasmania ▪ workers in local government in New South Wales, Queensland and South Australia ▪ workers in a non-constitutional corporation in Western Australia (including a sole trader, partnership or trust) ▪ contractors

(Adapted from: The Fair Work Act 2009)

Ignoring the for the moment the brief intervention of the limited protections of the Work Choices 2005 legislation, there is an overlap in coverage between the Fair Work Act and the earlier Workplace Relations Act 1996 in that both protected: all workers in the State of Victoria, Northern Territory or Canberra; waterside workers, maritime workers or flight crew officers engaged in interstate or overseas trade or commerce; and Commonwealth public sector employees (Australian Industrial Relations Commission 2005b). The point of departure between to two Acts is that the 1996 Act also covered employees under a *federal award or agreement and whose employer is a constitutional corporation,* whereas the 2009 Act has broader coverage by protecting employees of *private enterprise in NSW, Qld, SA and Tasmania as well as employees in constitutional corporations in WA*. Thus, on reviewing the coverage list in Table 3.4 it is understandable that the Fair Work Act 2009 provides the broadest coverage of unfair dismissal protections in Australia to date, with estimates that the 2009 Act covers 79 percent of Australia's workforce (McCallum, Moore & Edwards 2012).

However, despite the 2009 Act offering the broadest coverage of workers to date, there remain particular categories of employees excluded from lodging a federal

unfair dismissal claim in the federal tribunal. This has been the case since unfair dismissal provisions were first introduced in the 1993 federal legislation reflecting the ILO recommendation which in itself excluded specified-period employees; specified-task employees and short-term casuals. Since then, the categories of employees excluded have undergone several legislative iterations, as depicted in upcoming Table 3.5.

Table 3.5 shows that both workers and employers have been exposed to varying degrees of vulnerably over the last three years. For instance, the Fair Work Act 2009 exposes all business to claims from casual employees. At odds to the current Act, the Work Choices legislation excluded employees in firms of fewer than 100 workers and casual employees and people dismissed for any genuine operational reason. Creighton (1994) referred to the members of the workforce affected by the unfair dismissal exclusions as the 'forgotten workers', noting that the legislation had still to catch up with the post-industrial society where the variations to the employment arrangements are far beyond the permanent, wage earning employee.

Key changes to Australia's labour market have occurred since the 1970s: increased use of casual labour; workers supplied by labour hire businesses; 'contract work' in terms of using both independent contractors and/or outsourcing discrete elements of the work. These changes have resulted as employers adopt flexible staffing practices to meet the demands of operating in a global market and more recently 'knowledge economy' (Pittard & Naughton 2010; Wooden 2002). For one category of these workers, the casual workers, the Fair Work Act has improved security of employment. Casual employees in businesses of more than 15 employees have unfair dismissal rights after six months regular service.

Fair Work Amendment Act 2012: The name of the federal tribunal changed to the Fair Work Commission. The implication of this amendment on unfair dismissals was to extend the time limit for lodging an unfair dismissal claim from 14 days to 21 days.

Table 3.5 *Comparison of employees excluded from unfair dismissal protections under successive Federal legislation*

	Workplace Relations Act 1996	**Workplace Relations Act 1996 (Work Choices) 2005**	**Fair Work Act 2009**
Qualifying period or Probationary period	If serving a 3 month or less qualifying period or other qualifying period provided it has been agreed in writing before commencing and reasonable for the nature of the employment	If serving a 6 month or less qualifying period or a 3 month or less probationary period determined in advance.	If less than 12 months regular and systematic employment ***and*** **in a business with less than a headcount of 15 workers.**
Number of employees		If employed in a businesses with a head count of 100 or fewer worker	If less than 6 months regular and systemic employment ***and*** **in a larger businesses**
Redundant workers		If dismissed for a genuine operational reason which includes economic, technological or structural reasons relating to the employer's business	If made genuinely redundant because of downturn in business or position no longer needed provided the employer complied with consultation obligations and explored options for redeployment of the employee
Specified period workers	If under an employment contract for a specified period or task	If employed as a seasonal worker or under an employment contract for a specified period or task	If at the end of a seasonal or specified task employment contract
Trainee / apprentice	If employed under a National Training Wage Traineeship	If employed as a trainee or approved apprentice	If employed as a specific period traineeship dismissed at the end of the traineeship arrangement
Casual workers	If employed as a casual employee for less than 12 months	If employed as a casual employee for less than 12 months	
High income earners	If not covered by an award and earning (circa $90,400) a year or more in remuneration (indexed).	If not covered by an award or workplace agreement and earning (circa $106,400) or more a year in remuneration (indexed).	If not covered by an award or enterprise agreement and earning $123,300 (in 2013) a year or more in remuneration (indexed)
Multiple claims		If pursuing other termination related proceedings	If pursuing an application or complaint of a kind referred to in any one of sections 726 to 732 of the Act in relation to the dismissal.
Claim period	If it has been over 21 days since dismissal	If it has been over 21 days since dismissal	If it has been over 14 days since dismissal*

* revised to 21 days under the Fair Work Amendment Act 2012

Adapted from: (Australian Industrial Relations Commission 2005b, 2007b; Fair Work Australia 2011; Southey 2008a)

3.6.3 The process of making an unfair dismissal claim

As the focus of this thesis is on the arbitral decisions of Australia's federal tribunal between 2000 and 2010, it is worth outlining the general process adopted by the tribunal to resolve an unfair dismissal. The unfair dismissal claim process of the current tribunal, the Fair Work Commission (FWC) is not unlike the process used by its predecessor tribunals, Fair Work Australia and the Australian Industrial Relations Commission (AIRC 2007b) – the later two being the consecutive federal tribunals in place during the 'period of interest' in this thesis. Eligible employees commence the process by filing a dismissal remedy application claim form (Form F2) available by either contacting the FWC helpline or accessing the FWC website. The completed form can be filed with the FWC in person, by email, fax or by accessing the FWC website. The applicant pays a small application fee, for instance in March 2013 the fee was $64.20 (FWC 2013b), indexed annually, but if the General Manager at FWC is satisfied payment of this fee will cause the applicant serious hardship, it can be waived (*Fair Work Australia Regulations* 2009).

On receipt of an application form from a grievant worker, the FWC notifies the employer of the unfair dismissal application. At this point the employer can object to an unfair dismissal claim by completing the employer's response to application for unfair dismissal remedy form (F3). Forms F2 and F3 inform the conciliator during a conciliation conference. In summary, FWC – and its predecessor tribunals – initially engage the parties in a private conciliation conference with a specialist conciliator from the FWC. These conferences are usually conducted by telephone and the conciliation settlement rate reported in the most recent annual report of the FWC is listed at 81 percent (FWA 2012). The conciliation settlement rates reported for the period of interest in this thesis reported in sub-section 3.6.5.

In the event the dismissed employee is unsatisfied with the conciliation conference, he or she can seek an arbitration hearing with a different member of the FWC to determine if the dismissal was harsh, unjust or unreasonable. Arbitration hearings are public hearings and FWC is required to publish its arbitration decisions, which it does on its website (Fair Work Australia 2011). Both the Fair Work Act 2009 and its predecessor, the Workplace Relations Act 1996, contain similar guidelines for

arbitrators to determine if a dismissal was harsh, just and unreasonable – although the current Act is slightly more detailed. The Fair Work Act, Section 387 provides the following guideline to FWC members for determining if a dismissal was harsh, unjust or unreasonable:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal;

Furthermore in determining if a dismissal was harsh, unjust or unreasonable, Section 382 retained the 'fair go all round' principle founded in the 1996 legislation. This means that under Section 387 the FWC member (arbitrator) must also include in their considerations the employer's position in relation to:

(a) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(b) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(c) any other matters that FWC considers relevant.

In the event the FWC arbitrator determines that the worker was unfairly dismissed, Section 390 of the Act empowers the arbitrator to provide a remedy of either reinstatement or compensation. The application of these two types of remedy is as follows. Section 391 allows FWC to order 'reinstatement' which involves re-appointment to the position employed immediately prior to dismissal, or re-employment to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal. An order can also be made to maintain the employee's continuity of service, and/or to restore lost pay. Reinstatement rates resulting from upheld dismissal claims are presented in sub-section 3.6.5.

Section 392 allows the FWC to order 'compensation' in lieu of reinstatement. According to the 'fair go all round' principle, the arbitrator is required to take into account the effect of the order on the viability of the employer's business before an order for compensation can be made. The Act also prescribes the arbitrator take into account the employee's length of service and the remuneration he or she would have received had no dismissal occurred, less the amount of any remuneration earned by the employee from other work since dismissal. Additionally, if the employee was dismissed due to misconduct, the arbitrator can 'appropriately' reduce the compensation amount. The compensation '*must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal'*. And, as a final requirement, compensation is capped at the lesser of half the amount of the high income threshold (in March 2013 the income threshold for making a claim was $123,300, capping compensation at $61,650 (FWC 2013b)). Arbitral findings for compensation payments to dismissed workers are presented in sub-section 3.6.5.

Finally, Section 400 of the Act provides for appeals against the arbitration decision. Appeals are heard by a bench of three members of Fair Work Commission. In order for the FWC full bench to grant an appeal, the appellant must show that it is in the public interest to do so and that the arbitrator's decision involved a significant error of fact. Appeal rates are discussed in sub-section 3.6.5 on unfair dismissal claim statistics.

3.6.4 The debate over neutrality in the federal tribunal

Former judge of the Commonwealth Industrial Court, Sir Richard Eggleston, said '*in the arbitration jurisdiction everything is relevant, but there is very little which is helpful*' (in Jeffery 2005). Faced with the challenge of wading through endless facts and sentiments, as alluded to by Eggleston (and similarly by Ronfeldt 1998), it would be unfair and unreasonable to claim arbitrators are purposely biased. However, the debate about the neutrality of the federal commission is raised frequently by politicians, unions, employer bodies and in the media (Southey & Fry 2010). This sub-section considers initially the theoretical potential for bias to occur in the arbitral decision-making process. The discussion will then review claims of bias amongst members of Australia's federal tribunal Fair Work Australia, and its predecessor, the

Australian Industrial Relations Commission. To finalise this discussion, responses to the bias are addressed.

Two assumptions of judicial type decision-making are that judges or arbitrators will think independently and honour societal values. On the matter of independence, Brown (2004, p. 455) emphasised:

> (Third parties) have to be seen to be independent of employers and of trade unions, but also of governments, which often have their own agendas. They have to be independent in terms of finance and allegiance. This is necessary if one-off conciliation and arbitrations are to be successful.

The second assumption, that judges exercise judgements reflective of society's values, is argued to be flawed by Justice Wright who writes '*it is presumptuous to assume too readily that all members of society necessarily share even basic values*' (Wright 2002, p. 105) implying that values are variable therefore impractical for judges to consistently apply in their decisions. A further two arguments can be mounted in support of the debate that judges and arbitrators may be challenged by the societal ideal of impartiality.

First, a search of the literature pertaining to judicial decision-making – the type of decision-making to which arbitration judgements are associated – identified papers that suggested, simply, judges can make mistakes. Articles by Kirby (1999); Sangha and Moles (1997); Seamone (2002); and (Bemmels 1991b) suggested that the judge's intuition and personal attributes unavoidably effect the interpretation of the evidence and consequent judgement of a case. Sangha and Moles (1997) suggested that the judge's findings are actually a combination of attributions and assertions entangled among facts. Whether it is a reasonable expectation from society that judges can conjure a neutral mindset was also considered by Mason (2001). Mason conceptualised a difference between judicial neutrality and judicial impartiality suggesting that neutrality is humanly impossible whilst impartiality, a guiding judicial principle, calls the judge to be open minded and act upon differing opinions presented to them. Mason (2001) further acknowledged the existence of 'unconscious prejudice' which contends that bias is not 'neatly packaged' and can exist in spite of the decision maker believing they are not prejudiced.

Second, in a more frank manner, Dabscheck (1981, p. 444) stated:

> Judges, notwithstanding the mystique of judicial impartiality, hand down decisions which reflect their biases and value judgements ... members of Australian industrial tribunals have sought to inculcate their values and beliefs into the operation of Australian industrial relations.

He suggested that a major critique of judicial decision-making is to assume judges can divorce themselves from the influence of the general society and groups to which they belong. Recall that in section 3.2 on theories of arbitration, it was illustrated in Table 3.1 how some models contained an inherent sympathy for the plight of the employer under the authoritarian arbitration model, or the employee, within the frameworks of corrective and humanitarian arbitration. And further, Dabcheck's (1981) theory of 'activist arbitration' suggested arbitrators are ambitious in their attempts to impose on the interest groups appearing before them, their personal ideals as to how the industrial relations environment should be regulated.

In Australia, the question of whether FWA's predecessor the AIRC is completely free of bias received regular attention by the Australian media. Southey and Fry (2012) outlined claims from union and employer representatives that successive federal governments had 'stacked' the AIRC by appointing members with either employer or union sympathies. Additional reference to this matter occurs in: Moore (2005); Robinson (2004); and Wilson (2005). For the purpose of this discussion, it is worth noting that the installation of FWA in 2009 occurred because the (then) Labor opposition claimed the appointments made to the AIRC by the Howard government were stacked, with only two appointees with union backgrounds whilst 14 had management backgrounds (Gillard 2007a). The ALP described the Liberal government of possessing *'a tawdry system of appointing political mates'* to the AIRC (Norington & Hannan 2007) and the appointments as '*one of the last desperate acts of a desperate government trying to give its mates a job for life*' (Emerson in Robinson 2004). Thus, one of the ALP's election promises before winning power in 2007 was to eliminate bias in the tribunal by proposing a new selection process for members and replacing the AIRC with Fair Work Australia to *'break a cycle that sees each political party in government use appointments to the industrial umpire as political spoils'* (Australian Labour Party 2007, p. 2).

On winning power, Rudd's Labor government committed to a new selection process ensuring '*appointments will not favour one side over the other but will be made through a transparent selection process'* (Gillard 2008). In announcing Labor's appointment process for FWA, then Deputy Prime Minister Gillard acknowledged Although Labor too, had not been immune from self-interest in its appointments to the AIRC (Steketee 2007). In any event, the composition of FWA was assembled from members of the AIRC upon the announcement '*the existing full time members of the Australian Industrial Relations Commission will be offered roles in Fair Work Australia*' (Gillard 2009). Hence, the tally-keeping and 'stacking' debate has continued. For instance, in 2010, a press release by the Australian Mines and Metals Association (AMMA 2010) read:

> While AMMA in no way seeks to undermine the professionalism and capability of those the Rudd Government has appointed to FWA, their backgrounds do reflect a particularly partisan approach, despite the Government's earlier promises this would not be the case'

The AMMA counted that six of the seven appointments to FWA up to June 2010 were commissioners with union ties, intimating the Labor government was making biased appointments.

The focus of the discussion will now consider the counter-argument to the bias debate. As a baseline argument, and similar to the principles in the legal system, the 'rule against bias' operates in the federal tribunal which requires the 'decision maker' to be impartial in relation to the case they are deciding (CCH 2009; Van Essen et al. 2004). The federal tribunal has promoted its commitment to ensuring the impartiality of its judicial officers (Giudice 2002) and one might consider the availability of an avenue of appeal against an arbitral decision a safety measure to counteract bias. As a case in point, Justice Guidice's decision on 21 October 1998 (*Section 45 appeal against decision issued by Commissioner Tolley on 20 May 1998 Telstra Corporation Limited* 1998), quashed the previous decision made by the arbitrator on the grounds that the arbitrator's conduct during the course of the hearing had 'the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer' [Vakauta v Kelly at 573]. Justice Guidice maintained that the tribunal's duty is to be an independent tribunal.

Dabscheck (1993) noted that the AIRC would at times hand down decisions favouring the employee, and at other times favouring the employer, or government, and at other times, decisions which favour no one and instead upset all parties involved. Arbitration hearings are open to the public and the decisions of the federal tribunal are public documents. With the advent of the internet, easy accessibility to the federal tribunal decisions occurred in July 2000 when the AIRC commenced online publication of its decisions, making unfair dismissal arbitration decisions available for the scrutiny of the Australian people. The decisions of the tribunal have been described as elaborately informed, reasoned decisions covering arguments and evidence (Issac 1981 in Blain, Goodman & Loewenberg 1987). Each decision is available for examination by the affected parties and in many cases by the media, government and other interested parties (Provis 1997). Undoubtedly, this open availability of decisions improves the transparency in the decision-making of each commissioner (as well as access to a data source for this thesis).

Successive federal legislation has contained provisions regarding the selection and behaviour of the tribunal members; perhaps to help limit the 'perceived bias of the [AIRC] appointment process' (Forsyth et al. 2008, p. 231). For instance, The Fair Work Act 2009 in Section 627 sets out qualification requirements for each level of appointment. As an example, to be appointed as a 'commissioner' the Minister must be satisfied that the person possesses knowledge of, or experience in, one or more of the following areas: workplace relations; law; business; industry; and/or commerce. Section 634 of the Act requires that prior to commencing their duties; members undertake an oath to '*faithfully and impartially perform the duties of the office*' (from Schedule 5.1 Oath and affirmation of office). Section 640 of The Fair Work Act requires members to disclose conflicts of interest and Section 641 permits the dismissal of a member for 'misbehaviour'.

As a final point, one should consider the matter of self-preservation in which the tribunal might engage. If the tribunal were to be too extreme or overtly biased, it may lead to its demise. The following quote from Dabcheck (1981, p. 446) explains:

> The line which divides acceptable and unacceptable decisions may be very fine indeed. The interesting question is what will happen if industrial tribunals are out of step with those that they regulate ... Unions and employers would take action to circumvent the tribunal. This would threaten its survival as an institution and force it to make decisions which were not inconsistent with the needs of those that they regulate.

This statement, made in 1981, was prophetic of the folding of the AIRC after continued accusations of bias led to its 2009 replacement by FWA – which, to all intents and purposes, is similar in composition to its predecessor. This has demonstrated that the government of the day, still has significant control over appointments to the federal tribunal (Forsyth et al. 2008).

The conclusion drawn from this discussion is that the federal tribunal, in spite of its obligations and undertakings, can never be free from human fallibility. Theoretically it was outlined that there are grounds to suggest that bias can potentially rear its head in the judicial decision-making process, and by definition this includes the arbitral decision-making of the federal tribunal. The AIRC, by its own admission, had engaged in biased behaviour and upheld an appeal on this ground. The positive side is that the Australian system has installed legislative and systematic measures of providing an appeals avenue, holding public arbitration hearings and providing publicly accessible decisions as an offer of transparency and prohibition of bias.

3.6.5 Unfair dismissal claim statistics

This section aims to explain the workload of Australia's federal tribunal in resolving unfair dismissal claims and the general outcomes of such claims, for the period under examination in this thesis. The data for this thesis are drawn from the arbitral decisions of the federal system from the start of July 2000 to the end of June 2010. During this period, decisions were made by two successive tribunals. The vast majority were made by the Australian Industrial Relations Commission (AIRC) until July 2009 after which Fair Work Australia (FWA) was commissioned as the country's federal industrial tribunal. The majority of AIRC members had their appointments from the AIRC transferred to FWA (and in 2013 to FWC).

Unfair dismissal claims account for a substantial amount of the tribunal's work. Table 3.6 presents statistics pertaining to the number of claims lodged and their

manner of disposal under the requirements of federal legislation. Claims can be: settled by conciliation, dismissed because they failed on matters of jurisdiction, or resolved by substantive arbitration. Substantive arbitration involves the arbitrator deciding whether or not the dismissal was harsh, unjust or unreasonable after hearing the respective responses of the employer and dismissed worker. Claims achieving substantive arbitration may be subsequently subjected to appeals, thus appeal statistics are also provided. The descriptive statistics in Table 3.6 enable one to make several general observations about the pattern of unfair dismissal claims by Australian workers during the last decade.

First, unfair dismissal claim lodgements increased by 62 percent from the commencement to the end of the data period (8,109 to 13,054 lodgements). A noticeable annual increase occurred in the 12 months from June 2009 with a 61 percent jump in claims alone (7,994 to 13,054 lodgements). Legislative changes may have accounted for the increase with the Fair Work Act assuming coverage of the majority of Australian workers, along with the reinstatement of dismissal protection that Work Choices denied employees in firms of less than 100 workers or those dismissed for any operational reason. The Work Choices legislation may have also accounted for a dip in lodgements between 2004-05 and 2006-07 with numbers starting to recover in 2007-08.

Second, for the ten year period, the numbers show that for nine years the conciliation rate sat between 73 and 77 percent, with a jump in the final year to 81 percent. This is due, presumably, to the introduction of the Fair Work Act. On average, 75 percent of claims were resolved as a consequence of, or subsequent to, conciliatory intervention. Conciliation provides a service that ultimately protected the majority of the parties from the stressful events of arbitration. The statistics also showed that, on average, 1,109 annual claims either settled or discontinued, *after* conciliation but prior to an arbitration hearing. This indicates employees would frequently take a claim to conciliation but not pursue their claim through the arbitration process. Uncertainty, cost or complexity of the arbitration process could be plausible explanations for why they walk away from their claims. Alternatively, workers may have been settling with their (ex) employer after conciliation and not informing the Commission of their resolution.

Table 3.6 *Unfair dismissal claim statistics in the federal tribunal from 1st July 2000 to 30 June 2010*

Stage of Claim	Australian Industrial Relations Commission									FWA	*10 year average*
	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	
No. Claims lodged*	8109	7461	7121	7044	6707	5758	5173	6067	7994	13054	***7449***
Conciliation statistics											
Finalised at or prior to conciliation	6096	6719	5876	5763	5654	4739	4508	5282	5972	11823	***6243***
Finalised post conciliation but prior to arbitration	1422	1648	1209	1139	985	1143	922	930	913	780	***1109***
Conciliation settlement rate [H]	73%	75%	75%	75%	77%	73%	73%	73%	75%	81%	***75%***
Unsubstantive Arbitration statistics											
Dismissed: out of time	85	105	87	77	41	62	87	135	142	111	***93***
Dismissed: no jurisdiction	129	156	154	129	120	128	255	382	437	228	***212***
Dismissed: vexatious claim	(new category from 2006)						15	14	19	11	***15***
Substantive Arbitration Statistics											
Dismissed on merits	142	148	136	117	115	55	58	34	59	67	***93***
Compensation order	96	96	81	84	96	52	35	17	22	51	***63***
Reinstatement order	42	47	24	22	18	17	8	18	14	22	***23***
Breach without a remedy order	11	0	0	0	0	0	0	0	0	2	***1***
Finalised by substantive arbitration	291	291	241	223	202	124	101	69	95	142	***178***
Claim upheld rate [V]	51%	49%	44%	48%	43%	56%	43%	51%	38%	53%	***48%***
Appeal Statistics											
No. of appeals	87	63	52	53	44	40	37	38	43	41	***93***
Appeal rate [#]	30%	22%	22%	24%	22%	32%	37%	55%	45%	29%	***32%***
Upheld	27	28	17	16	14	18	14	9	6	11	***23***
Dismissed	60	35	35	37	30	22	23	29	37	30	***34***
Appeal upheld rate [I]	31%	44%	33%	30%	32%	45%	38%	24%	14%	27%	***32%***

* claims lodged are not always finalised in the same year
[H] conciliation settlement rate is provided in each annual report
[V] (compensation + reinstatement + breach without order) ÷ finalised by substantive arbitration
[#] number of appeals ÷ finalised by substantive arbitration
[I] appeals upheld ÷ number of appeals

Source: Developed for thesis with base statistics from: (Australian Industrial Relations Commission 2001, 2002, 2003, 2004, 2005a, 2006, 2007a, 2008, 2009; Fair Work Australia 2010a)

Third, the impact of different legislative eras on the disposal of claims can be identified in the statistics. Claims deemed to be 'out of jurisdiction' increased in 2006-07, spiking in 2008-09, probably due to the 2005 Work Choices amendments declaring extensive exclusions to categories of employees that could lodge unfair dismissal claims (these exclusions were discussed previously in Table 3.5). The 'out of jurisdiction' claims declined in 2009-10 under the effects of The Fair Work Act 2009. The introduction of Work Choices also coincided with a four year decline in the number of fully fledged, substantive arbitration claims determined from 2005-07, before showing a recovery in 2009-10. These are predictable results arising from the tough Work Choices limitations on allowable claims. The number of claims moving through to a full arbitration hearing declined over the decade: with 291 decisions issued in 2000-01 compared to 142 decisions in 2009-10. This may be explained by legislative changes affecting the jurisdictional viability of claims with 129 rejections in 2000-01 compared to 228 in 2000-10, or softening on attitudes towards 'out of time' claims which increased from 85 rejections in 2000-01 compared to 111 in 2000-10.

A fourth point is made of the likelihood of success at the arbitration table. The chance of an employee convincing an arbitrator to overturn management's dismissal action was, on average, 48 percent. Although from year to year there appears to be a noticeable variation in the successful claim rate. For instance, the highest successful claim rate with 56 percent of claims falling in favour of the employee occurred in 2005-06 and the lowest success rate occurred in 2008-09 with 38 percent of claims favouring the employee. In the event the decision favoured the employee, the arbitrator was more likely to award compensation instead of reinstatement. Riley (2005, p. 234) suggested that industrial tribunals show reluctance to order reinstatement, most likely on the basis that trust and confidence has been destroyed. However, an anomaly to this preference occurred in 2007-08 where 18 reinstatement orders were made compared to 17 compensation orders.

A final point is made about the appeal rates. The ten year average showed that 32 percent of decisions as to whether a dismissal was harsh, unjust or unreasonable, were appealed to the full bench. The average appeal success rate – which reflected the chance of getting the arbitrator's decision overturned by a bench of three

members of the AIRC/FWA – was also 32 percent. As either party could make an appeal on the single arbitrator's decision, the success rate does not distinguish appeal decisions favourable to the employer from those favouring the worker. Moreover, appeal rates reflected a measure of full bench support of the single arbitrator's reasoning and administration of the hearing process by a panel of his or her peers. Logically, one would think the lower the appeal success rate, the more confidence one can have in the arbitral decision-making of single members of the tribunal. Whether a 32 percent overturn rate is low enough to inspire confidence is a matter for debate, but the chance that a single arbitrator can err (or be overturned) on nearly a third of his or her decisions may have inspired some parties to make an appeal.

Appeal rates peaked in 2007-08 and 2008-09 at 55 percent and 45 percent respectively. At the same time, the appeal success rate was at its lowest with 24 percent and 17 percent, respectively, overturning the arbitrators' initial decision. Again this trend could be attributed to the Work Choices legislation where arbitrators were compelled to administer new restrictions, particularly in relation to defining the scope of the legislation permitting employers to dismiss workers 'for any operational reason'. Thus it is postulated that many of these appeals would have been from workers that, under previous legislation, would have considered their treatment to be harsh, unjust and reasonable, but due to the dismissal for 'any operational reason' exclusion of Work Choices, they no longer had a viable claim – which was confirmed by the appeals bench. Not seen in these statistics is the effect of Section 400 Appeal Rights in the Fair Work Act 2009, whereby an appeal will not be heard unless it is in the public interest and only if the original decision involved a 'significant error of fact'.

This chapter has so far defined the role of arbitration, considered industrial relations theories of arbitration and arbitration as a part of a workplace grievance within the organisational behaviour literature, philosophical ideals to support unfair dismissal protections, as well as international and Australian perspectives of unfair dismissal arbitration. The remainder of chapter 3 is devoted to analysing arbitral decision-making theories *specifically* within a termination of employment context.

3.7 Theories of 'arbitral decision-making' over dismissal claims

To finalise this chapter, the discussion turns to a critical examination of theories on the arbitral *decision-making process* itself, in the context of termination of employment. Since the 1970s, researchers from predominantly the US and Canada have examined influential factors in the arbitral decision-making process. The next chapter will contain a consideration of the findings from such investigations, as they will contribute to the development of testable hypotheses for this thesis. Moreover, in this section, the contributions of several authors are featured due to either, their prominence in the literature on the unfair dismissal arbitration decision process, or because they have authored the most recent conceptualisations of the arbitral decision-making process regarding dismissal claims. This section concludes with an explanation of this thesis' conceptual model, which proposes a revised theory of arbitral decision-making within the termination of employment context.

3.7.1 Nelson and Kim's model

Nelson and Kim published their statistically validated model in the esteemed *Journal of Economy and Society* in 2008. The model submits that the testimony of both parties in an unfair dismissal claim will consist of facts to which both parties agree whilst other facts will be disputed. Their model suggests the arbitrator engages in two roles to arrive at an arbitration decision. First, from the assembly of facts, they isolate those of relevance. Second, they assess each fact by assigning a mental weight as to how much of a deciding factor it is to be in determining the outcome of a case. The combination of ascertained facts and subsequent weighting of them, combined with the uncontested facts, form the crucial elements of the arbitrators' decision. Further, the model suggests an arbitrator's characteristics will influence their treatment of the contested facts in terms of identifying those considered significant and the degree of importance they assign to them in making a decision. These dynamics are reflected in Figure 3.1 showing Nelson and Kim's conceptual model.

Nelson and Kim's method to test this model involved a logistic regression analysis using responses from 74 arbitrators registered with the American Arbitration Association. The arbitrators responded to quantitative survey questions after reading a 17 page summary of a dismissal case involving the discharge of a crane operator at

a large steel plant after a series of alcohol related offences. The case contained two facts agreed between the parties: that the final incident leading to discharge occurred outside of work hours, and that the worker had broken a promise to not drink. Two facts were also contested by the parties: whether or not the worker was a reformed alcoholic with membership in Alcoholics Anonymous, and whether or not the worker's job performance was being affected. The arbitrators assessed, on a five point scale, whether they 'strongly disagreed' to 'strongly agreed' with each of the contested and uncontested facts and assigned, again using a five point scale, whether each fact held 'no weight' to being a 'deciding factor' in their decision-making process.

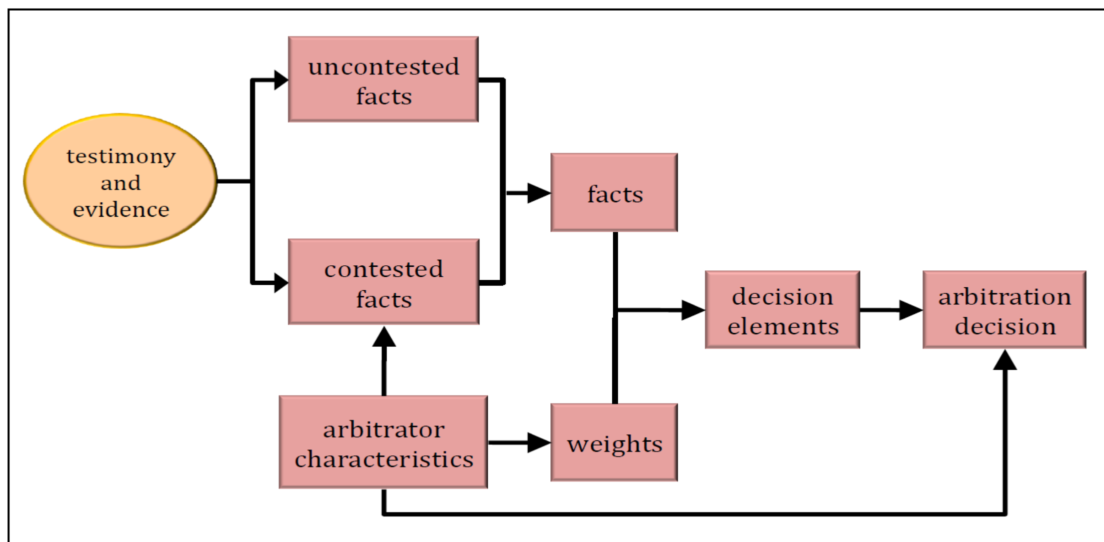


Figure 3.1 *Nelson and Kim's model of the arbitral decision-making process*

(*Source*: Nelson & Kim 2008, p. 269)

The data collected to measure the arbitrator's characteristics were experience, education, occupation and age. Experience was measured by whether or not the arbitrator was a member of the National Academy of Arbitrators that has a threshold requirement to hear at least 50 cases in the previous five years. Education was measured according to whether or not the arbitrator held a law degree. Occupation was measured according to whether or not being an arbitrator was their primary occupation. Arbitrators were asked to record their age in years. The dependent variable – the arbitration decision – was measured by the arbitrators indicating whether or not they would reinstate the dismissed worker.

Nelson and Kim found their conceptual model to be statistically supported to the extent that decision elements – a combination of how much the arbitrator accepted the truth of the facts and the importance assigned to each – were significantly influencing the arbitration decision. The most significant influence on the decision was the weight assigned to the uncontested fact where the final incident occurred outside the workplace – an irregular (and controversial) feature of most dismissal cases and a fact which Wheeler and Rojot's (1992) global study found was least likely to attract dismissal. The measurement of the decision elements may have been different if the uncontested fact were that the behaviour occurred in the workplace, reflecting the context of the majority of dismissal cases. Methodologically, the limitation of this model is that involves a single dismissal scenario using an 'on the papers' assessment by the arbitrator, potentially limiting the model's ability to generalise to other dismissal scenarios. It also restricted the arbitrators to a dichotomous decision: reinstate or not reinstate, whereas compensation, as a third possible remedy may have changed the outcome. However, the survey aspect of the research methodology enabled the investigators to measure part of the arbitrator's cognitive process which would not have been possible if a text analysis of decisions, as a methodology, were used.

A finding that could be generalised to the broader arbitral decision-making phenomenon is that the analysis showed that the arbitrators' characteristics swayed how much weight the arbitrators placed on each fact – but also found their characteristics were not directly impacting their final decisions. Specifics of this aspect of Nelson and Kim's findings will be discussed further in chapter 4 in relation to sub-question (c) pertaining to the influence of arbitrator characteristics on the arbitration outcome.

In summary, Nelson and Kim's main focus appears to have identified the mental scoring an arbitrator performs when assessing if a 'fact' is of value or not, and if so, how much impact it had on the final decision. Whilst this is a valuable contribution towards understanding the arbitral decision-making process, the model did not take into account the arbitrator's consideration of the natural justice and procedural elements of the dismissal nor measure the worker's explanation for their behaviour.

3.7.2 Gely and Chandler's model

Gely and Chandler's (2008) model was published in the *Journal of Collective Negotiations*. They investigated 175 arbitral decisions made by US arbitrators involving alleged workplace violence, focusing on cases in which the 'union wins', vis-a-vis, the 'worker wins' the case. The authors argued that arbitrators consider the variety of issues before them by 'lumping' issues together, rather than by dealing with each one in isolation. To identify influential factors on arbitral decisions, a mixed method analysis was performed: a qualitative comparative analysis (QCA) followed by logistic regression analysis.

Initially, the union's defences were examined to identify the arrangement of the union's argument, according to four categories of 'causal conditions'. Figure 3.2 displays the four categories of 'causal conditions', any of which may or may not exist in the arbitrator's deliberations, with 16 possible configurations emanating from these four categories. The QCA revealed four, predominant combinations where the decision favoured the union/worker in at least 51 percent of the cases.

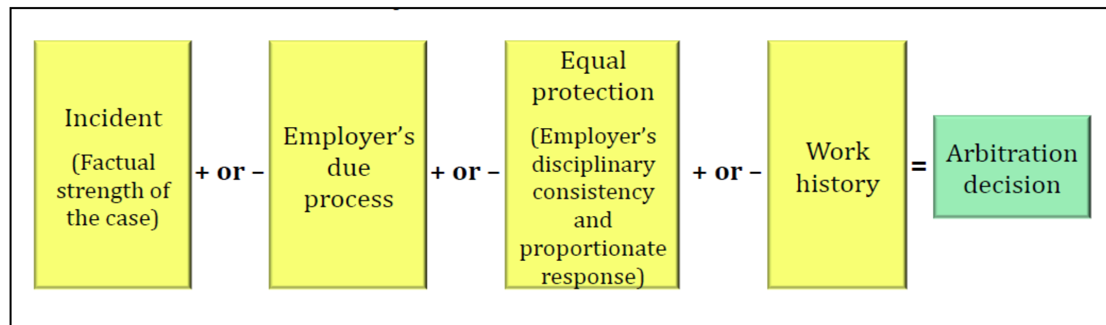


Figure 3.2 *Gely and Chandler's conceptualisation of combinational arbitral decision-making*

(Adapted from: Gely & Chandler 2008*)*

Secondly, from these four combinations, logistic regression analysis was then used to identify any defence configurations that were statistically significant. As a result, two configurations were statistically significant in which the decision favoured the worker: 'factual strength of the case' + 'due process' + 'work history'; and 'factual strength of the case' + 'work history' + 'equal protection'. Gely and Chandler concluded that arbitrators are more likely to favour the union's defence, when confronted with arguments specifically arranged in either one of those two orders,

compared to cases were defences were not captured by that arrangement. In the subsequent logistic regression analysis, several factors were controlled for to reflect the 'broader environment' in which the grievance took place. These factors were: worker's gender; whether the 'victim' of the violence/aggression was a supervisor; whether physical contact was involved; and whether the union used an attorney at the arbitration table. Of these factors, only the use of an attorney was found to have a significant, positive relationship with 'union wins'.

The authors concluded that unions, by focusing their defences on either: inconsistency in the employer's treatment of the worker (equal protection), or the employer's due process in administering the investigation and dismissal, could overshadow the facts relating to the act of aggression or violence in the arbitrator's considerations. Additionally, if the union combined their defence with evidence of a positive work history, it further bolstered the likelihood of a union wining their claim on behalf of the worker (along with using an attorney).

The authors' focus on the configurations of the argument, contributed new insight into arbitral processes. This insight, though, came at the compromise of limited control variables being included in the subsequent logistic regression analysis. It is also possible that the model's underpinnings of aggressive or violent behaviour, defined in the study as either '*physical or verbal acts that significantly affect the workplace, generate a concern for personal safety, or result in physical injury or death*' (Gely & Chandler 2008, p. 290), may limit the ability to generalise its findings to other less aggressive types of misbehaviour, such as theft.

3.7.3 Ross and Chen's model

Published in 2007 in the *Labor Law Journal*, Ross and Chen presented a conceptual model of arbitral decision-making after reviewing five US labour arbitration case reports. The cases concerned employees in the health care industry terminated due to infractions in handling personal, medical information. The dynamics of the arbitrator's decision-making process in these cases are reflected in Figure 3.3 showing Ross and Chen's conceptual model.

This model contains four initial inputs to the arbitral decision-making process. The first input is the employer's application of just cause provisions when dismissing the worker. Second is whether the employee or another party were to profit from the nature of the offence. Third are employee characteristics of gender, tenure and work record to incorporate findings from existing published research. The fourth input is the type of punishment administered and whether it was progressive in nature. It is from these four dimensions that the arbitrator will develop perceptions in relation to the motive underlying the employee's behaviour and the degree of procedural and distributive justice employed during the dismissal process.

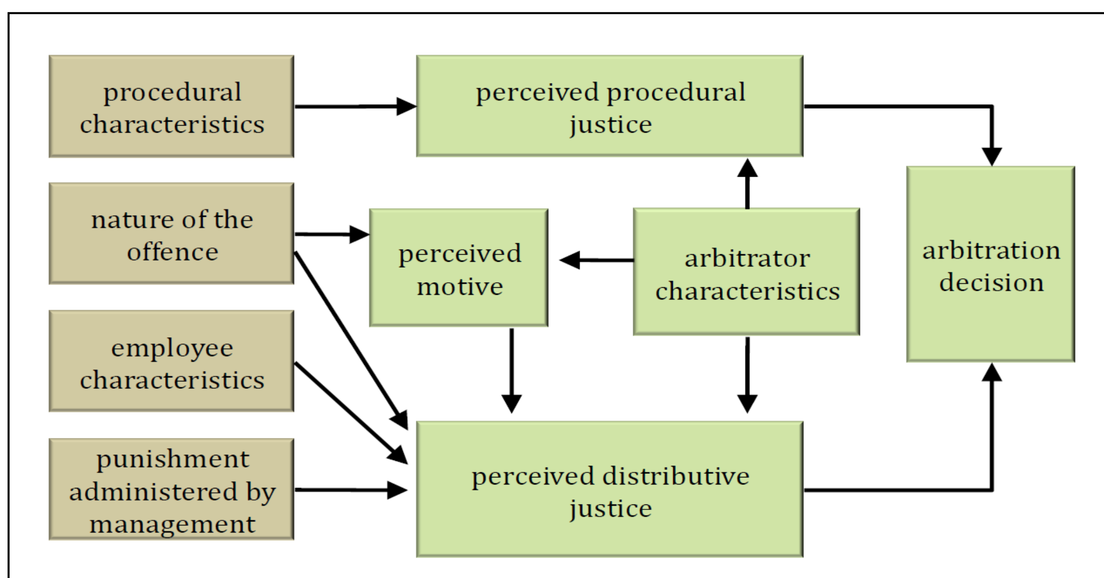


Figure 3.3 *Ross and Chen's model of the arbitral decision-making process*

(*Source*: Ross & Chen 2007, p. 126)

The model contends that these perceptions are influenced by the arbitrator's personal characteristics such as education and experience. The arbitrator's decision is conceptualised to ultimately arise from the arbitrator's assessment of the perceived procedural justice as to whether a due process was followed and distributive justice as to whether the punishment was proportionate to the behaviour. Whilst from a positivist's paradigm this model is at the conceptual stage and requires validation, the conceptual integration of the justice components into the model is a valuable contribution recognising the extent of the workplace justice literature.

3.7.4 Chelliah and D'Netto's model

Chelliah and D'Netto's (2006) model was published in *Employee Relations* and it examined arbitral decision-making in Australia using 342 randomly selected unfair dismissal decisions by commissioners in the AIRC from 1997 to 2000. The authors considered influences on three hierarchies of dependent variables. First, they considered influences on whether or not the employee's complaint was either 'denied' or 'upheld'. Second they considered influences on the amount of 'damages' ordered for reinstated employees. The third dependent variable considered influences on the amount of money awarded as 'compensation' in lieu of reinstatement. Figure 3.4 presents Chelliah and D'Netto's conceptual model.

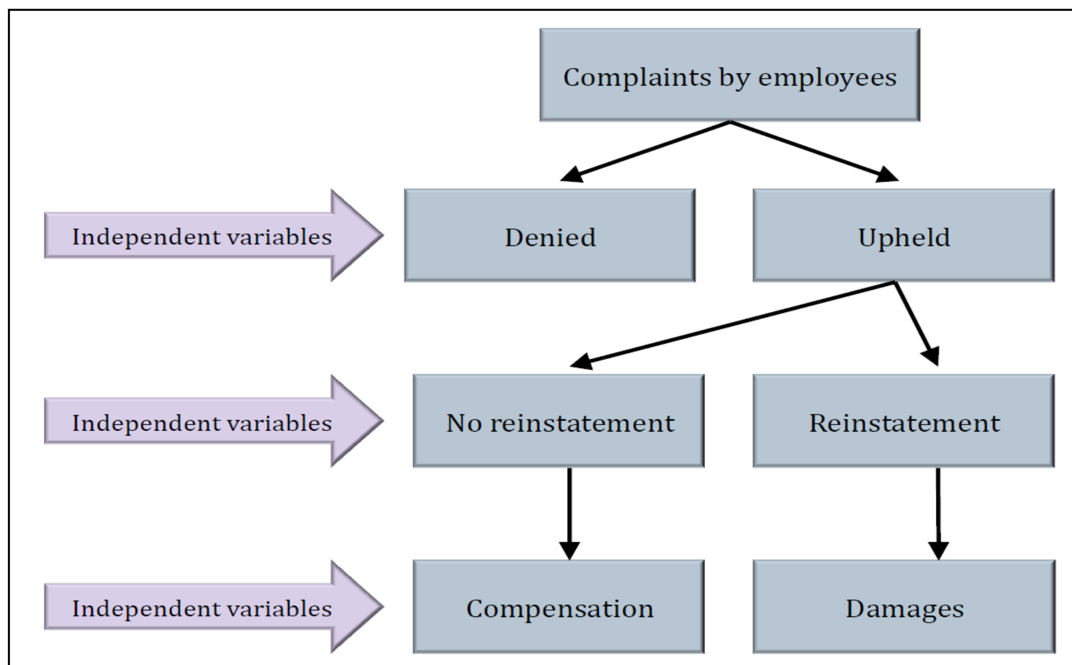


Figure 3.4 *Chelliah and D'Netto's conceptual model of arbitration outcomes*

(Adapted from: Chelliah & D'Netto 2006, p. 488*)*

Logistic regression and ordinary least squares analysis was used to test for influences, from a variety of independent variables, on the three levels of dependent variables. The independent variables examined were selected from the 1990 unpublished, doctorial thesis by Eden on unjust dismissal in the Canadian federal jurisdiction.

The authors identified the following independent variables that were statistically significant. First, in terms of whether an upheld or denied claim was awarded, they

found an 'upheld' unfair dismissal complaint was significantly and positively correlated with the workers' 'years of service'; and three aspects of the 'employer's discharge process': a) failure to apply progressive discipline; b) failure to provide warnings; and c) improper promulgation of rules. At the same time, a 'denied' claim was significantly and positively associated with dishonesty – a value in the variable, 'type of offence'. Further, the amount of 'damages' paid to 'reinstated' employees was found to be significantly and positively correlated with the 'period since dismissal' – a logical result as arbitrators attempt to compensate for lost wages reflective of the period out-of-work. Finally, where a dismissal complaint was upheld but the employee was not reinstated, the analysis showed that 'compensation' awarded by the arbitrator was significantly and positively correlated with 'years of service' and significantly yet negatively correlated if the 'employee was at fault' – although the article did not explain how this variable was measured.

Overall, Chelliah and D'Netto's investigation was exploratory in nature providing initial insight into some aspects of Australia's arbitration outcomes. Knowledge was obtained about how Australian arbitrators respond to, managerial errors in the dismissal process, and three particular types of misbehaviour: insubordination; dishonesty and alcohol related offences. These findings can be taken into consideration during hypothesis development for subsequent decision-making models. As also identified in the previous conceptual and/or econometric models discussed in this section, a gap also exists in Chelliah and D'Netto's analysis where it did not take into account the arbitrator's consideration of the worker's defence for their behaviour. Additionally, arbitrator characteristics, union advocacy and HR expertise variables, which were not incorporated into the Chelliah and D'Netto model, will be incorporated into the conceptual model (presented in sub-section 3.7.6) to undergo analysis in this thesis.

3.7.5 Bemmels' investigations

Bemmels is noted as a seminal scholar in the dismissal arbitration literature (McAndrew 2000) due to his studies examining gender influences on discipline and dismissal arbitration decisions published during the late 1980s and early 1990s. Table 3.7 provides a summary of these publications, which predominantly contained

the finding that, when controlling for factors such as the type of offence and managerial processes, gender effects existed in the arbitration process, whereby male arbitrators were more lenient on female grievants compared to male grievants.

Table 3.7 *Bemmels' investigations into arbitral decision-making influences*

Study details	***Dependent variables***	***Independent variables*** NAME	SIGNIFICANT EFFECTS DETECTED
1. 'The effect of grievants' gender on arbitrators' decisions' Published 1988 104 Canadian discharge cases from 1981 to 1983 heard by male arbitrators Used text analysis with logit analysis and ordinary least squares regression	Claim denied OR Claim sustained: • Reinstatement with no loss of pay • Reinstatement with partial loss of pay • Length of suspension (if partially reinstated)	Gender of grievant	Yes: Female grievants, appearing before male arbitrators, are twice as likely to win a sustained claim – and win full reinstatement –than male grievants
		Reason for discharge	No
		Occupation group	Yes: Semi-skilled and supervisory/professional level employees more likely to win a sustained claim than skilled or clerical occupations.
		Sector	No
		Forum	No
2. 'Gender effects in grievance arbitration' Published 1988 557 United States 'suspension' cases (not discharge) from 1976 to 1986 Used text analysis with logit analysis and ordinary least squares regression	Claim sustained: • Reinstatement with no loss of pay • Reinstatement with partial loss of pay • Length of suspension (if partially reinstated)	Gender of arbitrator & grievant	Yes: Male arbitrators more likely to sustain the grievances of female claimants than male claimants.
		Length of suspension	Yes: Less likely to overturn suspensions for shorter than two weeks.
		Type of offence	Yes: Less likely to overturn suspensions for insubordination or dishonesty/theft.
		Disciplinary record	Yes: Unblemished record positively related to a sustained decision. Previous offences less likely to win a sustained decision.
		Industry group	Yes: Grievants from the non-manufacturing sector more likely to receive a sustained grievance than public and manufacturing.
		Mitigating factors	Yes: Where the union argued some form of mitigating factors (such as long service record or inconsistent rules enforcement) increased the odds of a sustained grievance.
		Gender changes over time	Yes: male arbitrators have become more lenient to female grievants over time.

Study details	*Dependent variables*	*Independent variables* NAME	SIGNIFICANT EFFECTS DETECTED
3. 'Gender effects in discharge arbitration' Published 1988 1,812 United States discharge cases Determined from 1976 to 1986 Used text analysis with logit analysis and OLS regression	Claim denied OR Claim sustained: • Reinstatement with no loss of pay • Reinstatement with partial loss of pay • Length of suspension (if partially reinstated)	Gender of arbitrator & grievant	Yes: female workers before male arbitrators positively related to sustained decisions with either full reinstatement or length of suspension.
		Type of offence	Yes: dishonesty/theft and assault/fighting negatively related to a sustained decision. Insubordination negatively related to reinstatement. Attendance and work performance positively related to length of suspension.
		Disciplinary record	Yes: Unblemished record positively related to a sustained decision. Previous offences negatively related to a sustained decision. Both negatively related to length of suspension.
		Industry group	Yes: Public sector positively related to a sustained decision. Non-manufacturing sector positively related to length of suspension.
		Mitigating factors	Yes: Where the union argued some form of mitigating factors (such as long service record or inconsistent rules enforcement) positively related to a sustained grievance and negatively related to length of suspension.
4. 'Gender effects in discipline arbitration: Evidence from British Columbia' Published in 1988 633 Canadian discipline or discharge cases from 1977 to 1982 Used text analysis with logit analysis and OLS regression	Claim denied OR Claim sustained: • Full exoneration (Reinstatement with no loss of pay or penalty) • Length of suspension (if partially reinstated)	Gender of grievant	Yes: Female grievant more likely to be fully exonerated (rather than a reduced penalty) than male grievants.
		Length of suspension	No
		Type of offence	No
		Disciplinary record	Yes: Previous offences negatively related to a sustained decision and likelihood of full exoneration.
		Industry group	No
		Arbitration single or panel	Yes: Panel of arbitrators positively associated with sustaining a grievance.
5. 'Arbitrator characteristics and arbitrator decisions' Published 1990 459 arbitrators deciding 2001 cases in the US	Claim sustained: • Reinstatement with no loss of pay • Reinstatement with partial loss of pay	Arbitrators' age	Yes: older arbitrators more likely to find in favour of the worker than younger arbitrators
		Arbitrators' gender	Yes: female arbitrators gave shorter suspension periods.
		Arbitrators'	Yes: PhD qualified arbitrators less likely to award full reinstatement

Study details	*Dependent variables*	Independent variables: Name	Independent variables: Significant effects detected
determined from 1976 to 1986 Used text analysis with logit analysis & OLS regression	• Length of suspension (if partially reinstated)	education Arbitrators' current Occupation Arbitrators' previous occupation	Yes: Arbitrators with Law qualifications less likely to award full reinstatement than any of the other occupations. Yes: Former business professors most likely to award a full reinstatement than any of the other occupations
6. 'The effect of grievants' gender and arbitrator characteristics on arbitration decisions' Published 1990 131 US arbitrators completed a survey about a dismissal due to inadequate performance. Used a field experiment with logit analysis and OLS regression	• Claim denied OR • Claim sustained • Length of suspension (if partially reinstated)	Gender of grievant Gender of arbitrator Arbitrator's education Arbitrator's experience Arbitrator's employment background	No No No No Yes: Those with an academic background gave shorter suspensions periods than non academic backgrounds.
7. 'Attribution theory and discipline arbitration' Published 1991 230 male arbitrators completed a survey about a dismissal due to inadequate performance. Used a field experiment with logit analysis and OLS regression	Claim denied OR Claim sustained: • Reinstatement with no loss of pay • Reinstatement with partial loss of pay • Length of suspension (if partially reinstated)	Grievants' gender Causal attributions Facts of the case Arbitrators' experience	Yes: Male arbitrators more lenient towards women grievants then male grievants in relation to being fully reinstated or, if suspended, length of suspension was shorter. Yes: Management responsible positively associated with a sustained claim and full reinstatement; and grievant responsible negatively related to a sustained claim and positively related to length of suspension. Yes: More likely to sustain a grievance if there was high 'consensus' (other employees exhibit same behaviour as the grievant) and high 'distinctiveness' (whether behaviour that led to dismissal is a first time behavioural issue). Less likely to sustain a grievance if high 'consistency' existed (grievant exhibited same behaviour in the past). Full reinstatement more likely if high 'consensus' existed and full reinstatement less likely if high 'consistency' existed. Yes: More experienced arbitrators more likely to attribute responsibility for the incident to the grievant.

(Adapted from: Bemmels 1988b, 1988a, 1988c, 1990b, 1990a; 1991a, 1991b)

The literature shows that Bemmels' investigations provided methodologies and insights followed by future grievance researchers. These studies occurred within either US or Canadian contexts, where the focus on gender effects and arbitrator characteristics resulted from to the ability of grievant and respondent to select their arbitrator. These findings provide insights that can be used for international comparison, especially in countries where arbitrators cannot be selected by the parties (such as Australia). Even within the context of these two countries, Bemmels' investigations uncovered contradictory findings, particularly the 1990 study (number 6 in Table 3.7) involving a field experiment with US arbitrators completing an 'on the papers' assessment of an unfair dismissal. In this study, most of the independent variables returned insignificant results, perhaps reflecting a weakness in the design of the field experiment. Meanwhile, the studies that relied on analysing actual arbitration decisions returned, in the main, consistent findings. This consistency adds support to the use of a similar data collection method – as a reliable method – for use in this thesis.

3.7.6 The conceptual model investigated in this thesis

The objective of the conceptual model, and forthcoming analysis of the model in this thesis, is to synthesise a new area of enquiry pertaining to employee defences provided at the arbitration table, with an array of existing, but disconnected, knowledge about employee misbehaviour and dismissal arbitration. The conceptual model, presented in Figure 3.5, is illustrative of this major research objective, which, recalled from the introductory chapter, is:

> ***To identify factors influencing the arbitral decisions of members in Australia's federal industrial tribunal when they determine unfair dismissal claims from workers who have been terminated from their employment due to 'misbehaviour'.***

It is also recounted from the first chapter that this research objective is underpinned by three main research questions and four sub-questions, as follows:

RQ1: ***How does the type of misbehaviour in which the worker engaged influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

RQ2: ***How does the explanation provided by the dismissed worker influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

RQ3: ***How does the dismissal procedure used by the employer influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

Sub-question (a): *Is the arbitration decision influenced by the presence of expert advocates representing the parties?*

Sub-question (b): *Is the arbitration decision influenced by characteristics of the dismissed worker?*

Sub-question (c): *Is the arbitration decision influenced by characteristics of the arbitrator?*

Sub-question (d): *Is the arbitration decision influenced by characteristics of the employer?*

The conceptual model, as introduced in the first chapter is revisited in Figure 3.5 to remind the reader how each of the research questions and sub-questions 'relate' to the dependent variable.

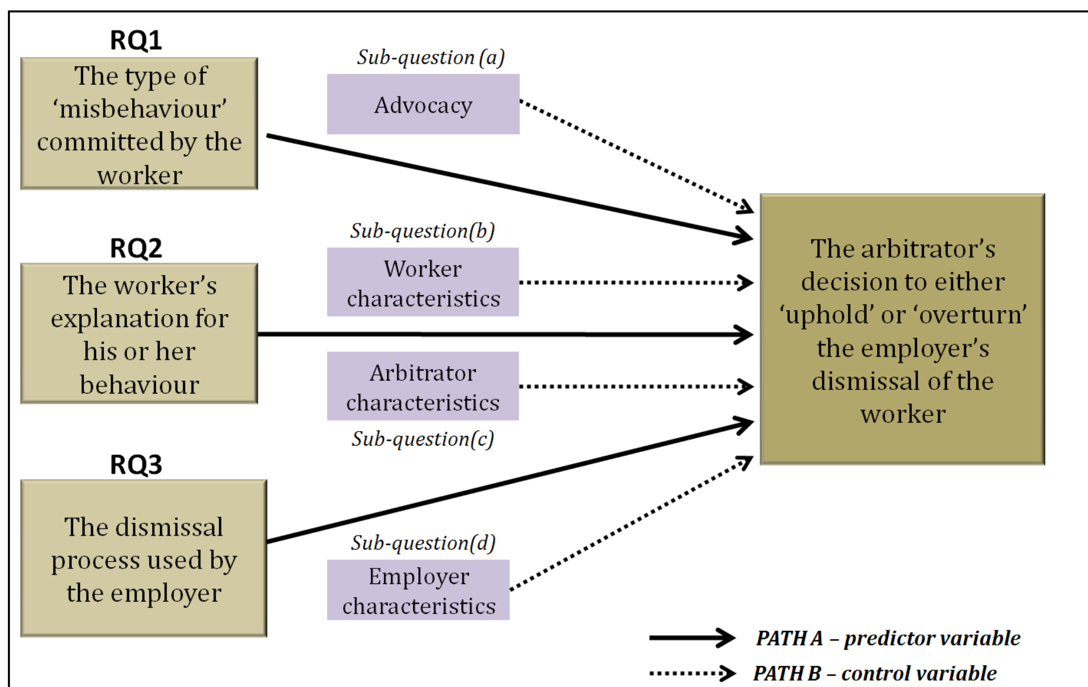


Figure 3.5 *Conceptual model of arbitration decisions regarding unfair dismissal claims from workers dismissed due to misconduct (reprised)*

(*Source:* Developed for thesis)

Figure 3.5 shows that the 'output' or the dependent variable is the 'arbitration decision'. This reflects whether the arbitrator decides to either uphold the employer's decision to dismiss the worker, or, overturn the employer's decision. An 'overturn' decision occurs if the arbitrator decides one of the following: to reinstate the worker without backpay; reinstate the worker with backpay for lost wages; or pay financial compensation to the worker but without reinstatement.

The model also shows that the arbitration decision is influenced by three decision 'inputs' or 'predictor/independent variables' (PATH A): the type of misbehaviour in which the employer states the worker engaged; the worker's explanation for engaging in this behaviour; and the process used by the employer to terminate the worker's employment contract.

Whilst the three major research questions address the principal predictor or independent variables in the model, the forthcoming analysis would be insular without the inclusion of sub-questions that present a compilation of additional, independent variables that could have some influence on the arbitration decision (Block & Stieber 1987). Accordingly, the model allows for control factors/variables (PATH B). These factors are not direct decision inputs, but they may indirectly influence the arbitrator's decision. The control variables address factors associated with the use of advocates to present a case, as well as characteristics of the worker, employer and arbitrator.

3.8 Chapter 3 conclusion

This chapter commenced by defining the role of arbitration to adjudicate disputes pertaining to the employment relationship and that unfair dismissal claims are generally perceived as a dispute concerning an employee's rights. Ultimately, arbitrators can provide court-like decisions without the burden of court formalities and expense. The second section of the chapter contained a broader discussion concerning theoretical explanations for the existence of arbitration arising from the workplace. This discussion reviewed the writings of Carlston, Wheeler, Perlman, Dabscheck and Thornthwaithe on theories of arbitration and bureaucratic structures, as well as the scholarly perspective of 'judicial arbitration'. Recognising that the

unfair dismissal arbitration process is likely to be adversarial by nature between the parties, the theories in this part of the discussion were analysed in terms of whether they showed partiality towards either the plight of the worker, or were more sensitive to the managerial prerogatives of the employer.

Up to this point the chapter mainly reflected industrial relations perspectives of arbitration. Consequently, in the third section of the chapter the organisational behaviour perspective was considered in terms of unfair dismissal arbitration as a dimension of the workplace grievance literature within organisational behaviour. This section reviewed published works aimed at understanding the implication of attribution and justice theories on unfair dismissal arbitration outcomes.

It was noted that the literature also prescribed an ideological proposition to support the practice of providing unfair dismissal protections to workers. Thus, the fourth section of the chapter transitions from a theoretical discussion of arbitration towards a practical orientation. The short-comings of common law in giving workers a voice against employment termination when the employer treats them in a harsh or unjust manner were discussed. It acknowledged that the State (the government) intervenes to provide protection supplementary to the common law contract. This is in the form of an industrial mechanism: unfair dismissal. It was argued that unfair dismissal legislation and its associated administration through tribunals is underpinned by principles of providing workers with dignity and autonomy as a balance to the employer's need to make a profit.

The fifth section of the chapter explored global perspectives of unfair dismissal arbitration by considering the variation in application of unfair dismissal protection policies in other developed market economies. The sixth section of the chapter considered present day unfair dismissal protections under the Fair Work Act. The process for how current day Australians can make an unfair dismissal claim, through to resolution by arbitration, was outlined. A discussion was presented on the ongoing political and public interest debate about the neutrality of Australia's federal tribunal. This section was finalised by presenting descriptive statistics pertaining to the work of Australia's federal tribunal in resolving unfair dismissal claims for the period of interest in this thesis, between 2000 and 2010.

The final section of this chapter featured the most recent, or prominent, arbitral decision-making models identifying influences on arbitration decisions over termination of employment claims. Previous research suggests that perceptions of truth, justice and motivations, and characteristics of the arbitrator and the worker, may be influencing the arbitrator's decision. It was noted that one dimension not considered in the existing models was the influence of specific types of employee defences for their behaviour. This section culminated in the presentation of the conceptual model that will form the basis of the statistical examination in this thesis. This model contends that an arbitration decision is a function of three elements: the type of misbehaviour in which the employee purportedly engaged; the employee's explanation for their behaviour; and the process used by the employer in dismissing the worker. Using a theoretical deductive process, hypothesis for testing each aspect of this conceptual model will be presented in the next chapter.

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CHAPTER 4

HYPOTHESIS DEDUCTION

4.0 Introduction

This final chapter of the literature review discusses the independent variables in the conceptual model using the hypothetical-deductive approach of a positivist paradigm (Strauss & Whitfield 1998). This is achieved by referring to existing theories to develop logical assumptions about the impact of each variable on arbitral decision-making in misbehaviour cases. The aim of this chapter is to arrive at testable hypotheses to facilitate the statistical analysis of the conceptual model on arbitral decision-making over dismissal due to misbehaviour.

The design of this chapter is that it will first re-cap the research objective and its supporting three main research questions and four sub-questions. After which, the remainder of this chapter provides for the deduction of each research question into a series of testable hypothesis by drawing on both descriptive and process theories, as well as Australian contextual issues, which might indicate the direction of influence each variable will cast on the arbitration outcome. The later chapters of this thesis will test these hypotheses against empirical facts drawn from genuine arbitration decisions.

4.1 A reprise of the research objective and questions

To maintain the focus of this thesis, it is worth recalling from the outset of this chapter that the major research objective is:

> ***To identify factors influencing the arbitral decisions of members in Australia's federal industrial tribunal when they determine unfair dismissal claims from workers who have been terminated from their employment due to 'misbehaviour'.***

This objective will be operationalised by investigating these three major research questions:

RQ1: ***How does the type of misbehaviour in which the worker engaged influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

RQ2: ***How does the explanation provided by the dismissed worker influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

RQ3: ***How does the dismissal procedure used by the employer influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?***

In addition, these four sub-questions consider whether moderating variables are influencing the arbitration decision:

Sub-question (a): *Is the arbitration decision influenced by the presence of expert advocates representing the parties?*

Sub-question (b): *Is the arbitration decision influenced by characteristics of the dismissed worker?*

Sub-question (c): *Is the arbitration decision influenced by characteristics of the arbitrator?*

Sub-question (d): *Is the arbitration decision influenced by characteristics of the employer?*

The steps for building the hypotheses will proceed as follows: after introducing the nature of the question, where appropriate, the 'descriptive' theory will be outlined to define and measure the independent or control variable. After which, where applicable, 'process' theories drawn generally from the organisational behaviour literature, will be identified that enable one to make a prediction as to the impact the variable may have on whether or not the arbitration decision is to uphold or overturn the dismissal. This will be followed by a review of the literature to identify results of previous investigations, which may also influence the expectations of what might be found in the analysis. Then, as this thesis occurs within the Australian context, where

necessary, conditions particular to the Australian experience will be identified. Finally, taking a collective view of the theoretical propositions and investigative findings, a hypothesis or multiple hypotheses will be presented for use in the statistical analysis in chapter 6.

4.2 Research question 1 – the employee's behaviour

The first research question aims to incorporate the employee misbehaviour dimension into the arbitral decision-making model, by measuring the impact of the type of misconduct in which the worker purportedly engaged on the arbitration outcome.

4.2.1 Measuring 'misbehaviour' using the employee deviance typology

The independent variable of focus in research question one is 'the type of misbehaviour'. The descriptive theory used to measure this variable was drawn from the seminal article by Robinson and Bennett (1995) in which the authors introduced a four-quadrant typology of deviant workplace behaviour consisting of: production deviance; property deviance; political deviance and personal aggression. This typology also incorporates a two-point scale to indicate if the behaviour is either minor or serious. The typology identifies whether the behaviour is targeted at either the organisation as a whole or individuals within the organisation. Table 4.1 provides a summary of the typology.

Table 4.1 *Robinson and Bennett's typology of misbehaviours*

CATEGORY OF MISBEHAVIOUR	*Definition*	*Example*
Property deviance	Serious misconduct targeted at the organisation	Sabotaging equipment; accepting kickbacks; lying about hours worked; stealing from the firm
Production deviance	Minor misconduct targeted at the organisation	Leaving early; taking excessive breaks; working slow; wasting resources
Personal aggression	Serious misconduct targeted at a co-worker or co-workers	Sexual harassment; verbal abuse; stealing from co-workers; endangering co-workers
Political deviance	Minor misconduct targeted at a co-worker or co-workers	Gossiping; showing favouritism; blaming co-workers; competing non-beneficially

(*Adapted from*: Bennett & Robinson 2000; Robinson & Bennett 1995)

This typology provides a framework that enables the classification of any type of misbehaviour identified in the dismissal cases. The Robinson and Bennett typology has been statistically validated as a measure of workplace deviant behaviours in the organisational behaviour literature (Bennett & Robinson 2000). This typology has since held up to re-examination by Stewart et al. (2009). Any form of misbehaviour that might occur in the workplace could be assigned to any of the four categories in the typology, further improving the utility of this typology for measuring an inconceivable array of employee acts of misconduct that have resulted in their dismissal.

Identifying a measure of misconduct is the first step in addressing the independent variable of interest in research question one. The actual knowledge gap that research question one is seeking to address is to discover which direction these different categories of misbehaviour might influence the arbitration decision. The theory of 'retributive justice', discussed next, may provide an indication as to how arbitrators may be influenced to either uphold or overturn a dismissal.

4.2.2 How 'misbehaviour' influences decisions using retributive justice

Within the sociology and criminology literature is retribution theory which explains how society sanctions the exacting of a punishment or negative allocation such as costs or losses, on an offender so that he or she pays for his or her offence (Cottingham 1979; Törnblom & Jonsson 1987). A fundamental principle of retributive justice is that of 'proportionality' between the offence and the punishment (Mahony & Klass 2008; Miceli 2003; Zaibert 2006). In colloquial terms: the harm-doer must be punished and the punishment must fit the crime. Thus, the objective of retributive justice is to take action against the harm-doer, to remove or otherwise deal with an injustice that he or she inflicted on his or her victim (Darley & Pittman 2003). The manner, in which retributive justice applies in the dismissal arbitration context, is discussed next.

In dismissal disputes – unlike criminal prosecutions – either or both parties are potentially liable of being found at fault: the employee who is accused of poor performance or misbehaviour, or the employer who is accused of contractual

violations (Mahony & Klass 2008). Either party can face questions of accountability, blame and punishment as a consequence of arbitration (Darley & Pittman 2003). In this thesis, it is contended that it is not the arbitrator's role to administer 'punishment' to employees if they were found to engaged in misconduct, because, punishment has already occurred at the hands of the employer. Instead it is proposed that the arbitrator is more likely to be influenced by behaviours that are higher in severity, to uphold employers' decisions to 'punish' employees by terminating their employment (Klass, Mahony & Wheeler 2006). Alternatively, if employers are found to be errant in their dismissal, retribution takes the form of employers either paying financial compensation, or re-employing workers that they once dismissed.

However, two factors could operate to alter the arbitrator's perception of proportionality between the attribution of blame and an appropriate retribution. First, *employees may be able to mitigate* the severity of the retribution or punishment by providing additional information that might affect the perceived fairness of the dismissal sanction, which means they increase the likelihood of shifting blame to the employer (Klass, Mahony & Wheeler 2006; Mahony & Klass 2008). To achieve this, dismissed workers might emphasis their seniority or length of service to the organisation (Chelliah & D'Netto 2006; Knight & Latreille 2001; Saridakis et al. 2006; Simpson & Martocchio 1997). Employees might also demonstrate that management was delinquent in their responsibilities toward them during the dismissal process (Gely & Chandler 2008; Simpson & Martocchio 1997). And, making an 'apology', which demonstrates remorse, regret and concern, can be used in a bid to restore a sense of self-respect and remedy relations, potentially mitigating the severity of the punishment (Brownlee 2010; Friedman 2006). The apology is an impression management tactic that may soften the arbitrator's decision (Eylon, Giacalone & Pollard 2000). Skarlicki & Kulik (2005, p. 198) also support the notion that 'contrition' can soften punishment, in their statement:

> *The more contrite a transgressor, the greater the third party's confidence that the individual will not violate the rule again ... the violation is seen as less purposeful and less threatening to the social order.*

On the other hand, *management may justify the severity of the punishment* by emphasising the severity of the behaviour, and/or previous offences or weaknesses

about the employee's service (Ross & Chen 2007). Severity of the offence is believed to be an important control measure when analysing arbitral decision making (Dalton et al. 1997; Mesch 1995; Scott & Shadoan 1989). Previous investigations have found that the likelihood of a dismissal sanction being upheld increased for employees with shorter tenure and/or prior disciplinary incidents (Bemmels 1988a, 1991b; Harcourt & Harcourt 2000; Klass, Mahony & Wheeler 2006; Simpson & Martocchio 1997). An Australian study into arbitral decision making by Chelliah and D'Netto (2006) did not find this effect for an employee with a prior disciplinary record, in spite of finding a positive relationship between overturned decisions and years of service.

4.2.3 Previous empirical findings about misbehaviour as a factor in arbitration

So far in this section, the theoretical premise has been developed that the type of behaviour and mitigating factors can influence the arbitrator's decision. This sub-section examines the results of previous empirical investigations. First considered are investigations that found the type of misbehaviour in which the worker engaged had no significant impact on the arbitrator's decision. Caudill and Oswald's (1992) Canadian study considered three types of misconduct: non-attendance, insubordination and dishonesty/theft, with the finding that none of them were significantly associated with the arbitration result. This study echoed the findings of Bemmels' (1988b, 1988c) dual Canadian studies that also considered non-attendance, insubordination and dishonesty/theft. Likewise, Harcourt and Harcourt's (2000) Canadian study considering 'insubordinate' behaviour found it was not a significant factor that influenced an arbitrator's decision. At the same time, Harcourt and Harcourt (2000) also that found behaviours that had 'imminent potential to harm' were not significantly related to the arbitration decision. More recently, Gely and Chandler's (2008) US investigation found that incidents involving physical contact, regardless of its severity, did not influence the arbitrator's decision.

In contrast, other studies reported significant relationships between the type of misbehaviour and the arbitration decision. Bemmels' (1991b) US based study broadened his earlier studies (referred to above) to include additional types of misbehaviours in the form of 'assault/fighting' and 'drugs/alcohol'. This study

revealed that acts of insubordination and dishonesty/theft were significant factors influencing an arbitrator to dismiss the grievance. One that appears more recently in the literature is the Australian study by Chelliah and D'Netto (2006) which found that acts of theft or fraud committed by the employees were significantly related to an upheld decision in favour of the employer. The other types of misconduct considered in the Chelliah and D'Netto investigation were: absence without permission; insubordination; and alcohol related offences. These acts were found to be insignificant in influencing the arbitration decision.

Another notable article that considered the broadest range of misconduct types indentified in the literature, was Block and Stieber's (1987) US study that considered: excessive absenteeism; absence from work without permission; threat or assault on a fellow employee; threat or assault on a management representative; insubordination; falsification of records; theft; damage to or misuse of employer's property; refusal of an assignment or order; possession or use of drugs; possession or use of intoxicants; obscene or immoral conduct; and abusing customers or clients. From all these types of misconduct, it was found that excessive absenteeism, and threatening or assaulting a supervisor, were the only misbehaviours that had a significant influence on decisions, with both activities influencing the arbitrator towards rejecting a grievance claim made by the worker.

There were also investigations that incorporated a single, broad concept of 'misconduct' as the reason for dismissal and its relationship with an arbitration decision. For instance, Knight and Latreille's (2001) British study found that 'misconduct' as a broad construct, was a significant factor influencing upheld arbitration decisions, particularly in the case of female grievants. Similarly, Southey's (2008b) Australian study found that 'misconduct' was associated with upheld decisions supporting the employer's dismissal action. McAndrew's (2000) study of New Zealand employees dismissed on 'misconduct' grounds identified significantly different arbitration decisions whereby misconduct was treated more harshly by arbitrators depending on the geographic region in which the claim was decided.

In yet another approach, studies were identified that considered a single misbehaviour incident as a test case under analysis. This approach was identified in Nelson and Kim's (2008) US study with the result that the specific act of drinking in the workplace was significantly related to findings favouring the employer, if the arbitrator believed the worker's on the job performance had been implicated. Alcohol consumption in the workplace was also used as the test case in Bigoness and DuBose's (1985, p. 489) US study which revealed that 'mock' arbitrators viewed the alleged offence as 'a serious offence warranting stern punishment'. Similarly, Eylon, Giacalone and Pollard (2000) used the case of a drunk and disorderly worker to examine arbitral decision making and found that serious consequences, in terms of causing injury, aligned with more severe rulings.

Due to the disperse nature of these findings, it is proposed that the incorporation of the four type deviance typology for defining and operationalising 'misbehaviour' in this thesis, will provide the most structured approach, to date, for statistically analysing a diverse range of misbehaviours according to their underlying similarities as defined by Robinson and Bennett's (1995) and Bennett and Robinson's (2000) typology.

4.2.4 Misbehaviour matters relevant within the Australian context

This sub-section will consider the Australian context of this thesis and how acts of employee misbehaviour may be, in some way, reflective of the Australian circumstance. As noted in the introductory chapter, comments on the Australian context of this thesis will be incorporated throughout this chapter. Australian contextual factors, such as culture, economic environment and legislation, are viewed as inherent, ubiquitous influences, not directly testable in the hypotheses. However, some recognition is given to these latent features in these discussions as they may have implications at the time of drawing research conclusions and identifying future research possibilities.

Both national culture and organisational culture are believed to influence managerial styles and employee behaviour (Hoogervorst, van der Flier & Koopman 2004; Lok & Crawford 2003). Further, it is thought that a country's national cultural values and

attitudes, which are collectively formed by its citizens, are brought into the workplace and infiltrate the organisational culture (Hofstede 2001; Lok & Crawford 2003). National culture is described as a '*collective programming of the mind: it manifests itself not only in values, but in more superficial ways: in symbols, heroes and rituals*' (Hofstede 2001, p. 1). As national culture permeates organisational culture and consequently influences employee behaviour, it is worth identifying the most prominent features of Australia's national culture as these aspects of Australian values and approaches to life may be serving as potential 'Australia specific' antecedents of employee misbehaviour, as much as they are of good employee behaviour.

To this end, the prominent work by Geert Hofestede into national culture offers insight into Australia's culture. Table 4.2 displays how Australia ranks in terms of the five dimensions of national culture.

Table 4.2 *Australian rankings in Hofstede's index of national culture dimensions*

	POWER DISTANCE	UNCERTAINTY AVOIDANCE	INDIVIDUALISM	MASCULINITY	LONG TERM ORIENTATION
Australia's ranking	41st out of 50 countries	37th out of 50 countries	2nd out of 50 countries	16th out of 50 countries	15th out of 23 countries
Highest ranked country	Malaysia	Greece	United States	Japan	China
Lowest ranked country	Austria	Singapore	Guatemala	Sweden	Pakistan
Nearest to Australia	Netherlands (40th) Costa Rica, Germany & UK (tied at 42nd)	East Africa (36th) Norway (38th)	United States (1st) United Kingdom (3rd)	United States (15th) New Zealand (17th)	Germany (14th) New Zealand (16th)
Implication	Australia's low power distance is associated with people (including workers) that are not afraid to question authority and who are not too concerned about upholding status differentials between social classes, authority, family members, governments and so forth.	Australia's lower levels of uncertainty avoidance associates its people with being less concerned about: keeping to rules; staying with the same employer for long periods; and experiencing lower levels of stress	Australia's high ranking suggests Australians attach an extremely high importance to personal time, a personal sense of accomplishment, self sufficiency and achieving goals on one's own merits – independent from an employer's influence	Australia's high ranking associates it with traditional gender role patterns whereby men will show more masculine behaviour and women more feminine behaviour and people engage in learned, gender-specific styles of interpersonal interactions	Ranked at the lower end of the scale this suggests Australians are more short-term oriented which is associated with being less inclined to: save money; keep traditions; be persistent and patient; and acquire skills and education from a young age for future prosperity

(*Adapted from*: Hofstede 2001)

According to Hofestede (2001) each of the five cultural dimensions represents a fundamental societal issue regardless of one's country: power distance; uncertainty avoidance; individualism; masculinity; and long term orientation. The results of Table 4.2 paint the picture that Australia's cultural dimensions are split into extremities, with Australia being one of the lowest-ranked: power-distance; uncertainty avoidance; and long term orientated countries, yet one of the highest-ranked masculine countries and an extremely high individualist country.

Based on the implications for each of Australia's rankings, also provided in Table 4.2, it could be reasoned that Australian workplace cultures are imprinted with a collective character that suggests employees (and management themselves) are not fearful of authority, tending to see the next-in-charge as an equal, and challenging them if necessary. 'Bending the rules' may be commonplace at work, whether testing the boundaries oneself, or witnessing management and co-workers do it. As workers are not inclined toward the idea of a 'job for life', they will be more transient in their loyalties if they are unhappy in their job, or if work does not align with personal and family life. Workers will guard their personal time, tending to 'work to live' not 'live to work', taking full responsibility for being masters of their domain in their own career and personal life. Male and female workers are likely to pursue stereotypical behaviours and roles. And perhaps, as a society, Australians prefer to live and enjoy the moment, without being driven, from an early age, to achieve personal stability and virtuous living as a lifelong goal.

The values described in Hofestede's national cultural dimensions appear to be congruent with 'popular culture' materialisations of life in Australian workplaces. Educational materials prepared for migrant and student workers new to the Australian workplace experience, have characterised Australia's workplaces as being highly informal and relaxed in their management and communication styles, where employees frequently joke amongst themselves and address their supervisors by their first name (Department of Education and Training 2009). Descriptions offered to international students by Victoria University (2008) on common cultural characteristics of the Australian workplace included:

- Informal communication style – the use of Australian slang is common, as is the discussion of non-work matters
- Socialising – workers often socialise at lunchtime, during breaks or after work.
- Sense of humour – a good sense of humour is also valued in the workplace, as long as no one gets offended.
- The Australian workplace is usually not overly formal and hierarchical but there are clear lines of authority and decision-making.
- Workers usually talk on an equal basis with their superiors, sometimes using humour or irreverence which can be seen as a sign of disrespect in other cultures.
- Being a good team member is an important skill sought by Australian employers.
- Workers in lower level positions (e.g. cleaners, filing clerks and delivery people) are usually treated with respect and as equals by those above them.

Based on the previous description of life in Australian workplaces, it is plausible to consider that other countries might differ on their exposure to inappropriate workplace behaviours triggering dismissals. As an example, the accepted use of informality and humour, such as it occurs in Australian workplaces, may be misused as a cover for underlying aggression or subversive attitudes towards colleagues (Ackroyd & Thompson 1999b). Such an effect may not be found in a country where humour is not expressed commonly in the workplace. Another example arises from Australian's proposed comfort for questioning authority and avoiding rules. This latitude may reduce the incidence of insubordination-related dismissals compared to countries where workers tend to be submissive to management.

So far, this discussion described the collective nature of Australia's workplaces. Not all workplaces in Australia would match this description; however, national culture theory suggests that each country has a collective mindset that leaves an imprint on each societal structure within it: families, institutions, organisations, governments – and workplaces. This sub-section made explicit Australia's national values which will underpin any findings, when generalising to other countries.

As a final contribution in this sub-section on employee misbehaviour in the Australian context, some insight about the amount of tolerance demonstrated by Australia's government and legislators towards misbehaviour in the workplace can be found in the Australian federal industrial legalisation, The Fair Work Act 2009 (a provision introduced by the Work Choices legislation). The current Act's dismissal protections allow the arbitrator to discount the amount of compensation that can be

paid to a worker dismissed due to misbehaviour and for whom it was arbitrated to have been an unfair dismissal. Specifically, the Act states the following:

> ***Misconduct** reduces amount*
> (3) If FWA is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, FWA must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct (Part 3-2; Division 4, Section 392).

Although a provision to deduct a penalty was not explicit in the Workplace Relations Act 1996, tribunal members at that time relied upon Section 170CH(4) that empowered the Commission to make ***any*** order appropriate; and the 'fair go all round' requirements noted in Section 635(2). The practice and eventual provisioning for arbitrators to make a deduction for misconduct, even if the employee was found to be either harshly, unjustly or unreasonably dismissed, suggests that even in being 'pardoned', Australian worker's, regardless of their culpability, must pay a penalty if their behaviour was perceived by their employers to be inappropriate. Senior Deputy President Duncan in Scott vs Centrelink 2001, (PR907822) demonstrated this in his statement:

> The order that will issue will provide for Mr Scott to be reimbursed for all salary lost as a result of the termination less monies earned during the period prior to the reinstatement and further less the sum of $1500. This reflects my view that while management was misguided and over-reacted it nevertheless was exercising authority which it was entitled to exercise.

Drawing on the previous discussion about national culture, the financial penalty set by Australia's legislators may be reflecting Australia's highly individualistic culture, whereby people are responsible for, and accountable for, the management of their own lives and careers and management of their behaviour in the workplace – regardless of the circumstances that may trigger negative behaviours.

4.2.5 Hypotheses deduced about the type of 'misbehaviour'

In summary, the discussion for the first research question, after introducing the deviant behaviour typology, considered how the retributive justice theory enables one to speculate when misbehaviour is more likely to be associated with an arbitration decision that either favours the worker or management. The logic

underpinning the forthcoming hypothesis is that the behaviours considered 'serious' in nature are worthy of a 'serious' consequence in terms of dismissal, however, the severity of the punishment may be alleviated to some degree if the dismissed worker convinces the arbitrator that the employer was not entirely blameless. It was also discussed how previous empirical investigations have not yet replicated consistent findings on the variety of misbehaviour types, and moreover, that a piecemeal approach has occurred to identify the influence of the type of misbehaviour – a matter which this thesis aims to address by using the deviance typology. Finally, awareness of the Australian context of this thesis was raised by describing how Australia's innate national cultural factors and compulsory legislative requirements are latent influences on the tolerance of misbehaviour amongst arbitrators. In view of this, three hypotheses have been developed to analyse the first research question:

$H_{0(1)}$ *The type of misbehaviour in which the worker engaged will not influence arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(1)}}$ *All four categories of Robinson and Bennett's typology of misbehaviours will be negatively related to arbitration decisions favourable to the worker.*

$H_{0(2)}$ *The severity of the misbehaviour will not influence arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(2)}}$ *The severity of the misbehaviour act will be negatively related to arbitration decisions favourable to the worker.*

$H_{0(3)}$ *There is no statistically significant relationship between the years of service by the worker; the presence of an apology; or a clean disciplinary record and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(3)}}$ *Each of these factors will have a separate, positive relationship with arbitration decisions favouring the worker: 1) years of service 2) a clean disciplinary record; 3) the presence of an apology from the worker.*

4.3 Research question 2 – the employee's explanation

The second research question introduces the employee's defence as an aspect of the decision making considerations of the arbitrator. The findings from this question, by incorporating the employee explanation typology (Southey 2010), encapsulate a major contribution to our understanding of arbitrating misconduct-related unfair

dismissal claims. In this thesis, an employee's defence refers to the explanation or response the employee provides for engaging in the behaviour.

4.3.1 Defining 'explanations' using the employee explanation typology

The major variable of interest in this question can measured according to the author's typology of employee explanations for misbehaviour (Southey 2010b). The explanation typology categorises the self-reported and potentially sanitised defences that employees provide for their behaviour, when confronted with the 'please explain' question by their employer. Cognitive dissonance theory (Festinger 1957) and neutralisation theory (Robinson & Kraatz 1998; Sykes & Matza 1957) provided a premise for suggesting employee defences may be more a product of self preservation rather than reflecting actual reasons for their behaviour, but nevertheless, are taken as evidence by the arbitrator.

Organisational conditions and individual characteristics have been found to influence employees in their decisions to engage in deviance (Avery, Wernsing & Luthans 2008; Domagalski & Steelman 2005; Harris & Ogbonna 2002; Leck 2005). The employee explanation typology, as displayed in Figure 4.2, identifies three domains of rationalisation: personal-inside; personal-outside; and workplace related, with the potential that these domains can overlap and result in the worker providing a conflated rationale to defend single or multiple acts of deviant behaviour. The themes collated under each of the domains in the typology are levelled at the employer (organisational) and/or due to personal reasons (individual characteristics).

The typology reflects that '*personal-inside reasons'* are intangible in nature. That is, reasons based on: cognitive processes; reactions; and/or emotions of the employee. Examples of personal-inside reasons are those where the employee denied the behaviour or reported that they felt the need to act in self-defence, or that they reacted in response to feelings of tension or inequity. The remaining personal reasons could be attributed to physical aspects surrounding the employee. These dimensions are classified as '*personal-outside reasons*' and are defined as those reasons which are non-work related and exist in a tangible or measurable form. Examples are family responsibility, illness, financial stress and use of mood altering substances.

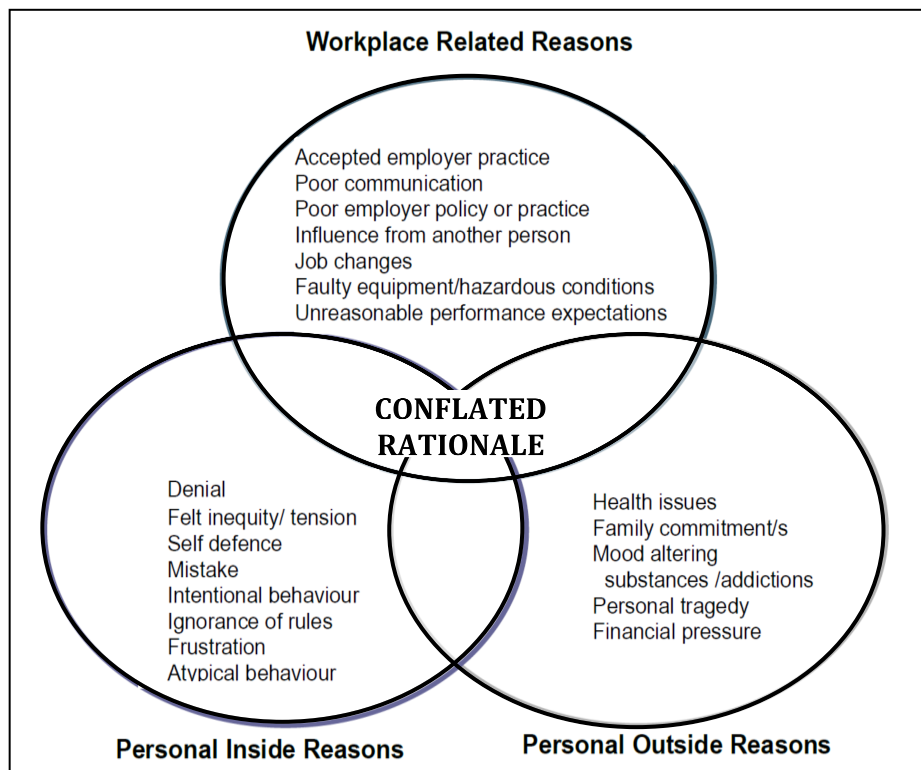

Figure 4.2 *A typology of employee explanations of their misbehaviours*

(*Source*: Southey 2010)

The employer focused reasons occur in a single domain devoted to '*workplace-related reasons*'. Workplace-related reasons are defined as rationales that pertain either directly or indirectly to the workplace. The conceptual model also recognises that multiple themes from within and across categories can occur. These explanations are viewed as having a *'conflated rationale'* in the model. For example, an employee might rationalise that his behaviour occurred because he had to meet a family commitment, he was unwell and he misunderstood a company policy. Such an explanation invokes both 'personal-outside reasons' and 'workplace related reasons' in the model.

It is not contended that the dimensions listed under each of the three categories in Figure 4.2 would address the full range of reasons. The full range of reasons would be as varied as there are individuals in the workplace. Of more importance and contribution, is that the model provides a framework for classifying a comprehensive range of reasons within each of the three domains. In this thesis, these three domains

will provide a categorical measure for identifying and incorporating employee explanations for misbehaviour into the statistical modelling.

4.3.2 How employee explanations influence decisions using attribution theory

Having outlined a framework for categorising employee explanations in this thesis, it is worth considering attribution theory for its ability to make an association between the type of explanation (or defence) provided by the dismissed worker and its potential influence on the arbitrator's decision to hold the employee responsible for the behaviour. Attribution theory suggests that people will judge another's behaviour on the basis of whether they consider the behaviour to have been internally or externally caused, with externally caused behaviour more likely to be judged less severely than behaviours over which a person had full control (Heider 1958; Judge & Martocchio 1996; Klass, Mahony & Wheeler 2006; Robbins et al. 2011). For example, arriving to work late due to a car accident – an external cause – is judged less harshly by a supervisor than arriving to work late due to oversleeping – an internal cause. Attribution theory can be applied from either an interpersonal or intrapersonal context to describe the factors that people use to make assessments (or place attributions) about the behaviours of other people, or their own behaviour (Leopold, Harris & Watson 2005; Martinko 1995). Bemmels (1991a) used attribution theory to underpin his experiment with 230 male labour arbitrators to determine how much external and internal attributions influenced their decision. It was found that attribution theory held, whereby an arbitrator that assessed the dismissed worker's behaviour resulted from an external cause, was more likely to find in favour of the worker.

In this thesis, attribution theory is applied from the interpersonal perspective; wherein one person, the arbitrator, judges another person, the employee on their conduct. Further, it is contended the arbitrator will consider if the employee's explanation for his or her behaviour was based on either internal or external attributions to determine if the worker was culpable. The external-internal ascriptions of attribution theory align with the domains of the employee explanation typology, whereby 'workplace related' explanations ascribe external attributions, and the 'personal-inside' and 'personal-outside' explanations ascribe internal attributions.

4.3.3 Previous empirical findings about employee explanations in arbitration

This is an area of arbitral decision-making where the literature appeared to contain very few investigations. Apart from Bemmels' (1991b) study, otherwise identified was Southey's (2010) review of 92 Australian arbitration decisions revealing that of the three categories, the externally-attributed workplace-related reasons were most frequently associated with a sympathetic response from the arbitrator.

4.3.4 Complexity of the explanation

The employee explanation typology led the author to consider whether the dismissed worker would be better placed to provide either a single explanation or multiple explanations to persuade the arbitrator to award a favourable result. The author's development of the employee explanation typology (Southey 2010b) conceptualised that employees may give multiple explanations for their behaviour in a conflated rationale. The analysis of descriptive data on dismissal cases reported in Southey (2010), suggested that 41 percent of cases were won by dismissed employees providing a single explanation of their behaviour compared to 33 percent where the employee provided multiple explanations. It was reasoned that the clarity of a single explanation provided less opportunity for an arbitrator to experience a cognitive bias that might otherwise occur whilst trying to assess several explanations.

The opportunity for cognitive bias to occur in judicial type decision-making was considered by Hastie and Pennington (2000, p. 212) who proposed that the first task for the decision-maker is to construct a mental model of the events, by comprehending a '*large base of implication-rich, conditionally dependent pieces of evidence ... using inference rules'*. The idea of such mental summarising of information is logical if one considers that a judgement that repeated the entire transcript of the proceedings, would offer little value to the parties (Sangha & Moles 1997). Thus, it is from this 'representative summary' of evidence that it is contended the arbitrator makes the decision, rather than on the original, unprocessed evidence. The use of inference rules in this mental summarising, involves the use of cognitive heuristics (rules of thumb) and selectivity to assess information during decision-making, and whilst these decisions may produce reasonable results, the risk is they

can also incur systematic biases (Korte 2003; Malin & Biernat 2008; Sangha & Moles 1997; Tversky & Kahnemann 2000).

Systematic biases are also thought to contribute to the differences in decision outcomes among individuals (Hastie & Pennington 2000; Korte 2003). Numerous cognitive biases have been discussed in the literature Hogarth (1987) and Das and Teng (1999) suggested one such bias, that may have relevance to an arbitrator managing multiple explanations from workers, is the reliance on 'prior hypothesis and focus on limited targets'. This bias suggests the decision maker is influenced innately by his or her prior experiences, orientations and mental models and will focus on selected interests and outcomes and possibly ignore conflicting information. It is suggested that this bias may be amplified when employees provide multiple, perhaps disparate explanations for their behaviour.

4.3.5 Hypothesis deduced about the 'employee's explanation'

In the first part of this section, the descriptive domains of the employee explanation typology were presented, which were then considered in combination with the procedural elements of attribution theory. This enables the deduction of two hypotheses about the influence of an employee's explanation for his or her behaviour, on the arbitral decision. Thus, the first testable hypothesis to address research question two is:

$H_{0(4)}$ *There is no statistically significant relationship between the type of explanation rendered by the worker and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(4a)}}$ *'Workplace-related' explanations will be positively related to arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(4b)}}$ *'Personal-inside' explanations will be negatively related to arbitration decisions favouring the worker.*

In the second sub-section it was suggested that the mental summary arbitrators build during complex decision-making, provides scope for cognitive bias to occur, particularly when more complex explanations are provided by the worker. This leads to the following hypothesis, which finalises the testable hypotheses pertaining to research question two:

$H_{0(5)}$ *There is no statistically significant relationship between the number of explanations provided by the worker and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(5)}}$ *The number of reasons to explain behaviour will be negatively related to decisions favourable to the worker.*

4.4 Research question 3 – the employer's process

The independent variable of focus in the third research question concerns the process used by management to dismiss the worker. Arbitration decisions are influenced by factors, beyond the misbehaviour act itself, that led to the dismissal (Oswald & Caudill 1991). Thus, a factor which can be expected to influence the arbitrator's decision is the management – or the mismanagement – of the dismissal process by the employer. This factor can be underpinned by organisational justice theories (Nelson & Kim 2008), which will be discussed after first clarifying that the dismissal process will be measured in terms of errors made by management when performing a dismissal. If no errors were made, it is assumed the dismissal process was fair and reasonable.

4.4.1 Defining the 'dismissal process' by using the dismissal errors typology

Workers can be exposed to unscrupulous dismissal *processes* at the hand of the employer. Although many advanced economies provide workers with protection from unlawful or wrongful *reasons* for termination of employment, fewer countries offer protection against unfairness and procedural inadequacies – which are within the ambit of '*unfair dismissal*' protection. To explain further, in Australia, *all* workers are protected from unlawful termination under the general protection and unlawful termination provisions under the Fair Work Act 2009 (Part 3-1, Division 5, Section 351 and Part 4-1, Division 2, Section 772(1)) on the basis of their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, religion, political opinion, national extraction or social origin. Yet, if an employee is dismissed due to other reasons, such as performance, redundancy or misconduct, and *if* the worker comes under a permitted category under the legislation (see chapter 3 sub-section 3.6.2, Table 3.5 listing permitted and excluded categories of employees), there exists *additional*, unfair dismissal protections in the Act (Part 3-2 Sections 385 to 387). Such protections

empower the federal tribunal to determine if the employee was terminated in a fair and reasonable *manner*.

One may tend to assume that when an employer makes an error in their process, the dismissal is automatically unfair. However, this is not always the case. According to Leventhal (1976, p. 34) '*the relative weight of procedural rules may differ from one situation to the next, and one procedural component to the next.*' Therefore, it is possible that errors can be made by management in the dismissal process that will not result in the arbitrator overturning the employer's decision to dismiss the worker. As an example, in *Mabior V Baiada Group Pty Ltd*, U2010/12656, Commissioner Steele of Fair Work Australia decided that, due to the gravity of the worker's abusive behaviour, the procedural faults were not sufficient *of themselves*, to conclude that the dismissal was unfair.

Another example occurs in *Pritchard v Timberglen, FWA 5144*, wherein the employer failed to provide details of sexual harassment allegations to the accused worker and denied him an opportunity to respond. In this case, these procedural errors were not considered by the arbitrator to outweigh the worker's poor judgement and behaviour. Thus, in this thesis, there is value in incorporating a variable that measures the influence of deficiencies that occurred in the dismissal process, on the direction of the arbitration decision. And, if deficiencies occurred, which kinds of errors were made, as some errors may be more influential in the direction of a decision than others.

In order to measure an independent variable that will capture the process used by management to dismiss the worker, it is of interest in this thesis that Blancero and Bohlander (1995) identified six prominent managerial errors committed by employers when dismissing workers. An explanation of each type of error follows.

(a) Weak or flawed evidence: This means management's accusations of the employee's wrongdoing were not supported by sufficient substantive evidence. It means the employer had not gathered *valid* evidence to uphold the discipline imposed. Alternatively, the employer may have acted on a strong suspicion of misconduct without solid documentation or collaborative evidence.

(b) Mitigating circumstances surrounding the situation that led to the dismissal: In this situation, the misbehaviour was undisputed, but the employer was negligent in considering additional circumstances that may reduce the severity of a dismissal. Examples of mitigating circumstances could be: the employee was otherwise considered a good corporate citizen; the employee was seen to be genuinely remorseful; the employee had a long and satisfactory work record; the employee was experiencing difficult, personal or family situations

(c) Management was neither clear nor consistent with its rules and policies: Whilst management has the power to make the workplace rules and policies, they are responsible in four areas when making its rules: first, it must make rules only within the boundaries necessary for safe and efficient operations of the business. Second, it must make rules which are clear and unambiguous. Third, they must effectively communicate these rules to all employees. And, fourth, enforce rules consistently and without bias. An error in this category means that the employer breached one or more of these rule-making responsibilities.

(d) Lack of due process: Concerned with natural justice, this error refers to employers who failed to provide a procedurally fair process to the worker when considering his or her dismissal. Examples of lack of due process would be: the worker was denied union or other support person; the employer did not conduct an investigation or conducted a poor one; the employer did not give the opportunity for the worker to respond to allegations; and/or not taking corrective action within an appropriate time period of completing the investigation.

(e) Too harsh a punishment: This means the arbitrator considered that whilst procedurally the dismissal was executed correctly, the consequences of the dismissal from the workplace was too severe (or harsh) for the degree of seriousness of the misbehaviour. An example of this would be Webster v Mercury Colleges (2011) where SDP Drake (the arbitrator) ruled:

> The termination of Mr Webster's employment was harsh because of the serious financial consequences to Mr Webster and the social dislocation which was clearly inevitable on summary termination of his employment. Mr Webster was required to leave the country and dislocate his life within twenty-eight days of the termination of his employment. As an employer of sponsorship visa

> employees I have concluded that the employer was likely to know of these consequences. Termination of employment in these circumstances, with this knowledge, was harsh.

(f) Management in some way contributed to the situation: The arbitrator may find that management's own conduct contributed to the incident for which the employee was dismissed. An example of a management infraction of this nature would be where the employee acted on bad or wrong information provided by a supervisor, or the employee acted under direction of someone assumed to be – but was not – in authority. Another example would be where management (or supervisor) neglected to provide the necessary equipment or materials to perform the work or maintain equipment to a standard to perform. A third example would be if management (or supervisor) concurred with the behaviour or rule violation – possibly due to 'custom and practice arrangements' – that operate counter to organisational rules. A final example might be if the manager (or supervisor) and employee were involved jointly in the incident, but only the employee was disciplined.

In the main, the errors described by Blancero and Bohlander (1995) resonate with breaches of justice. For instance, 'lack of due process' encapsulates mistakes in procedural justice and possibility interactional justice, whilst 'too harsh a punishment' shows a weakness in distributive justice. This point will be explored further in the remaining sub-sections under research question three.

4.4.2 How the 'dismissal process' influences decisions within a justice framework

The focus of this discussion is to theorise how justice theories might influence the result of an arbitration decision when the arbitrator reviews the process used by management to dismiss the worker. Tribunals and courts use three cornerstone principles of 'natural justice': the right to a fair hearing; an unbiased decision-maker; and that the decision be based on only the evidence provided (Forbes 2006). Whilst arbitrators must meet the demands of natural justice when conducting their arbitral hearings, likewise, arbitrators expect to see that employees, under investigation by their employer, were also afforded these same principles before the employer made the decision to terminate the worker. Natural justice principles – whilst primarily relevant in legal and quasi-legal proceedings – have themes that permeate the

broader justice system in the workplace and in other aspects of business (see for instance Van Essen et al. 2004).

In addition to 'natural justice', 'organisational justice' appears in the literature as an umbrella term for the collection of fairness theories in relation to the employee's perceptions of the structural and social processes that occur in the workplace (Brown, Bemmels & Barclay 2010; Greenberg 1990). It has been established in the literature that an employee's sense of fairness, or perhaps moreover, a sense of being treated unfairly, is a powerful catalyst that will affect his or her feelings and actions. For example, scholars suggest a worker's sense of justice is believed to influence how he or she will respond to managerial authority and accept its decisions, his or her level of job satisfaction and organisational commitment, and his or her likelihood of engaging in anti-social behaviours, violence or theft (Aquino, Galperin & Bennett 2004; Aquino, Lewis & Bradfield 1999; Aquino, Tripp & Bies 2006; Giacalone & Greenberg 1997; Greenberg & Baron 2007; Törnblom & Vermunt 2007; Zoghbi Manrique de Lara 2006).

The first theory considered within the organisational justice framework is 'distributive justice' – a development from Adam's (1966) equity theory of pay injustices. Distributive justice accounts for a person's *perceptions* of the fairness of the distribution of a resource or decision – whether it concerns economic goods, or psychological, physiological, economic or social aspects that affect a person's wellbeing – and whether the 'end result' or outcome matched the expectations of what was believed to be a person's 'just deserts' (Kabanoff 1991; Törnblom & Vermunt 2007, p. 3). Distribution is related to power relationships (Kabanoff 1991) and in the workplace is it evident in the power the employer has to dismiss the employment contract. The employer's application of distributive justice principles is under examination throughout the arbitration hearing whereby the arbitrator reviews the evidence pertaining to the misbehaviour the employee was alleged to have committed, and determine whether employer was justified to occasion a dismissal, as a disciplinary outcome, on the employee.

However, 'the distribution of a punishment is only the final set in a sequence of events' (Leventhal 1976, p. 17). Therefore, related to distributive justice is

‘procedural justice’, as it is not possible to judge a distributive justice result in isolation from the ‘system’ by which it was generated (Rawls 1999). Procedural justice is concerned with the method used to arrive at an outcome, which must be performed in a consistent, transparent and unbiased manner by the actors that administered the process (Bemmels, Brown & Barclay 2004). Thus procedural justice considerations are reflected in the arbitrator’s examination of the process management used to arrive at a decision to dismiss the worker.

Interactional (or interpersonal) justice relates to the interpersonal dynamics that unfold while a decision is being put into practice, with the expectation that management engage in sincere and respectful actions towards the employee whilst engaging in organisational procedures (Brown, Bemmels & Barclay 2010; Folger & Skarlicki 1998; Greenberg & Alge 1998; Zoghbi Manrique de Lara 2006). As an example, a member of management making a malicious or intimidating comment, or displaying a dismissive attitude during a disciplinary investigation or dismissal, breaches interactional justice expectations. Thus interactional justice expectations are inherent in the administration of procedural justice, with the power to moderate the arbitrator’s perception of the quality of both procedural justice and distributive justice (Brown, Bemmels & Barclay 2010). Therefore, in the scope of unfair dismissal arbitration, an accurate process, yet administered in a discourteous manner, may reduce the arbitrator’s willingness to find in favour of the employer.

4.4.3 Previous empirical findings about the process as a factor in arbitration

Few studies have captured insight about the range errors in the dismissal process actioned by the employer. This may be a reflection of a challenge in measuring ‘procedural errors’ as a well defined variable in an analysis, with scholars tending to incorporate procedural errors as a broadly measured construct, if at all. For example, due process factors were absent entirely in Nelson and Kim’s (2008) analysis, whilst Simpson and Martocchio (1997) used a broad, dummy variable of ‘management conformed with due process/management did not conform with due process’ to capture errors in justice during the dismissal. In this thesis, the influence of Blancero and Bohlander’s (1995) typology for categorising errors, aims to improve the measurement of managerial errors in dismissal as an independent variable, which is

hoped will lead to more insight into the impact of different *types* of errors on the arbitral decision.

In the meantime, the following findings about the influence of procedural errors on the arbitration decision have been identified in the literature. Scholars have tended to find that an unfair dismissal almost never gets overturned when management complies with organisational justice expectations (Simpson & Martocchio 1997). For instance, in an Australian study, it was found the chance of having a dismissal overturned is 97 percent where the employer failed to provide warnings – a possible procedural deficiency (Chelliah & D'Netto 2006).

However, procedural justice errors on their own were insufficient to cause a significant impact on the arbitration decision according to Gely and Chandler (2008) and Klass, Mahony and Wheeler (2006). Gely and Chander (2008) suggested that unions cannot rely on a defence that argues due process errors alone, and that a an upheld claim is most likely when unions present a defence that combines an attack on the factual strength of the incident along with identifying faults in the dismissal process. Furthermore, in arriving at an arbitration decision, Klass, Mahony and Wheeler (2006) found that arbitrator's assign the most weight to the strength of evidence against the employee, the employee's work history and evidence of discrimination, before assigning weight to procedural compliance issues.

4.4.4 Dismissal process matters relevant within the Australian context

As this variable is concerned with identifying errors that the employer may have made in dismissing the worker, it is relevant to consider how the Australian federal tribunal approaches the matter of determining whether an employer erred in its dismissal process. An underpinning notion in the unfair dismissal legislation in the Fair Work Act 2009 (Part 381) – and likewise in the previous federal legislation – is that the federal tribunal is to ensure a 'fair go all round' is accorded to the worker to present his or her case and the employer to defend its decision. This means the dismissed worker needs to be provided with an avenue of appeal to the tribunal, whilst at the same time the tribunal must show concern for the employer's viability, in the event it determines a remedy for dismissals that are found to be unfair.

The federal tribunal is bound to consider whether a dismissal was 'harsh, unjust or unreasonable'. Sub-section 3.6.3 listed the provisions of Part 3-2 Section 387 of the Fair Work Act 2009 that contains the criteria arbitrators need to take into account when considering whether a dismissal was harsh, unjust or unreasonable. Apart from these guidelines, the Act does not go so far as to define the concepts of 'unfair', 'unjust' or 'unreasonable'.

However, this lack of clarity is likely an intentional strategy by legislators. Justice Sheldon, in summarising his concerns about the use of 'adjectival tyranny' to determine if the tribunal had permission to intervene, stated, '*The less fetters there are on the discretion the better (none appear in the Act) but it is all important that it should be exercised soundly*' (in Loty and Holloway v Australian Workers' Union (1971) AR(NSW)95). Some insight into the intent of the terms, 'harsh, unjust or unreasonable' occurs in a High Court finding – frequently cited in arbitration decisions – relating to *Byrne v Australian Airlines Ltd* (1995)185CLR. This finding states, in part:

> It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment can be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted ... procedures adopted in carrying out the termination might properly be taken into account in determining whether the termination thus produced was harsh, unjust or unreasonable.

A final point that contextualises the Australian nature of the dismissal process is that arbitrators frequently document in their decisions, their considerations about the notion of a 'valid reason' for dismissal and the characteristics of one. Developed by previous legislation, and now enshrined in Section 387 of The Fair Work Act 2009, federal arbitrators refer to the opinion from Justice Northrop in *Selvachandran v Peteron Plastics Pty Ltd (1995) 62IR371* to describe the elements of a 'valid reason':

> "valid" should be given the meaning of sound defensible or well founded. A reason which is capricious, spiteful or prejudiced could never be a valid reason

> ... at the same time, the reason must be valid in the context of the employee's capacity or conduct, or based upon the operational requirements of the employer's business.

Across several fronts: legislatively, court rulings and arbitral decisions, it is clear that justice principles bind Australian employers to fulfil legal obligations to administer the dismissal of a misbehaving worker, in a fair and reasonable manner – clearly distinguishing it from 'employment at will' policies prevalent in the US whereby 'just cause' for termination is not a feature of the employment relationship (Arrow-Richman 2010; Battaglio 2010).

4.4.5 Hypotheses deduced about the 'employer's process'

Table 4.3 has been prepared to tie together the three areas of discussion presented for this major variable. It demonstrates how each of the justice principles discussed in sub-section 4.5.2 can be aligned to managerial errors identified in Blancero and Bohlander (1995), which are further reflected in the themes of Australia's legislative protections against 'unfair, unjust or unreasonable' dismissal.

Table 4.3 *Alignment of justice principles with managerial dismissal errors and Australian unfair dismissal legislative terminology*

Justice principle	**Blancero and Bohlander (1995) managerial dismissal errors**	**Unfair dismissal provisions in FWA Act 2009** Part 3-2 Section 387
Natural justice: right to a fair hearing and unbiased decision maker	Lack of due process Management was neither clear nor consistent with its rules and policies	Section 387 (a) valid reason Section 387 (b) notified of reason Section 387 (c) chance to respond Section 387 (d) support person
Natural justice: evidence rule	Lack of due process Weak or flawed evidence	Section 387 (a) valid reason
Distributive justice	Too harsh a punishment	Section 387 (a) valid reason Section 387 (f) size of enterprise Section 387 (g) absence of HR
Procedural justice	Lack of due process	Section 387 (b) notified of reason Section 387 (c) chance to respond Section 387 (d) support person
Interactional justice	Lack of due process	

(*Source:* Developed for thesis)

Unfair dismissal provisions are underpinned by a justice framework and mindful of the discussion on retributive justice addressed in section 4.3.2, and Australian case history discussed in section 4.5.4, it is proposed that the arbitrator will weigh the seriousness of the behaviour against any errors made by management in dismissing

the worker. That is, management may be able to mitigate flaws in their process by arguing that they were managing an extremely serious behavioural issue. Reflective of the preceding theoretical and practical discussions, the following hypotheses to test research question three have been developed:

$H_{0(6)}$ *There is no statistically significant relationship between the type of errors in judgement or processes in actioning the dismissal and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(6)}}$ *Errors in judgement or processes in actioning the dismissal will be positively related to arbitration decisions favourable to the worker.*

$H_{0(7)}$ *Regardless of the severity of the offence, there is no statistically significant relationship between the type of error made by the employer in actioning the dismissal and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(7)}}$ *As the severity of the misbehaviour increases, errors in the employer's dismissal process, will be negatively related to arbitration decisions favouring the worker.*

THE SUB-QUESTIONS

The remainder of this chapter will be devoted to the four sub-questions. The literature was scoured to identify additional, potentially relevant variables which were integrated into the four sub-questions. These moderating variables enabled the statistical analysis to be more sensitive to the differences that existed between the principal, independent variables discussed in the three major research questions and their relationships with the dependent variable (Lord 1960).

4.5 Sub-question (a) – advocacy

The first moderator variable of interest incorporated into the conceptual model captured whether, or not, the dismissed worker and/or the employer, engaged the services of a representative to present their case to the arbitrator.

Advocacy was included as a moderating variable as the expertise of a trained advocate, familiar with the rules and procedures of unfair dismissal arbitration, should place their client – be it the employer or the dismissed worker – in an improved position to present their case. Workers that represented their own case (litigant-in-person) may be intimidated by the employers' presence and disadvantaged by their '*lack of familiarity with the law, difficulty with the language,*

prolixity and excess of emotion' (Mourell & Cameron 2009, p. 68). Skilled advocates can concisely communicate the facts to an arbitrator (Crow & Logan 1994) and they may utilise every possibility of winning a case to achieve better outcomes for the client (Jones 1961; Latreille & Knight 2005). On the negative side, involvement of legal counsel in arbitration settings was found to be associated with significant time delays between the actual dismissal and adjudication (Ponak et al. 1996; Sherman 1989; Thornicroft 1994).

4.5.1 Exit-Voice theory as a justification for worker advocacy

Workers may have either a public or personal reason to 'fight' for the return of their job and the theory of exit-voice (Hirschman 1970) suggests that whilst employed, employees can show dissatisfaction with the treatment received from their employer by exhibiting 'exiting' behaviours, such as job hunting or resigning. Alternatively they may exhibit 'voice' behaviour, whereby they aim to constructively improve their work conditions, such as union engagement (Cappelli & Chauvin 1991).

However, a dismissed worker exists on the outer of the employment relationship. Thus, exit-voice theory contains an element providing for 'voice from without (after exit)' (Hirschman 1970, p. 104) or a 'representative voice' whereby a third party advocates for the discounted worker (Luchak 2003, p. 118). This element in the theory presents a reactionary option for a dismissed worker, and it is present in arbitration as the employee's representative presents his or her narration of events as they occurred to the worker (Budd & Colvin 2008). Unions, consultants or legal representatives can offer employees a formal 'voice' mechanism that may improve the employee's dismissal circumstances through reinstatement or compensation.

4.5.2 Previous empirical findings about advocacy in dismissal arbitration

Research focusing on the role of union advocacy in unfair dismissal arbitration appears limited. Mesch and Dalton (1992) found a positive relationship between union representation and successful arbitration, and in a later study, Bingham and Mesch (2000) found that arbitration with union involvement is more likely to have reinstatement as an outcome. More recently, Gely and Chandler (2008) found union advocacy was beneficial if the dismissal was due to aggressive behaviour.

Research that focused on the effects of an ***imbalance*** in the representation of either party was slightly more extensive. Latreille and Knight (2005), Crow and Logan (1994), Wagar (1994), and Block and Stieber (1987) all found that if there was an imbalance in the representation, the 'better represented' party gained a significant advantage - 'better represented' meaning: a legal representative facing a non-legal advocate or self-represented party; or a non-legal advocate facing a self-represented party. In variation to this, Harcourt (2000) and Thornicroft (1994) found this thesis held true in so far that a represented employee had an advantage if the employer was not represented. But, unfortunately for the employer, it gained no comparative advantage by hiring a lawyer when the employee did not.

Viewing matters from the *employer's* perspective of using an advocate, McAndrew (2000) found that employers were less likely to win a case without an advocate. McAndrew's (2000) investigation further discovered employers were, paradoxically, disadvantaged if they had used an advocate when it came to the arbitrator making compensation orders.

Advocates that tap effectively into both legal tactics and facilitative techniques are conceptualised to be most deft type of advocate (Posthuma & Swift 2001). Thus, also in contention in the literature is whether the ***type*** of advocate engaged to represent a party, can provide additional advantage. Crow and Logan (1994) and Block and Stieber (1987) found that legally qualified advocates offered greater advantage than non-legal advocates in dismissal arbitration, such as human resource/industrial relations experts and union representatives, whose daily duties demand from them a range of obligations. These 'lay' advocates are at a comparative disadvantage to legal advocates, whose speciality is adversarial defence.

However, counter to this position, is that the lay-representation service offered by unions affords the worker some assurance of a legitimate claim, when a union elects to represent them. That is because union officials are able to make '*expert judgements about the viability of the case'*, whereas, legal representatives are in a position where their income '*relies not on the pursuit of successful claims but the pursuit of any claim'* (Sherman 1989, p. 223). Although today, lawyers may be choosing cases more carefully as many operate on a 'no win-no fee' basis and elect

to charge uplift fees in the event of success (Legal Services Commission 2012). This opinion was supported by Harcourt's (2000) finding that legally qualified advocates are no more or less likely than non-legal representatives to win a claim for a dismissed worker. It appears that few studies failed to find some form of a significant relationship between representation and arbitration outcomes, although, one that failed to find a statistical significance between use of representations and arbitration result was by Kirschenbaum, Harel & Sivan (1998) on voluntary arbitration in the Israeli industrial tribunal.

4.5.3 Advocacy matters relevant within the Australian context

Representation in Australia's federal tribunal at an unfair dismissal hearing by a paid agent, such as a professionally qualified lawyer/solicitor or a non-legal advisor from an industrial advocacy service, is subject to approval by the arbitrator. Section 596(4) of the Fair Work Act permits legally qualified representation if the advocate is an employee of the 'person'; or the employee of an organisation representing the person, such as a peak council, association or bargaining agent. However, Section 596(1) of the Act places limitations on when a person can be legally represented in a matter before FWA. Similar rules also operated under the arbitration process of FWA's predecessor, the AIRC. Legal representations may be approved if the arbitrator considers:

a) it is a complex matter that may be dealt with more effectively by legal experts; or
b) one of the parties is unable to represent him or herself effectively; or
c) the 'power balance' between the two parties would make it unfair for one not to be represented.

Leave to allow legally-qualified representation is not uncommon, despite the aim of successive federal industrial legislation to limit it (Mourell & Cameron 2009). In instances where the parties elect to 'self represent', the tribunal appears to accommodate the lack of skill in defending and cross examining a case. For example, in *Theoctistou v Austaron Surfaces (U2009/12732) 2010,* Deputy Commissioner Sams stated:

> Both parties appeared unrepresented at the arbitration of the matter ... unsurprisingly, the oral evidence was, to put it kindly, free flowing, and conducted without an adherence to the correct procedure for asking questions and answering them. Understandably, the Tribunal was minded to give the parties relatively free rein in their oral evidence and, doing the best I can from this approach, I am able to glean the following evidence relevant to the case.

An additional point that has implications for the use of union advocacy in Australia, relates to the decline in union density in Australia, in all industries, in all occupations and in all demographic groups during the last 30 years (Bray & Underhill 2009; Burgess 2000; Campbell & Brosnan 1999; Cooper 2005; Lewis 2004; Wooden 2002). Bray and Underhill (2009) reported that in 1990, union density in Australia was 40 percent across all industries, and by 2006 this figure had declined to 20 percent. Australia is reflecting a world-wide decline in union membership (Bender & Sloane 1999; Broadbent 2005). Australia's decline has been attributed to successive 'neoliberal' legislative changes since the Howard Coalition government in relation to wage setting, bargaining structures and Award modernisation, which have, from time to time excluded, and at the least, limited, union involvement (Bray & Underhill 2009).

Further, labour market changes have been seen as a major contributor, where union membership was viewed as less relevant due to increases in casual and part-time work, youth workers, and labour hire workers (Burgess 2000; Lewis 2004). This factor, combined with the growth in personal and knowledge based service industries that are traditionally less unionised than goods producing industries (Wooden 2002) contributed to declining unionisation. An unfortunate implication of shrinking union membership, in relation to unfair dismissal claims, is that employees without union support, particularly 'lower-power employees', may be reluctant to pursue arbitration without union support, limiting accessibility to the federal industrial tribunal to those workers who are perhaps in most need of such a means of workplace redress (Bacharach & Bamberger 2004, p. 537).

4.5.4 Hypotheses deduced about advocacy

In this section, it was discussed that advocacy, theoretically, should provide the parties with an advantage, particularly noting the power of legal advocacy, at the

arbitration table. And, it appears that the majority of empirical investigations have found statistical significance supporting the use of advocacy. Advocacy in the Australian setting was also discussed, in terms of the legislative parameters surrounding the use of advocates and the potential influence of declining union density. This trend may have had implications for dismissed workers as they had less access to union advocacy. To finalise this first sub-question, a range of hypotheses about the influence of advocates on unfair dismissal arbitration decisions results have been developed based on the preceding discussions:

$H_{0(8)}$ *There is no statistically significant relationship between union advocacy and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(8)}}$ *Union advocacy will be positively related to arbitration decisions favourable to the worker.*

$H_{0(9)}$ *There is no statistically significant relationship between the type of advocacy used by the worker and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(9)}}$ *Worker advocacy by independent lawyers will have a greater positive relationship to decisions favouring the worker than other advocacy services, who in turn will have a greater positive relationship to those workers that self-represent their claim at the arbitration hearing.*

$H_{0(10)}$ *There is no statistically significant relationship between the type of advocate used by the employer and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(10)}}$ *Employer advocacy by independent lawyers will have a more negative relationship to decisions favouring the worker than other types of advocates.*

$H_{0(11)}$ *There is no statistically significant relationship between self-representation and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(11a)}}$ *'Self-representation' by a dismissed worker will reflect the strongest, positive relationship with decisions favouring the worker.*

$\boldsymbol{H_{1(11b)}}$ *'Self-representation' by an employer will reflect the strongest, positive relationship with decisions favouring the employer.*

4.6 Sub-question (b) – worker characteristics

This sub-question considers characteristics about the worker that may have influenced the arbitration decision. The worker characteristics examined come from the arbitral decision-making literature and are: the worker's gender, occupational skill level, and industry in which the employment was held.

4.6.1 Worker's gender (and interaction with arbitrator's gender)

The effect of the worker's gender on the arbitration decision was inextricably linked with the gender of the arbitrator in the literature. Thus, whilst 'pure' effects of the worker's gender on the arbitration decision were considered in the analysis, so were the interaction effects with the arbitrator's gender. The reason for considering gender interaction effects in arbitration related to four different theses identified in the literature about judicial-type judgements made towards women.

For the purpose of this thesis, these theories were assembled into a matrix shown in Figure 4.3 to convey how the four theories can underpin predictions about gender interaction effects in arbitration. The four theories displayed in Figure 4.3 pertain to decisions rendered to female grievants, with the implication that female grievants may be treated either more favourably or harshly when compared to the decisions rendered to male grievants.

	Favourable decisions to female grievants		
Female arbitrator	1. MATERNALISM	3. PATERNALISM AND CHIVALRY	**Male arbitrator**
	2. QUEEN-BEE	4. EVIL WOMAN	
	Unfavourable decisions to female grievants		

Figure 4.3 *Potential gender interaction effects in arbitration*

(*Source:* Adapted from Southey & Innes 2010)

Quadrant 1: The 'maternalism' thesis (author's labelling) suggests women in power positions show a tendency to nurture women in lower status roles (Luthar 1996). Women who break through to positions of leadership (in this case the female arbitrator) are anticipated to possess a 'feminine' attribute of ensuring women's advancement (Eveline 2005). Furthermore research has shown women, more so than men, perceived more discrimination against women in the workplace (Gutek, Cohen & Tsui 1996). This thesis thus suggests that female arbitrators are more likely to be lenient on female grievants than they are with male grievants.

Quadrant 2: The ‘queen-bee’ syndrome suggests that women in authority or leadership positions (in this case the female arbitrator), have high expectations of other women, based on their own experience of having to work hard to get to their position of power (Cooper 1997; Eveline 2005). It is aligned to ‘hostile sexism’, wherein women place other women in positions with a silent desire to see them fail (Ryan & Haslam 2007). Thus one might deduce that female arbitrators will be harsher on female grievants than they are with male grievants.

Quadrant 3: Paternalism and chivalry have been used to reason preferential treatment of women in the criminal justice system, suggesting that male judges harbour fatherly, benevolent, protective attitudes towards female grievants (Franklin & Fearn 2008; Herzog & Oreg 2008; Staines, Tavris & Jayaratne 1974). This notion suggests that male arbitrators are more likely to be lenient on female grievants than they are with male grievants.

Quadrant 4: The ‘evil woman’ theory envisages that a male arbitrator will treat a female grievant more harshly because, through her misdemeanours, she has offended the female stereotype that women are good and moral beings (Herzog & Oreg 2008; Moulds 1978; Nagel & Hagan 1983; O'Neil 1999). Essentially, women are judged on two fronts: their wrong doing, and their gender-deviant behaviour. This theory would support the suggestion that male arbitrators might be harsher in their findings towards female grievants compared to male grievants.

The themes associated with Quadrants 2 and 4, which suggest the females are treated more harshly by both male and female arbitrators, have also been combined in the literature and referred to as the ‘Garden of Eden effect’ (Hartman et al. 1994). The underlying tenant of this effect is that women that misbehave may be seen as temptresses who have provoked the punishment. As a result, decision makers are more likely to enforce tougher discipline on females than males.

4.6.2 Previous research about gender effects

Investigations conducted on gender effects in arbitral decision-making over dismissal or workplace discipline claims revealed a variety of findings, under an array of

different conditions. Statistically significant relationships between female grievants and favourable arbitration decisions from male arbitrators, or predominantly male arbitrators – reflective of the paternalism/chivalry thesis – were detected in the investigations by: Southey and Innes (2010); Knight and Latreille (2001); McAndrew (2000); Bingham and Mesch (2000) (in terms of the amount of backpay); Saridakis et al. (2006); Wagar and Grant (1996), Bemmels (1988b, 1988a, 1988c, 1990b, 1990a, 1991a) and Oswald and VanMatre (1990).

Alternatively, significant effects in terms of female grievants actually receiving *harsher* penalties than male counterparts, regardless of the arbitrator's gender – reflecting the 'queen bee', 'evil women' theses and 'Garden of Eden effect' – were found in the studies by Hartman et al. (1994) and Oswald and Caudill (1991). Women were also found to be receiving lower compensation payments in investigations by Mesch (1995), Rollings-Magnusson (2004) and Southey (2012). One study was identified that supported the 'maternalism' thesis, which was Caudill and Oswald's (1993) study detecting female arbitrators were more lenient with female grievants.

Another group of studies also considered whether female arbitrators made harsher or more lenient judgements, compared to male arbitrators, regardless of whether the grievant was male or female. No significant effects could be detected to suggest female arbitrators rendered either softer penalities – thus rejecting the 'maternalism' thesis – in investigations by Rollings-Magnusson (2004), Scott & Shadoan (1989), Bemmels (1990b) and Bigoness and DuBose (1985), or harsher penalties - thus rejecting the 'queen bee' thesis (Bemmels 1988a, 1991b). Some authors commented on the problematic nature of small female to female sample sizes, where, for instance Crow and Logan (1994) had only had one case of female to female interaction.

Meanwhile, studies that reported female workers were no more likely to be treated favourably than male grievants, regardless of the arbitrator's gender – thus not supporting any of the theories contained in Figure 4.3 – were: Gely and Chandler (2008); Chelliah and D'Netto (2006); Harcourt and Harcourt (2000); Bingham and Mesch (2000); Dalton et al. (1997); Thornicroft (1995a); Steen, Perrewe & Hochwarter (1994); Oswald and Caudill (1991); Bemmels (1991b); Scott and

Shadoan (1989); Malin & Biernat (2008); Block and Stieber (1987); Dalton, Owen and Todor (1986) and Bigoness and DuBose (1985).

A cautionary note about all these findings is that women workers will drop a claim more often than men, according to Gwartney-Gibbs and Lach (1994). Plus, not all cases present with an equal probability of being won (Dalton & Todor 1985a), thus Gwartney-Gibbs and Lach (1994) contended that arbitration reports may well reflect female-based cases that are unusual in strength – which may explain the number of significant effects detected in analytical investigations. Furthermore, the dearth of data on female orders, due to low numbers of female arbitral appointments, could mean we are simply studying the arbitral decisions from the pioneering female arbitrators that are under pressure to conform to, or have assimilated to, existing males norms of tribunal members (Neave 1995). These factors could be potential limitations to the aforementioned findings.

4.6.3 Gender matters relevant within the Australian context

Australian society has moved beyond the 'husband supporting a wife and three children' (Ridout 2005), with women active participants in the workforce. It is worth considering gender patterns in Australia's workforce as it may have implications for the gender patterns seen at arbitration. Table 4.4 presents the latest available statistics showing full-time and part-time employees, by gender, in Australia's workforce in 2005, the mid-point during the period of interest in this thesis.

Table 4.4 *Gender mix of full-time and part-time* employees in Australia in 2005*

	MALES			FEMALES			*Total combined workforce*
	Part-time	Full-time	Total	Part-time	Full-time	Total	
Count	775,500	4,502,700	5,278,200	1,971,500	2,328,300	4,299,800	9,578,000
In group %	15%	85%	[100%]	46%	54%	[100%]	100%
National %	8%	47%	[55%]	21%	24%	[45%]	100%

* Part-time employment occurs where the person usually works less than 35 hours per week (in all jobs)

(Source: Australian Bureau of Statistics 2005a)

Table 4.4 shows that Australian women comprised 45 percent of Australia's total workforce. Only fifteen percent of men worked part-time compared to 46% of women. Part-time female workers accounted for 21 percent of Australia's total workforce, in comparison to part-time male workers who accounted for 8 percent.
With changing social attitudes toward mothers participating in the workforce, the ABS (2005a) reported that life-cycle patterns were evident in the female labour force participation patterns, with women of peak child-bearing ages combining work with family commitments. The ABS (2005) statistics revealed that the tendency to work part-time, for both men and women, as they progressed through life, follows roughly the same pattern, with people in early career and family rearing years performing higher levels of part-time work.

The trends also showed that the highest full-time participation rate amongst males (in 2005) were those born around the mid 1930s. In comparison, the highest full-time participation rate amongst females was the cohort born around the late 1960s/early 1970s. Furthermore, there were more full-time female than male workers until women reached around 45 years, after which full-time female participation steadily declined. This suggested Australia's full time labour force was (and still is) staffed by elderly males nearing retirement and middle-aged females that were predicted to leave the workforce in a short time.

The gendered nature of the full-time/part-time composition of Australia workforce and its relationship with union membership is also worth considering as research suggests union members are more likely to pursue a grievance claim than non-union members (Bemmels 1994; Bemmels, Reshef & Stratton-Devine 1991). In spite of the propensity for women to work in part-time (and casual) positions, women were as likely as men to join a union (Bray, Waring & Cooper 2011) and in 2010, female membership overtook male membership, with an estimated 18.7 percent of female workers and 17.9 percent of male workers members of a union (ABS 2011c).

Table 4.5 displays an estimated comparison of union membership to non-union membership by gender and employment type for workers in their *primary* job. This table shows that in 2010, 19 percent of workers joined the union associated with their primary job. Further, it reflects the representative gender balance discussed in the

literature, with 10 percent of male workers and 9 percent of female workers members of a union in their main job.

Table 4.5 *A comparative of union and non union membership in main job by gender in Australia's workforce in 2010*

	MALE UNION MEMBERS			FEMALE UNION MEMBERS			*Total union members*
	Part-time	Full-time	Total	Part-time	Full-time	Total	
National totals	82,400 1%	847,900 9%	930,300 [10%]	335,300 3.5%	522,300 5.5%	857,600 [9%]	1,787,900 ***19%***
	MALE NON-UNION MEMBERS			**FEMALE NON-UNION MEMBERS**			*Total non-union members*
	Part-time	Full-time	Total	Part-time	Full-time	Total	
National totals	729,600 8%	3,335,100 35%	4,064,700 [43%]	1,736,400 18%	1,879,300 20%	3,615,600 [38%]	7,680,300 ***81%***

* Part-time employment occurs where the person usually work less than 35 hours per week (in all jobs)

(Source: Australian Bureau of Statistics 2011c)

The final point noted about the Australian context refers to 'occupational segregation', which is the objective measure of the proportions of male and female workers in an occupation collected from workforce datasets (Miller & Hayward 2006). Historically, Australia has possessed a strongly gendered workforce reflecting Western stereotypes of which jobs should be performed by men, and which jobs should be performed by women (Barns & Preston 2010; Cobb-Clark & Tan 2011; Moskos 2012; Pocock 1998; Preston & Whitehouse 2004; Sappey et al. 2009; Strachan 2010; Watson 2008). The risk perceived with occupational segregation is that it can provide the environment for an 'in-group' bias to occur, where rules may be applied rigorously to outsiders but flexibly to insiders (Williams 2003). For instance, a male nurse might be subjected to more extreme disciplinary response for misbehaviour (such as dismissal) compared to a female nurse who may only be given a warning.

Table 4.6 displays the percentage of females according to the collapsed occupational categories to be used in this analysis, based on labour force statistics produced by the ABS (2012a). In line with Western, gendered roles, Table 4.6 demonstrates that the female-dominated occupational categories were community services workers, personal services workers, clerical, administration and sales workers. The male-

dominated occupational categories were managers and professionals, technical and trade workers, machinery operators, drivers and labourers.

Table 4.6 *Dominant gender in occupational categories in Australia 2012*

Occupational classification	% female	
managers and professionals	46%	= male dominated
technical or trade worker	14%	= male dominated
community/personal service	68%	= female dominated
clerical/admin or sales worker	71%	= female dominated
machinery operators, drivers, labourers	24%	= male dominated

Source: (Australian Bureau of Statistics 2012a)

4.6.4 Hypotheses deduced about gender effects

It was discussed in this sub-section that the literature identifies theoretical propositions explaining why gender effects might occur when either a male or female worker appears before either a male or female judge. Further, there was a clear ambiguity of empirical results pertaining to gender effects in arbitration and research in this area needs to continue. Australia's labour market, with its declining union density, occupational segregation and constitution of around one-third part-time workers, may be influencing the number of men and women being dismissed and/or accessing the unfair dismissal claim service of the federal tribunal. Therefore, the following hypotheses have been developed in relation to gender effects:

$H_{0(12)}$ *There is no statistically significant relationship between the* ***worker's*** *gender and arbitration decisions favourable to the worker.*

$\mathbf{H_{1(12)}}$ *Females will be more positively related to arbitration decisions favouring workers than males.*

$H_{0(13)}$ *There is no statistically significant relationship between the* ***arbitrator's*** *gender and arbitration decisions favouring the worker.*

$\mathbf{H_{1(13)}}$ *Male arbitrators will be more positively related to awarding arbitration decisions favouring the worker than female arbitrators.*

$H_{0(14)}$ *There is no statistically significant relationship between* ***female arbitrators*** *and favourable arbitration decisions awarded to dismissed,* ***female workers****.*

$\mathbf{H_{1(14)}}$ *Females will be positively related to favourable arbitration decisions from female arbitrators.*

$H_{0(15)}$ *There is no statistically significant relationship between employment status, gender and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(15)}}$ *Females that performed part-time hours will be positively related to favourable arbitration decisions.*

$H_{0(16)}$ *Women dismissed from jobs typically performed by men, are not statistically significantly related to arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(16a)}}$ *Females employed in an area of male dominated work, will be negatively related to favourable arbitration decisions.*

$\boldsymbol{H_{1(16b)}}$ *Females working in female dominated occupations will be positively related to favourable arbitration decisions.*

4.6.5 Occupational skill level of the dismissed worker

Occupation, or inherently, the skill level required to perform the occupation, was included as a potential variable on the premise that differentials in power and job prestige associated with the skill, education and/or training needed to perform different types of jobs may expose workers to different work situations. That is, job prestige is thought to predict occupational conditions such as work complexity, control over work, degree of supervision, routinisation and occupational conditions which have a consequent effect on a person's sense of self-worth and self-belief (Gecas & Seff 1989; MacKinnon & Langford 1994).

The job prestige hierarchy is believed to be near standard across modern industrialised countries, in spite of wide cultural variations (Inkeles 1960; Inkeles & Rossi 1956). Therefore, there appears to be a stable, global view of the hierarchical order of occupations. Seminal theories on the way in which occupations are structured in society appear in the writings of Karl Marx and Max Weber. It is not within the scope of this thesis to disentangle and critique the works of Marx (in Hyman 2006) and Weber (1978), however, these methodologies provided insight into why it was worth considering occupational skill level as a variable that might impact the arbitration outcome for a dismissed worker.

4.6.6 Occupational differentials: Marxist and Weberian viewpoints

Occupations demand from their incumbents varying levels of skill, education and/or training, leading to inherent differentials in power and job prestige, which

subsequently influence the quality of a person's work-life and social status. Generally, those with higher status occupations have access to the most resources to achieve personal goals and self-fulfilment (Otto & Featherman 1975). Both Marx (in Hyman 2006) and Weber (1978) theorised that people are located hierarchically in society into 'classes', which coincide, in the main, with the status derived from the type of work they perform (Inkeles & Rossi 1956; Watson 2008).

Marx believed two classes existed, the class that owned and controlled the creation of wealth that dominated and exploited the class of people that performed the work. Weber believed in a steeper, hierarchal class structure: the people that owned the 'capital' or businesses and that made an income from such capital or businesses; senior and junior classes that manage and administer these business; those that provide professional services; a clerical and shopkeeper class; and a manual working class.

Both Marxist and Weberian methodologies incorporate a power inequality dimension whereby the occupationally-defined classes continuously struggle to achieve, maintain or improve the level of status and reward that they believe the members of their class are entitled, and moreover, the resistance and contestation each incurs from the other classes, toward such efforts (Watson 2008; Wegener 1987). In current times, and relevant to this thesis, is the occupational-power struggle apparent when a dismissed worker takes their employer to task over his or her dismissal – whether the employer is a private business owner that 'owns the means of production', or, the managerial expert acting as an 'agent' for the owner - with a view to recovering the sense of dignity and the autonomy to navigate life, that comes with earning an income (Collins 1992).

4.6.7 Previous empirical findings about occupational skill differentials

Arbitral decision-making as a function of the employee's occupational skill level has received limited attention from researchers. One study found lower skilled workers, particularly male, were more likely to face higher disciplinary and dismissal actions (Antcliff & Saundry 2009). Less sympathy towards lower skilled workers was also found in previous studies by Cappelli and Chauvin (1992), Bemmels (1988b),

Caudill and Oswald (1992) and Block and Stieber (1987). Then, there existed the investigations that revealed skill level was an insignificant factor influencing the arbitration result, such as Saridakis et al. (2006) and Knight and Latreille (2001).

However, other investigations found employees engaged in lower or semi-skilled occupations were *more likely* to receive a favourable arbitration decision than employees working in high skilled occupations (Southey 2008b) and particularly where the decision was administered by a female arbitrator (Southey & Innes 2010). Meanwhile, Rollings-Magnusson (2004) and Southey's (2012) examinations of interaction effects between skill level and the gender of the grievant found that females in higher level positions (executive/professional, middle and lower-level management) received less compensation compared to men in higher level positions.

4.6.8 Occupational skill differentials within the Australian context

This sub-section describes Australia's labour market during the first ten years of the 21st century (the period of interest in this thesis). It specifically describes the occupational skills that were less sought after and those which were in higher demand. It was workers in the lowest skilled occupations in Australia that faced a tougher job market compared to those occupations requiring managerial and professional level skills. Technology and automation capable of producing repetitive, routine work was displacing low skilled workers in each industry, except for the wholesale and retail trade industry (Kelly & Lewis 2001). Consequently, lower skilled workers, both blue and white collar, faced reducing work opportunities because they were the least equipped to adjust to rapid technological advances. Low skilled workers also faced redundancy as organisations pursued productivity improvements or dealt with non-renewed contracts due to fluctuating financial markets (Pappas 1998 in Lewis & Ong 2000).

As Australia's labour market was increasingly integrating with a global labour market, many lower skilled workers became 'vulnerable' occupational groups, such as machine operators and assembly workers, as well as intermediately qualified workers such as clerical workers, secretaries and word-processing operators (Richardson & Tan 2008; Shah & Burke 2003). These groups were said to be

vulnerable because their services or products were most subject to substitution by overseas workers or products. In comparison, higher skilled groups of professionals and associate professionals were either 'advantaged' by being able to sell their skills and knowledge on the global labour market, or 'insulated' from its effects as the personalised nature of the services they provide offered them a degree of protection (such as doctors, teachers, community service workers, elementary sales and service workers).

Labour demand in Australia was for highly skilled workers with increases in managerial, professional and para-professional occupations as well as trade workers (Gollan, Pickersgill & Sullivan 1996; Kelly & Lewis 2001; Lewis 2004; Richardson & Tan 2008). This reflected a corresponding growth in tertiary qualifications over vocational and trade qualifications (Richardson & Tan 2008).

The number of new entrants into trade work declined during the 1990s and stagnated in 2002 – due to trouble attracting young people to take on trade apprenticeships – but growth in the mining and construction industries triggered some modest employment growth from 2003 (Richardson & Tan 2008). The reducing availability of trade skills was compounded by an ageing workforce with the baby boomer generation setting to retire within the next ten years, combined with declining fertility rates which had not adequately replenished the supply of young people entering the workforce and trade apprenticeships specifically (Jorgensen 2005a, 2005b; Patrickson & Ranzijin 2004). Consequently, Australia faced shortages of people to perform the required work whilst the current workforce coped with the extra demand to develop new skills at a much faster and frequent rate than previously (Schienstock 1999 in Jorgensen 2005a). In response, Australian industry bodies and governments suggested older workers delay retirement (Patrickson & Ranzijin 2005) and remain active participants in the labour market.

4.6.9 Hypothesis deduced about occupational skill differentials

This sub-section first considered that a person's occupation equates to a person's social status and that power struggles exist between the occupations, in terms of either protecting themselves from an unscrupulous dismissal by business owners or

management; or gaining a skill set desirable in the labour market. Having established Australia's context of a turbulent existence for lower skilled workers, it could be that the arbitrators aim to counteract the vulnerability and power differential experienced by those in the lower end of the occupational class structure. Whereas, higher skilled workers, due to their protected position in the local market and competitive position in the global labour market, are less vulnerable in the workplace and labour market. The following hypothesis has been deduced about the potential influence of occupational skill on arbitration outcomes:

$H_{0(17)}$ *There is no statistically significant relationship between the worker's occupation and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(17)}}$ *Lower-skilled occupations will be more positively related to arbitration decisions favouring the worker than higher-skilled occupations.*

4.7 Sub-question (c) – arbitrator characteristics

This sub-question considers characteristics about the arbitrator that may be influencing the arbitration decision. The arbitrator characteristics examined from the arbitral decision making literature are: the arbitrator's gender; the arbitrator's professional background-award orientation; and the arbitrator's experience in arbitrating unfair dismissal claims. Colvin (2009) called researchers to explore the relationship between arbitral decisions and the characteristics of the arbitrators. Crow and Logan (1995) noted researchers are finding effects between arbitrator characteristics and decisions, but they tend to be explaining only a small percentage of the arbitral decision-making and clarification is needed. Crow and Logan's (1995, p. 113) statement suggests further investigation into the linkages between arbitrator characteristics and their decisions is required, despite challenges in doing so:

> ... no scholar has stated flatly that personal characteristics do not influence arbitral decision making. Our sense of the related commentary and research is that in some small way personal characteristics do affect arbitral decision making, but the nature of the relationship resists measurement.

4.7.1 Arbitrator's gender

On the basis of the gender interaction effects that may be present in arbitration, the arbitrator's gender was incorporated with the discussion on worker's gender under sub-question (b), section 4.6.1.

4.7.2 Arbitrator's professional background – award orientation

In terms of whether an arbitrator holds either management sympathies or union sympathies, Crow and Logan (1994) contended that arbitrators may philosophically orientate to one side over the other. This contention is underwritten by the suggestion that an arbitrator or judge's personal attributes unavoidably influence their interpretation of the evidence and consequent decision (Bemmels 1991b; Crow & Logan 1995; Heneman III & Sandver 1983; Kirby 1999; Sangha & Moles 1997; Seamone 2002). Mason (2001) contended that 'unconscious prejudice' is often at play in judicial-type decisions, because we cannot expect to see bias 'neatly packaged', and that a prejudice can exist in spite of the decision maker believing they are not prejudiced.

Aligned with the contention of the arbitrator's work background leading to potential bias, is the concept of 'award orientation'. Defined as '*the extent to which his/her bias in awards favors either management or the union, or demonstrates a propensity for modifying awards'* (Crow & Logan 1995, p. 114). Award orientation is seen as a window to the arbitrator's value system and that people hold an innate preference for the philosophical stance of either union or management, so ultimately arbitrators, even at a subliminal level, would too. Award orientation is thought to be influenced by an arbitrator's work history (Simpson & Martocchio 1997, p. 256). As a consequence, arbitral-decision making researchers have included the arbitrator's work history as a factor to be explored in arbitral decision making.

4.7.3 Previous empirical findings on professional background-award orientation

This sub-section presents, first, those studies that found the arbitrator's background to be significantly related to the arbitration decision, followed by those which did not identify a significant relationship between the two variables. To be expected, each researcher has measured this variable differently. Thus, a variety of findings have emerged. For a start, arbitrators with a legal background were less likely to reinstate a dismissed worker, compared to those arbitrators with an academic background (Bingham & Mesch 2000).

In a similar vein, Bemmels measured professional background according to whether the arbitrator had a management, union, legal or academic background and found that arbitrators with a management background were 'acutely avert' to awarding partial reinstatements (Bemmels 1990b), whilst academics gave more lenient suspension penalties than the other professionals (Bemmels 1990a). In Australia, mildly significant award-orientation effects were found by unfair dismissal arbitrators in the federal tribunal (Southey & Fry 2010) whereby those with employer backgrounds returned favourable decisions more frequently to management and those with union backgrounds returned favourable decisions more frequently to employees. These 'logical' patterns were reflected similarly in the findings in the US study by Crow and Logan (1994).

Alternatively, employment background was found not to influence arbitral decisions in a study by Nelson and Kim (2006) where the arbitrator was assessed as either a full-time arbitrator or worked professionally elsewhere. Heneman and Sandver (1983) considered the most comprehensive range of past occupations (business academic, IR academic, economics academic, law academic, attorney, federal employee, state employee, arbitrator, consultant, management employee, union employee and 'other') but did not report a significant relationship between any of the occupations and arbitral decisions.

4.7.4 Professional background-award orientation within the Australian context

The work history of Australian arbitrators, prior to their appointment on the federal tribunal, is of interest in Australia as social and political commentators have debated claims that successive governments 'stack' the tribunal with members that reflect the ideological position – union or management – of the political party in power. Accounts of this debate were discussed in sub-section 3.6.4, and in Southey and Fry (2010, 2012) which were articles prepared by the author during the period of candidacy for this thesis. The results produced in this thesis are of significance to this debate as it will contribute further insight into a range of factors influencing Australian arbitrator's in their decisions, including whether their previous employment, in either union or management allied positions, are significant predictors of their arbitration decisions.

4.7.5 Hypotheses deduced about professional background-award orientation

The majority of the previous research into the arbitrator's work history supported the contention that this factor has some level of influence on the arbitral decision, if only minor. Australian social and political commentators have been pre-occupied with concerns about unbalanced appointments – colloquially referred to as 'stacking' – the federal tribunal. The concerns contained in this commentary can be theoretically underpinned by the award-orientation philosophy recorded in the arbitral decision-making literature. Yet little empirical research on this matter within Australia has been conducted beyond the author's earlier works. Consequently, the following hypothesis has been deduced in relation to the influence of arbitrators' previous work history on their decisions:

$H_{0(18)}$ *There is no statistically significant relationship between an arbitrator's work background and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(18)}}$ *A union background will be more positively related to decisions favouring the worker than a management background.*

4.7.6 Arbitrator's experience in arbitrating unfair dismissal cases

Scholars posit that experienced arbitrators are more familiar with the principles of arbitral proceedings and detecting whether a person is telling the truth, suggesting they are better able to 'judge' (Nelson & Kim 2008, p. 270). It is also posited that more experienced arbitrators would be appointed to more senior status arbitrator roles because more experienced arbitrators have been found to be harsher on the worker and more likely to support the employer's decision to terminate (Nelson & Curry 1981; Nelson & Kim 2008; Oswald & Caudill 1991; Simpson & Martocchio 1997) or award longer suspensions (Caudill & Oswald 1993). It appears they are prepared to make the tough call of denying reinstating or financially compensating a dismissed worker, a decision that can have potential, serious consequences on the worker's right to dignity and autonomy.

Similarly, Bemmels (1991a) found that more experienced arbitrators were more prepared to make a clear-cut call in terms of either denying a claim outright, or, reinstating a worker with full backpay. Whereas, less experienced arbitrators were more likely to make 'compromise' decisions by substituting a dismissal with a

suspension. At the same time, there were scholars that found arbitral experience appears not to bear an influence on an arbitral decision in the employment termination arena (Bemmels 1990a, 1991a; Bingham & Mesch 2000; Crow & Logan 1994; Heneman III & Sandver 1983; Thornton & Zirkel 1990; Westerkamp & Miller 1971).

4.7.7 Hypothesis deduced about arbitrator's experience

On the basis that to date the results of previous investigations have returned mixed findings, and the logic that either more experience or higher levels of seniority should equate to more confidence to deny claims that can have serious negative implications on the worker's life, the following hypothesis has been deduced:

$H_{0(19)}$ *There is no statistically significant relationship between either the experience an arbitrator has in determining unfair dismissal claims or their seniority, and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(19)}}$ *Each of these factors has a separate, negative relationship with arbitration decisions favouring the worker: 1) decision making experience; 2) seniority.*

4.8 Sub-question (d) – employer characteristics

This sub-question is concerned with identifying characteristics about the employer that may be influencing the arbitration decision. The employer characteristics which will be examined as moderating variables have been identified in the arbitral decision making literature: the presence of human resource management expertise and use of formal disciplinary processes which can reflect the size of the employer's business; the type of industry in which the business operates; and whether it is a public or private sector operation..

4.8.1 Formality, business size and the presence of HR expertise

There exists a growing body of evidence supporting a positive relationship between the degree of human resource management expertise or 'sophistication' within an organisation, and positive employee behaviour and corporate performance (Guest 1997, 2011a; Huselid 1995; Kehoe & Wright 2010; Michie & Sheehan-Quinn 2001). Moreover, researchers are being called to map the direct effects of HR practices to external measures of organisational performance, such as increased sales or export

growth (Combs et al. 2006; Guest 2011b); and such effects are being found for instance in Khavul, Benson and Datta (2010) and in Deng, Menguc and Benson (2003). In general, it appears that consensus exists in the academic community that HR practices influence organisational citizenship and employee stability (Ahmad & Schroeder 2003; Arthur 1994; Cho et al. 2006; Liu et al. 2007).

The dismissal of employees is a human resource management responsibility (Blancero & Bohlander 1995) in which HR managers are expected to administer the dismissals with justice and due process. Formalised dismissal policies and procedures, if followed correctly by management can guide, and should legally protect management (Antcliff & Saundry 2009). Formal practices involve providing an employee under the threat of a dismissal with a just process that involves written notice specifying the event that has led to the predicament, the opportunity for the employee to engage a union/legal representative/or support person, opportunities for the employee to consider, then respond to accusations, and written confirmation of the process (Antcliff & Saundry 2009). To this end, empirical support was found by Knight and Latreille (2001) whereby formal dismissal processes were positively related to arbitral findings that supported the employer's dismissal action.

However, smaller firms are unlikely to employ an HR expert to develop the more methodical or formalised HR processes of larger firms (Kotey & Slade 2005; Mazzarol 2003; Southey 2007). Therefore, hypothetically, a contention exists between larger firms that have HR expertise, and the smaller firms that operate using informal HR practice, in the matter of appropriately terminating an employment contract. It could be argued that a number of smaller firms administer their dismissal without HR or legal expertise and could inadvertently administer a dismissal without due process.

4.8.2 Previous empirical findings about formality, business size-HR expertise

Based on their research of small establishments in the UK hotel industry, Head and Lucas (2004) suggested that employees in smaller businesses that were subjected to disciplinary action were more likely to be approached in an informal manner, which may not have incorporated the opportunity for the employees to defend accusations.

In essence, lack of formal disciplinary procedures where the owner/manager held the locus of control for HR related decisions (Harris 2002; Matlay 2002) increased the 'possibility of arbitrary management practice' with potential to be 'detected' by the arbitrators (Head & Lucas 2004, p. 697/705).

The study by Saridakis et al. (2006) supported the proposition that small businesses without HR expertise are less likely to secure a favourable decision. This investigation of British employment tribunal applications detected a trend. '*Small businesses were more likely to lose (compared) to medium firms who in turn, were more likely to lose than large firms… with an HR Department*' (Saridakis et al. 2006, p. 26). It is noted that this analysis included, in addition to unfair dismissal cases, other types of claims such as wages, breach of contract and discrimination. Similarly, the presence of a human resource expert was positively related to Australian arbitration decisions upholding management's action to dismiss the worker, suggesting employers with HR expertise are better able to defend to their actions (Southey & Innes 2010).

Earnshaw, Marchington and Goodman (2000, p. 67), in their investigation into dismissal arbitration in small business, found that 'employers won more cases than they lost'. The context of the study was small and medium enterprises within the transport and communication, hotels and catering, and engineering industries in the UK. However, the authors' found that in nearly every instance where the SME employer lost a case, it was not because of the reason they dismissed the employee, but for the way in which they actioned it. For example, an employee may not have been given an opportunity to respond to an accusation as part of the disciplinary process, the employer may not have conducted a sound investigation, denied the employee a support person or representation, or entered the disciplinary meeting with a predetermined stance to terminate the employee's contract. The potential result of small businesses relying on informal HR practices could be that they risk denying employees 'procedural justice' when dealing with a problem employee.

Another challenge to managing dismissal in small businesses, noted by MacMahon and Murphy (1999), Earnshaw, Marchington and Goodman (2000) and Marlow and Patton (2002), is that sociable relationships are fostered by the close proximity in

which the owner/manager and employees work. Earnshaw, Marchington and Goodman (2000, p. 71) stated concern that arbitrators:

> May not understand how small firms operate and do not give sufficient weight to size and administrative resources when making a decision [and] will not understand the challenge of remaining unbiased for a small business manager.

In the event that the owner/manager needs to discipline or terminate an employee, ultimately, they are compromised in maintaining the 'personal distance' and unbiased opinion required to manage the process objectively.

4.8.3 The Australian context of business size

Australia is characterised by a heavy reliance on small and medium sized businesses as employers. In 2009, 89 percent of businesses employed less than 20 employees; 10 percent of businesses engaged 20 to 199 employees and less than one percent of Australian businesses operated with 200 or more employees (ABS 2010d). Several protections for the small business sector appear in the current legislation. First, Section 387 of The Fair Work Act requires the arbitrator to consider as part of his or her deliberation, the size of a business – a feature of the 1996 Act - and whether it has dedicated HR expertise. HR expertise first appeared in the Workplace Relations Amendment (Termination of Employment) Act 2001.

Further, before a worker in a small business can lodge an unfair dismissal claim, Section 383 of the Act imposes that the worker must have performed a 12 month minimum service period with the employer. Comparatively, workers that are not employed by a small business need serve only six months with their employer to be eligible for unfair dismissal protections. Another element of the legislation concerning business size is the 'Small Business Fair Dismissal Code' (the Code) under The Fair Work Act 2009. This means the Code was in effect during the final year of the period of interest in this thesis. The Code was implemented in recognition of the particular circumstances of small business operations, specifically, their limited HR expertise and redeployment opportunities (Chapman 2009).

The history of the Code is that prior to the 2005 Work Choices industrial relations amendments, the Australian Chamber of Commerce and Industry, along with

industry groups and peak employer bodies lobbied the Federal government extensively about the costs of unfair dismissal provisions to small firms and their subsequent reluctance to hire staff (Sheldon & Thornthwaite 1999). At the time, the lobbying was effective, and motivated with concern that unfair dismissal regulation may be preventing small business from hiring staff (Harding 2002; Harris 2002; IRM Letter 2005; Ridout 2005), the Federal government exempted small businesses (of up to 100 workers) from unfair dismissal laws in the Work Choices amendments to the Workplace Relations Act 1996. However, this was to be short-lived, with the 2007 election of the Labor Party, the new government had the mandate to unwind the Work Choices legislation and, in the main, it returned dismissal protections to employees of small businesses.

Consequently, the current Code provides support to businesses with a headcount of fewer than 15 employees in that a dismissal cannot be claimed if the employee was engaged for less than 12 months. Further, the Code states: '*If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair'* (DEEWR 2008, p. 4). The Code provides a checklist for the employer which offers insight into the level of justice the Tribunal expects a small business employer to afford a worker. For example, 'serious' misconduct can see the worker terminated without notice or warnings, if the employer '*believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures'* (DEEWR 2008, p. 4).

Less serious misconduct (or performance) places higher procedural expectations on the employer. It must: allow the worker a support person if requested (cannot be a lawyer); provide a warning to the employee, either verbal or written advising the worker to improve his or her conduct otherwise dismissal could be a consequence; and provide a reasonable amount of time for the worker to improve conduct. In the event a dismissal then occurs, the Code requires the employer to provide a reason for it and an opportunity for the employee to respond. The checklist also suggests the employer keep records of any meetings and warnings, implying that written documentation is expected to be maintained by the employer. Completing the

checklist does not guarantee an employer will avoid an unfair dismissal claim, and in the event the federal tribunal differentiates on the employer's application of the 'reasonable grounds' standard (Chapman 2009), it is still possible for a small business employee to be successful in having their dismissal deemed unfair.

4.8.4 Hypotheses deduced about formality and HR expertise-business size

It was discussed how smaller businesses tend to operate without HR experts on board. Based on the complexity of the industrial relations regulations and the level of expertise needed to navigate dismissing an employee (Goodman et al. 1998; Pratten & Lovatt 2005), it could be fair to suggest that arbitration decisions favourable to the employer are more likely for organisations that have a higher degree of human resource and/or industrial relations expertise with formalised procedures in place. As a consequence the following two hypotheses have been formulated:

$H_{0(20)}$ *There is no statistically significant relationship between the formality of the dismissal process; or the presence of a support person for the worker during the dismissal process; and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(20)}}$ *Each of these factors has a separate, negative relationship with arbitration decisions favouring the worker: 1) the formality of the process; 2) presence of a support person for the worker.*

$H_{0(21)}$ *There is no statistically significant relationship between the presence of HR expertise and/or the size of the business; and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(21)}}$ *Each of these factors has a separate, negative relationship with arbitration decisions favouring the worker: 1) employers with HR experts; 2) larger businesses.*

4.8.5 Industry sector

An 'industry' is a segment of business activity or commercial enterprise that can be isolated from others (WebFinance Inc 2011). Industry is included as a potential moderating variable in this thesis, on the basis that industry values are believed to vary due to the nature of their competition, their customer requirements and the social expectations placed upon them, which drive industry specific cultures (Gordon 1991; Porter 1980). Viewed as being influential on a firm's profitability, McGahan and Porter (1997) advise it would be misguided to discount the influence of the

industry parameter, from the organisation and its operations. Whilst sub-section 4.3.4 suggested national culture could be influential on an organisation's practices, it is likewise proposed that industry values could also be influential on managerial practices and behaviours orientated towards ensuring an organisation's competitiveness and profitability (Gordon 1991; Porter 1980).

It is proposed that industry values and environments contribute to industry variations in employment relations and human resource management approaches, such as those associated with communication, authority, interpersonal work relationships (Phillips 1994) and discipline and dismissal (Green & Weisskopf 1990). And, Cappelli and Chauvin (1991) proposed that industry variations in wages and alternative job opportunities may account for differences in employee behaviours such as grievance initiation rates.

4.8.6 Previous empirical findings about industry

Bemmels (1988a, 1988c, 1991b) compared manufacturing to non-manufacturing industries and suggested that variations in grievance activity could be caused by differences in union and management policies or the quality and clarity of collective agreements. Other scholars suggested the manufacturing industry consists of 'high disciplinary workplaces' characterised by lower skilled workers, lower unionisation and high turnover (Antcliff & Saundry 2009; Green & Weisskopf 1990). Several analyses support this contention.

Evidence collected in Australia suggests that dismissal rates vary between the manufacturing industry and other industry classifications. Specifically, Klass, Brown and Heneman III (1998) used the data collected in the 1991 Australian Industrial Relations Survey of 1,596 workplaces to analyse the determinants of dismissal usage. This analysis identified that, compared to the manufacturing industry, fewer dismissals occurred in mining, communications, utilities, construction, transportation, financial services, public administration and community services. A similar finding was noted in Green and Weisskopf (1990) where more aggressive approaches to discipline were noted in the US industries that involved physically demanding work, those operating in harsh environments, or those in secondary

industries (that is, those involved in manufacturing) wherein the frequent threat of dismissal was used as a disciplinary tactic.

In addition, the literature suggests that 'service-related' industries face challenges in relation to the management of workplace grievances, born of the management styles prevalent in the industry. For instance, the level of human resource expertise was described in the British hospitality industry by Head and Lucas (2004) as exemplifying 'hard' human resource principles where staff are treated as a commodity with few participatory opportunities. The hospitality industry belongs to the general categorisation called the 'service sector'. Service sector industries, as defined by Mills and Dalton (1994), are those industries that trade in the intangible, are not easily inventoried and are complicated in their delivery. Possibly, this complication arises from the human involvement with delivery of the service. Employers in service related industries encounter challenges in managing staff performance because the humanised, service nature of the work equates to 'imprecise' standards and expectations. The intangible nature of the work makes grievances involving performance, behaviours, attitude and output particularly complex to resolve (Mills & Dalton 1994) rendering parties involved in the service sector vulnerable to grievances escalating to arbitration for settlement.

4.8.7 The Australian context of industry

This sub-section offers insight about Australia's industry profile. Table 4.7 displays Australian industry demographics, revealing that in 2011 the *health care and social assistance* industry, closely followed by the *retail trade* industry, employed the highest numbers of workers in Australia (ABS 2011b). However, regional variations exist (ABS 2011a). The *construction* industry employed the most workers in the Northern Territory and *professional, scientific and technical services* industry was the highest employing industry in the ACT. The *retail* industry dominated the remaining States.

Table 4.7 shows that no particular industry dominates the employment market, although perhaps the needs of the aging population are reflected in the health care and social assistance industry being a leading employing industry. The strength of

retail trade industry in Australia also reflects our end-user dependence for manufactured products and food supplies. Overall, Australian industries are populated towards the 'tertiary sector' (those that supply services to the consumer, be it profit motivated, non-profit or public sector service), reflecting Australia's status as an advanced economy.

Table 4.7 *Number of employees working in each industry in Australia in 2011*

Industry	*Total Employee headcount*	*% (rounded up)*
Agriculture, Forestry and Fishing ++	313,000	3
Mining ++	226,000	2
Manufacturing #	945,600	8
Electricity, Gas, Water and Waste Services **	141,700	1
Construction #	1,031,800	9
Wholesale Trade #	406,800	4
Retail Trade **	1,220,000	11
Accommodation and Food Services **	780,200	7
Transport, Postal and Warehousing #	583,500	5
Information Media and Telecommunications ++	204,400	2
Financial and Insurance Services **	431,100	4
Rental, Hiring and Real Estate Services **	193,900	2
Professional, Scientific and Technical Services **	877,700	8
Administrative and Support Services ++	407,200	4
Public Administration and Safety ++	734,400	6
Education and Training ++	866,900	8
Health Care and Social Assistance ++	1,322,900	12
Arts and Recreation Services **	208,400	2
Other Services ++	449,400	4
Total employees across industries	11,344,700	

part of manufacturing cluster ; ** part of service cluster; ++ other

Counts adapted from: (Australian Bureau of Statistics 2011b)

Based on the discussion in this sub-section it is necessary to cluster the industries for wording the hypothesis. Therefore, in Table 4.7, industries clusters are coded: # for industries associated with manufacturing; and ** for industries associated with the service sector; and remaining industries falling into 'other' industries denoted by ++.

4.8.8 Hypothesis deduced about industry

This sub-section discussed the research literature that generally supported the proposal that differences occur across industries in the management of their human resources which could affect the way employees within each industry are treated

when they are being disciplined or have a grievance. It was noted that the manufacturing sector is associated with a harsher disciplinary focus. Meanwhile, the service related industries face particular human resource management difficulties because of the intangible nature of the work performed, which may lead to poorer managerial judgements about an employee's behaviour. Both these factors may lead to inappropriate dismissal actions by management in these two industrial sectors. Thus, the following hypothesis has been deduced about the influence of industry as a moderating factor on arbitration decisions:

$H_{0(22)}$ *There is no statistically significant relationship between the type of industry in which the employing business operated and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(22)}}$ *Employees dismissed from workplaces associated with either the manufacturing industry or service industries will be more positively related to arbitration decisions favouring the worker, than those from other industries.*

4.8.9 Public or Private Sector

Akin to the industry in which a business operates, is also whether the business is within the public sector or private sector. The public sector consists of employers where their operations are *'either in State ownership or under contract to the State, plus those parts which are regulated and/or subsidised in the public interest'* (Flynn 2007, p. 2). The following definition by Dolton & Makepeace (2011, p. 274) also provides insight into distinguishing the public sector from the private sector.

> The definition of the public sector is those workers who are employed by an organisation that is financed by the government and for which the government has direct financial responsibility. All other individuals work in the private sector. This definition places some institutions in the private sector, such as universities that receive large amounts of public money ... together with many people providing services to the public sector such as many cleaners in hospitals. Further, some public sector services, such as refuse collection, will be contracted out to the private sector.

The underpinning philosophy for including this variable as a possible moderator is that the public and private sector workplaces are thought to incur differing environments, constraints, incentives, standards and cultures which influence their people management techniques (LaVan 2007; Perry & Rainey 1988). In spite of

attempts to increase customer responsiveness and flexibility, public sector organisations continue to stay close to the values of a bureaucratic and hierarchical organisational culture (Parker & Bradley 2000). Public sector politics and bureaucracy are believed to constrain personnel practices (Rainey & Bozeman 2000) including making dismissal of a public sector employee 'difficult' (Boyne et al. 2010) and in the event a dismissal occurs, Kirschenbaum, Harel and Sivan (1998) argued that public sector employers are most likely to have their actions challenged because it is the largest, most diverse employer.

In the private sector, Antcliff and Saundry (2009) found that in the UK, private sector businesses were 'high discipline' workplaces resulting in high levels of dismissals, and (Byron 2010) found that dismissals on discriminatory grounds are higher in the private sector. However when it came to arbitrating dismissal claims, Block and Stieber's (1987) US research, along with Bemmels (1988b), Caudill and Oswald (1992), Thornicroft (1994), Wager's (1994) Canadian investigations, and Knight and Latreille's (2001) UK investigation failed to identify a significant relationship between public or private businesses and the arbitration decision.

4.8.10 Public or private sector in Australia

The ABS (2010a) reported that in June 2010, 16 percent of Australia's workforce consisted of public sector employees, comprised of 243,700 employees in commonwealth government, 1.4 million in state government and 185,400 in local government. Table 4.8 displays the breakdown of industry interests of the public sector, compared to the number of workers employed by both sectors. It reveals that the majority of the public sector workforce engages in public administration and safety; education and training, and health care and social assistance. The figures suggest that the private sector also shoulders a reasonable proportion of the responsibility for providing these services.

Union density differs significantly between the public and private sectors. Forty-one percent of public sector workers were union members in August 2010 (falling from 46 percent the previous year). Union membership amongst private sector employees sat at 14 percent (ABS 2010c). Wages differentials between the sectors show that as

at August 2011, a full-time, adult public sector employee earned a weekly average of $1,462, compared to a private sector counterpart who earned $1,352 per week (ABS 2011d). Possibly, the collective agreements negotiated by the more highly represented public sector workforce are being reflected in the wage differential.

Table 4.8 *Proportion of public sector employees by industry in Australia, 2010-2011*

Industry	***Total employee headcount***	***Public sector headcount***
Electricity, Gas, Water and Waste Services	141,700	59,900
Construction	1,031,800	13,200
Transport, Postal and Warehousing	583,500	107,100
Information Media & Telecommunications	204,400	11,500
Financial and Insurance Services	431,100	11,800
Rental, Hiring and Real Estate Services	193,900	9,400
Professional, Scientific & Technical Services	877,700	28,500
Public Administration and Safety	734,400	578,00
Education and Training	866,900	578,00
Health Care and Social Assistance	1,322,900	413,300
Arts and Recreation Services	208,400	16,800
Agriculture, Forestry and Fishing	313,000	
Mining	226,000	
Manufacturing	945,600	
Wholesale Trade	406,800	16,000
Retail Trade	1,220,000	
Accommodation and Food Services	780,200	
Administrative and Support Services	407,200	
Other Services	449,400	
Total employees all industries	**11,344,700**	**1,843,500**

Adapted from: (Australian Bureau of Statistics 2010a)

4.8.11 Hypothesis deduced about public or private sector

This moderator variable considered the demographic variation of whether the dismissed worker was employed in either the public or private sector. It was identified that the public sector is historically considered a bureaucratic culture, binding management to a number of formalised procedures regarding dismissal, whilst the private sector is thought to have a lower tolerance for disciplinary matters. The public sector employee may be benefiting from higher union density and support, subsequently a dismissal is more likely to occur in accordance with a formalised process under the watchful eye of a union representative. Therefore, the following hypothesis has been deduced:

$H_{0(23)}$ *There is no statistically significant relationship between the sector in which the employing business operated and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(23)}}$ *The private sector will be more positively related to arbitration decisions favouring the worker than those from the public sector.*

4.9 Chapter 4 conclusion

This chapter addressed descriptive and process theories relevant to each of the principal independent variables and, where appropriate, moderator variables that appear in the conceptual model. Relevant Australian contextual issues were incorporated into the discussion after providing specific literature reviews for each research question. Finally, each research question and sub-question was systematically deduced into a set of 23 testable hypotheses.

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CHAPTER 5

THE RESEARCH METHODOLOGY

5.0 Introduction

The research objective and questions underpinning this thesis were designed to determine the viability of a range of variables that are thought to be influencing arbitral decision-making over an unfair dismissal claim, in the event the worker was dismissed due to misbehaviour. The aim of this chapter is to describe the methodological approach used to investigate the research questions. This aim involves, first, an introduction to the research paradigm in which the author operated, before describing content analysis as the chosen method for collecting data. Attention is paid to explaining the process used to administer the content analysis and discussing the benefit of using secondary source data. The implications of validity and reliability of the method – essentials for successful research – are then addressed. The final section of the chapter is devoted to discussing logistic regression as the selected statistical analysis technique for testing the hypotheses developed in the previous chapter. Part of this discussion involves providing the results of the data diagnostics; which are preliminary data checks fundamental for a sound logistic regression.

5.1 The positivist research paradigm

The previous chapter presented a range of testable hypotheses about the influences on arbitral decision-making in cases of employee misbehaviour and dismissal. These hypotheses now require treatment via statistical analysis to determine their viability. This type of approach for verifying the feasibility of the conceptualised arbitral decision-making model alludes to a 'traditional', 'scientific' or 'positivist' paradigm, whereby the researcher addresses each research question by deconstructing it into a series of variables and hypotheses, using previous literature as a guide (Neuman 2003). Researchers working within a positivist paradigm collect data in a form that is quantitative, detached and objective to measure the variables of interest in their hypothesis, and subject such data to statistical analysis (Collis & Hussey 2003; Leedy & Ormrod 2001).

The purist application of the positivist paradigm contains the tenet of 'absolutism', meaning that research is to be theory driven, and that through replication, it is possible to verify a theory to be accepted as 'universally true' (Allen, Titsworth & Hunt 2009). However, social scientists have debated whether it is possible to accept 'universally true' theories about human behaviour, given the infinite variations of human behaviour. Thus, advocates for using a positivist approach in social science pose an altered stance on 'absolutism'. That is, the positivist paradigm is regarded by the social scientist as an approach that allows the researcher to draw generalisations about *patterns* of behaviour within the population – these patterns are not assumed to be universally true (Allen, Titsworth & Hunt 2009). Allen, Titsworth and Hunt (2009) suggested that these patterns aim to either identify how behaviours may differ from one group to the next, or how one type of behaviour is related to other types of behaviour. Importantly, they state '*patterns are just that, patterns. Any statement about a pattern of human behaviour does not imply that all people act in a certain way or perceive certain phenomena similarly'* (Allen, Titsworth & Hunt 2009, p. 8). It was with this interpretation in mind that the results of the analysis are discussed in the final chapter.

5.2 Content analysis as the research method

Content analysis is used by scholars who believe a text document can provide a window into human experiences (Bernard & Ryan 1998). A content analysis involves studying an artefact of communication in an objective, systematic and quantitative manner to determine the shared meaning of the message contained in the artefact. A researcher performing a content analysis can examine images, sounds, or the texts of documents such as newspaper stories, speeches, diaries, interviews or official publications in an attempt to interpret their message and identity their impact or influence on people (Krippendorff 2004). In this thesis, the texts of the arbitration decisions provide the communication artefact.

The data yielded by a content analysis are suitable for making predictions or drawing inferences because a content analysis classifies textual material and reduces it to manageable pieces of data (Krippendorff 2004). Content analysis can be used to identify cultural patterns in groups, institutions or societies and to identify the focus

of individuals, groups, institutions or societal attention (Weber 1990). Thus, in this thesis, the content analysis of the texts of the arbitration decisions – which are authored by the arbitrators themselves – will provide information about the matters upon which arbitrators focus their attention in order to discern whether or not to uphold or overturn a managerial decision to dismiss an employee due to his or her conduct.

5.2.1 Content analysis within the industrial relations discipline

Content analysis is a method commonly used in history, literature, anthropology, sociology, psychology, marketing, organisational behaviour and communication disciplines. This section serves to assure the reader that a content analysis can also provide insights for industrial relations methodologists. The following quote supports both a content analysis as a method, and the use of tribunal cases as source of data, in industrial relations research:

> There are several ways in which cases may be useful in industrial relations research ... (one) approach depends on treating cases as sources of data. Legal decisions are also events and, like other social phenomena, may be studied using the standard tools of social science analysis. Using recognised sampling methods, it is possible to analyse a number of cases using quantitative statistical methods. Such methods can range from simple arithmetic calculations (means, percentages) to more complex tests like regression and factor analysis. ... finally cases are texts and can be approached using a variety of techniques of textual analysis ranging from discourse analysis to quantitative methods such as content analysis (Frazer 1999, p. 90).

Tribunal or court decisions provide rich, narrative material for quantitative re-analysis (Frazer 1999; Hodson 2008) and in this thesis the tribunal decisions reflected real episodes of employee misconduct in genuine workplace settings. A benefit of the content analysis method was that multiple cases of misbehaviour incidents were unobtrusively examined (Trochim 2006), with the content of each arbitration decision recording the incident from several perspectives: the employee, the employer, and the finally arbitrator's interpretation. And, as the discussions recorded in the decisions occurred under Oath in a quasi-legal setting, it provided some assurance that the accounts were accurate (Southey 2010b). Examples of peer-reviewed studies that have used this methodological approach with tribunal decisions are: Nelson and Kim (2008), Gely and Chandler (2008), Southey (2008a), Chelliah and D'Netto (2006), Rollings-Magnusson (2004), Knight and Latreille (2001),

Blancero and Bohlander (1995), Crow and Logan (1994), Thornicroft (1994), Wagar (1994) and Knight (1987).

5.3 Data source

The data source for this investigation was the unfair dismissal arbitration decisions of Australia's federal industrial tribunal, published in Word format on the Fair Work Australia website <www.FWA.gov.au>. Each decision, generally between 10 and 15 pages in length, contained factual information about the parties, arguments from both parties regarding the claim, and the arbitrator's reason for his or her decision. The use of genuine arbitration decisions as a source of data might typically be identified by researchers as a 'secondary data' source, as these decisions originated for a purpose outside this investigation (Pienta, McFarland O'Rourke & Franks 2011).

However, for the purposes of this thesis, with its investigative focus on quasi-legal decision making in an industrial relations context, it is argued that the arbitral decisions offered a *primary* source of data pertaining to the termination of employment due to misconduct. Tribunal decisions resemble court judgements and contain a wealth of information about the facts of the dispute, the positions of each party involved in the claim, the applicable legislation and the justification for the decision (Frazer 1999, p. 89). Essentially, if one is to investigate the decisions of an industrial tribunal, the primary data source would be the decisions made by the tribunal itself (Rollings-Magnusson 2004).

Furthermore, this data source differed from the type of data sources typically associated with secondary data research. To explain, secondary source data sets such as the Household Income and Labour Dynamic of Australia (HILDA) or Longitudinal Studies of Australian Youth (LSAY) exist as metadata formats found in established data archives and disseminated by government or other bodies (Pienta, McFarland O'Rourke & Franks 2011). Markedly, in this thesis, the arbitration decisions did not arrive in a pre-assembled format. Instead an intensive review of over 500 arbitration decisions occurred to assemble the necessary insights for the analysis. There was a benefit derived from the unassembled form of the secondary data, which was that the investigation was not compromised by complex sampling

designs (Shrout & Napier 2011). The author was spared from investing time and start-up costs in learning a particular dataset, and running the analysis unaware of problems and errors in the data, which can occur with metadata formats (Donnellan, Trzesniewski & Lucas 2011). However, it cannot be assumed the author pursued an 'easy' methodology on the perception that there was no 'tricky' data collection phase (Smith 2008, p. 61). The demands of the data collection phase for this thesis are demonstrated throughout this chapter.

5.4 The population

This investigation drew upon *all* misconduct-related unfair dismissal substantive arbitration decisions of the Australian Industrial Relations Commission (AIRC) and Fair Work Australia (FWA) that occurred between 1 July 2000 and 30 June 2010. These dates represent a ten year period commencing from when the decisions started to be electronically published, through to the most recent decisions available at the time of downloading the decisions from the FWA website for the purposes of this investigation. This time period yielded 565 arbitration decisions dealing with misconduct related unfair dismissal claims.

To avoid computation difficulties in the statistical analysis, the rule of thumb is to have 10 to 20 cases in the dataset for every predictor variable (Peng, Kuk & Ingersoll 2002; Petrucci 2009). The number of independent variables, including dummy variable, totals 34. This provided about 16 cases per variable. However, given the number of values within each variable, the analysis was run with a count of around 7 cases per predictor. One implication was that the database was too small to support the regression analysis of the specific acts of misconduct under each of the deviance categories, and the specific reasons provided by the workers under each of the explanation categories. However, details of these specific acts of misconduct and specific reasons have been provided in the form of descriptive statistics presented in Table 6.1 and Table 6.2 in the results chapter.

The decisions provided the raw data source, but the investigation still required a primary investigator in order to design, collect and analyse the data set (Donnellan, Trzesniewski & Lucas 2011). Extensive fieldwork was required to collect the data

via the 'content analysis' to systematically convert the text in the decisions to numerical codes (Collis & Hussey 2003) and to then input the numerical data into SPSS for analysis. Thus, the next step in the method was to harvest the relevant information from the arbitration decisions.

5.5 Operationalising the independent and dependent variables

The 'measures document and coding protocol' contained in Appendix 3, describes first, the logic of how both independent and dependent variables were defined, and second, the codes denoting values within each variable for the purpose of identifying and recording their presence in the texts of the arbitration decisions. The 'measures document and coding protocol' was produced with a view to achieving a consistent interpretation of each variable during the coding exercise (Willms 2011; Zikmund 2003). Zikmund (2003) warned that if a variable is too abstract, and/or contains too few values, it may limit the ability to make more concrete statements from the analysis. With the view that the values might later be collapsed for the analysis, the opportunity was taken during the initial coding to collect data with a number of values in each variable. The final list of variables, with their associated values as they appear in the statistical analysis, is presented next.

5.5.1 An operational definition of the dependent variable

The arbitration decision (ARBITRATION_DECISON): Dichotomous in nature, the dependent variable captured whether the arbitrator either found in favour of the worker or the employer. Decisions made in the employer's favour are analogous to an upheld decision and reflected claims where the arbitrator agreed with the employer's decision to dismiss the worker. Alternatively, an overturned decision reflected one that was in the worker's favour because the arbitrator reversed the employer's dismissal by either reinstating the worker to his or her job (with or without backpay) or ordered the employer to pay financial compensation to the dismissed worker. For the regression analysis, the arbitration decision was coded as a dummy variable:

EMPLOYER'S FAVOUR (CLAIM DISMISSED)	(0)
WORKER'S FAVOUR (CLAIM UPHELD)	(1)

5.5.2 Operational definitions of the independent variables

The following section provides a summary of the definitions, values and codes for the independent variables. (The full rationale for the definitions and values for each variable is contained in the 'measures document and coding protocol' in Appendix 3). The major variables of focus in the analysis were:

Type of misbehaviour: The acts of misbehaviour the employee allegedly engaged in – according to the employer – that led the employer to make the decision to terminate the employment contract. This variable contains four categories based on the deviance typology published by Bennett and Robinson (2000; 1995). This major variable of interest appears in the regression analysis as a dummy coded variable for each category of misbehaviour to capture multiple responses:

PROPERTY_DEVIANCE	(0 no; 1 yes)
PRODUCTION_DEVIANCE	(0 no; 1 yes)
PERSONAL_AGGRESSION	(0 no; 1 yes)
POLITICAL_DEVIANCE	(0 no; 1 yes)

Severity of the misbehaviour (SEVERITY): Measures how obnoxious, offensive, harmful and/or violent the *most prominent* act of misbehaviour, originally on a five point scale ranging from 'not particularly serious' to 'extremely serious' (Bigoness & DuBose 1985; Scott & Shadoan 1989). As this was an *ordered*, nominal scale it was possible to use this measure as an interval variable in the analysis. With low counts in the *not particularly serious* category, it was combined with *somewhat serious*, with this variable appearing in the regression analysis as:

somewhat serious	(1)
serious	(2)
very serious	(3)
extremely serious	(4)

Employee's explanation for misbehaviour: The reasons/defences employees provide to arbitrators for engaging in the alleged misbehaviour. This variable contains three categories based on the explanation typology published by Southey (2010b). This major variable of interest appears in the regression analysis as a dummy coded variable for each category of explanation to capture multiple responses:

WORKPLACE-RELATED	(0 no; 1 yes)
PERSONAL-INSIDE	(0 no; 1 yes)
PERSONAL-OUTSIDE	(0 no; 1 yes)

Complexity of explanation (COMPLEXITY)**:** Measures the number of across-categorical explanations provided by the worker. As this was an *ordered*, nominal scale it was possible to use this measure as an interval variable in the analysis. Appears in the regression analysis as:

single category explanation	(1)
dual category explanation	(2)
triple category explanation	(3)

Managerial errors in the dismissal process: The arbitrator's assessment of managerial errors in the employer's administering of the dismissal process. It can occur that even when an arbitrator favours the employer in the final decision, they can still find fault with the employer's process. This variable contained nine categories based on insights from Blancero and Bohlander's (1995) descriptors of dismissal of errors, combined with the Australian industrial legislative context. This major variable of interest appears in the regression analysis as a dummy coded variable for each type of error to capture multiple responses. Furthermore, due also to low counts in two of the categories (*denied union/support person* with 5 occurrences and *rules violation* with 22 occurrences) it was necessary to collapse into seven categories appearing in the regression analysis as:

POOR_EVIDENCE_OR_ REASON	(0 no; 1 yes)
MITIGATING_FACTORS	(0 no; 1 yes)
PUNISHMENT_TOO_HARSH	(0 no; 1 yes)
PROBLEMATIC_INVESTIGATION	(0 no; 1 yes)
PROBLEMATIC_ALLEGATION	(0 no; 1 yes)
PROBLEMATIC_RESPONSE	(0 no; 1 yes)
MANAGEMENT_CONTRIBUTED	(0 no; 1 yes)

The control variables incorporated into the analysis were:

Worker's gender: (WORKER_GENDER)

male	(0)
female	(1)

Length of service: (SERVICE) How long the dismissed employee had worked for the employer before his or her dismissal. Initially collected on a ratio scale, to overcome the problem of missing data, this variable was organised into the following nominal categories for the regression analysis:

up to 2 years	(1)
2 up to 5 years	(2)
5 up to 10 years	(3)
10 up to 15 years	(4)
15 up to 20 years	(5)
20 plus years	(6)
not identified	(7)

Disciplinary record: (RECORD) Whether or not the dismissed worker had been in the receipt of *any form* of previous warnings from his or her employer – be it verbal or written – for some aspect of their behaviour at work. Appears in the regression analysis as:

unblemished record	(1)
previous offences	(2)
not identified	(3)

Occupation: (OCCUPATION) The dismissed worker's occupation on the basis of his or her skill level and skill specialisation. They were classified according to the eight 'major' groups of the Australian and New Zealand Standard Classification of Occupations (ANZSCO). Due to low counts in three of the categories, it was necessary to collapse into five categories, appearing in the regression analysis as:

manager/professional	(1)
technician/trade	(2)
community/personal service	(3)
clerical/admin/sales	(4)
operator/driver/labourer	(5)

Support for worker during dismissal process: (SUPPORT) The presence, or not, of a person to provide moral support *at any* meeting where the employee was being investigated and/or terminated. Appears in the regression analysis as:

union present	(1)
companion present	(2)
no-one present	(3)
not identified	(4)

Formality of dismissal process: (FORMALITY) The employer's approach to documenting the dismissal process. As this was an *ordered*, nominal scale it was possible to use this measure as an interval variable in the analysis. Appears in the regression analysis as:

informal	(1)
semi-formal	(2)
formal	(3)

Industry: (INDUSTRY) The type of industry in which the employment relationship occurred according to the 19 major industrial categories identified in the most recent version of the Australian and New Zealand Standard Industrial Classification (ANZSIC). Due to low counts in nine of the categories, it was necessary to collapse into ten categories, appearing in the regression analysis as:

agriculture, mining	(1)
manufacture, wholesale	(2)
construction, utility supply	(3)
retail	(4)
hospitality, recreation	(5)
transport, postal, warehousing	(6)
communication, technical, professional ser.	(7)
admin and support services	(8)
public admin and safety	(9)
education, health, social assistance	(10)

Business size: (FIRM_SIZE) The number of employees working for the employer's business, using the four categories determined by the Australian Bureau of Statistics (2002), Small Business in Australia, Cat. No.1321.0. Due to a low count in the 'micro' business category (up to 5 workers), it was necessary to combine it with the up to 19 (small) business category, appearing in the regression analysis as:

up to 19 (small)	(1)
20 to 199 (medium)	(2)
200 plus (large)	(3)
Not identified	(4)

Business sector: (SECTOR) The two major sectors in which the employment relationship occurred, dummy coded for the regression analysis as:

private sector	(0)
public sector	(1)

Human resource expertise of employer: (HR_EXPERTISE) Whether or not the employer had the 'benefit' of HR expertise, either through some type of HR manager/officer or if the employer approached a HR/legal consultant to take advice about administering a dismissal. Appearing in the regression analysis as:

no HR expert	(1)
yes HR expert	(2)
not identified	(3)

Employment status: (STATUS) Whether the worker was performing either full time or part-time hours before his or her dismissal. Dummy coded for the regression analysis as:

full-time (permanent/casual)	(0)
part-time (permanent/casual)	(1)

Worker apology or remorse: (REMORSE) Whether or not the worker apologised and/or indicated regret about their behaviour or incident leading to their dismissal. For reasons explained in Appendix 3, the sincerity of the apology was not measured. Dummy coded for the regression analysis as:

no apology or remorse indicated	(0)
yes apology or remorse indicated	(1)

Worker advocacy: (WORKER_ADVOCACY) Whether an advocate appeared on behalf of the dismissed worker at the arbitration hearing itself. Appearing in the regression analysis as:

self-represented	(1)
union	(2)
independent lawyer	(3)
not clear	(4)

Employer advocacy: (EMPLOYER_ADVOCACY) Whether an advocate appeared on behalf of the employer at the arbitration hearing itself. Appearing in the regression analysis as:

self-represented	(1)
association	(2)
independent lawyer	(3)
not clear	(4)

Arbitrator's gender: (ARBITRATOR_GENDER)

male	(0)
female	(1)

Arbitrator's professional background: (ARBITRATOR_BACKGROUND) The arbitrator's work history before joining the tribunal. Appearing in the regression analysis as:

history working for management	(1)
history working for unions	(2)
history shows no strong preference	(3)

Arbitrator's experience: (ARBITRATOR_EXPERIENCE) The number of 565 decisions determined by each arbitrator, as an indication of his or her experience in making unfair dismissal arbitration decisions pertaining to misbehaviour. Appearing in the regression analysis as:

up to 5 decisions	(1)
6 to 10 decisions	(2)
11 to 15 decisions	(3)
16 to 20 decisions	(4)
21 to 25 decisions	(5)
26 or more decisions	(6)

Arbitrator's seniority: (ARBITRATOR_SENORITY) The status of the arbitrator amongst his or her tribunal peers according to the hierarchal structure of the tribunal. Appearing in the regression analysis as:

commissioner	(1)
deputy president	(2)
senior deputy president /vice president/justice	(3)

5.5.3 Data collection using a coding sheet

To record the pertinent information in each decision, a 'coding sheet' containing the codes outlined in the previous sub-section capturing the dependent and independent variables was completed for each arbitration decision. A copy of the coding sheet is contained within Appendix 3.

The coding sheet was completed manually as two independent coders reviewed the arbitration decisions and identified occurrences in the text that were analogous to the constructs described in the measurement document. Manual collection was required over the use of text analysis software such as Leximancer and Nvivo, as these programs primarily enable a researcher to organise tracts of text into qualitative, thematic dimensions. In contrast, the quantitative focus of this research was to identify separately, for each decision, the occurrence of a number of specific items, so that the completed coding sheet for each decision was not unlike a completed survey (Kelly 1999) capturing responses to the variables of interest for each research

participant. Section 5.7 on 'reliability' clarifies the process used to pilot test the coding sheet and prepare the coders for their duties.

5.5.4 Supplementary fact finding

After the coding exercise was performed, further fact finding missions were undertaken by the author, in cases where the arbitration decisions did not provide insights about: the number of workers employed in the business, the presence of HR expertise within the business, or the industry in which a business operated. Searches were performed on newspaper articles on the FACTIVA and Australia/New Zealand Reference Centre databases, combined with searches on the Australian Exporters website at *<http://www.australianexporters.net/>*, IBIS World website at *<http://www.ibisworld.com.au/enterprise/home.aspx>,* as well as general internet searches of business websites. These searches returned, with a reasonable degree of success, additional data for such missing pieces of information. This process reduced the number of 'not identified' values in the dataset. Table 5.3 presented further in this chapter reports the occurrence of non-response values for each variable.

5.6 Validity

A valid study is one that assesses what it claims to assess across several dimensions: construct, content, and external validity (Collis & Hussey 2003; Leedy & Ormrod 2001). It is noted that different research methods vary in their ability to maximise different types of validity, and rarely attain all forms of validity (Strauss & Whitfield 1998). The use of a content analysis method, due to its reliance on a pre-existing source of data, could be anticipated to be generally strong on external validity and reliability but weaker on construct and content validity (Strauss & Whitfield 1998). This point is further explained in the following sub-sections devoted to validity issues evident in this study.

5.6.1 Construct validity

This is the degree to which the variables that are measured accurately reflect the theoretical construct they are designed to measure (Strauss & Whitfield 1998) within the constraints that a single study cannot establish the construct validity of a scale (Widaman et al. 2011). Thus the operational definitions used to measure the main

constructs of misbehaviour; worker explanations and dismissal errors were drawn from the experiences of previous researchers as published in the literature. Construct validity relates to measuring characteristics which cannot be directly observed (Leedy & Ormrod 2001) for example, job satisfaction or happiness. In this thesis, the constructs measured had equivalent *behavioural* analogues (described in the measurement document and coding protocol in Appendix 3). For example, theft from the company equated to property deviance and theft from a co-worker equated to personal aggression. Thus the constructs did not measure internalised, cognitive and emotional states. These behavioural analogues improved the construct validity of the investigation.

5.6.2 Content validity

Content validity identifies whether the study is sufficiently comprehensive of all aspects of the domain under investigation (Widaman et al. 2011). Existing literature guided which variables central to the domain of arbitral decision-making needed to be incorporated. For instance, the arbitral decision-making models by Nelson and Kim (2008) Gely and Chandler (2008), Ross and Chen (2007), Bemmels (1998, 1990, 1991), and Chelliah and D'Netto (2006) suggested a range of variables to include in this study.

5.6.3 External validity

This is the degree to which the results can be generalised to the population (Strauss & Whitfield 1998). The data were drawn from genuine arbitration decisions and the ten year timeframe of decisions by the AIRC/FWA involving misconduct reflected the **population** of such decisions for that time period. This reduced, if not eliminated, errors that can be made in sampling. Secondly, as the decision contained evidence provided by parties to the unfair dismissal claim that was provided under Oath, it improved the external validity because the responses were more likely to be truthful reflections of dismissal and arbitration events as they occur in reality, than if a person were to self-report the incident in a survey or report. The Australian context of the investigation has been provided throughout this thesis, so that the reader can be mindful of the broader environment when generalising findings across national boundaries.

5.7 Reliability

A reliable study allows another person to reproduce the same results as those reported by the original researcher (Collis & Hussey 2003). Supporting the reliability of this investigation is the 'open source' nature of arbitration decisions from which the data was extracted. The 'open source' nature of the decisions improved the 'transparency' of the investigation, with the raw data available to any person who may wish to replicate the study (Donnellan, Trzesniewski & Lucas 2011, p. 5). However, two main threats to the reliability of a content analysis methodology, as used in an investigation of this type, can occur. First, the inherent bias of the investigator during the data collection phase of the content analysis can risk distorting the results of the study. And, second, the data codes themselves may not be accurately applied to the events occurring in the decisions. The remainder of this section describes how these two threats to reliability were addressed.

First, the use of multiple, independent coders serves the purpose of limiting the bias that may exist if only one coder or the primary investigator were to perform all the coding (Lacy & Riffe 1996). Additionally, it improves the likelihood of a shared meaning of the work with future readers of the research (Lombard, Snyder-Duch & Bracken 2002). The use of multiple coders promotes an efficient, yet more thorough, interpretation of the documents being coded (Burla et al. 2008). For these reasons, two, independent research assistants performed the coding of the arbitration decisions in this investigation. The coders worked independently (in different cities) which avoided 'covert' (Krippendorff 2004, p. 217) agreement that might otherwise arise when coders are in contact.

Despite their physical separation, the literature dictates that it is paramount both coders apply a common frame of reference or mental schemata when making their judgements about which code to assign to the content. Intercoder (or interrater) consistency measures can indicate the extent to which the coders have applied a shared meaning to their work (Kolbe & Burnett 1991; Lombard, Snyder-Duch & Bracken 2002). Poor intercoder consistency is likely to be caused by systematic bias of the coders which may be the result of unclear definitions, poor design of coding protocols, or inadequate coder training (Kolbe & Burnett 1991; Lombard, Snyder-

Duch & Bracken 2002). Whilst intercoder agreement and reliability indices do not establish the validity of how a construct was measured, without it, the interpretations derived from the data analysis lack credibility (Kolbe & Burnett 1991; Krippendorff 2004; Lombard, Snyder-Duch & Bracken 2002).

Strong, intercoder reliability indicators were calculated in this study. However, to demonstrate intercoder consistency, according to Lombard, Synder-Duch and Braken (2002), a range of items about the data coding process, in addition to the reliability coefficients, should be reported. These matters and how they materialised in this investigation are addressed in the following sub-sections.

5.7.1 Pilot testing and preparing coders to use the data collection instrument

An initial coding sheet for recording the data, as a numerical code, from each arbitration decision was prepared by the author, along with an accompanying 'measures document and coding protocol' – referred to forthwith as the 'coding guidelines'. Appendix 3 contains the final version of the coding sheet and coding guidelines. To test the useability and clarity of the coding sheet and coding guidelines with the coders, ten arbitration decisions were coded individually by each coder under the guidance, and in consultation, with the author. This exercise resulted in refinements to the coding sheet and coding guidelines particularly for variables measuring formality of the dismissal process, advocacy, and managerial errors. The revised coding sheet and coding guidelines were then issued to both coders.

5.7.2 The reliability sample

At the time of preparing the intercoder sample, it was estimated that the number of cases to be analysed in the final analysis would be around 550 decisions. Thus a 20 percent reliability sample size – as recommended by Lacy and Riffe (1996) - equated to 110 decisions. The reliability sample of 110 decision was drawn randomly from the years 2010, 2009, 2007, 2006 and 2003. Decisions occurring in those years were selected due to their convenience of being available (that is, they had been downloaded from the FWA website and printed) at the time when the coders were ready to commence work. This reliability sample later formed a subset of the population of decisions coded for the analysis. As each decision in this reliability

sample resulted with 2 completed coding sheets, 55 of coder A's sheets were included in the final analysis, and 55 of coder B's sheets were included in the final analysis.

5.7.3 The reliability indices

'*Different people should code the same text in the same way'* (Weber 1990, p. 12). Reliability indices were therefore used to check whether this had occurred by scoring the degree of consistency between the coders. The nature of the data dictated the type of reliability index that should be calculated (Tinsley & Weiss 1975). Thus, where data were collected on a numerical scale, for example, length of service, interrater *reliability* represents '*the degree to which the ratings of different judges are proportional when expressed as deviations from their means*' (Tinsley & Weiss 1975, p. 359). However, where data were measured on a nominal scale – for example, type of behaviour – the reliability measures reverted to interrater (or intercoder) *agreement* which represents the extent to which each coder made *exactly* the same judgments (Burla et al. 2008; Tinsley & Weiss 1975). As it is not possible to calculate a mean and standard deviation for unordered, categorical data, it is limited to indicators of *absolute agreement* (Tinsley & Weiss 1975); a point relevant to most of the data collected in this thesis.

In this thesis, a large majority of the data were unordered, categorical data, with very few variables measured on a numerical scale. For the unordered, categorical data, the literature largely supports the use of Cohen's Kappa to measure intercoder *agreement* as a more 'advanced strategy' – than merely reporting percentage agreement (Burla et al. 2008, p. 114; Lacy & Riffe 1996; Lombard, Snyder-Duch & Bracken 2002; Tinsley & Weiss 1975). Cohen's Kappa coefficient takes into account (a) the number of concurring codes between the coder; (b) the number of conflicting codes; and (c) allows for the number of agreements that could be expected due to chance (Burla et al. 2008). Kappa values between .41 and .60 are regarded as moderate, values between .60 to .80 suggest satisfactory or 'solid' agreement, and those above .80 are regarded as 'nearly perfect' agreement (Burla et al. 2008, p. 114). Krippendorff (2004) recommended that researchers should only rely on reliability values above .8, and consider values between .667 and .8 only for drawing tentative conclusions.

Lombard, Synder-Duch and Braken (2002) advised researchers to report an intercoder reliability coefficient for each variable (as opposed to a single, overall reliability coefficient combining the variables – which can mask variances). Table 5.1 presents the results of the intercoder consistency for all nominal level variables appearing in the analysis. The reliability coefficients for each variable were calculated in SPSS (version 19) using the 110 decisions sample, and appear in Table 5.1 in descending order according to those variables with the highest Kappa values (highest agreement) to those with lower agreement. Reiterating that a Kappa value above .8 is considered 'near perfect' agreement (Burla et al. 2008); all the variables shown in Table 5.1 sit comfortably within this category.

Table 5.1 *Kappa coefficients of intercoder reliability for variables measured on a nominal scale**

Variable	Percent agreement	Kappa value**
WORKER_GENDER	100%	1.0
ARBITRATION_DECISION (dependent variable)	100%	1.0
ARBITRATOR_GENDER	100%	1.0
ARBITRATOR_SENIORITY	100%	1.0
STATUS	99.1%	.955
OCCUPATION	95.4%	.946
REMORSE	98.1%	.939
INDUSTRY	95.4%	.938
SUPPORT	94.5%	.923
RECORD	94.5%	.917
TYPE_OF_MISBEHAVIOUR	94.5%	.910
EMPLOYER ADVOCACY	93.6%	.893
MANAGERIAL_ERRORS_IN_THE_DISMISSAL	92.7%	.890
WORKER ADVOCACY	91.8%	.886
HR_EXPERTISE	93.6%	.871
EMPLOYEE_EXPLANATION	90.0%	.847
FIRM_SIZE	90.0%	.845
SECTOR	89.0%	.835

* ARBITRATOR_EXPERIENCE and ARBITRATOR_BACKGOUND contained default values that did not require coder judgement, thus not included in the Table.
**p = .000

(*Source:* Developed for thesis)

However, not all data in this investigation were categorical in type. In this investigation, SERVICE was recorded as ratio data, and SEVERITY, COMPLEXITY and FORMALITY were recorded as anchored scaled data. Whilst Kappa values provide indications about direct agreement between coders on the

assignment of the same rating, it is a 'conservative' measure, particularly when applied to ratio and ordinal data, as scant credit is given where decisions are 'close' (Lombard, Snyder-Duch & Bracken 2002, pp. 591-2).

Thus, to assess consistency for this type of data, the literature suggested analysing the variance of the ratings from the mean, by determining the intraclass correlation coefficient (ICC) (Nichols 1988). As the reliability sampling required each case to be rated by the same two judges (selected from a population of potential judges), and as the study will not average their scores, according to Shrout and Fleiss (1979) the ICC tests need to be in a format of a two-way random effects ANOVA using single measures (as opposed to average measures). ICC values have an upper limit of 1 but no lower limit, with scores of .7 to .8 indicating *strong* agreement and more than .8 suggesting almost perfect agreement (Nichols 1988). Table 5.2 contains the results of the intraclass correlation analysis for the variables that reflect ratio and ordinal data measures. The reliability coefficients were calculated in SPSS (version 19) on the 110 decisions sample.

Table 5.2 *Intraclass correlation coefficients of interrater reliability for variables measured with a numerical scale*

Variable	**Mean** *coder a* *coder b*	**Standard deviation** *coder a* *coder b*	**Kappa value***	**ICC value***
SERVICE (in years)	6.90 6.62	8.360 8.295	.970	.970
FORMALITY (1 – 3 scale)	2.42 2.36	.641 .646	.806	.871
SEVERITY (1 – 5 scale)	3.63 3.65	.822 .365	.792	.830
COMPLEXITY (1 – 3 scale)	1.44 1.38	.599 .558	.797	.813

* $p = .000$

(*Source:* Developed for thesis)

Table 5.2 reveals that all four variables had intraclass correlation values above .8, suggesting 'almost perfect' alignment (Nichols 1988) between raters in their assignment of values to the constructs during the coding exercise. The variation between the Kappa and ICC values illustrates how the conservative Kappa ignores the incremental attribute of a numerical scale. On the other hand, ICC values are sensitive to incremental variations, enabling it to reflect *degrees* of agreement. Thus,

whilst the KAPPA values reflect that the raters did not score exactly the same on the scales, their mean scores varied by less than .28 of a year for SERVICE (approximately three months), .06 of an increment for FORMALITY, .02 of an increment for SEVERITY, and .06 of an increment for COMPLEXITY.

5.8 Analysing the data

Information from the completed coding sheets was input into SPSS (version 19) to create a dataset suitable for statistical analysis. As the kind of data generated by this study is categorical, and in the main, 'unordered' or 'nominal' in nature, the type of analysis needed to take into account that data of this nature has '*no notion of scale or order ... no notion of a smooth probability function*' (Hand, Mannila & Smyth 2001, p. 188).

The data yielded was also 'frequency' and not 'count' data, a 'distinction not emphasised in the categorical data literature' (Lindsey 1995, Preface). Frequency data represents independent events occurring to different individuals (Lindsey 1995). In comparison, count data is when an event re-occurs repeatedly to the same individual. Categorical, frequency-type data has no 'scale', and lacks a normal distribution (Lindsey 1995) and it has limitations supporting statistical techniques describing causal connections such as structural equation modelling (Blunch 2008) and does not meet the assumptions of parametric analysis such as linear regression (Burns & Burns 2008). Instead, its benefit is that it offers discrete, informative measurements for comparisons and correlations (Leedy & Ormrod 2001) enabling one to address questions pertaining to relationships between unordered, mutually exclusive 'characteristics' on a likewise dependent variable (Petrucci 2009). Logistic regression, as the most appropriate analytical technique for the type of data that dominated this investigation, is discussed in the next section.

5.8.1 Logistic regression as the statistical analysis technique

Logistic regression can be used to analyse categorical, frequency-type data, where the dependent variable is binomial, for example, successful/not successful (Agresti 2002; Lindsey 1995). The arbitral decision-making process, with its dichotomous dependent variable and its largely unordered, categorical predictor variables, meant

that the logistic regression function could determine the likelihood of either success for the worker (an 'overturn' decision) or success for the employer (an 'upheld' decision). Therefore, logistic regression as the statistical analysis method was used in this thesis because the type of data and variable measurements accurately aligned with the logistic regression assumptions, which, according to Burns and Burns (2008) are:

a) The relationship between the dependent and independent variables is not linear;
b) The dependent variable has two possible outcomes; and
c) The independent variables are not linearly related, and they may be categorical or non-parametric in nature.

The logistic regression model, presented in the following results chapter, was developed using a sequential block design, which is useful for examining the impact of each independent variable as it is added to the model, controlling for those previously included into the model (Menard 2010). Adding blocks of related variables sequentially into the model provided insight into how the addition of each set of variables changed the explanatory power of the model.

The design of the blocks of variables is recommended to follow 'ascribed' then 'achieved' characteristics (Menard 2010, p. 120). Therefore, socio-demographic characteristics or those which the parties to the arbitration hearing have little control were entered in the first block, followed by 'achieved' characteristics which reflect variables over which the parties had some control. In summary, the logistic regression analysis in this thesis represents a series of multivariate analysis, hierarchically arranged into two blocks, in order to examine the importance of variables independent from logically prior variables.

Other statistics presented in the results chapter are the: overall test for model fit (–LogLikelihood); a pseudo model r squared (Nagelkerke); chi square significance test for each block in the hierarchical model; and a table of predicted probabilities (Peng, Kuk & Ingersoll 2002).

5.8.2 The logistic regression equation and model specification

The following insights about the logistic regression equation are based on writings by Burns and Burns (2008), Kleinbaum and Klien (2002), Peng, Kuk and Ingersoll (2002), Hosmer and Lemeshow (1989) and SPSS (2010). The logistic regression function calculates a coefficient for each independent (or predictor) variable indicating their respective contribution to the dependent variable. As the dependent variable must have two outcomes (a dichotomous value), logistic regression aims to identify the probability that a set of circumstances – consisting of the predictor variables – is more likely to result in one of the outcomes over the other. The general equation for the logistic regression is:

$$1\mathrm{n}(Odds) = \alpha + \beta_1 x_1 + \beta_2 x_2 + ... + \beta_k x_k$$

(Formula A)

The terms on the right side of the equation in Formula A take into account the independent variables and the intercept in the regression equation. The left side of the equation in Formula A calculates the 'natural log of odds' – or the *logit* of the event of interest occurring. The logit, can range from negative infinity to positive infinity, whereas probabilities (odds) can only range from 0 to 1. To calculate the probability of an event occurring, the natural log of odds (or logit) needs to be converted to odds in the logistic regression equation. This is called the logit transformation (UCLA Academic Technology Services 2012a). Thus the use of the logit transformation in the logistic regression equation results in a model that has many of the desirable features of a linear regression model (Hosmer & Lemeshow 1989) because the logit transformation has the effect of making the relationship between the probability of the outcome occurring and it predictors, linear (Peng, Kuk & Ingersoll 2002). Reiterating that the logit (natural log of odds) of the event occurring *is neither the same as* the odds ratio of the event occurring nor the odds of the event occurring (Peng, Kuk & Ingersoll 2002), the relationship between the *odds ratio* and the *odds* of an event occurring is stated as:

$$Odds = \frac{p}{1 - p}$$

(Formula B)

The equation in Formula B defines the odds of an event occurring as the ratio of the probability of the event occurring, divided by the probability of the event not occurring. Thus, the two equations presented in Formula A and Formula B must be combined to perform the logit transformation and to calculate the actual odds of the event occurring. Relating the formulas suggested by Burns and Burns (2008) and Peng, Kuk & Ingersoll (2002) to the variables in this thesis, the probability that an event will occur using the logit transformation is:

$$p(\text{event}) = \frac{e^{\alpha + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \ldots\ldots + \beta_k X_k}}{1 + e^{\alpha + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_3 + \ldots\ldots + \beta_k X_k}}$$

where:

p = The probability that the arbitration decision falls in the worker's favour. Using dummy coding protocols for the dependent variable in logistic regression will result in a model for the occurrence of the event– which is that the arbitrator *overturn*s the dismissal of the worker (the same as finding in favour of the worker) with the alternate event, dismissal *upheld*, defaulting to the reference category for comparison.

e = The base of natural logarithms (the exponential function). This parameter is a conversion of the odds ratio enabling the probability of the event occurring to be calculated. This function is built into the regression software (SPSS 2010; Hosmer & Lemeshow 1989).

α = The constant of the equation.

β_1, β_2, β_3 = The coefficients of the first, second, and third independent variables. This parameter is calculated using the maximum likelihood function (Hosmer & Lemeshow 1989; SPSS Inc 2010)

X_1, X_2, X_3 = The first, second and third independent variables which are: type of misbehaviour ($X_{1,}$); employee's explanation for misbehaviour (X_2); and managerial errors in the dismissal process (X_3).

β_k = The coefficient for each independent variable entered into the formula.

X_k = The total independent variables entered into the formula. Reflects those in the conceptual model which, in addition to the 1st, 2nd and 3rd independent variables listed above are: SEVERITY (X_4); COMPLEXITY (X_5); WORKER_GENDER (X_6); SERVICE (X_7); RECORD (X_8); OCCUPATION (X_9); SUPPORT (X_{10}); FORMALITY (X_{11}); INDUSTRY (X_{12}); FIRM_SIZE (X_{13}); SECTOR (X_{14}); HR_EXPERTISE (X_{15}); STATUS (X_{16}); REMORSE (X_{17}); WORKER_ADVOCACY (X_{18}); EMPLOYER _ADVOCACY (X_{19}); ARBITRATOR_GENDER (X_{20}); ARBITRATOR_BACKGROUND (X_{21}); ARBITRATOR_EXPERIENCE (X_{22}); and, ARBITRATOR_ SENIORITY(X_{23}).

5.8.3 Hypotheses testing using the results of the logistic regression analysis

The hypotheses developed during the literature review predicted the direction of influence each variable might have on the arbitration decision. The overall aim of the analysis was to provide answers to these hypotheses. To do so, the SPSS logistic regression output reported the exact level of significance (as a two-tail *p*-value) for each independent variable entered into the model. The *p*-value represents the likelihood that the coefficient calculated for each variable is due to random chance: its value decreases as 'chance' findings decrease (Kemp & Kemp 2004). In essence, the *p*-value provides evidence that a relationship actually exists: the lower the *p*-value the stronger the evidence (Thompson 2009).

To determine whether the *p*-value is suitable for rejecting the null hypothesis, researchers frequently assign a predetermined level of significance (α) (Kline 2009). A cut-point of .05 is commonly adopted as the tolerance level for α (Collis & Hussey 2003; Hill, Griffiths & Judge 2001; Kemp & Kemp 2004). However, it is possible to specify a more liberal cut-point if .05 appears to be 'too severe' for a model that has sound goodness-of-fit and variance explained measures (Cohen 1988; Kline 2009; Menard 2010, p. 119). It is the *p*-value itself that is more informative: it reflects the degree of confidence that the coefficient reported for each variable was not due to chance.

This investigation modelled *all* the decisions related to misconduct related unfair dismissal claims for a ten year period – a situation where the whole population of instances was available. Full population studies have a major benefit, as Pyle (1999, p. 160) suggested:

> ... anything that is learned, is by definition, present in the population ... all that needs to be done to "predict" the value of some variable, given the values of others, is to look up the appropriate case in the population.

Thus, an a priori significance level (α) of .05 to reject the null hypothesis in favour of its alternative was considered a realistic cut-off. An a priori significance level of .05 suggests there is up to a 5 percent probability that a result as extreme as the one observed could occur (in future random samples) if the null hypothesis was in fact true. A significance level of .05 reduces the risk of making a Type I error than if a

more liberal cut-point was used. A Type I error means the researcher rejects the null hypothesis when in fact the null hypothesis should have been retained (Zikmund 2003). The danger of a Type I error is that potentially flawed new knowledge is advanced. However, a conservative cut-point increases the chance of making a Type II error. A Type II error occurs when the null hypothesis is retained when in fact the alternative hypothesis should have been accepted (Zikmund 2003). Perhaps less serious than a Type I error, a Type II error inevitability limits the advancement of new knowledge. It is noted though, that as this investigation analysed a full population of misconduct arbitration decisions, p-values that showed slightly above .05 are duly discussed in the final chapter.

5.9 Data diagnostics

This section summarises the data screening that was conducted prior to running the regression analysis. Data screening is advisable for identifying, and if necessary managing, the effects of underlying problems in the data that may violate the assumptions of the regression model, which can result in either 'biased, inefficient or inaccurate statistical inference' (Menard 2010, p. 126).

5.9.1 Missing data

The dataset was initially scanned to identify variables that may have gaps in the values assigned to them, and importantly to consider whether these gaps were due to the data source and collection method, rather than a matter of the missing values reflecting patterns in the population (Hair et al. 1998). Categorical data, as used in this analysis, allow the researcher to eliminate the impact of missing data on the sample size (Cohen et al. 2003). To give an example, the use of the ratio measure of service period in this thesis would ultimately reduce the number of eligible cases that could be analysed. Table 5.3 shows that the numerical scale data pertaining to the actual number of years worked by the employee had 68 incidences of missing data. In this instance, it was converted to a categorical variable, with the final category recording those cases that did not refer to an employment period. The design of nominal scale codes can ensure all information about each case is recorded, *including* that there was no information available for a particular variable (Cohen et al. 2003).

Table 5.3 *Missing values and non-response categories*

CONTROL VARIABLES				MAJOR PREDICTOR VARIABLES			
Variable	***N***	*No. of missing values*	*No. of non-response values*	***Variable***	***N***	*No. of missing values*	*No. of non-response values*
WORKER_GENDER	565	0	0	PROPERTY_ DEVIANCE	565	0	0
SERVICE_IN_YEARS (on a numerical scale)	497	68	N/A	PRODUCTION_ DEVIANCE	565	0	0
SERVICE (on a nominal scale)	565	0	68	PERSONAL_ AGGRESSION	565	0	0
RECORD	565	0	10	POLITICAL_ DEVIANCE	565	0	0
OCCUPATION	565	0	0	SEVERITY	565	0	0
SUPPORT	565	0	191	WORKPLACE_ RELATED	565	0	0
FORMALITY	565	0	0	PERSONAL_INSIDE	565	0	0
INDUSTRY	565	0	0	PERSONAL_OUTSIDE	565	0	0
FIRM_SIZE	565	0	52	COMPLEXITY	565	0	0
BUSINESS_SECTOR	565	0	0	POOR_EVIDENCE_OR _REASON	565	0	0
HR_EXPERTISE	565	0	25	MITIGATING_ FACTORS	565	0	0
EMPLOYMENT_STATUS	565	0	0	PROBLEMATIC_ INVESTIGATION	565	0	0
REMORSE	565	0	0	PROBLEMATIC_ RESPONSE	565	0	0
WORKER_ADVOCACY	565	0	115	PROBLEMATIC_ ALLEGATION	565	0	0
EMPLOYER_ADVOCACY	565	0	131	PUNISHMENT_TOO _HARSH	565	0	0
ARBITRATOR_GENDER	565	0	0	MANAGEMENT_ CONTRIBUTED	565	0	0
ARBITRATOR_ ACKGROUND	565	0	0				
ARBITRATOR_ EXPERIENCE	565	0	0				
ARBITRATOR_ SENIORITY	565	0	0				

(*Source*: Developed for thesis)

In this thesis, when a value for any of the variables could not be gleaned with certainty from the text or supplementary data searches, it was assigned a 'not identified' code during the coding exercise. Thus, the missing data and non-response categories report, presented in Table 5.3 shows that all the variables measured on a

nominal scale have nil missing data, allowing the full 565 cases to be used in the statistical modelling.

A final observation drawn from Table 5.3 is that it demonstrates the usefulness of the arbitration decisions as a data source: in spite of its inherent disadvantage that it was a secondary data source. The table shows that the majority of variables could be ascribed a value other than a 'non-response' value. All variables measuring the major predictors of interest contain a value (listed on the right side of Table). And, only six of the moderator variables contained missing data recorded as a 'non-response' value. The variable showing the highest number of non-response values at 191 was the variable 'support'. This variable captured whether or not the worker had an ally or witness with him or her when being investigated or interviewed by the employer. Mining the arbitration decisions for 'support' information was least successful with 34 percent of the decisions absent of this detail. Nevertheless, valuable data about support practices were provided in the remainder of the decisions. Similar comments can be made in relation to the other five control variables that recorded non-response values. Missing values can result from the data source itself (Hair et al. 1998) which was the case in this study as it relied on secondary source data, rather than it resulting from a pattern in the population.

5.9.2 Multicollinearity

Multicollinearity occurs when an independent variable contains values that mimic, or closely mimic, those of another independent variable. High degrees of multicollinearity should be minimised in a model as it can result in a model with statistically insignificant, independent variables and large standard errors (Hill, Griffiths & Judge 2001; Kline 2009; Menard 2010). When a pair, or a group, of the independent variables contain little variation between, or amongst, their respective values, the model is less able to isolate the impact of each of those variables (Hill, Griffiths & Judge 2001).

Ideally, the more variation amongst the values in the independent variables, the more precisely their coefficients can be estimated in the model (Hill, Griffiths & Judge 2001). Therefore, measuring two variables reflecting similar values results in

redundant variables being included in the regression, when only one of the variables needed to be analysed (Kline 2009). For instance in this thesis, it could be suspected that business size, HR expertise and formality of the dismissal process have the potential to be highly correlated. This is because most small business do not have a HR manager, while most large business do possess one, and those with HR expertise are likely to produce formal HR processes. Thus, it could be that including the degree of HR expertise as an independent variable alone, might also be able to serve as a proxy for business size and formality. To detect correlations *among groups* of variables – as collinearity relationships may implicate several independent variables - requires the use of a tolerance statistic that estimates the variance in each independent variable, explained by all of the other variables (Menard 2010).

Multicollinearity will be found where the dummy variable and their sum are linear combinations of one of the other variables. This combination occurs between (a) the three dummy variables: PERSONAL_INSIDE; PERSONAL-OUTSIDE and WORKPLACE _RELATED and (b) the three numerical values in the COMPLEXITY variable. As this reflects a 'special kind' of multicollinearity that produces a redundancy between the variables: one of the variables needed to be excluded (Kline 2009, p. 245). The decision was made to withhold the PERSONAL_OUTSIDE variable on the basis that the COMPLEXITY variable contained values segregated in a manner essential for testing hypothesis 5 pertaining to the theoretical proposition that combinations of reasons may be harder for the arbitrator to decode. It also meant that the COMPLEXITY variable implicitly captured the effect of the PERSONAL_OUTSIDE variable, which meant care in interpreting the estimation for the COMPLEXITY variable.

A collinearity diagnostic table containing the tolerance value and variance inflation factor (VIF) for each independent variable in this thesis, was prepared using the linear regression function in SPSS (Menard 2010). Tolerance values measure the correlation between the predictor variables on a scale between 0 and 1 with values moving closer to zero as the strength of the correlation increases (Brace, Kemp & Snelgar 2009). Tolerance values of less than .20 indicate potential multicollinearity problems and those with less than .10 indicate serious problems (Menard 2010). The VIF is a direct measure of the impact that multicollinearity inflicts on the precision

of the model (SPSS 2010). A rule of thumb for the VIF is elusive, but values above 4 or 5 may warrant further investigation (SPSS 2010). The results for the multi-collinearity measures are presented in Table 5.4.

Table 5.4 *Collinearity measures between independent variables in the equation*

Independent variable	*Tolerance*	*Variance inflation factor*
PROPERTY_DEVIANCE	.395	2.534
PRODUCTION_DEVIANCE	.314	3.184
PERSONAL_AGGRESSION	.327	3.060
POLITICAL_DEVIANCE	.655	1.526
SEVERITY	.816	1.225
WORKPLACE_RELATED	.654	1.528
PERSONAL_INSIDE	.709	1.410
PERSONAL_OUTSIDE	-	-
COMPLEXITY	.757	1.321
POOR_EVIDENCE_OR_REASON	.828	1.208
MITIGATING_FACTORS	.825	1.212
PROBLEMATIC_INVESTIGATION	.934	1.071
PROBLEMATIC_RESPONSE	.623	1.606
PROBLEMATIC_ALLEGATION	.694	1.440
PUNISHMENT_TOO_HARSH	.811	1.233
MANAGEMENT_CONTRIBUTED	.872	1.147
WORKER_GENDER	.812	1.232
SERVICE	.862	1.160
RECORD	.854	1.171
OCCUPATION	.840	1.191
SUPPORT	.857	1.167
FORMALITY	.653	1.531
INDUSTRY	.663	1.508
FIRM_SIZE	.724	1.382
SECTOR	.749	1.336
HR_EXPERTISE	.728	1.375
STATUS	.861	1.161
REMORSE	.870	1.150
WORKER_ADVOCACY	.768	1.303
EMPLOYER_ADVOCACY	.814	1.228
ARBITRATOR_GENDER	.710	1.408
ARBITRATOR_BACKGROUND	.838	1.193
ARBITRATOR_EXPERIENCE	.723	1.383
ARBITRATOR_SENIORITY	.915	1.093

(*Source*: Developed for thesis)

Statistical experts suggest to expect a degree of multicollinearity amongst its independent variables, and it is only the high correlations that can affect the

reliability of the coefficients in the model (Hill, Griffiths & Judge 2001; Kleinbaum & Klien 2002; Menard 2010). Returning to the earlier suggestion in this sub-section that FIRM_SIZE, HR_EXPERTISE and FORMALITY may harbour a collinear relationship in the dataset: such a concern was allayed by their tolerances (.724, .728 and .653) and VIFs (1.3, 1.3 and 1.5) reported in Table 5.4, respectively. In summary, all the scores for both tolerance and VIF measures in the 'revised' column fell comfortably within the bounds of acceptability.

5.9.3 Zero cells and potential data separation

If a zero count occurs in a cell in a contingency table containing the occurrences between an independent variable and the dependent variable, the regression calculation is likely to incur either partial (quasi-complete) or complete separation (Hosmer & Lemeshow 1989; Menard 2010). A zero cell count occurs when there is no overlap in the distribution in one of the dependent variable's values across one of the independent variable's values. This means all cases in one category of the independent variable had the same response or 'perfectly predicted' one of the independent variable's categories.

Complex diagnostics are required to determine whether complete or partial separation have occurred (Hosmer & Lemeshow 1989). In either event, the consequence of such data structures is that the regression equation is unable to calculate a finite maximum likelihood estimate (Hosmer & Lemeshow 1989; UCLA 2012a). However, a zero cell count and separation does not result in an incorrect model or a model that has been specified poorly, rather it is about identifying the effect that data patterns can have on the computation of the model (Hosmer & Lemeshow 1989). Hosmer and Lemeshow (1989, p. 131) suggested that separation is more likely caused by 'numerical coincidence' with it being a 'problem [we will have] to work around'.

During the screening of the data, it was identified that three of the seven independent variables representing the errors made by management in dismissing a worker, possessed a zero count cell in their respective contingency table: POOR_EVIDENCE _OR_REASON; MITIGATING_FACTORS and PUNISHMENT_TOO_HARSH. Table

5.5 displays the contingency tables for these three variables which contain counts that allow us to predict 'with certainty' (Hosmer & Lemeshow 1989, p. 130) that if management commits any one of the three errors, the outcome will not be in the employer's favour (due to the 0 count cells). Ultimately, the maximum likelihood estimates will either not be found, or they will produce inflated coefficients and standard errors for these variables, as an overlap must exist in the distribution of the covariates in the model (Hosmer & Lemeshow 1989).

Table 5.5 *Two-by-two contingency tables of the three independent variables with a zero cell count*

	INDEPENDENT VARIABLES								
DEPENDENT VARIABLE	POOR_EVIDENCE _OR_REASON			MITIGATING_ FACTORS			PUNISHMENT_ TOO_HARSH		
	no	*yes*	total	*no*	*yes*	total	*no*	*yes*	total
employer's favour	**311**	0	311	**311**	**0**	311	**311**	**0**	311
worker's favour	**141**	**113**	254	**221**	**33**	254	**139**	**115**	254
Total	452	113	565	532	33	565	450	115	565

(*Source:* Developed for thesis)

The literature contains suggestions that a variable with a zero cell count and potential separation can be managed in one of three ways: collapse some categories of the offending independent variable; exclude the offending variable from the model; or 'do nothing' (Hosmer & Lemeshow 1989; Menard 2010; UCLA 2012a). The first option was discounted in this analysis, as it was not logical to combine any of the three managerial error variables with any of the other variables measuring managerial errors. In addition, as these particular variables are dummy coded (0 for 'error not present'; 1 for 'error present') it was not possible to further collapse internal values in variables.

The second option involved excluding the offending variables from the model, which could mean the coefficients for the remaining variables in the model could be biased by providing scope for less important predictors to take primacy in the model. The third option was to leave the variables in the model, but to ignore them, because the remaining coefficients for the other independent variables remain valid. Whilst this

third option was the preferred course of action, a combination of the second and third option had to be adopted. The reasons for this are outlined next.

First, the model did not populate efficiently when the three problem variables along with the remaining independent variables were entered into the model. True to the form that zero cell counts '*will cause problems in the modelling stage*' (Hosmer & Lemeshow 1989, p. 128) including the full set of independent variables in the model manifested in SPSS warnings that 'estimation had failed due to numerical problem'. (The SPSS output showing the failed estimation is attached in Appendix 4). It was detected, by a process of running a series of tests that progressively included and excluded the three variables of concern, that it was only the inclusion of the POOR_EVIDENCE_OR_REASON variable that resulted in the failed estimation warnings. Therefore, if a model were to be produced at all, no option existed other than to drop the POOR_EVIDENCE_OR_REASON predictor from the model: the second option for managing a variable with a zero cell count. On the positive side, it was detected that the other two 'problem' variables, MITIGATING_FACTORS and PUNISHMENT_TOO_HARSH could be entered into the model without distorting the coefficients for the other variables (although the two variables themselves obtained unstable coefficients). The benefit of leaving these two variables in the model was that it improved the validity of the estimates for the remaining effects in the model. This meant that the third option identified in the literature for managing a variable with a zero cell count could be implemented in respect to MITIGATING_FACTORS and PUNISHMENT_ TOO_HARSH.

To manage the concern that the exclusion of the POOR_EVIDENCE_OR_REASON variable might result in biased estimates for the model, Hosmer and Lemeshow (Hosmer & Lemeshow 1989, p. 131) suggest the use of 'some careful' bivariate analyses to show the unadjusted effects of variables. Consequently, a bivariate analysis, in the form of a series of simple regression models, were run to identify estimates for the influence of each independent variable – without controlling for the effects of the other independent variables – on the dependent variable. These results appear *alongside* the multivariate analysis output in the results chapter. The dual output allowed for a direct comparative of unadjusted versus adjusted parameters in the model.

5.9.4 *Influential points in the data*

Once a 'baseline' regression model was developed, it was necessary to administer tests on the data to detect any single cases that had excessive influence on the regression coefficients or *p*-values. Influential points in the dataset affect the ability to generalise results to the population, because it means the regression equation heavily depended on a few influential cases (SPSS 2010). Therefore, influence points may distort the inferences drawn from the model (Sarkar, Midi & Rana 2011). Influential points can be categorised according to their appearance as an outlier, a high leverage case, or an influential case. An 'outlier' is an atypical case – hard to predict because its values deviate from the expected range for the cases in the model, producing an extremely large residual in the model and potentially suppressing the explanatory level of the model (Sarkar, Midi & Rana 2011). Whereas, a high leverage observation results when a data point in one of the independent variables within an observation possesses a high deviation from the mean of all the data points for the independent variables (Sarkar, Midi & Rana 2011). As a result, it may have a strong influence on the full model. An 'influential' case relates to the 'extremeness of an observation' (Sarkar, Midi & Rana 2011, p. 27) and has a disproportionate effect on the regression coefficients (SPSS 2010).

However, excessive testing to check for influential points is not recommended. All datasets are likely to contain cases that do not fit the regression equation and excessive testing will probably return an excessive number of influential points. SPSS analysts recommend using more than one measure of influential points, and to concentrate on the cases returning values 'far above' the rule of thumb or cut-off values (SPSS 2010). To this end, diagnostic tests available within the logistic regression function of SPSS performed were: Cook's distance to detect influential cases, standardised residuals to detect outliers, and leverage values. The results of these diagnostics are presented next.

5.9.4.1 Cook's distances

This is an *influence* measure designed to indicate how much change would occur if a single observation were deleted from the analysis (Menard 2010; SPSS 2010). Its measurement relies on the studentized residual and leverage statistics - two of the tests recommended as minimum diagnostics (Menard 2010). The rule of thumb presented in the literature suggests observations with a value above 1 warrant closer examination (Menard 2010; SPSS 2010). Figure 5.1 displays 22 cases in the baseline model had an influence statistic above 1.

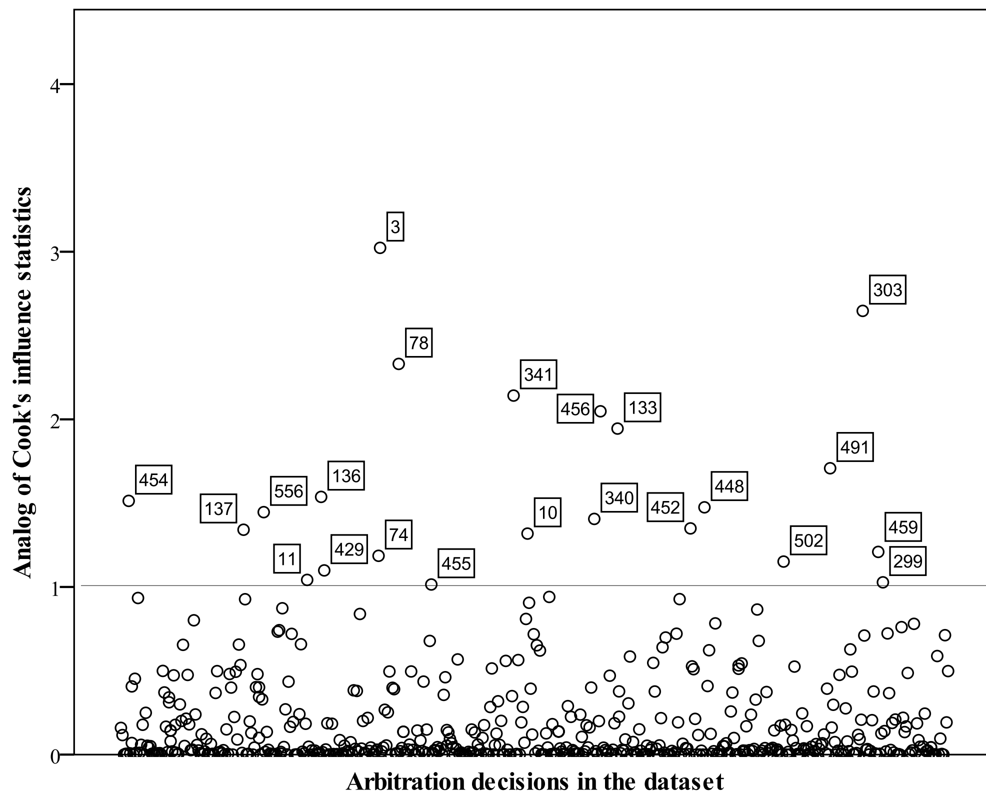

Figure 5.1 *Scatterplot of Cook's distances showing influential cases in the baseline model*

(*Source:* Developed for thesis)

5.9.4.2 Identifying outliers using standardised residuals

Residuals can be used to identify observations that may be *outliers*. Standardised residuals operate with the rule of thumb that residuals of less than -3 or greater than +3 warrant further inspection (Menard 2010). Conservative researchers consider observations with values of less than -2 and greater than +2 for further attention (Menard 2010). If the +or–3 guide is applied to the baseline model, the scatterplot in

Figure 5.2 shows that no cases had values above this rule. However, 22 cases are identified in Figure 5.2 when the more conservative rule of +or–2 was applied.

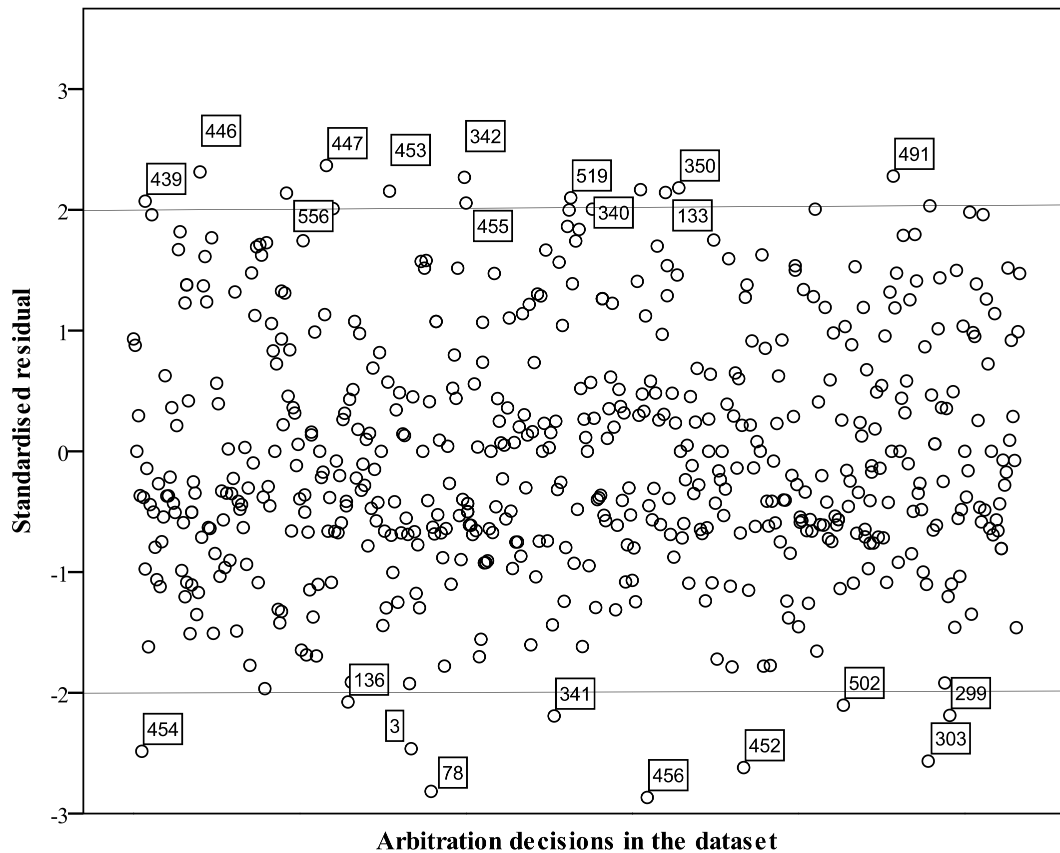

Figure 5.2 *Scatterplot of standardised residuals showing outlier cases in the baseline model*

(*Source:* Developed for thesis)

5.9.4.3 Leverage points

In logistic regression, leverage values are constrained between 0 where a case potentially has no influence on the parameters in the model, and 1 to indicate a case that might completely determine the parameters in the model (Menard 2010). The word 'potentially' is used because a high leverage on its own does not automatically mean it is an influential case (Menard 2010). The rule of thumb for interpreting the leverage value is to give attention to cases which are 'several times over' the expected value of (K+1)/N (Menard 2010, p. 143). In this investigation K = 34 (the number of independent variables) and N = 565 (the total number of observations). Thus 34÷565 = .06 and 'several' times this value (a multiple of three was used) resulted in cases with leverage values over .18 worthy of further consideration. The scatterplot in Figure 5.3 shows the distribution of leverage points for all the

arbitration decisions in the base model. Noticeably, near half of the cases are above the .18 value, suggesting half the cases have high leverage points. Common sense suggests that this is a pattern in the data (if one were to consider removing such cases, half the data set would be discarded). Of more interest are the five extreme leverage points identified clearly by the scatterplot that exhibit a leverage value above .5.

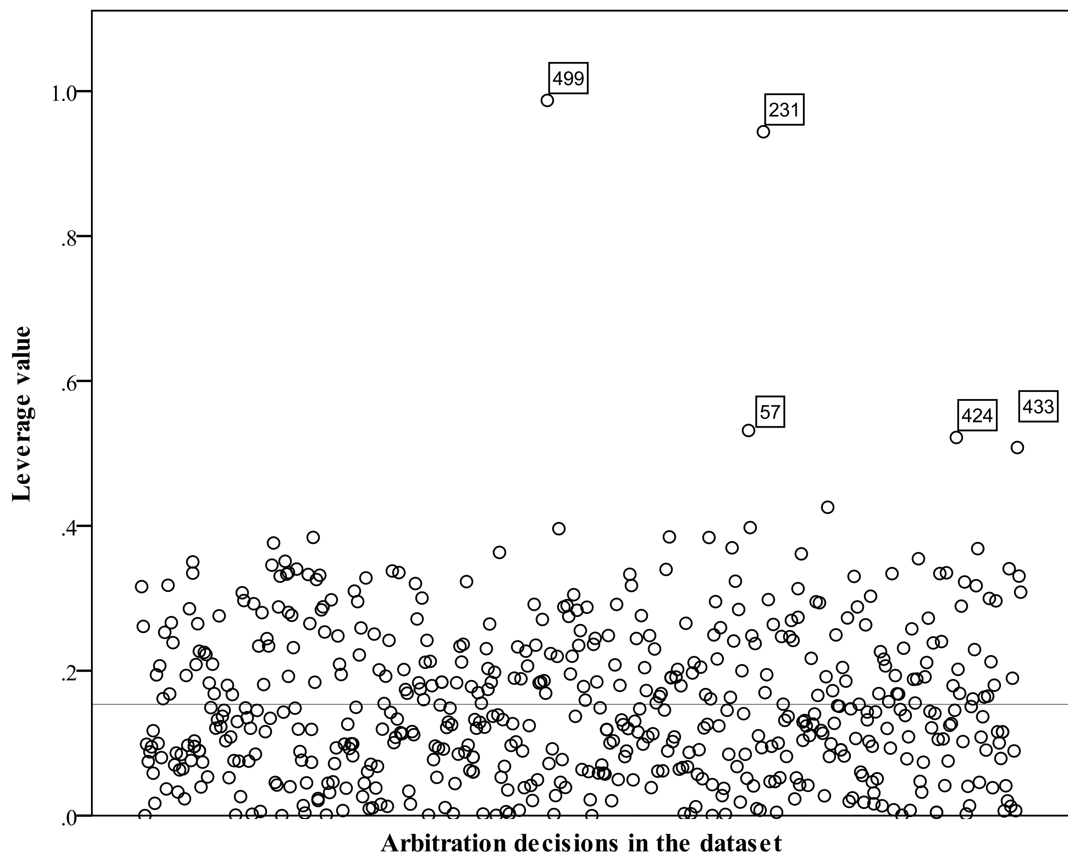

Figure 5.3 *Scatterplot of leverage values showing extreme leverage cases in the baseline model*

(*Source:* Developed for thesis)

5.9.4.4 Managing influential points in the data

The observations identified via the Cooks, Leverage and Standardised residuals were collated into Table 5.6. A profile of the cases listed in Table 5.6 is contained in Appendix 5. The unusual or unexpected cases identified by the influence and outlier diagnostics were, first, reviewed to ensure accurate data entry. Second, a visual inspection of the cases was conducted with a view to detect peculiarities in the decisions. The profile of independent and dependent variables in these cases did not present any apparent peculiar or abnormal characteristics. The cases involved

decisions that both overturned and upheld the worker's dismissal and they also appeared to reflect a mix the values associated with the independent variables.

Table 5.6 *Summary of outliers, influential and leverage arbitration decisions in the model, highlighting shared observations*

Outliers *n =22*	**High influence cases** *n = 21*	**Extreme leverage cases** *n = 5*
AIRC1097	AIRC1097	
AIRC1127	AIRC916	
AIRC564		
FWA1164	FWA1164	
FWA2605	FWA3096	
FWA3690	FWA3690	
	FWA3940	
PR900405	PR901937	PR917287
PR902030	PR902030	PR952785
PR903625	PR903625	PR954650
PR909342		PR977028
PR909750	PR909750	PR981805
PR919842	PR919842	
PR924004	PR923310	
PR935561		
PR936112	PR936112	
PR939942	PR939942	
PR941688		
PR952744	PR952744	
	PR954640	
PR971014	PR971014	
PR973914	PR973914	
PR975252	PR975252	
	PR976481	
PR976758	PR976758	

(*Source:* Developed for thesis)

The literature suggests that the removal of an 'influential' case from the model can substantially change the coefficients in the model, and 'failure to detect outliers and hence influential cases can have a severe distortion on the validity of the inferences drawn from the modelling exercise' (Sarkar, Midi & Rana 2011, p. 27). On the other hand, eliminating outliers and influential observations is likely to improve the model fit but at the cost of introducing an element of bias into the model (Jennings 1986). Thus, it is also argued in the literature that outliers and influential points – that have not resulted from a mistake in the data collection or data entry – contain perfectly

valid data (Pyle 1999). Neither do they indicate a problematic model, particularly when modelling matters of 'individual human choice which can produce less than perfect predictions of human behaviour' (Menard 2010, p. 143). Pyle (1999) reminds us that in every dataset there will always be the most extreme observation; and Menard (2010, p. 143) mentions that random variation alone will produce four to five percent of observations containing suspicious standardised and deviance residuals (Menard 2010). In any event, the literature appears to be strongly advocating that deletion of outliers and influential points must be well justified by the investigator (Hosmer & Lemeshow 1989; Kleinbaum & Klien 2002; Menard 2010; Pyle 1999; SPSS 2010). Therefore, whilst outliers and influential points might produce unusual results, as long as the results are plausible, a case should be retained (Menard 2010).

Another point considered in relation to the treatment of outliers and influential cases in the model drew from the fact that the dependent and independent variables in the model were measured on nominal scales. This meant the values assigned to every observation were bounded by the values nominated for each variable. Furthermore, this meant outliers and influential points were observations that in some way were reflecting extremes within an *available* range (Pyle 1999, p. 323). This is an important distinction from outliers and influential points that can occur when variables are measured on an unbounded, continuous scale that has the potential for a value of any magnitude to be assigned to a variable.

Therefore, after ensuring the absence of data collection or data entry errors, it was decided not to delete any one of the outlier or influential arbitration decisions for the following reasons:

a) Peculiar patterns could not be identified by a visual inspection of the decision profiles.
b) The extremity of each decision was bounded by the constrained values assigned to categorical variables.
c) The decisions contained data reflecting the unpredictability of human behaviour and decision-making.

5.10 Chapter 5 conclusion

The aim of this chapter was to inform the reader about how the investigation for this thesis was actually executed. This chapter commenced by defending the use of a positivist research paradigm within the social sciences, on the basis this paradigm enables a researcher to quantitatively measure constructs and make generalisations about patterns of human behaviour across a population. A content analysis of the texts of genuine arbitration decisions was justified as an appropriate, and effective, research method for uncovering insights about arbitral decision-making in unfair dismissal claims. The source of the arbitration decisions was revealed, along with how the insights contained in these documents were harvested. The reliability and validity of the data procurement methods were discussed. It was found that the design of this investigation resulted in high reliability: as shown by the results of the intercoder reliability indicators. And, claims of external validity, construct validity and content validity were made. The chapter progressed to provide operational definitions of the variables that would be examined in order to test each of the hypotheses. This aspect was supported largely by the material in Appendix 3.

Having defined the variables to include in the analysis, the statistical analysis technique of logistic regression was defended as the most appropriate technique for modelling the largely unordered, categorical data that occurred from the content analysis. The chapter concluded by presenting the results of the data diagnostics in terms of missing data, multicollinearity, zero cell counts, influential cases, outliers and high leverage cases. As any issues identified by these diagnostics may impact on the validity or useability of the results of the regression analysis, it was discussed how the results of these diagnostics were managed. It was discussed how the analysis was plagued by the challenge of a zero cell count for the independent variable, POOR_EVIDENCE_OR_REASON which resulted in 'perfect prediction' of the arbitration decision for that variable. A justification for excluding this variable from the model was provided and remedial analysis in the form of simple regressions, to account for its removal, was discussed. The implication of this challenge is that results must interpreted with caution. The point has now come to report descriptive statistics for the dataset, results of the logistic regression and associated hypothesis tests in chapter 6.

CHAPTER 6

THE RESULTS

6.0 Introduction

The research objective and research questions central to this thesis aim to determine the viability of a range of variables thought to be influencing arbitral decision-making over unfair dismissal claims from employees that allegedly misbehaved. This chapter provides the results of the statistical analysis. Editorial comments about the results are presented in chapter 7.

The contents of chapter 6 unfold as follows. The initial section presents a summary of the general descriptive statistics for the dependent and independent variables included in the analysis. Following this, the next section presents the outputs of the logistic regression modelling combined with an explanation of the models. The final section of this chapter responds to each of the hypotheses developed during chapter 4 and discusses whether the null or the alternate hypotheses are supported by the regression models.

6.1 Descriptive statistics

Descriptive statistics relevant to each research question are presented in the form of a stacked bar graph. Graphically presenting data offers the reader more immediate awareness of distributions and outstanding characteristics that otherwise may be overlooked during tabular inspections of the data (Kemp & Kemp 2004). The stacked bar graphs show the distribution of the arbitration decisions that favoured either the worker or the employer, for each value used to measure the variable. The graphical presentations of the descriptive statistics were derived from a contingency table of data counts for each variable. These contingency tables are provided in Appendix 6.

Before delving into the details of the descriptive statistics for each research question, provided first are four brief insights about the population of the arbitration decisions examined in the analysis. First, Figure 6.1 depicts that 45 percent of the arbitration decisions favour the worker, that is, the arbitrator agrees with the worker's claim that his or her dismissal was unfair and overturns the employer's dismissal action.

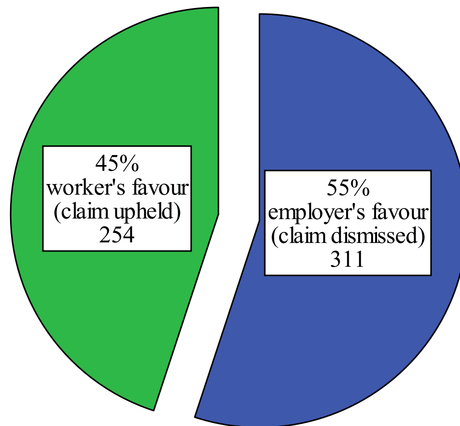

Figure 6.1 *Pie chart of misbehaviour related unfair dismissal arbitration decisions, July 2000 to June 2010*

Second, the pie chart contained in Figure 6.2 shows that within the 254 decisions favouring the dismissed worker, the employer is ordered to pay compensation – in lieu of reinstatement – in 59 percent of cases. For the remaining 41 percent of cases, the employer is ordered to reinstate the worker to a former position or, at least, re-employ him or her to a similar position.

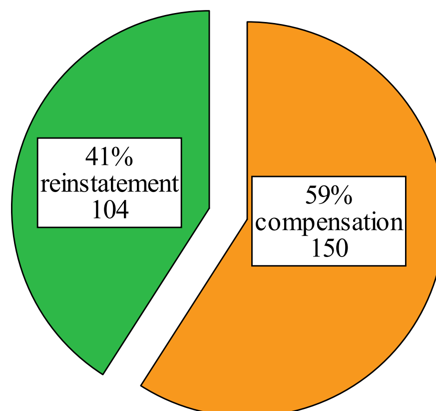

Figure 6.2 *Pie chart of reinstatement and compensation orders contained in the 254 arbitration decisions made in the worker's favour*

Third, the distribution of decisions across the ten year period, as displayed in Figure 6.3, reveals 2006 as the busiest year for the arbitrators during the 10 year time span. And, whilst 2005 produces the least number of decisions, it is also the toughest year for the worker, with only 27 percent of claims favouring them. In comparison, 2002 is the best year for the worker, with 59 percent of claims favourable to them.

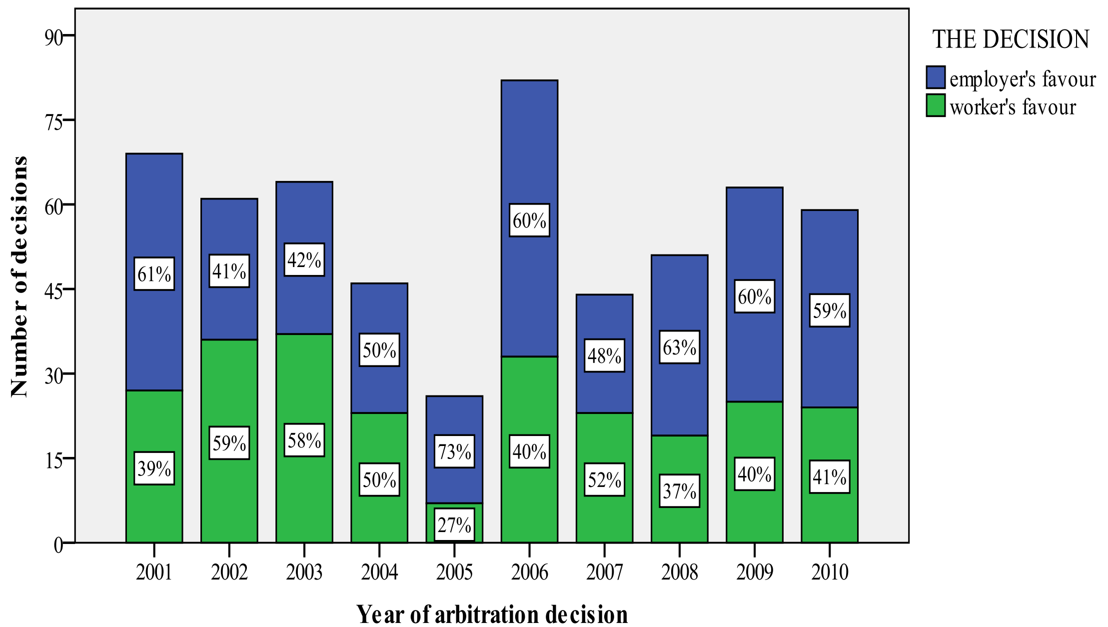

Figure 6.3 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by year*

Finally, Figure 6.4 exhibits the distribution of arbitration decisions according to tribunal locations across Australia.

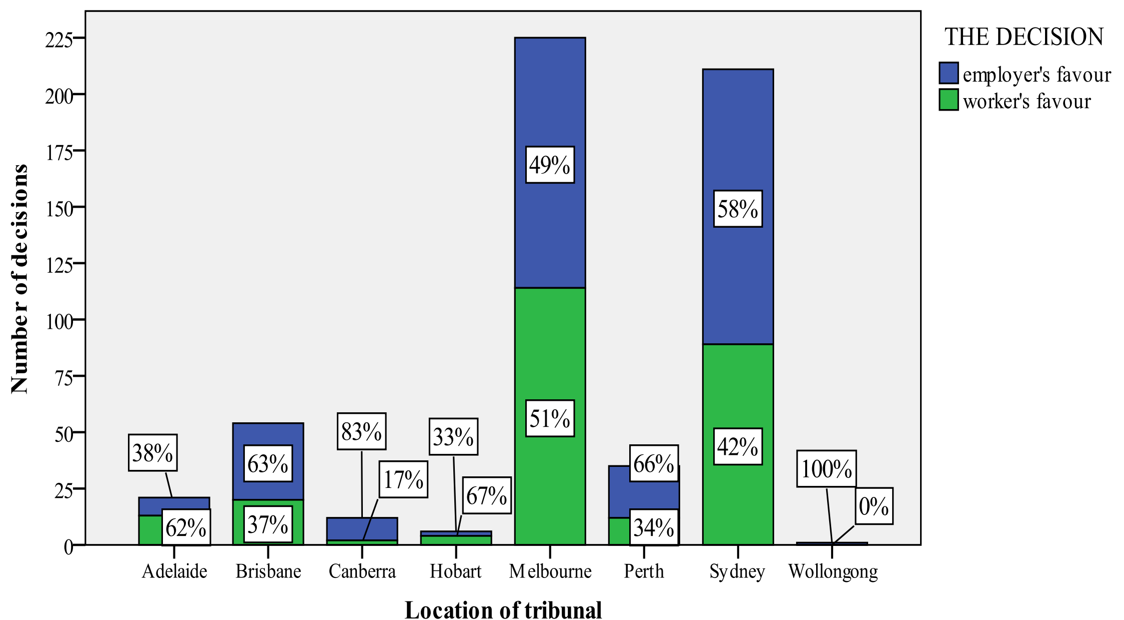

Figure 6.4 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by Tribunal location*

Melbourne and Sydney are the busiest tribunals, each determining over 200 misbehaviour-related unfair dismissal claims. Melbourne arbitrators produce an almost 50/50 split in their decisions favouring either the worker or employer.

Comparatively, Sydney-based arbitrators show a leaning towards the employer, with 58 percent of their decisions in the employer's favour. Wollongong and Hobart issue the least number of arbitration decisions. Leaving aside the small number arising in Wollongong (1 decision), hearings occurring in Hobart and Adelaide produce the most decisions favouring the worker, at 67 percent and 62 percent respectively. Alternatively, employers fare better in hearings held in Perth and Brisbane, with favourable decisions at 66 percent and 63 percent, respectively.

The descriptive statistics for each of the research questions are now presented.

6.1.1 Descriptive statistics for research question 1

6.1.1.1 Type of misbehaviour

Figure 6.5 depicts production deviance as the most common type of misbehaviour associated with a worker's dismissal. The graph also suggests that workers who were accused of property deviance are the least likely to win their claim, with favourable claims occurring in only 38 percent of the decisions. On the other hand, workers accused of political and production deviance show the highest success rate winning 49 percent and 47 percent of claims, respectively.

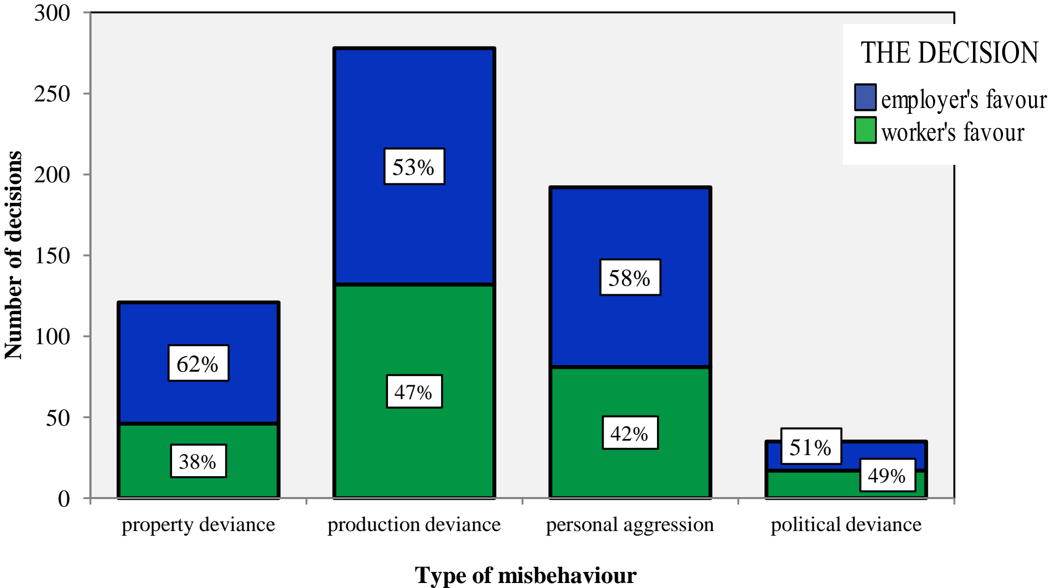

Figure 6.5 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by type of misbehaviour*

It was addressed in the methodology chapter that data about specific acts of misbehaviour were harvested from the decisions and that regrettably this depth of detail could not be incorporated into the regression analysis. Nevertheless, for the reader's interest, Table 6.1 provides descriptive statistics on the specific actions in which employees purportedly engaged that led to their dismissal. Acts of misbehaviour were recorded as a multi-response variable, thus Table 6.1 accounts for 643 separate acts identified in the 565 actual decisions.

The results reveal that acts of *verbal or written aggression*, followed closely by *not following procedures or instructions* are the most frequently cited reasons for dismissal (105 and 102 incidents, respectively). In relation to the specific acts of misbehaviour, it is the worker who was dismissed for purportedly engaging in *theft from co-workers or customers,* or *theft from the business* who is least likely to receive a favourable decision (wining only 14 percent and 30 percent of claims, respectively). Alternatively, a worker dismissed for a *safety violation* or due to *tardiness, absenteeism or dishonesty about hours worked* is most likely to receive a favourable decision (winning 54 percent and 53 percent of claims, respectively).

Table 6.1 *Descriptive statistics of specific acts of misbehaviour leading to dismissal*

SPECIFIC ACT OF MISBEHAVIOUR		ARBITRATION DECISION			
		employer's favour	*worker's favour*	*count*	*%*
PROPERTY DEVIANCE: theft from firm	Count	33	14	47	
	%	70%	30%		
	% of Total				**7.3%**
wilful damage or sabotaging equipment or property	Count	13	8	21	
	%	62%	38%		
	% of Total				**3.3%**
fraud/misuse of assets or property	Count	32	24	56	
	%	57%	43%		
	% of Total				**8.7%**
other property deviance	Count	2	2	4	
	%	50%	50%		
	% of Total				**.6%**
PRODUCTION DEVIANCE: tardiness, absenteeism or dishonesty about hours worked	Count	20	23	43	
	%	47%	53%		
	% of Total				**6.7%**
not following policy procedures or disregarding supervisor's instructions	Count	58	44	102	
	%	57%	43%		
	% of Total				**15.9%**
safety violation	Count	39	45	84	
	%	46%	54%		
	% of Total				**13.1%**
misusing or wasting resources	Count	21	18	39	
	%	54%	46%		
	% of Total				**6.1%**
other production deviance	Count	8	8	16	
	%	50%	50%		
	% of Total				**2.5%**
PERSONAL AGGRESSION: verbal or written acts of aggression	Count	59	46	105	
	%	56%	44%		
	% of Total				**16.4%**
physical acts of aggression	Count	36	28	64	
	%	56%	44%		
	% of Total				**10.0%**
sexual harassment: verbal and/or physical	Count	12	7	19	
	%	63%	37%		
	% of Total				**3.0%**
theft from co-workers or customer	Count	6	1	7	
	%	86%	14%		
	% of Total				**1.1%**
POLITICAL DEVIANCE: gossiping or breaching confidentiality	Count	6	6	12	
	%	50%	50%		
	% of Total				**1.7%**
disreputable actions towards others	Count	10	9	19	
	%	53%	47%		
	% of Total				**3.0%**
other political deviance	Count	2	2	4	
	%	50%	50%		
	% of Total				**.6%**
TOTALS	Count	358	285	643	
	%	**55%**	**45%**		**100.0%**

6.1.1.2 Severity of misbehaviour

A trend is displayed in Figure 6.6 that aligns with an expectation that the more severe the behaviour, the less likely the worker will win their unfair dismissal claim. The graph displays that a worker accused of behaviour that is 'somewhat serious' is successful in their claim in 68 percent of cases. At the other end of the severity spectrum, a worker accused of 'extremely serious misbehaviour', won his or her claim in only 32 percent of cases.

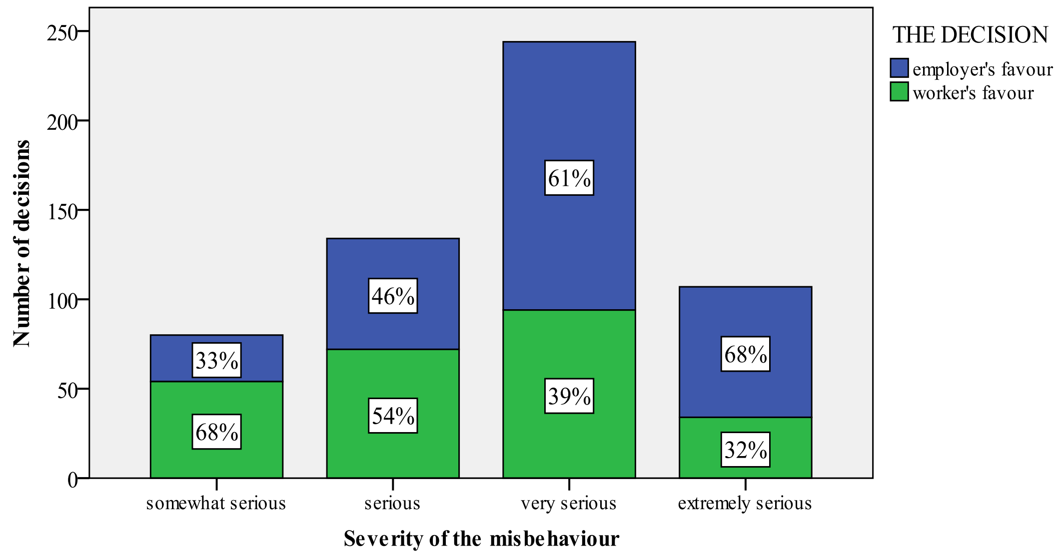

Figure 6.6 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by severity of misbehaviour*

6.1.1.3 Worker's disciplinary record

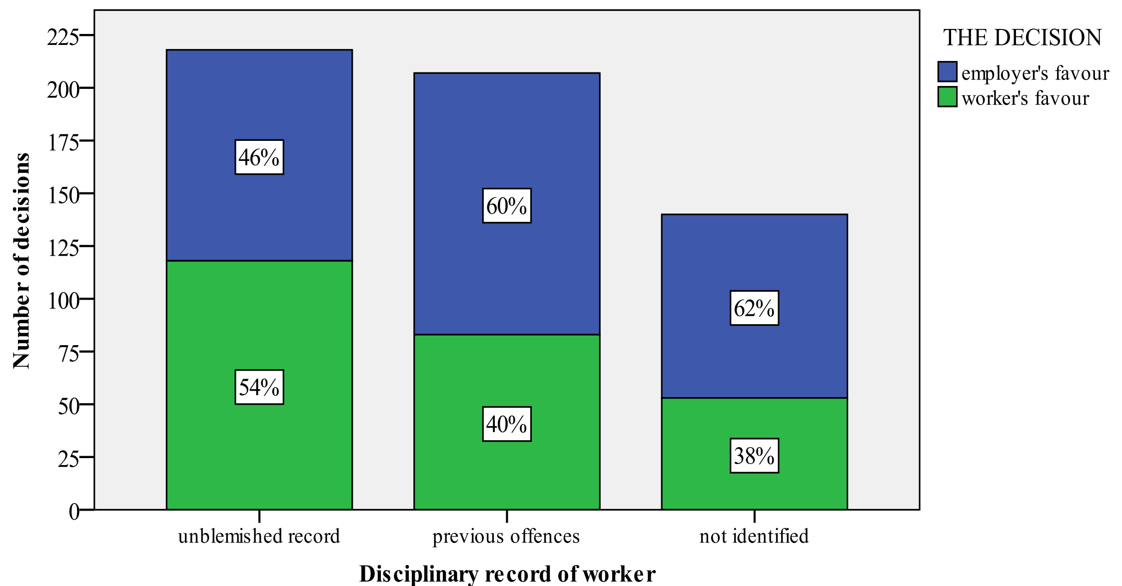

Figure 6.7 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by worker's disciplinary record*

Figure 6.7 reveals that a worker with an unblemished disciplinary record wins his or her claim in 54 percent of the cases. This statistic compares favourably to a worker with a previous disciplinary record, who wins his or her unfair dismissal claim in only 40 percent of the cases.

6.1.1.4 Worker's service period

The graph in Figure 6.8 provides no indication of a trend supporting the suggestion that longer service periods are associated with a worker getting a favourable outcome at arbitration. Although a worker with over 20 years service won his or her claim in 54 percent of cases, this is not greatly different from a worker who had less than 2 years service, winning his or her claim in 52 percent of cases. And, curiously, it appears a worker with 10 to 15 years of service faces the harshest prospects, wining his or her claim in only 36 percent of cases.

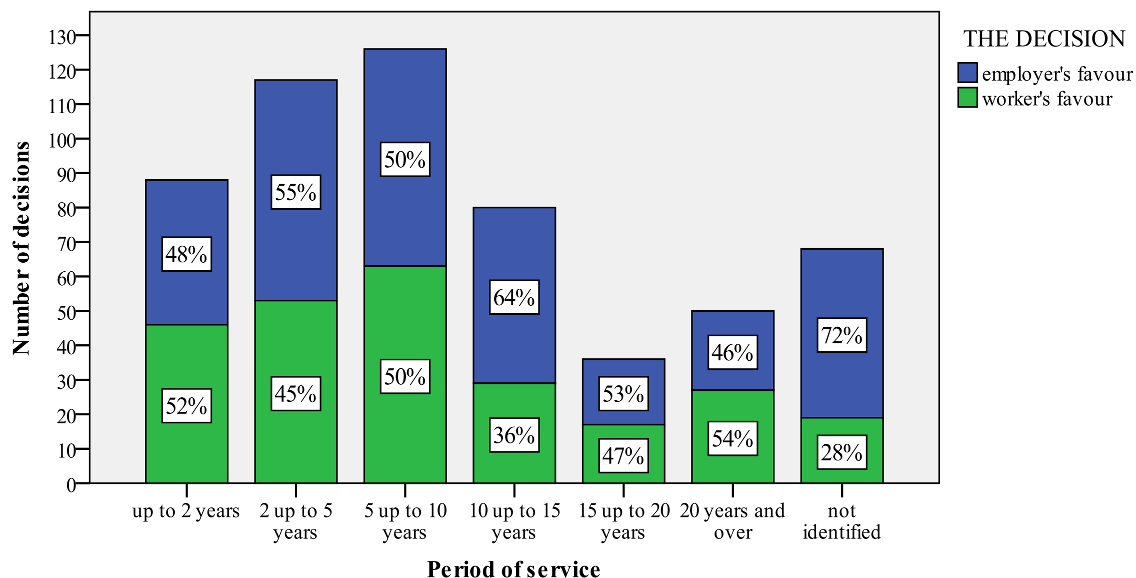

Figure 6.8 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by worker's period of service*

6.1.1.5 Remorse

Figure 6.9 depicts that around one-fifth of the arbitration cases contain evidence that the worker either apologised and/or was remorseful for his or her behaviour. Also noticeable is that those workers who did indicate remorse or apologised, achieve a successful unfair dismissal claim in 61 percent of cases.

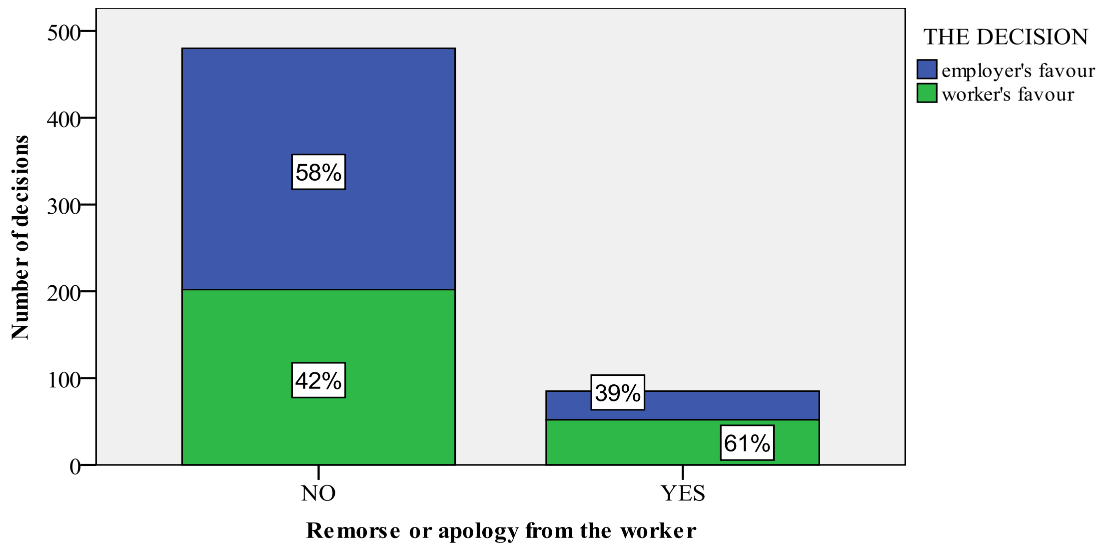

Figure 6.9 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by remorse*

6.1.2 Descriptive statistics for research question 2

6.1.2.1 Employee's explanation for misbehaviour

Figure 6.10 indicates that workers most frequently use a 'personal-inside' reason to explain their behaviour. However, it is the worker who provides a 'workplace-related' reason that wins a favourable claim in 61 percent of the decisions. 'Personal-inside' and 'personal-outside' reasons appear to provide much less likelihood of the worker winning his or her claim, with favourable decisions associated with these explanations in only 44 percent and 43 percent of decisions, respectively.

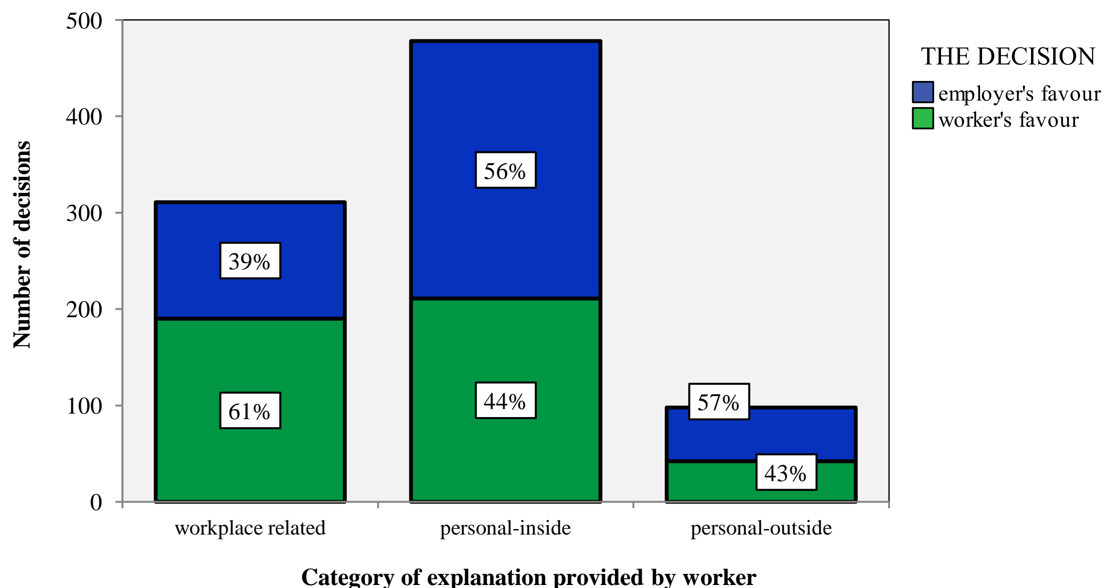

Figure 6.10 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by employee explanation*

As mentioned in the methodology chapter, data about the specific reasons a worker provided in defence of his or her purported misbehaviour, was also harvested from the decisions. However, this detail could not be supported by the size of the dataset to include it in the regression analysis. Nevertheless, for the reader's interest, Table 6.2 provides descriptive statistics on the specific reasons employees provided to defend their behaviour at the arbitration table. Specific reasons were recorded as a multi-response variable, thus the Table 6.2 accounts for 839 separate reasons identified in the 565 actual decisions.

Table 6.2 *Descriptive statistics of specific explanations for misbehaviour dismissal*

SPECIFIC EXPLANATION PROVIDED BY WORKER		ARBITRATION DECISION			
		employer's favour	*worker's favour*	*count*	*%*
WORKPLACE RELATED: accepted employer practice	Count % % of Total	26 51%	25 49%	51	**6.1%**
poor communication/poor instructions	Count % % of Total	10 50%	10 50%	20	**2.4%**
poor employer policy or practice	Count % % of Total	23 44%	29 56%	52	**6.2%**
influence from another person	Count % % of Total	14 56%	11 44%	25	**3.0%**
job changes	Count % % of Total	8 50%	8 50%	16	**1.9%**
faulty equipment/hazardous conditions	Count % % of Total	13 62%	8 38%	21	**2.5%**
unreasonable performance expectations	Count % % of Total	19 38%	31 62%	50	**6.0%**
other workplace related reason	Count % % of Total	8 62%	5 38%	13	**1.5%**
PERSONAL-INSIDE: denial	Count % % of Total	140 62%	87 38%	227	**27.0%**
felt inequity or tension	Count % % of Total	15 45%	18 55%	33	**3.9%**
self defence	Count % % of Total	27 61%	17 39%	44	**5.2%**

Specific Explanation Provided by Worker		Arbitration decision: employer's favour	worker's favour	count	%
made a mistake	Count % % of Total	42 45%	52 55%	94	**11.2%**
intentional behaviour	Count % % of Total	13 57%	10 43%	23	**2.7%**
ignorance of rules	Count % % of Total	15 68%	7 32%	22	**2.6%**
frustration	Count % % of Total	17 59%	12 41%	29	**3.5%**
other personal-inside reason	Count % % of Total	8 42%	11 58%	19	**2.3%**
PERSONAL-OUTSIDE: personal health issues	Count % % of Total	32 59%	22 41%	54	**6.4%**
family commitment/health issues	Count % % of Total	10 48%	11 52%	21	**2.5%**
financial pressures	Count % % of Total	2 67%	1 33%	3	**0.4%**
personal tragedy	Count % % of Total	2 67%	1 33%	3	**0.4%**
mood altering substances/addictions	Count % % of Total	6 60%	4 40%	10	**1.2%**
other personal-outside reason	Count % % of Total	5 56%	4 44%	9	**1.1%**
Totals	Count % of Total	455 **55%**	384 **45%**	839	**100.0%**

(*Source:* Developed for thesis)

The statistics reported in Table 6.2 reveal that *denial* is the defence most frequently cited by workers, with 227 incidents occurring amongst the decisions. This is followed by employees pleading that they *made a mistake* in 94 of the cases. A worker who used the *ignorance of rules* explanation to defend his or her behaviour appears to have the least success at arbitration, winning only 32 percent of such claims. Alternatively, a worker that cites either *unreasonable performance expectations* or *poor employer policy or practice* shows the highest success rate, winning 62 percent and 56 percent of claims, respectively.

6.1.2.2 Complexity of the explanation

The graph in Figure 6.11 displays the association between the complexity of the explanation and the arbitration decision. It appears that if a worker incorporates three facets to his or her explanation, the likelihood of winning a claim decreases compared to where he or she relies on one or two explanations. The worker's success is 45 percent with a single explanation, 47 percent with a dual explanation, but drops to only 36 percent with a triple explanation.

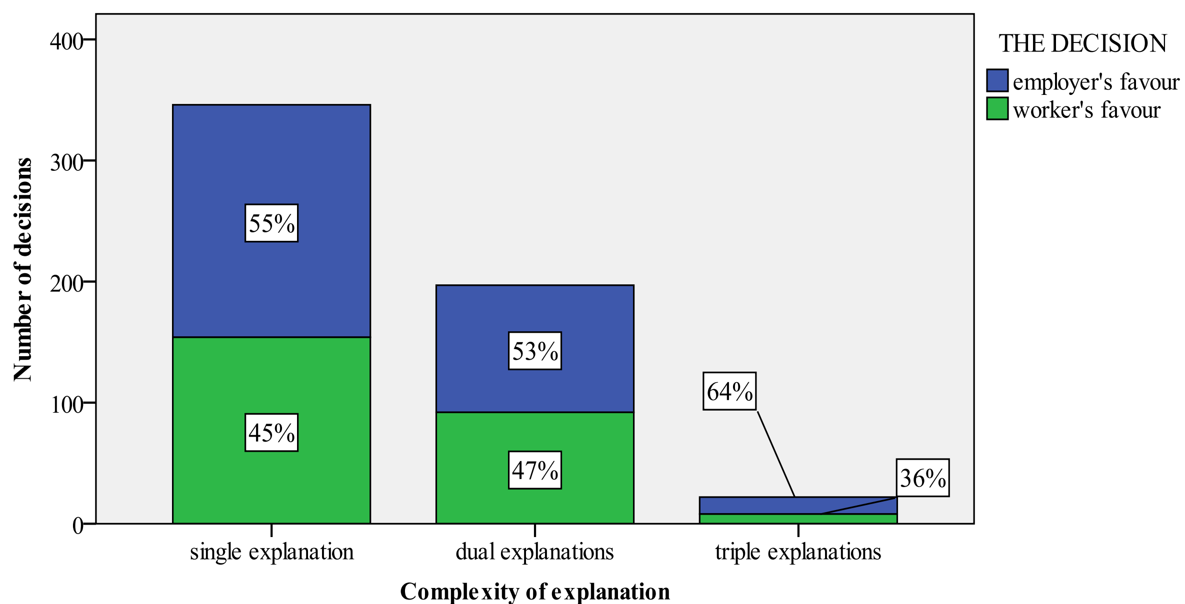

Figure 6.11 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by complexity of the worker's explanation*

6.1.3 Descriptive statistics for research question 3

6.1.3.1 Managerial errors in the dismissal process

Figure 6.12 displays that the most common mistake by employers was a failure to provide an appropriate opportunity for the worker to respond to the allegations of misbehaviour (*problematic response*). This is followed closely by administering a punishment that was disproportionate to the offence *(too harsh*) and dismissing the worker on the basis of weak evidence or a poor reason (*poor evidence/reason*).

The first three bars in Figure 6.12 display the type of errors made by management, to which the arbitrators are completely intolerant, and find in favour of the worker in every decision. However, the last four bars in the graph show that an error in the dismissal process does not always mean the worker will win the claim. Employers that erred in their investigation process (*problematic investigation*) still manage to have 28 percent of the decisions fall in their favour. The final three bars reflect errors that are progressively less tolerated by the arbitrators and offer the potential for a decision to be returned in the employer's favour.

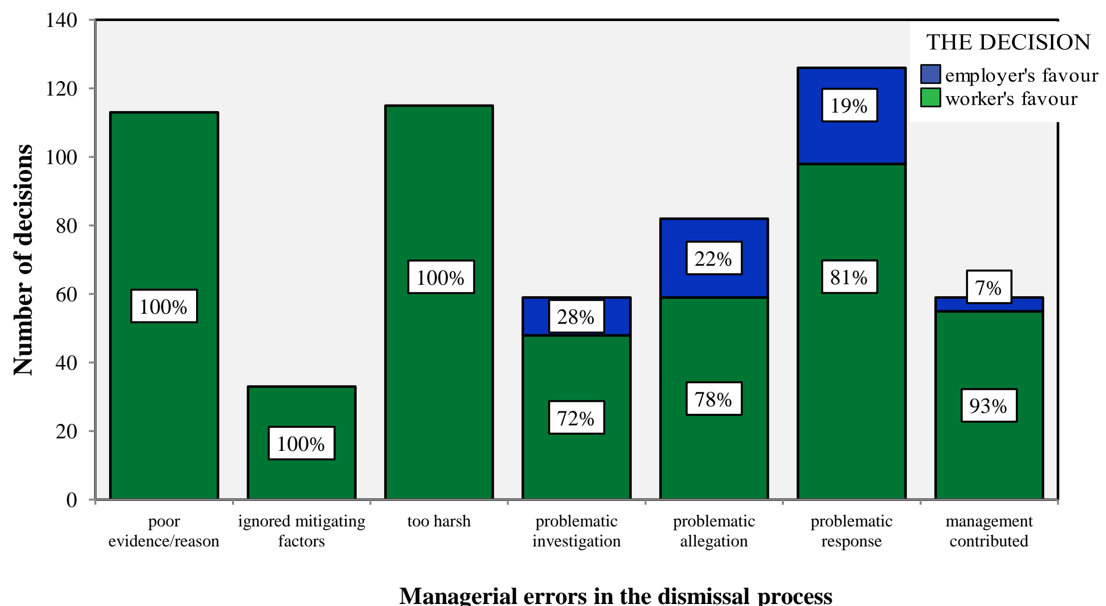

Figure 6.12 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by managerial errors*

6.1.4 Descriptive statistics for sub-question (a)

6.1.4.1 Worker's advocacy

Figure 6.13 shows that a worker who elects to use an independent lawyer to present his or her unfair dismissal at the arbitration table, had the most chance of success, with cases presented by independent lawyers showing a favourable decision for the worker 50 percent of the time. Not far behind this result is the use of union advocates (who may use a lawyer) and non-legally qualified advocates (such as consultants) that result in favourable decisions to the worker in 46 percent and 47 percent of cases, respectively. At the other extreme, a worker electing to present his or her own defence (self-represent) only wins his, or her, claim in 28 percent of cases.

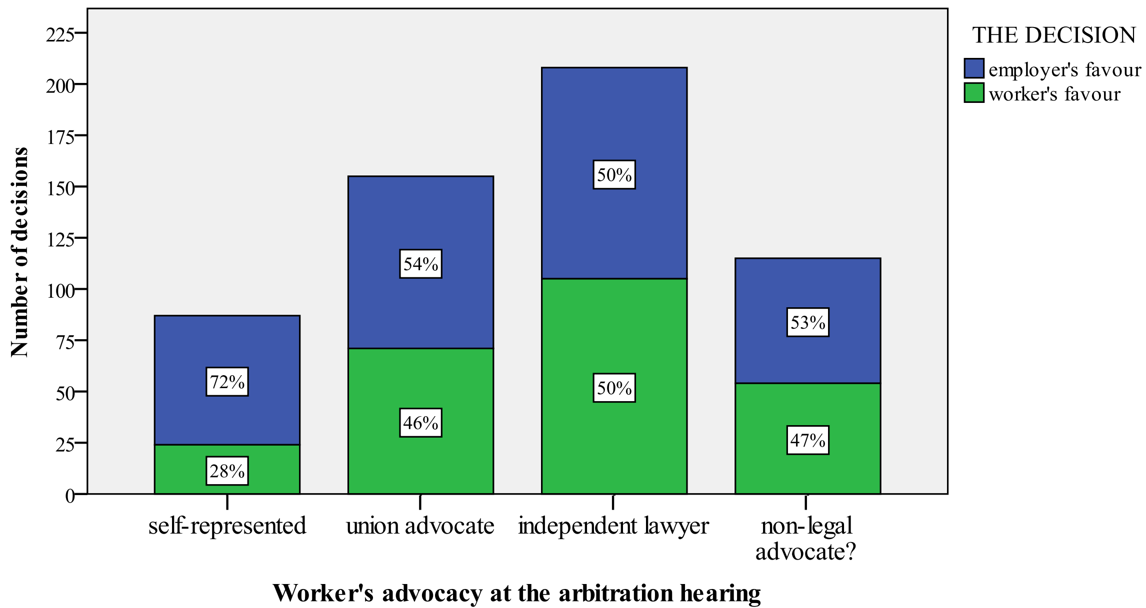

Figure 6.13 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by advocacy used by the worker*

6.1.4.2 Employer's advocacy

Figure 6.14 displays that most employers appear to use independent lawyers to defend their dismissal activities.

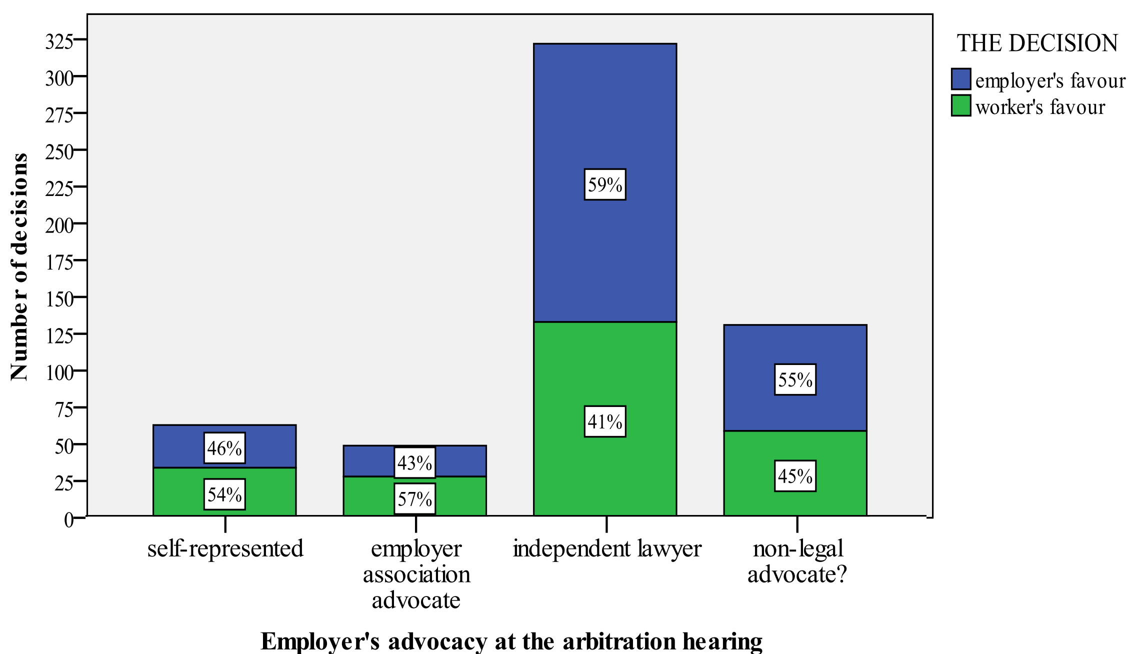

Figure 6.14 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by advocacy used by the employer*

The graph shows that lawyers are (again) the most successful at defending their client's interests. An employer, who uses an independent lawyer, manages to defend itself against an unfair dismissal claim from a worker in 59 percent of cases. The least effective advocate for the employer is an employer (or industry) association advocate who only earns a favourable decision for the employer in 43 percent of cases. However, the chi-square results suggest these findings may be reflecting random variation in the data. The χ^2 result fails statistical significance, with $p > .05$. This suggests no obvious association exists between the type of advocacy used by the employer at the arbitration table and the outcome of the arbitration decision.

6.1.5 Descriptive statistics for sub-question (b)

6.1.5.1 Gender of the dismissed worker

Figure 6.15 displays that male workers had a proportionately larger number of misconduct-related unfair dismissal claims settled at arbitration. However, favourable arbitration outcomes for male and female workers are similar, 45 percent and 43 percent respectively. This pattern is supported by the statistically insignificant chi-square results, with $p > .05$. This preliminary assessment suggests there is no direct association between the gender of the worker and the outcome of the arbitration decision.

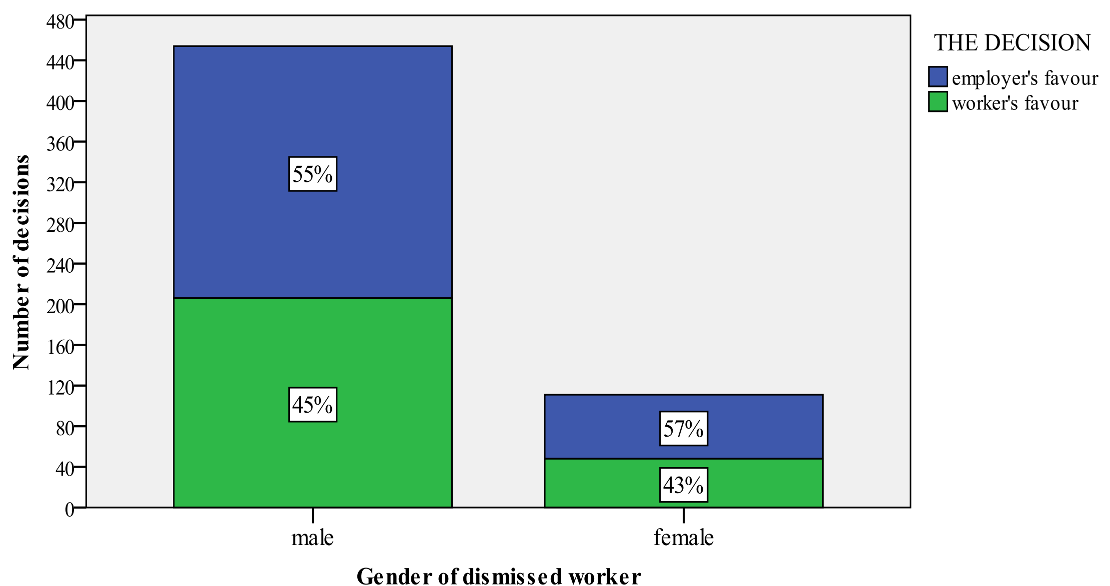

Figure 6.15 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by worker's gender*

6.1.5.2 Employment status of the worker

Figure 6.16 reflects the extensive proportion of claims made by full-time workers compared to workers performing part-time hours. It appears the part-time worker has more success at the arbitration table, winning 51 percent of claims, compared to the full-time worker who receives a favourable outcome in 44 percent of claims.

Figure 6.16 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by worker's employment status*

6.1.5.3 Occupation of the dismissed worker

Figure 6.17 displays that the majority of unfair dismissal claims came from machinery operators, drivers and labourers Technicians and tradespeople are least likely to receive favourable arbitration decisions, winning only 39 percent of their claims. Clerical and administration workers are the most successful at winning their unfair dismissal claims, with 49 percent of the decisions awarded in their favour.

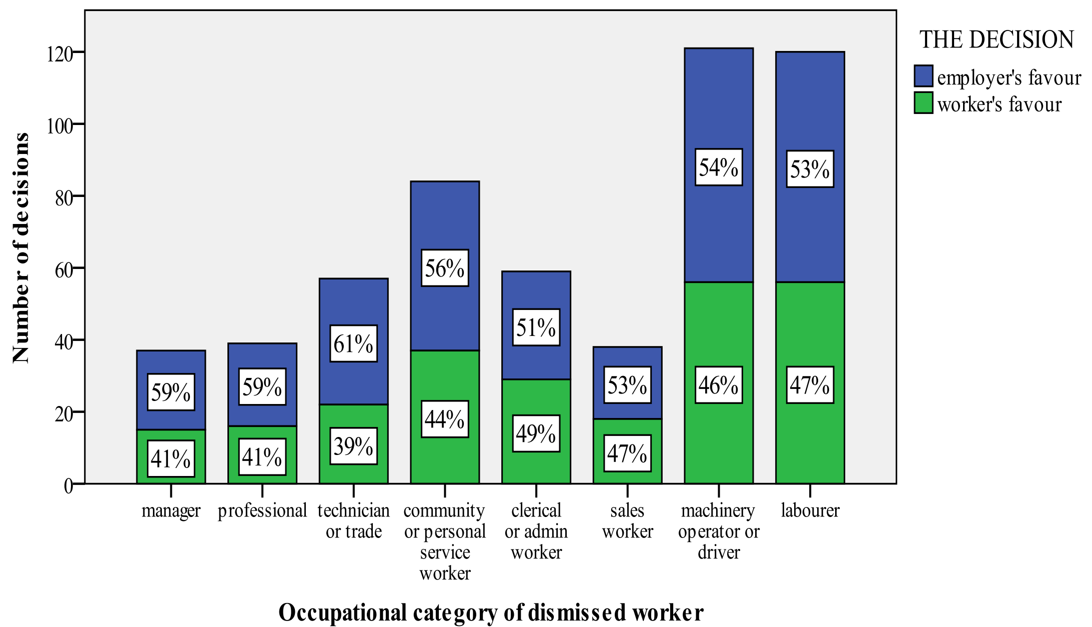

Figure 6.17 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by occupation*

6.1.6 Descriptive statistics for sub-question (c)

6.1.6.1 Gender of the arbitrator

Figure 6.18 contains the data pertaining to the gender of the arbitrator. It reveals that male arbitrators make the majority of the arbitration decisions. It also shows that male and female arbitrators award the same proportion of decisions, with both determining 45 percent of claims in favour of the worker.

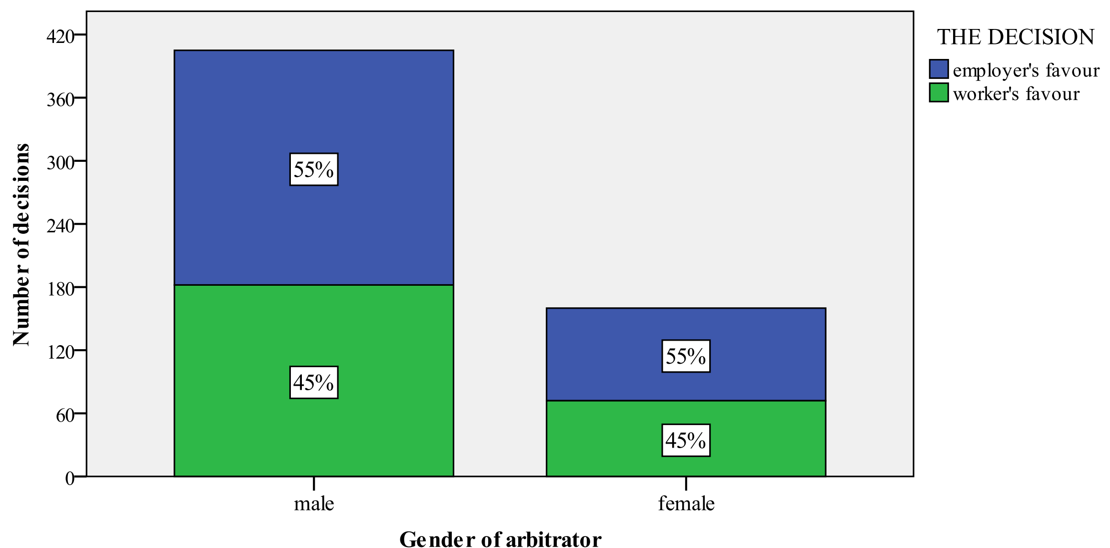

Figure 6.18 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by arbitrator's gender*

6.1.6.2 Professional background of the arbitrator

The graph in Figure 6.19 displays that arbitrators, who possess a résumé of union-related occupations before they became a tribunal member, determine arbitration decisions that favour the worker in 53 percent of cases.

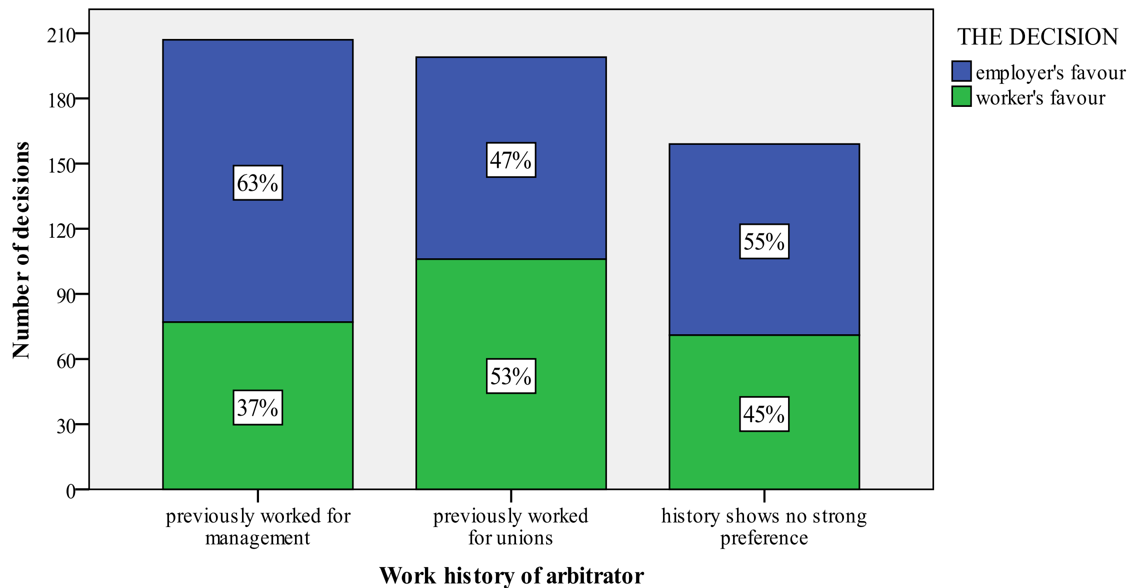

Figure 6.19 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by arbitrator's work background*

Whereas, a favourable decision is awarded to the worker in only 37 percent of cases, if the worker appears before an arbitrator that previously worked for management. In between these two extremes are the decisions made by those arbitrators whose previous work was for neither union nor employer (such as academics or public service workers), or a mix of management and union positions. These arbitrators award a favourable decision to the worker in 45 percent of cases.

6.1.6.3 Arbitral decision-making experience of the arbitrator

The graph in Figure 6.20 depicts the arbitrator's experience at making unfair dismissal arbitration decisions in misbehaviour cases. It suggests least experienced arbitrators - who had issued up to five unfair dismissal decisions - favour the worker in 65 percent of the claims. Inversely, arbitrators with the most experience – having issued 26 or more unfair dismissal decisions - favour the employer in 65 percent of the claims.

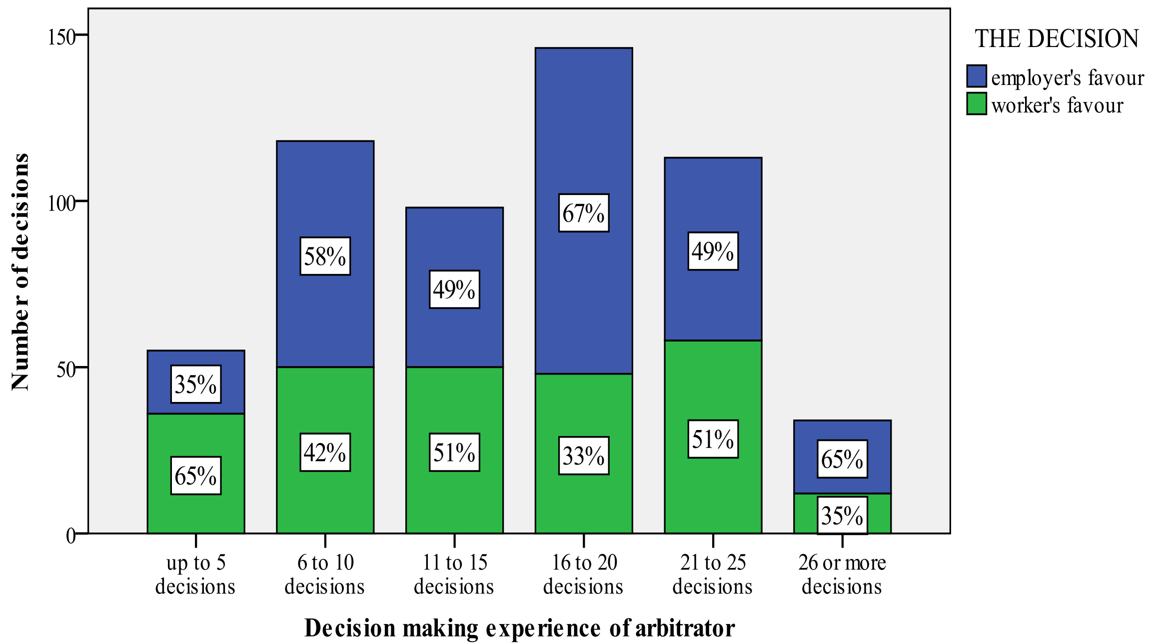

Figure 6.20 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by arbitrator experience*

6.1.6.4 Seniority of the arbitrator

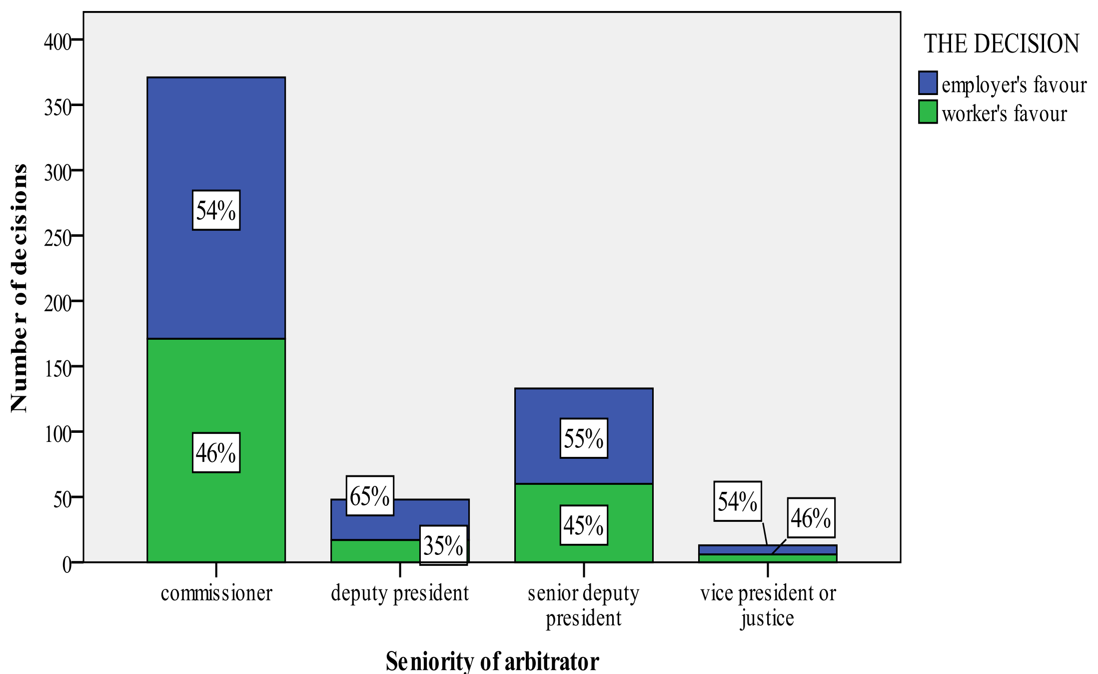

Figure 6.21 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by arbitrator seniority*

The graph in Figure 6.21 displays that the large majority of decisions are delivered by arbitrators designated as *commissioners* – the junior level in the tribunal

hierarchy. This is followed by decisions issued by *senior deputy presidents*, who issue more decisions than the more junior *deputy presidents*. The commissioners, senior deputy presidents and vice presidents/Justices reflect similar proportions of decision outcomes, with workers receiving favourable claims in 46 percent, 45 percent and 46 percent of their decisions, respectively. The deputy presidents show anomalous proportions, by issuing only 35 percent of their decisions in the worker's favour.

6.1.7 Descriptive statistics for sub-question (d)

6.1.7.1 Formality of the dismissal process

The graph in Figure 6.22 displays a strong trend. As the formality of the dismissal process increases, the decisions tend to favour the employer. Those dismissals that are actioned in an informal manner - primarily undocumented and relied on verbal discussions - fall in favour of the worker in 82 percent of decisions. This compares to only 39 percent of decisions falling in favour of the worker when the dismissal process is formalised through documentation.

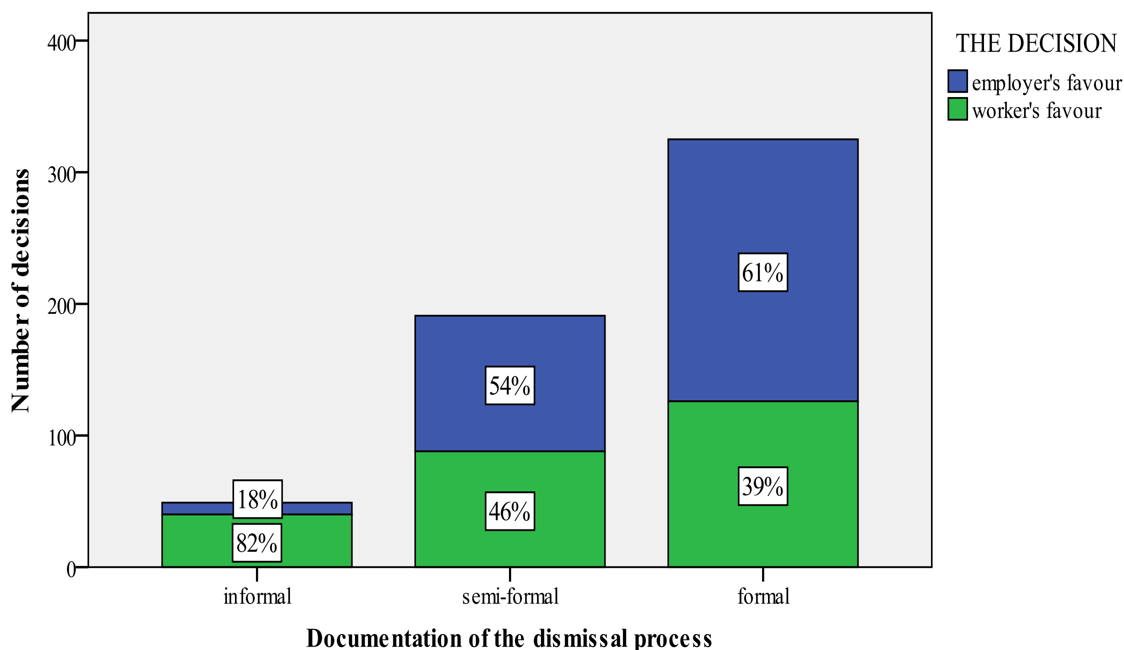

Figure 6.22 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by formality of dismissal process*

6.1.7.2 Support person

Figure 6.23 represents arbitration decisions in light of the presence or absence of a support person available to the worker during the meetings and investigations associated with the dismissal process. It shows that where either a union or companion is available, the employer's dismissal action is more likely to be upheld (in 60 and 66 percent of cases respectively). When it is clear workers had no collegial support, they win 54 percent of their claims.

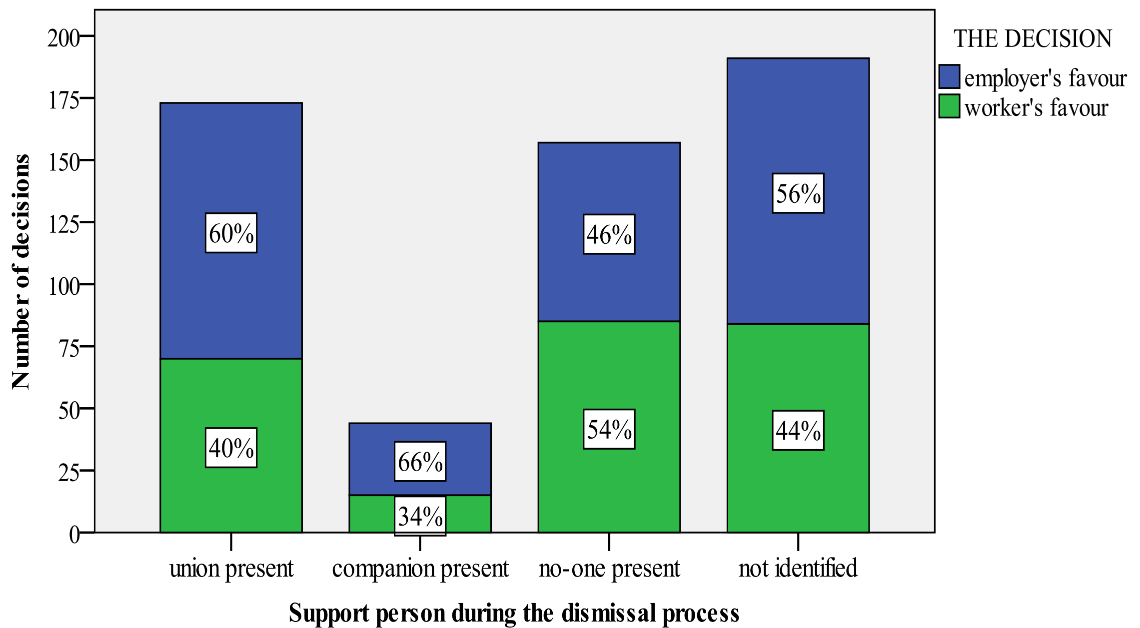

Figure 6.23 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by presence of a support person*

6.1.7.3 Business size

Figure 6.24 demonstrates that the vast majority of arbitration decisions are administered to workers who were dismissed from large businesses employing 200 or more workers. The graph also shows that workers from these large businesses are also the least likely to win their claim, with only 42 percent of the arbitration decisions in this category favourable to the workers. A mild trend is also evident in the graph, with the likelihood of an employee receiving a favourable claim increasing as the size of the business decreases.

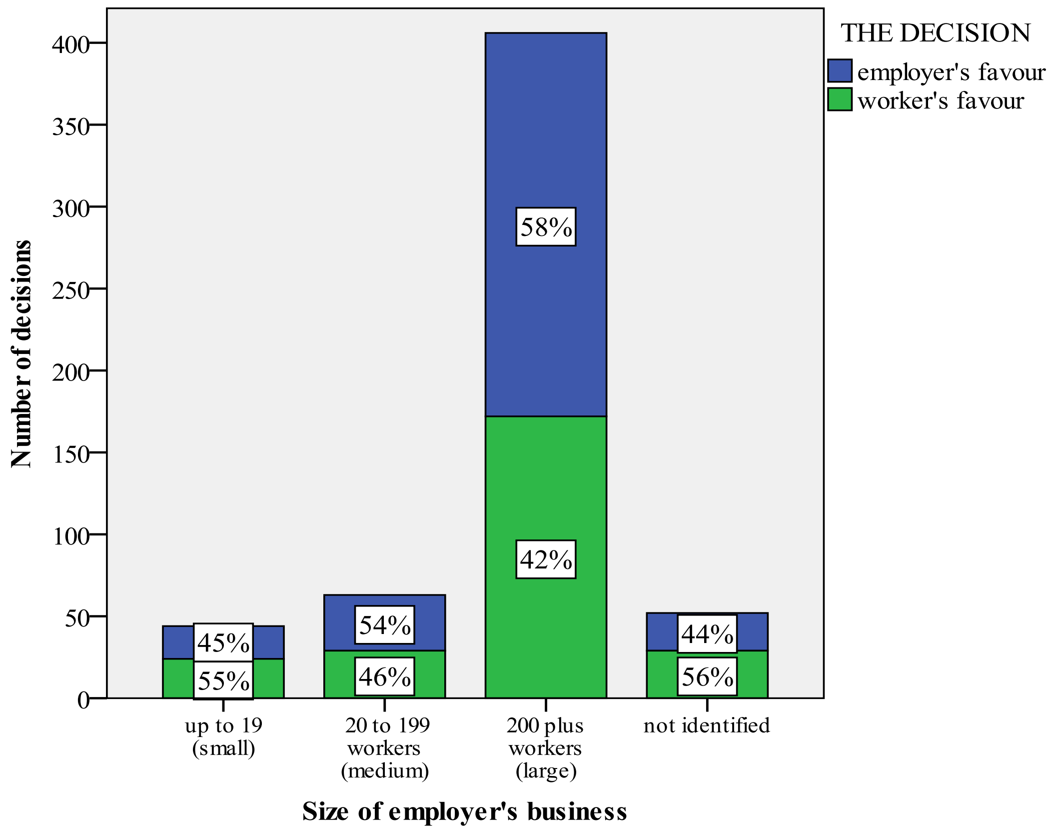

Figure 6.24 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by business size*

It is also possible that the 'not identified' cases are more than likely smaller businesses, as larger business are more likely have an internet presence making them easier to identify through supplementary fact finding (discussed in section 5.5.4 in the methodology chapter). In support of this contention, the 'not identified' cases reflect almost identical counts to those possessed by the 'up to 19' business size.

6.1.7.4 Presence of human resource expertise in the business

Figure 6.25 indicates that the vast majority of decisions involve employers who had, during the dismissal process, human resource management expertise at their disposal. The statistics suggest that a worker dismissed by an employer that engages an HR expert in the dismissal only wins his or her claim in 42 percent of cases. Whereas a worker dismissed by an employer that did not use an HR expert wins his or her claim in 55 percent of cases.

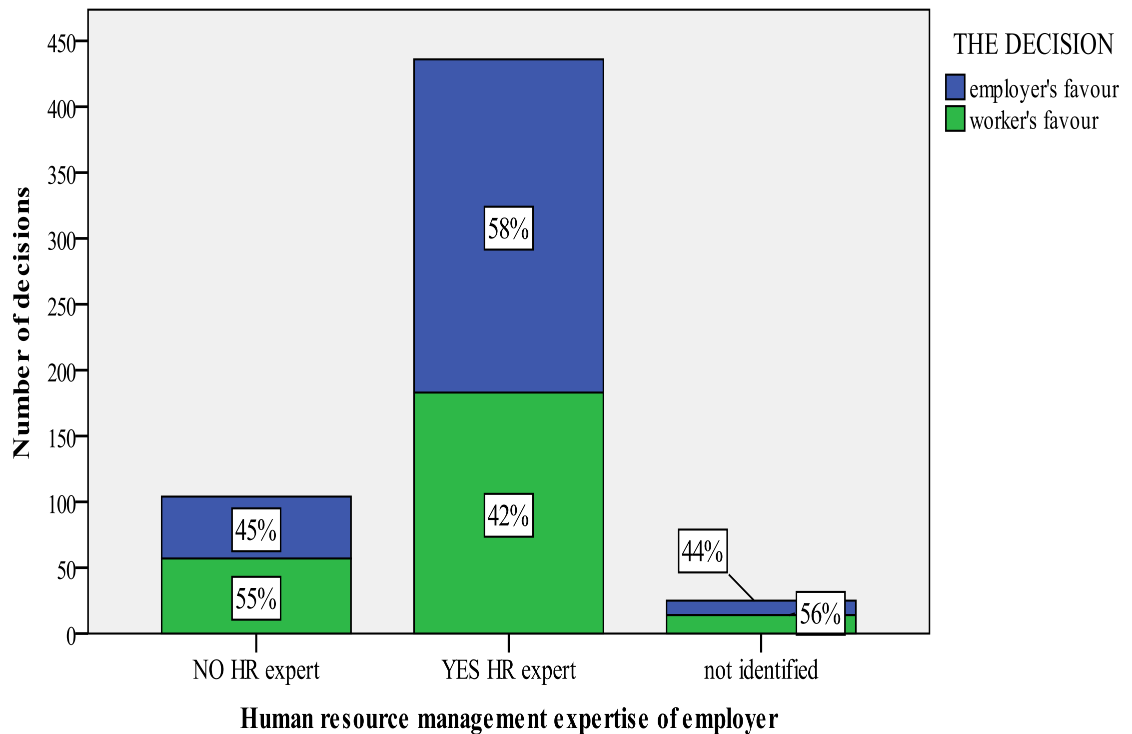

Figure 6.25 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by presence of HR experts in the employer's business*

6.1.7.5 Industry

It is noticeable in Figure 6.26 that the majority of arbitration decisions occur from claims arising from workers within the *transport, postal and warehousing* and the *manufacturing* industries. This is followed by *health care and social assistance*, then *retail trade*. The most successful claimant is the worker in *education and training* who receives a favourable decision in 65 percent of cases, compared to the worker in *financial and insurance services* who receives a favourable decision in only 22 percent of cases.

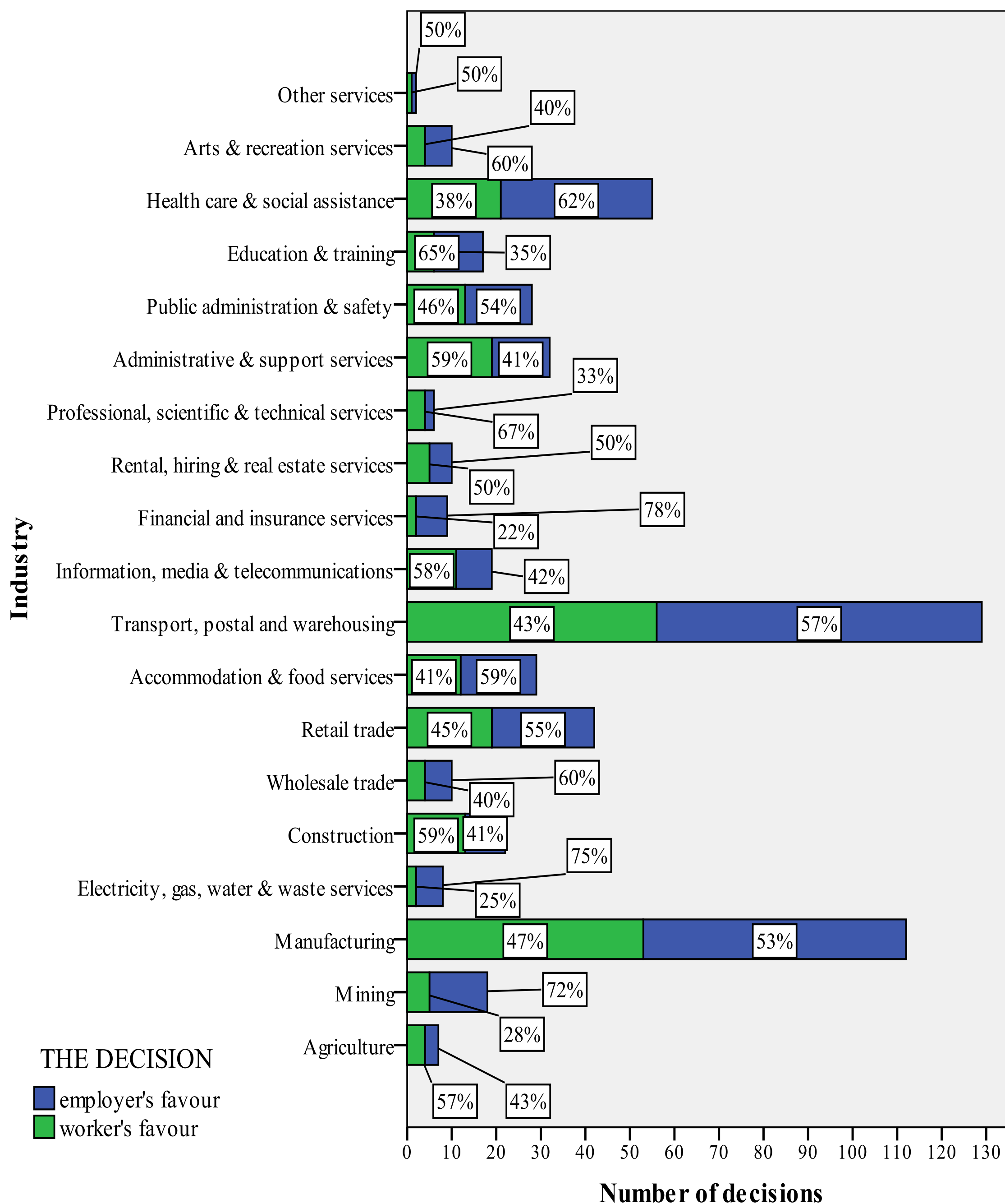

Figure 6.26 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by industry*

6.1.7.6 Business sector

The final graph for the descriptive statistics, in Figure 6.27 displays the distribution of decisions between those occurring for workers dismissed from a public sector employer compared to those dismissed from a private sector employer. Private sector workers receive favourable outcomes in 46 percent of cases, compared to only 40 percent of favourable cases for the public sector worker.

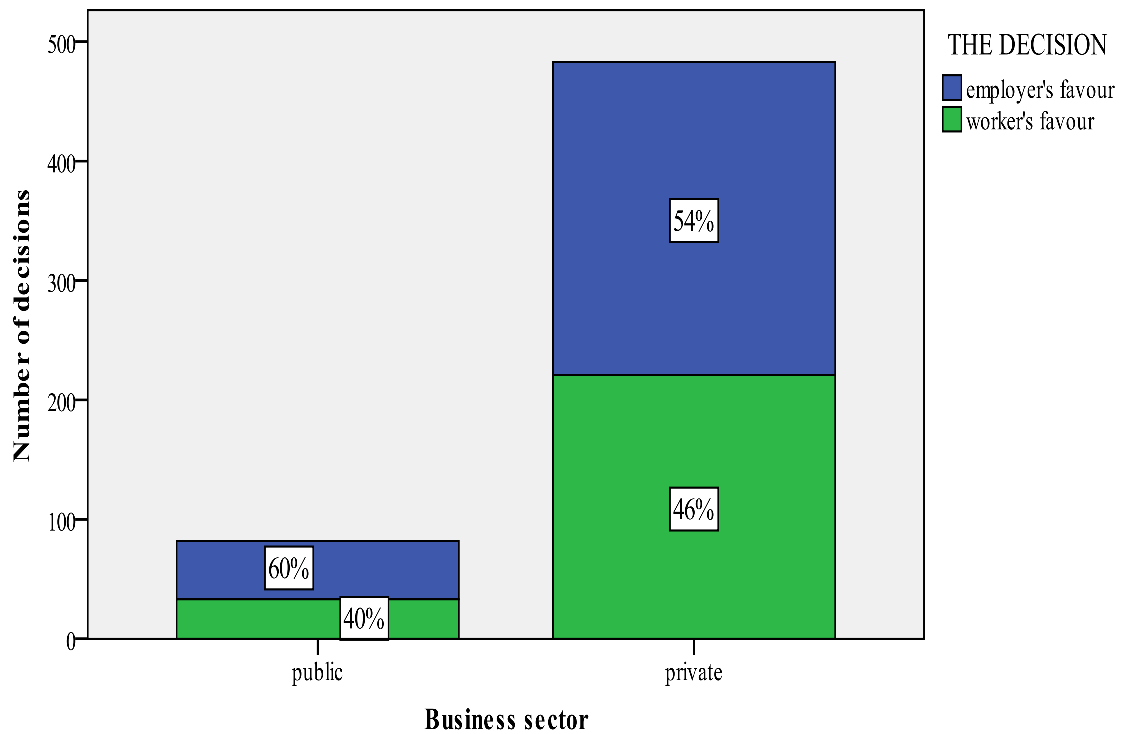

Figure 6.27 *Stacked bar graph of the outcomes of misbehaviour related unfair dismissal claims from 2000-2010, by business sector*

The next section of this chapter expands the analysis beyond the descriptive and uncontrolled bivariate relationships reported above, and progresses the analysis to determine the *degree of influence* that these variables have, both individually and collectively, on the arbitration decisions.

6.2 The logistic regression analysis

This section contains details of the econometric modelling results using the logistic regression technique. This analysis was performed in IBM SPSS version 19 software, which generated tables of substantial length. These tables have been redesigned for space-efficiency and reader-friendliness in this section. The actual SPSS output of the logistic regression analysis is contained Appendix 7.

In this section, the results of the multiple regression analysis for the model specified in section 5.8.2 of the methodology chapter, is presented in two tables. First, the logistic regression analysis of misbehaviour-related unfair dismissal arbitration decisions favourable to the workers is contained in Table 6.3. This is followed by a discussion about the diagnostics of the model fit and independent variables. Following, Table 6.4 contains the conversion of the odds ratios of worker wins to relative percentage probabilities (where the worker enters arbitration with a 45 percent baseline chance of winning a claim). This chapter reaches its climax where the results of the regression models contained in Tables 6.3 and 6.4 are used to determine whether or not each of the alternate hypotheses proffered throughout chapter 4 are to be upheld.

Provided as extra insight, yet in order not to distract the reader from the primary focus in this analysis, Appendix 8 contains a hierarchically arranged, logistic regression model of POOR_EVIDENCE_OR_REASON for a dismissal identified by arbitrators. Recalling that this particular independent variable caused the model to 'collapse' and needed to be excluded from the hierarchical modelling (see methodology chapter, section 5.9.3), this appendix was prepared with a view to informing the interested reader of the factors that appear to have influenced arbitrators in determining whether an employer dismissed a worker for what could be considered an 'invalid reason'.

6.2.1 The model of misbehaviour-related arbitration decisions on unfair dismissal claims

Table 6.3 displays the results of two sets of logistic regression: simple and multivariate. The left-side of the table presents a series of simple regressions: one for

each independent variable. The simple regression models estimate the autonomous influence of a single independent variable on the dependent variable without controls or adjustments for the other variables at play in the arbitration decision (Hosmer & Lemeshow 1989). It is recounted from the methodology chapter discussion that the primary reason for including results from the simple regressions was to observe the variation that occurred between controlled and uncontrolled effects, due to the fact that the multiple regression model could not sustain the inclusion of the POOR_ EVIDENCE_OR_ REASON variable.

Meanwhile, the right-side of Table 6.3 presents the multiple regression models arranged hierarchically into two blocks. The hierarchical blocks provide information about the impact of additional variables as they enter the model in a logical order, whilst simultaneously controlling for those previously included in the model (Southey & Innes 2010). The blocks were sequenced rationally so that pre-ordained variables, such as personal characteristics, demographics and firmagraphic factors, were entered initially into the base model; followed by the full model which contained the variables pertaining to the arbitration event such as type of misbehaviour, explanations and advocacy. To test several of the hypotheses it was necessary to include in the model, interaction effects between WORKER_GENDER and ARBITRATOR_GENDER; WORKER_GENDER, and OCCUPATION; WORKER_GENDER and STATUS; and finally DISMISSAL ERRORS and SEVERITY. These interactions were entered as the last items in the full model because any effects would be the result of 'enduring combinations of factors controlling from the previous blocks ... the most conservative method for showing a persistent effect' (Southey & Innes 2010, p. 11).

Table 6.3 *Logistic regression output of misbehaviour-related unfair dismissal arbitration decisions in the worker's favour # prepared in SPSS Statistics version 19: a comparison of simple and multivariate regression models*

INDEPENDENT VARIABLES T	SIMPLE REGRESSIONS — UNADJUSTED, SINGLE PREDICTOR MODELS				HIERARCHICALLY ARRANGED, MULTIPLE REGRESSION — BASE MODEL				FULL MODEL				
	B	Sig. (2-tail)	Odds ratio	Nagelkerke R	B	S.E.	Wald	Sig.	B	S.E.	Wald	Sig. (2-tail)	Odds ratio
SECTOR (public)	-.225	.354	.798	.002	-.125	.353	.126	.723	1.026	.696	2.173	.140	2.789
INDUSTRY:		.705		.015			8.004	.534			12.361	.194	
manufacture, wholesaling	.444	.329	1.559		.278	.511	.295	.587	2.038	1.559	1.711	.191	7.678
construction, utility supply	.575	.299	1.778		.368	.633	.338	.561	2.051	1.846	1.234	.267	7.774
retail	.384	.459	1.469		.166	.608	.074	.785	1.633	1.604	1.036	.309	5.117
hospitality, recreation	.212	.688	1.237		-.091	.648	.020	.888	-.925	1.881	.242	.623	.396
transport, postal, warehousing	.310	.493	1.364		.258	.512	.255	.614	2.710	1.536	3.113	.078*	15.026
communication, technical, professional ser.	.575	.260	1.778		.819	.596	1.887	.170	1.791	1.659	1.166	.280	5.997
administration & support services	.955	.083*	2.598		.978	.657	2.219	.136	.777	1.736	.200	.655	2.175
public administration & safety	.432	.443	1.541		.823	.701	1.377	.241	.000	1.759	.000	1.00	1.000
education, health, social assistance	.065	.894	1.067		.235	.593	.157	.692	.658	1.627	.163	.686	1.930
FIRM_SIZE:		.160		.012			1.557	.669			3.698	.296	
20 to 199 workers (medium)	-.341	.387	.711		.112	.452	.061	.805	-.874	.986	.786	.375	.417
200 plus workers (large)	-.490	.124	.613		.229	.462	.245	.621	.801	.980	.667	.414	2.227
not identified	.049	.904	1.051		.545	.484	1.269	.260	.643	1.049	.376	.540	1.902
HR_EXPERTISE:		.033		.016			.354	.838			1.745	.418	
yes, HR expert	-.517	.019**	.596		-.074	.364	.041	.840	-.085	.828	.011	.918	.918
not identified	.048	.914	1.049		.216	.511	.180	.672	1.390	1.182	1.381	.240	4.014
FORMALITY:	-.202	.017**	.817	.057	-.668	.186	12.827	.000**	-.563	.464	1.469	.225	.570

Independent Variables [T]	Simple Regressions: Unadjusted, Single Predictor Models				Hierarchically Arranged, Multiple Regression: Base Model				Hierarchically Arranged, Multiple Regression: Full Model				
	B	**Sig. (2-tail)**	**Odds ratio**	**Nagelkerke R**	**B**	**S.E.**	**Wald**	**Sig.**	**B**	**S.E.**	**Wald**	**Sig. (2-tail)**	**Odds ratio**
SUPPORT:		.032		.021			2.841	.417			7.465	.058*	
companion present	-.273	.440	.761		-.292	.397	.542	.462	-3.518	1.690	4.331	.037**	.030
worker unaccompanied	.552	.013**	1.737		.314	.280	1.261	.261	.581	.619	.882	.348	1.787
not identified	.144	.498	1.155		.184	.242	.576	.448	-.266	.579	.211	.646	.767
WORKER_GENDER (female)	-.086	.686	.917	.000	-.109	.265	.168	.682	1.741	1.279	1.852	.174	5.704
OCCUPATION:		.691		.005			5.733	.220			5.374	.251	
manager or professional	-.237	.372	.789		-.655	.354	3.434	.064*	1.703	.854	3.980	.046**	5.490
technician or trade	-.329	.273	.720		-.641	.351	3.331	.068*	.546	.819	.444	.505	1.726
community or personal service	-.104	.683	.902		-.337	.361	.871	.351	1.512	.924	2.679	.102	4.537
clerical/administration or sales	.074	.758	1.077		-.157	.324	.235	.628	1.375	.745	3.405	.065*	3.953
SERVICE:		.021		.037			19.310	.004			9.321	.156	
2 up to 5 years	-.280	.323	.756		-.044	.320	.019	.891	.219	.724	.092	.762	1.245
5 up to 10 years	-.091	.744	.913		.208	.333	.389	.533	.790	.682	1.341	.247	2.203
10 up to 15 years	-.656	.038**	.519		-.300	.382	.618	.432	-.576	.870	.438	.508	.562
15 up to 20 years	-.202	.610	.817		.135	.453	.089	.765	-2.211	1.202	3.381	.066*	.110
20 years and over	.069	.845	1.072		.793	.421	3.544	.060*	-.255	.945	.073	.787	.775
not identified	-1.038	.003**	.354		-1.076	.407	6.991	.008**	.208	.890	.054	.816	1.231
RECORD:		.002		.029			8.560	.014			.424	.809	
previous offences	.661	.003**	1.937		-.612	.219	7.792	.005**	-.287	.538	.284	.594	.751
not identified	.094	.675	1.099		-.511	.257	3.960	.047**	-.331	.582	.324	.569	.718
STATUS (part-time)	.267	.380	1.307	.002	.389	.384	1.026	.311	-.477	1.123	.180	.671	.621
ARBITRATOR_GENDER (female)	.002	.989	1.002	.000	.122	.251	.236	.627	.345	.630	.301	.583	1.413
ARBITRATOR_BACKGROUND:		.005		.025			11.158	.004			5.594	.061	

INDEPENDENT VARIABLES [T]	SIMPLE REGRESSIONS				HIERARCHICALLY ARRANGED, MULTIPLE REGRESSION								
	UNADJUSTED, SINGLE PREDICTOR MODELS				BASE MODEL				FULL MODEL				
	B	**Sig. (2-tail)**	**Odds ratio**	**Nagelkerke R**	**B**	**S.E.**	**Wald**	**Sig.**	**B**	**S.E.**	**Wald**	**Sig. (2-tail)**	**Odds ratio**
Union work background	.655	.001**	1.924		.808	.242	11.122	.001**	1.282	.581	4.879	.027**	3.606
No strong preference	.309	.150	1.362		.287	.258	1.241	.265	.950	.628	2.293	.130	2.587
ARBITRATOR_EXPERIENCE	-.113	.060**	.893	.008	-.104	.075	1.896	.169	-.431	.177	5.905	.015**	.650
ARBITRATOR_SENIORITY	-.036	.708	.964	.000	.137	.126	1.174	.279	.171	.306	.313	.576	1.187
PROPERTY_DEVIANCE	.363	.084*	1.437	.007					-1.819	.853	4.545	.033**	.162
PRODUCTION_DEVIANCE	-.201	.235	.818	.003					-2.189	.779	7.898	.005**	.112
PERSONAL_AGGRESSION	-.170	.343	.844	.002					-2.922	.833	12.314	.000**	.054
POLITICAL_DEVIANCE	.155	.657	1.168	.000					-1.952	.977	3.989	.046**	.142
SEVERITY	-.519	.000**	.595	.073					-.003	.338	.000	.992	.997
WORKPLACE_RELATED	.166	.335	1.180	.002					1.078	.886	1.483	.223	2.939
PERSONAL_INSIDE	-.212	.363	.809	.002					.889	.851	1.092	.296	2.434
PERSONAL_OUTSIDE	-.103	.646	.902	.001					/[a]	/[a]	/[a]	/[a]	/[a]
COMPLEXITY	-.008	.959	.992	.000					-1.611	.782	4.239	.040**	.200
REMORSE	.774	.001**	2.169	.025					-.761	.739	1.061	.303	.467
WORKER_ADVOCACY:		.005		.033							14.168	.003	
represented by union	.797	.006**	2.219						2.095	.885	5.608	.018**	8.129
represented by independent lawyer	.984	.000**	2.676						2.559	.793	10.418	.001**	12.925
representation not clear	.843	.006**	2.324						.725	1.008	.517	.472	2.065
EMPLOYER_ADVOCACY:		.084		.016							7.864	.049	
represented by association	.129	.737	1.137						1.270	1.084	1.372	.241	3.561
represented by independent lawyer	-.510	.065*	.600						-.989	.794	1.551	.213	.372
representation not clear	-.358	.245	.699						-.808	.845	.914	.339	.446
POOR_EVIDENCE_OR_REASON	21.994	.995	NP	.426					/[b]	/[b]	/[b]	/[b]	/[b]

Independent Variables [T]	Simple Regressions: Unadjusted, Single Predictor Models				Hierarchically Arranged, Multiple Regression: Base Model				Hierarchically Arranged, Multiple Regression: Full Model				
	B	**Sig. (2-tail)**	**Odds ratio**	**Nagelkerke R**	**B**	**S.E.**	**Wald**	**Sig.**	**B**	**S.E.**	**Wald**	**Sig. (2-tail)**	**Odds ratio**
MITIGATING_FACTORS	21.545	.998	NP	.125					28.034	4369.13	.000	.995	NP
MANAGEMENT_CONTRIBUTED	3.055	.000**	21.212	.156					6.443	2.740	5.530	.019**	628.405
PROBLEMATIC_INVESTIGATION	1.849	.000**	6.355	.084					3.805	1.914	3.949	.047**	44.906
PROBLEMATIC_ALLEGATION	1.332	.000**	3.789	.066					1.145	2.000	.328	.567	3.142
PROBLEMATIC_RESPONSE	1.848	.000**	6.349	.162					7.562	2.040	13.745	.000**	1924.22
PUNISHMENT_TOO_HARSH	22.008	.995	NP	.433					28.313	2330.17	.000	.990	NP
female arbitrator / female worker									-1.551	1.465	1.120	.290	.212
worker_gender by occupation:											8.119	.087	
female / manager or professional									-5.395	2.426	4.946	.026**	.005
female / technical or trade worker									9.258	25735.7[H]	.000	1.00	10486.5
female / community/personal service									.986	1.644	.359	.549	2.680
female / clerical/admin or sales worker									-1.721	1.671	1.061	.303	.179
female / part-time worker									1.937	1.732	1.251	.263	6.935
management_contributed / severity									-.428	.895	.228	.633	.652
problematic_investigation / severity									.177	.639	.077	.782	1.193
problematic_allegation / severity									.545	.744	.537	.464	1.725
problematic_response / severity									-1.583	.704	5.054	.025**	.205
Constant					4.069	2.140	.237	.627	-1.541	2.475	.387	.534	.214

	HIERARCHICALLY ARRANGED, MULIPLE REGRESSION							
	BASE MODEL				**FULL MODEL**			
Hierarchical model: Summary statistics								
-2 log likelihood	692.916				205.372			
Cox & Snell R Square	.139				.637			
Nagelkerke R Square	.186				.852			
Alternate goodness-of-fit statistic	Chi-square		df	Sig.	Chi-square		df	Sig.
Hosmer and Lemeshow Test	9.914		8	.271	3.761		8	.878
Classification tables		PREDICTED				PREDICTED		
Cut value at 0.50	OBSERVED	*Employer win*	*Worker win*	*% correct*	OBSERVED	*Employer win*	*Worker win*	*% correct*
	Employer Win	234	77	75.2	*Employer Win*	295	16	94.9
	Worker Win	126	128	50.4	*Worker Win*	28	226	89.0
	Overall %			**64.1**	*Overall %*			**92.2**

Explanatory notes:

* $p < .1$ (2-tailed test) ** $p < .05$ (2-tailed test). The hypothesis tests required 1-tailed *p* values which are obtained by halving the 2-tailed *p*-value.

internal values for the independent variable were 0 = employer's favour (as the comparison group) and 1 = worker's favour (included in the model)

NP not possible as a zero count cell in the variable's matrix produced extremely high standard errors (SE), resulting in an infinite odds ratio (discussed in the methodology chapter, section 5.9.3. These variables still influenced the remaining coefficients in the Model.

/[a] variable not included in the hierarchical model to avoid multicollinearity (discussed in methodology chapter, section 5.9.2)

/[b] variable not included in the hierarchical model to avoid complications of 'perfect prediction' (discussed in methodology chapter, section 5.9.3)

H extremely high standard error resulted from a low cell count in this variable's matrix: only two female technicians/trade workers in the dataset

T comparison groups for categorical variables in the models: SECTOR = private; INDUSTRY = agriculture, mining; FIRM_SIZE = up to 19 (small); HR_EXPERTISE = No HR expert; SUPPORT = union present; WORKER_GENDER = male; OCCUPATION = operator, driver or labourer; SERVICE = up to 2 years; RECORD = unblemished record; STATUS = full-time worker; ARBITRATOR_GENDER = male; ARBITRATOR_BACKGROUND = management background; WORKER_ADVOCACY = self-represented; EMPLOYER_ADVOCACY = self-represented; all other dummy variables = condition not present

6.2.2 Model fit diagnostics

Before describing how much influence the independent variables have on the arbitration decision - as exhibited in Table 6.3 – the model fit is explained to validate that the final model can provide sound answers to the hypotheses. This is achieved by considering the statistics reported in the overall summary statistics at the end of the Table 6.3, which provide measures for the multivariate model. To either accept or reject each alternate hypothesis is determined solely on the final block of the *multivariate* models. Thus, for brevity, the *Nagelkerke* R^2 was the sole summary statistic reported in Table 6.3 for each of the *simple* models.

First listed in the summary statistics are the *-2 log likelihood* statistics. Menard (2010) suggested this test was useful for determining the parameters of the model where larger values in the *-2 log likelihood* function indicate the independent variables have poorer predictive ability of the dependent variable. A perfect fitting model would have *-2 log likelihood* equal to zero (SPSS 2010). Thus, the decrease in the *-2 log likelihood* between the base model (692.9) and full model (205.3) reported for the hierarchical model in Table 6.3, suggests that the independent variables of interest – introduced in the full model - vastly improved the fit of the model.

Second, the *Nagelkerke* R^2 indicated how much the variability between decisions can be explained by the predictors in the model, as it is based on the comparison between the observed model and a model in which there is no predictors (Menard 2010). Multiplying the *Nagelkerke* R^2 by a hundred provides a percentage of variance explained. Scholars in the behavioural science literature suggested the following 'conventions' for effect sizes identified by R^2 tests: around 1 percent variance explained accounts for a small effect; around 10 percent indicates a medium effect; and around 25 or more precent indicates a large effect (Cohen 1988; Murphy 2002, p. 127). However, Cohen (1988) also cautioned that the amount of variance explained should be contextualised to the research problem and not to ignore very small values that may have cumulative effects. Therefore, reflecting first on the *simple models* presented in Table 6.3, apart from SEVERITY of the offence accounting for 7 percent of the variation in decisions, the scores reveal that the majority of the variables, on their own standing, had a small effect on the arbitration

decision. However, the mistakes made in the dismissal by the employer reveal to be very strong explanatory factors in their own right. Large effects are found for the variables POOR_EVIDENCE_OR_REASON and PUNISHMENT_TOO_ HARSH, with each accounting for 43 percent of the variation in decisions.

Turning attention towards the *Nagelkerke* R^2 scores for the *hierarchical models*, the combined effects of the moderator variables housed in the base model account for 18.6 percent of the variations in the decisions, which suggest ‘medium’ explanatory power based solely on the demographic features associated with each decision. The addition of the second block in the model that housed the major variables of interest, reveal a strong improvement in the explanatory power of the model, with the *Nagelkerke* R^2 indicating that 85.2 percent of the decisions are explained by the full model. As a comparison, Table 6.3 also provides the *Cox and Snell’s* R^2 statistics for the base and full model of 13.9 percent and 63.7 percent. *Cox and Snell’s* R^2 normally has a lower measure than *Nagelkerke’s* R^2 because, unlike *Nagelkerke’s* R^2, it cannot achieve a maximum range of 1 (or 100% explanatory power) (Burns & Burns 2008; Menard 2010). Nevertheless, *Cox and Snell’s* R^2 conservative estimates also suggest that the final model possesses strong explanatory properties.

Hosmer and Lemeshow’s goodness-of-fit statistic is reported as an alternative goodness-of-fit statistic to the *-2 log likelihood* (Burns & Burns 2008). It indicates how well the predicted values accurately represent the observed values by grouping observations and calculating chi-square statistics from the contingency table of observed and estimated frequencies (Hosmer & Lemeshow 1989). Under this test, well fitting models actually show a *non-significant* result ($p > .05$) because it indicates there is *no difference* between observed values and model-predicted values (Burns & Burns 2008; Hosmer & Lemeshow 1989; SPSS 2010). Thus, an insignificant chi-square statistic suggests that the predictions made by the model are not significantly different from the actual observations entered into the model. Desirable, non-significant *Hosmer and Lemeshow statistics* are detected in this analysis and are reported in Table 6.3, with the base model possessing a *p*-value of .271; and the full model possessing a *p*-value of .878.

The final model summary statistic appearing in Table 6.3 is the *classification table*. The classification table offers an alternative to the goodness of fit statistics. Instead of using chi-square foundations (as used in the *-2 log likelihood* and *Hosmer and Lemeshow's goodness-of-fit*), it uses percentages to reveal the proportion of cases that have been predicted correctly (Burns & Burns 2008; SPSS 2010). The *classification table* results reported in Table 6.3 suggest that the full model performs strongly at predicting the outcome overall, with it classifying correctly 92.2 percent of the observations entered into it. The *classification tables* also reveal that both models are better at predicting decisions favouring the employer more so than 'worker wins'. However, the full model shows a strong improvement in its ability to predict 'worker wins' with the percentage of correct predictions improving from 50.4 percent in the base model to 89.0 percent in the full model.

A visual demonstration of these classification predictions is provided in Figure 6.28. The clear clustering of observations at either end of the X axis shows that the cases were well-differentiated by the model allowing it to correctly classify the cases. The absence of cases around the midpoint (.5) on the X axis suggests that the model is apt at classifying the more 'difficult' cases (Burns & Burns 2008, p. 583). In essence, the classification tables and classification plot indicate clearly that the additional predictors entered into the full model produce a model that is superior to the base model.

```
                 Step number: 1

                 Observed Groups and Predicted Probabilities

        160 +                                                                                                    +
            I                                                                                                   wI
            I                                                                                                   wI
 F          I                                                                                                   wI
 R      120 +e                                                                                                  w+
 E          Ie                                                                                                  wI
 Q          Ie                                                                                                  wI
 U          Ie                                                                                                  wI
 E       80 +e                                                                                                  w+
 N          Ie                                                                                                  wI
 C          Ie                                                                                                  wI
 Y          Ie                                                                                                  wI
         40 +e                                                                                                  w+
            Iee                                                                                                 wI
            Ieeew                                                                                               wI
            Ieeeeee  eee e e  e  w                                                                           wwwwI
 Predicted ---------+---------+---------+---------+---------+---------+---------+---------+---------+---------+----------
   Prob:   0        .1        .2        .3        .4        .5        .6        .7        .8        .9         1
   Group:  eeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeeewwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwwww

           Predicted Probability is of Membership for worker's favour (claim upheld)
           The Cut Value is .50
           Symbols: e - employer's favour (claim dismissed)
                    w - worker's favour (claim upheld)
           Each Symbol Represents 10 Cases.
```

Figure 6.28 *SPSS classification plot of observed and predicted arbitration decisions for the full model in the hierarchical logistic regression*

6.2.3 Independent variable diagnostics

For each of the independent variables entered into both the simple and hierarchical models, Table 6.3 provides the log odds (B) or logit; its exponentiated value (odds ratio or Exp(B)); and significance values. The following explanations of these statistics were informed by Burns and Burns (2008). The B value is the logistic coefficient (log odds or logit) that indicates a negative or positive relationship with the dependent variable and performs the same function as b values in linear regression for calculating a predictive formula. In Table 6.3, SECTOR's logit (in the full model) is B = 1.026. This means that a worker from the public sector has increased log odds of receiving a favourable decision by 1.026. Whilst quoting such a statistic offers modest enlightenment to the reader, the log odd statistic is the point of origin from which odds ratios and percentages can be calculated.

The odds ratio is exponentiated B and indicates the change in the odds each time the predictor is raised by one unit. Thus, referring to Table 6.3 for SECTOR, the odds ratio in the full model of 2.789 indicates that the odds of a public sector worker receiving a favourable decision are 2.798 times *more likely* than a private sector worker. The odds ratio also denotes the direction of the relationship. Whereby if its value exceeds 1, the odds that the event of interest will occur increases (a positive relationship), and if it is less than one, the odds decrease (a negative relationship).

Two additional statistics are provided in the hierarchical models in Table 6.3: standard errors (SE), and the Wald statistic. Standard errors are the 'best indicator of numerical problems in logistic regression' (Hosmer & Lemeshow 1989, p. 29). Very large standard errors indicate problems with the data structure – such as multicollinearity or zero cell counts. As anticipated in the methodology chapter, large standard errors occur in the full model, attributable to zero cell counts, for the following variables: MITIGATING_FACTORS (SE = 4369.13); PUNISHMENT_ TOO_HARSH (SE = 2330.17); and POOR_EVIDENCE_OR_REASON (SE = not possible). The large standard error for the interaction effect between female workers and technical or trade occupations (SE = 25,735.7) is attributed to the presence of only two cases that possessed these attributes. Otherwise, the standard errors for the remaining variables in the model are low.

The Wald statistic must be interpreted with the *p*-value associated with it as it indicates the significance of each independent variable in the model. It is this statistic that leads to, ultimately, the acceptance or rejection of alternate hypotheses presented in this thesis. When the *p*-value is below the a priori significant level of .05, the variable is not considered to be to statistically significantly influencing the dependent variable. The *p*-values associated with the Wald statistics indicate '*merely the strength of evidence that there is some effect, not the magnitude of the effect*' (Thompson 2009, p. 2). For this reason, it is essential to consider the odd ratios to determine the magnitude of the effect. To avoid redundancy in the discussion, rather than commenting here about the independent variables that showed significant effects based on the Wald tests, commentary has been made under the results section pertaining to each of the individual hypothesis tests.

6.2.4 Observations drawn from comparing the simple and multivariate models

The simple and multivariate models allow for comparisons to be drawn between the unadjusted effects and controlled effects of each independent variable. Importantly, as suggested by Hosmer and Lemeshow (1989), the simple modelling provided insights about the three, zero-count independent variables discussed in the methodology chapter: sub-section 5.9.3 for which it were impossible to calculate their odds ratios (POOR_EVIDENCE_OR_REASON, PUNISHMENT_TOO_ HARSH, MITIGATING_FACTORS). However, it can be stated that POOR_ EVIDENCE_ OR_REASON possesses a log odds (B) factor of 21.994 in the simple model. Recounting that this variable needed to be excluded from the multivariate model, we can at least tell from this log odd statistic that the odds of a favourable decision to the worker increased by 21.994 units when this condition was present. Further comparisons of the simple to the multivariate model show that the log odds in the simple model for MITIGATING_FACTORS show 21.545 and increased by 7 units to 28.034 in the full model. A similar result occurs for PUNISHMENT_ TOO_HARSH with log odds = 22.008 in the simple model and increasing by 6 units to 28.313 in the full model. The conclusion here is that the presence of any of these three variables has an extremely powerful influence on an arbitration decision falling in the worker's favour.

The comparative layout of the simple and multivariate models in Table 6.3 reveals different patterns of statistical significance amongst a number of the independent variables. There are variables for which a significant effect remained persistent across the models (arbitrator background, worker advocacy, property deviance) whilst other significant effects in the simple model disappeared in the full model (HR expertise, formality, previous offences, remorse, employer advocacy). There are those that were statistically significant in the multivariate but not in the simple models (support, production deviance, political deviance, personal aggression, complexity), and finally a variable that waxes and wanes across the models (arbitrator experience). To avoid repetition, relevant observations about the persistency or deviations of the effects have been incorporated with the hypotheses results.

6.2.5 Conversion of odds ratio to percentage probability

The odds of an event occurring (odds ratios or exponentiated B) reported in Table 6.3 - whilst easier to interpret than the log odds (B) - are still not as easily interpreted as percentages for conveying the amount of influence of an effect. Therefore, the odds ratios reported for each of the effects in Table 6.3 were subsequently converted to percentage probabilities. Table 6.4 thus reports the percentage chance a worker has of winning a claim and whether they have better or worse chances compared to the expected likelihood of a successful claim. To calculate these insights, it was first necessary to identify the starting point – the baseline chance – of a worker winning a claim (SPSS 2010).

To determine this baseline chance, initial reference was made to the statistics from the annual reports of the federal industrial tribunal which were presented in chapter 3 in Table 3.6. These statistics revealed that from 2000 to 2010 the chance of an employee convincing an arbitrator to overturn management's dismissal action was, on average, 48 percent with the highest success rate occurring in 2005-06 at 56 percent and the lowest success rate occurring in 2008-09 with only 38 percent of claims favouring the employee. Notably, this statistic took into account arbitration decisions over dismissals for reasons *in addition to* misbehaviour, such as redundancy and work performance. As the investigation in this thesis focuses only on misbehaviour-related dismissals, reference was further made to the descriptive

statistics presented in this chapter which suggested that for the same ten year period, the *population* of decisions on misbehaviour related claims showed that workers won favourable decisions in 45 percent of cases, or, 9 in 20 claims. Thus it was determined - on the basis that the 45 percent chance of a worker win for misbehaviour-related dismissal claims was not too far removed from the 48 percent baseline for all types of claims - to use the 45 percent chance as the baseline chance for further calculations.

A 45 percent baseline means the starting odds of a worker 'win' is 45/55 (55 being the chance of not winning a claim), or odds of .82. To clarify, the odds are *not* suggesting that the worker has an 82 percent chance of winning– recalling that the baseline chance is actually 45 percent - but rather the odds that a worker will win a claim are .82, which is the same as stating the probability/chance a worker will win a claim is 9 in 20 (or 45 percent). Out of interest, employers receive favourable decisions 55 percent of the time, or 11 in 20 claims. Thus it can be stated that the odds that an employer receives a favourable decision are 1.22. However, for consistency, the analysis assumes the perspective of 'worker wins', or put another way, 'arbitration decisions favourable to the worker'.

Thus, in Table 6.4, the relative probability for each variable is calculated from a *biased* estimate of the baseline odds: .82 (45/55 or worker wins 9 of every 20 claims). An *unbiased* estimate of the probably would use baseline odds of 1 or 50/50 (the same as workers winning 10 of every 20 claims). To satisfy the author's curiosity, an unbiased, baseline odds of 1 was also calculated for each of the independent variables in the model to discover it resulted in only minor variations in the likelihood of between two and five percent, compared to those calculations using the biased, baseline odds. This is not surprising because the biased, baseline odds (.82) of a worker winning a claim were close to unbiased, baseline odds of 1.

Returning to the opening point in this section, the log odds and odds ratios of an event occurring are more complex to interpret than percentages and relative likelihood of an event occurring. According to SPSS (2010) the non-linear nature of the logistic regression means that the probability calculated from the odds ratio changes depending upon the baseline probability of a case. As an example from Table 6.3, SECTOR showed an odds ratio of 2.789. This means the model estimated

that the odds of a worker receiving a favourable decision increased by a factor of 2.789 if the worker came from the public sector. With baseline odds of .82, increasing the odds by a factor of 2.789 results in a *relative* odds ratio of 2.286 [that is, .82 x 2.789] for SECTOR. The consequent increase in the *probability* of a public SECTOR employee winning a claim can be calculated by using the probability formula: **odds/(1 + odds)** (Southey & Innes 2010; SPSS 2010). Inserting the revised public sector odds ratio into the formula [2.286/(1+2.286) = .695] equates to public sector workers possessing a 70 percent higher chance of winning their claim than private sector workers. However, recalling that the baseline chance of a worker winning a claim was 45 percent, the *relative* increase in the probability of a public sector worker winning a claim is actually only 25 percent higher than a private sector worker.

Establishing that the 'starting odds' of .82 for a worker 'win', it is possible to calculate the probability and relative probability of worker 'wins' for each of the independent variables. Table 6.4 reports odds ratios for these individual predictor variables converted to the 'percentage probability' of a worker win and the percentage 'relative probability' of a worker win. Again, Table 6.4 with its comparative layout offers insights into simple regression percentage probabilities alongside the percentage probabilities for multivariate relationships.

To give an example of a percentage probability and relative probability, using the first independent variable entered into the model, SECTOR, the simple model suggests workers from the public sector had a 40 percent chance of winning their claim. However, in relative terms, when workers expect to only win 45 percent of their claims in the first place, this means that workers in the public sector are actually facing a 5 percent reduced chance of winning their claim compared to workers in the private sector. In the multivariate model, when all variables are considered, we see a reversal of fortune for public sector workers with a 70 percent chance of winning their claim. Using again the starting chance of 45 percent, this translates to a 25 percent improved chance of a public sector worker wining a claim over a private sector worker. The relative probabilities reported in Table 6.4 are referred to throughout the discussions explaining the results of the individual hypothesis tests.

Table 6.4 *Probabilities and relative probabilities of misbehaviour-related unfair dismissal arbitration decisions in the worker's favour: a comparison of simple and multivariate regression models*

INDEPENDENT VARIABLES	SIMPLE REGRESSION MODELS			THE FINAL-BLOCK OF THE MULTIVARIATE MODEL		
	Odds ratio	Probability of a 'worker win' (using 45/55 odds)	Relative probability of a 'worker win' (using a 45% baseline)	Odds ratio	Probability of a 'worker win' (using 45/55 odds)	Relative probability of a 'worker win' (using a 45% baseline)
SECTOR (public)	.798	40%	5% less likely	2.789	70%	25% more likely
INDUSTRY:						
manufacture, wholesaling	1.559	56%	11% more likely	7.678*	86%	41% more likely
construction, utility supply	1.778	59%	14% more likely	7.774	86%	41% more likely
retail	1.469	55%	10% more likely	5.117	81%	36% more likely
hospitality, recreation	1.237	50%	5% more likely	.396	25%	20% less likely
transport, postal, warehousing	1.364	53%	8% more likely	15.026**	92%	47% more likely
communication, technical, professional ser.	1.778	59%	14% more likely	5.997	83%	38% more likely
administration & support services	2.598*	68%	23% more likely	2.175	64%	19% more likely
public administration & safety	1.541	56%	11% more likely	1.000	45%	equal chance
education, health, social assistance	1.067	47%	2% more likely	1.930	61%	16% more likely
FIRM_SIZE:						
20 to 199 workers (medium)	.711	37%	8% less likely	.417	25%	20% less likely
200 plus workers (large)	.613	33%	12% less likely	2.227	65%	20% more likely
not identified	1.051	46%	1% more likely	1.902	61%	16% more likely
HR_EXPERTISE:						
yes, HR expert	.596**	33%	12% less likely	.918	43%	2% less likely
not identified	1.049	46%	1% more likely	4.014	77%	32% more likely
FORMALITY:	.817**	40%	5% less likely	.570	32%	13% less likely
SUPPORT:						
companion present	.761	38%	7% less likely	.030**	2%	43% less likely
worker unaccompanied	1.737**	59%	8% more likely	1.787	59%	14% more likely

INDEPENDENT VARIABLES	SIMPLE REGRESSION MODELS			THE FINAL-BLOCK OF THE MULTIVARIATE MODEL		
	Odds ratio	Probability of a 'worker win' (using 45/55 odds)	Relative probability of a 'worker win' (using a 45% baseline)	Odds ratio	Probability of a 'worker win' (using 45/55 odds)	Relative probability of a 'worker win' (using a 45% baseline)
not identified	1.155	49%	4% more likely	.767	39%	6% less likely
WORKER_GENDER (female)	.917	43%	2% less likely	5.704	82%	37% more likely
OCCUPATION:						
manager or professional	.789	39%	6% less likely	5.490**	82%	37% more likely
technician or trade	.720	37%	8% less likely	1.726	59%	14% more likely
community or personal service	.902	43%	2% less likely	4.537	79%	34% more likely
clerical/administration or sales	1.077	47%	2% more likely	3.953*	76%	31% more likely
SERVICE:						
2 up to 5 years	.756	38%	7% less likely	1.245	51%	6% more likely
5 up to 10 years	.913	43%	2% less likely	2.203	64%	19% more likely
10 up to 15 years	.519**	30%	15% less likely	.562	32%	13% less likely
15 up to 20 years	.817	40%	5% less likely	.110*	8%	37% less likely
20 years and over	1.072	47%	2% more likely	.775	39%	6% less likely
not identified	.354**	22%	23% less likely	1.231	50%	5% more likely
RECORD:						
previous offences	1.937**	61%	16% more likely	.751	38%	7% less likely
not identified	1.099	47%	2% more likely	.718	37%	8% less likely
STATUS (part-time)	1.307	52%	7% more likely	.621	34%	11% less likely
ARBITRATOR_GENDER (female)	1.002	45%	equal chance	1.413	54%	9% more likely
ARBITRATOR_BACKGROUND:						
Union work background	1.924**	61%	16% more likely	3.606**	75%	30% more likely
No strong preference	1.362	53%	8% more likely	2.587	68%	23% more likely
ARBITRATOR_EXPERIENCE	.893**	42%	3% less likely	.650**	35%	10% less likely
ARBITRATOR_SENIORITY	.964	44%	1% less likely	1.187	49%	4% more likely

INDEPENDENT VARIABLES	SIMPLE REGRESSION MODELS			THE FINAL-BLOCK OF THE MULTIVARIATE MODEL		
	Odds ratio	**Probability of a 'worker win'** (using 45/55 odds)	**Relative probability of a 'worker win'** (using a 45% baseline)	**Odds ratio**	**Probability of a 'worker win'** (using 45/55 odds)	**Relative probability of a 'worker win'** (using a 45% baseline)
PROPERTY_DEVIANCE	1.437*	54%	9% more likely	.162**	12%	33% less likely
PRODUCTION_DEVIANCE	.818	40%	5% less likely	.112**	8%	37% less likely
PERSONAL_AGGRESSION	.844	41%	4% less likely	.054**	4%	41% less likely
POLITICAL_DEVIANCE	1.168	49%	4% more likely	.142**	10%	35% less likely
SEVERITY	.595**	33%	12% less likely	.997	45%	equal chance
WORKPLACE_RELATED	1.180	49%	4% more likely	2.939	71%	26% more likely
PERSONAL_INSIDE	.809	40%	5% less likely	2.434	67%	22% more likely
PERSONAL_OUTSIDE	.902	43%	2% less likely	NP	NP	NP
COMPLEXITY	.992	45%	equal chance	.200**	14%	31% less likely
REMORSE	2.169**	64%	19% more likely	.467	28%	17% less likely
WORKER_ADVOCACY:						
represented by union	2.219**	65%	20% more likely	8.129**	87%	42% more likely
represented by independent lawyer	2.676**	69%	24% more likely	12.925**	91%	46% more likely
representation not clear	2.324**	66%	21% more likely	2.065	63%	18% more likely
EMPLOYER_ADVOCACY:						
represented by association	1.137	48%	3% more likely	3.561	74%	29% more likely
represented by independent lawyer	.600*	33%	12% less likely	.372	23%	22% less likely
representation not clear	.699	36%	9% less likely	.446	27%	18% less likely
POOR_EVIDENCE_OR_REASON	NP	NP	NP	NP	NP	NP
MITIGATING_FACTORS	NP	NP	NP	NP	NP	NP
MANAGEMENT_CONTRIBUTED	21.212**	95%	50% more likely	628.405**	99.8%	54.8% more likely
PROBLEMATIC_INVESTIGATION	6.355**	84%	39% more likely	44.906**	97%	52% more likely
PROBLEMATIC_ALLEGATION	3.789**	76%	31% more likely	3.142	72%	27% more likely
PROBLEMATIC_RESPONSE	6.349**	84%	39% more likely	1924.22**	99.9%	54.9% more likely

INDEPENDENT VARIABLES	SIMPLE REGRESSION MODELS			THE FINAL-BLOCK OF THE MULTIVARIATE MODEL		
	Odds ratio	**Probability of a 'worker win'** (using 45/55 odds)	**Relative probability of a 'worker win'** (using a 45% baseline)	**Odds ratio**	**Probability of a 'worker win'** (using 45/55 odds)	**Relative probability of a 'worker win'** (using a 45% baseline)
PUNISHMENT_TOO_HARSH	NP	NP	NP	NP	NP	NP
female arbitrator / female worker				.212	15%	30% less likely
worker_gender by occupation:						
female / manager or professional				.005**	.004%	44.996% less likely
female / technical or trade worker				10486.5	99.9%	54.9% more likely
female / community/personal service				2.680	69%	24% more likely
female / clerical/admin or sales worker				.179	13%	32% less likely
female / part-time worker				6.935	85%	40% more likely
management_contributed / severity				.652	35%	10% less likely
problematic_investigation / severity				1.193	49%	4% more likely
problematic_allegation / severity				1.725	59%	14% more likely
problematic_response / severity				.205**	14%	31% less likely

* $p < .1$ (2-tailed) ** $p < .05$ (2-tailed)

6.3 Responses to the hypotheses

By using the regression results derived in the hierarchical model (in Table 6.3), each hypothesis deduced from the literature under each of the major research questions and sub-questions, is now addressed directly with a response. It is worth noting four points about how it was determined to either reject or retain the null hypothesis.

First, each hypothesis predicted the direction in which the independent variable would influence the outcome, which required one-tailed significance testing. SPSS presents *p*-values for two-tailed significance tests, thus it was necessary to divide in half, the *p*-value presented in Table 6.3, to obtain the one-tail *p*-values required for directional hypotheses (UCLA 2012b). Throughout the following results, *only* the ***one-tail*** *p*-values associated with each hypothesis are reported and considered.

Second, an a priori *p*-value of .05 was used to determine either the rejection or retention of the null hypothesis. For this determination to occur, reference was made to the *p*-value in the *final block* of the hierarchical model, which assessed the influence of each independent variable whilst holding constant logical, prior conditions. Note, this will not preclude references throughout these discussions, to other statistically significant items in either the simple regressions or base model.

Third, the statistics observed and reported to inform each hypothesis were the log odds (B), degrees of freedom (*df*) and the actual *p*-value for the independent variable/s implicated by the hypothesis. The log odds (or logit) are reported because it is the original term in the model (SPSS 2010) and it is from this coefficient that the odds ratio, and subsequently, chance probabilities, were calculated.

And, *fourth,* the discussion under each hypothesis also incorporates the odds ratio conversion to percentage probabilities reported in Table 6.4 because these statistics offer a more intuitive understanding of the degree of influence each variable has on the arbitration decision. Importantly, these discussions assume that a worker entered arbitration with a 45 percent baseline chance of winning a claim. Thus the improved or reduced chances quoted in the discussions are **relative** to this 45 percent starting point (as shown in the final column in Table 6.4).

6.3.1 Research question 1 – hypothesis 1 (re: type of misbehaviour)

Research question one considered: **How does the type of misbehaviour in which the worker engaged influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?** The first hypothesis under this question was:

$H_{0(1)}$ *The type of misbehaviour in which the worker engaged will not influence arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(1)}}$ *All four categories of Robinson and Bennett's typology of misbehaviours will be negatively related to arbitration decisions favouring the worker.*

Result: Reject $H_{0(1)}$, $p < .05$ in favour of $H_{1(1)}$

PROPERTY_DEVIANCE:	B = -1.819	df = 1	p = .002
PERSONAL_AGGRESSION:	B = -2.922	df = 1	p = .000
PRODUCTION_DEVIANCE:	B = -2.189	df = 1	p = .003
POLITICAL_DEVIANCE:	B = -1.952	df = 1	p = .023

All types of misbehaviour are strongly statistically significant, with one-tailed *p*-values of < .05, and they all display negative relationships with arbitration decisions favouring the worker. The results suggest that it is acts of personal aggression that are least tolerated by the arbitrators, with a reduction of 2.922 in the log odds of a worker wining a claim when this behaviour was present (which converts to a worker being 41 percent less likely to win when this behaviour was a factor), followed by production deviance (37 percent less likely); political deviance (35 percent less likely) and property deviance (33 percent less likely).

6.3.2 Research question 1 – hypothesis 2 (re: severity of misbehaviour)

$H_{0(2)}$ *The severity of the misbehaviour will not influence arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(2)}}$ *The severity of the misbehaviour act will be negatively related to arbitration decisions favouring the worker.*

Result: Do not reject $H_{0(2)}$, $p > .05$

SEVERITY: B = -.003 df = 1 p = .496

The null hypothesis is retained because the influence of severity as a factor in the arbitration decision is statistically insignificant in the final block of the hierarchical model, with a one-tail p-value of .496. Further, the model reveals it possesses an extremely weak negative relationship (-.003). Markedly, severity is strongly, statistically significant in the simple regression, with a p-value of .000. This suggests that whilst the severity of the offence is considered an extremely important factor in isolation, arbitrators appear to have offset the severity of the misbehaviour with other factors during their deliberations. To put this finding into percentage chance terms, it can be said that, when considered in isolation, for each unit increase in the severity of the misbehaviour (on a 1 to 5 scale), workers decrease their chance of a favourable decision by 12 percent. But, when severity is considered in conjunction with other factors at play, the workers incur a negligible reduction - suffice to say *no* reduction - in the chance of receiving a favourable decision.

6.3.3 Research question 1 – hypothesis 3 (re: service, apology, disciplinary record)

$H_{0(3)}$ *There is no statistically significant relationship between the years of service by the worker; the presence of an apology; or a clean disciplinary record and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(3)}}$ *Each of these factors will have a separate, positive relationship with arbitration decisions favouring the worker: 1) years of service 2) a clean disciplinary record; 3) the presence of an apology from the worker.*

Result: 1) Do not reject $H_{0(3)}$, $p > .05$ for SERVICE
2) Do not reject $H_{0(3)}$, $p > .05$ for DISCIPLINARY RECORD
3) Do not reject $H_{0(3)}$, $p > .05$ for REMORSE

SERVICE:

2 up to 5 years	B = .219	df = 1	p = .381
5 up to 10 years	B = .790	df = 1	p = .124
10 up to 15 years	B = -.576	df = 1	p = .254
15 up to 20 years	B = -2.211	df = 1	p = .033
20 years and over	B = -.255	df = 1	p = .394

RECORD:

Previous offences	B = -.287	df = 1	p = .297

REMORSE:	B = -.761	df = 1	p = .152

Apart from service period between 15 and 20 years, the remaining three factors are statistically insignificant in the final block in the hierarchical model, thus the null hypothesis is retained. However, it is of interest to note the following about each of the variables considered under this hypothesis.

Three points are made first in relation to the worker's ***period of service***. First, the full model showed that workers are positively associated with a favourable arbitration decision until they had ten years of service, after which, they are negatively related to receiving favourable decisions. This reversal of chances for the longer serving workers runs counter to the anticipated direction in the alternate hypothesis.

Second, workers with 15 to 20 years of service are statistically significant with a one-tail p-value of .033. It is thus worthwhile considering the impact of this factor on the arbitration decisions, which possesses a negative relationship with decisions that favour the worker. This negative relationship is counter to the direction anticipated in the alternate hypothesis. The model shows these workers are 37 percent *less likely* to receive a favourable arbitration decision compared to workers with up to 2 years service.

Third, uncontrolled effects measured in the simple regression reveal that it is workers with 10 up to 15 years service that are significantly *less likely* to win a claim (p = .038). These workers have a 15 percent lower chance of winning a claim compared to workers with up to 2 years of service.

In matters of the ***worker's disciplinary record***, specifically, the presence of a previous offence, it is found to be strongly statistically significant in both the simple regression (p = .003), and the base model of the hierarchical regression (p = .005). However, these effects disappear in the final block of the hierarchical model which controlled for other factors. Further, the direction of the relationship changes across the models. That is, previous offences are positively related to decisions favourable to the worker in the simple model; but reverses in the hierarchical model to show a negative relationship with favourable decisions. As well as being statistically insignificant in the full model, the degree of influence is mild, whereby workers with

a previous offence endure only a 7 percent reduced chance of receiving a favourable decision compared to workers with a clean disciplinary record.

Finally, ***remorse demonstrated by the worker*** during the arbitration proceedings, is strongly statistically significant in the simple regression (p = .001). It is positively associated with favourable decisions (B = .774) to the degree that a worker is 19 percent more likely to win a claim than a worker who does not demonstrate remorse. However, this effect disappears in the hierarchical model which controlled for other factors. The effect becomes statistically insignificant (p = .303) *and* the direction of the relationship reverses (B = -.761) whereby workers showing remorse have a 17 percent *reduced* chance of receiving a favourable decision compared to those workers who do not exhibit remorse or do not apologise.

6.3.4 Research question 2 – hypothesis 4 (re: worker's explanation)

Research question two considered: **How does the explanation provided by the dismissed worker influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?** The first hypothesis under this question was:

$H_{0(4)}$ *There is no statistically significant relationship between the type of explanation rendered by the worker and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(4a)}}$ *'Workplace-related' explanations will be positively related to arbitration decisions favouring the worker.*
$\boldsymbol{H_{1(4b)}}$ *'Personal-inside' explanations will be negatively related to arbitration decisions favouring the worker.*

Result: Do not reject $H_{0(4a)\text{ and }(4b)}$, $p > .05$

WORKPLACE_RELATED:	B = 1.078	df = 1	p = .112
PERSONAL_INSIDE:	B = .889	df = 1	p = .148

Explanations proffered by the worker for their behaviour are statistically insignificant in the hierarchical model, thus the null hypothesis is retained. Although statistically insignificant, the direction of the relationship between type of explanation and arbitration decision suggests that workers who use an externally-attributed explanation, in the form of a workplace-related reason, improve their

chance of winning a claim by 26 percent. In comparison, where a personal-inside reason is included in their explanation, workers improve their chance of winning a claim by only 22 percent.

6.3.5 Research question 2 – hypothesis 5 (re: complexity of explanation)

$H_{0(5)}$ *There is no statistically significant relationship the number of explanations provided by the worker and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(5)}}$ *The number of explanations to explain behaviour will be negatively related to decisions favouring the worker.*

Result: Reject $H_{0(5)}$, $p < .05$ in favour of $H_{1(5)}$

COMPLEXITY: B = -1.611 df = 1 $p = .020$

The model suggests that each time an extra category is incorporated into a worker's explanation (the three categories being workplace-related reasons, personal-inside reasons and personal-outside reasons) the log odds a decision favouring the worker decreases by 1.611. In probability terms, this equates to a substantial decrease of 31 percent for each additional category invoked. As workers can incorporate up to three different categories in their defences, the cumulative effect of using multiple explanations has a serious negative impact on a worker's chance of winning a claim.

6.3.6 Research question 3 – hypothesis 6 (re: errors in the dismissal process)

The third research question considered: **How does the dismissal procedure used by the employer influence the arbitrator's decision to either overturn or uphold management's action to dismiss the worker?** The first hypothesis under this question was:

$H_{0(6)}$ *There is no statistically significant relationship between the type of errors in judgement or processes in actioning the dismissal and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(6)}}$ *Errors in judgement or processes in actioning the dismissal will be positively related to arbitration decisions favourable to the worker.*

Results: Reject $H_{0(6)}$, $p < .05$ in favour of $H_{1(6)}$ for each type of error

MITIGATING_FACTORS_IGNORED:	B = 28.034	df = 1	p = .000
MANAGEMENT_CONTRIBUTED:	B = 6.433	df = 1	p = .000
PROBLEMATIC_INVESTIGATION:	B = 3.805	df = 1	p = .000
PROBLEMATIC_ALLEGATION:	B = 1.145	df = 1	p = .000
PROBLEMATIC_RESPONSE:	B = 7.562	df = 1	p = .000
PUNISHMENT_TOO_HARSH:	B = 28.313	df = 1	p = .000

All errors committed by employers in discharging the dismissal display a strong, statistically significant influence on arbitrators finding in favour of the worker. This result supports a logical and intuitive expectation of the phenomena. Perhaps of more interest is that the results of the analysis allow the ranking of the errors according to their influence on arbitrator's decisions to overturn the dismissal actioned by employers.

Due to the infinite odds ratios resulting from the extremely large log odds, it is not possible to calculate probabilities for MITIGATING_FACTORS_IGNORED and PUNISHMENT_TOO_HARSH, although the controlling effects of these two errors are incorporated into estimates for the errors ranked above. However, the descriptive statistics reveal that the arbitration decision favours the worker in every case where these two errors occur, along with the POOR_EVIDENCE_OR_REASON error. This is clear grounds for suggesting that workers who endure any one of these three errors, have an improved chance of winning a claim by 55 percent. Given the baseline probability of a worker to win a claim is 45 percent; a 55 percent improvement results in a perfect prediction of 100 percent. Thus, it is safe to suggest that POOR_EVIDENCE_OR_REASON; MITIGATING_FACTORS_IGNORED and PUNISHMENT_TOO_HARSH, share equal billing for first place in demonstrating the arbitrators' tolerance for managerial mistakes during the dismissal process.

Therefore, it is concluded, notwithstanding the absence of a controlling effect for errors concerning POOR_EVIDENCE_OR_REASON (as discussed in chapter 5 section 5.9.3), the errors associated with most improved chance for workers to win their claim to the least improved chance of winning a claim are:

Equal 1st	POOR_EVIDENCE_OR_REASON improved chances by 55 percent MITIGATING_ FACTORS_IGNORED improved chances by 55 percent PUNISHMENT_TOO_HARSH improved chances by 55 percent
2nd	PROBLEMATIC_RESPONSE improved chances by 54.9 percent
3rd	MANAGEMENT_CONTRIBUTED improved chances by 54.8 percent
4th	PROBLEMATIC_INVESTIGATION improved chances by 52 percent
5th	PROBLEMATIC_ALLEGATION improved chances by 27 percent

*6.3.7 Research question 3 – hypothesis 7 (re: interact severity of offence*errors)*

$H_{0(7)}$ *Regardless of the severity of the offence, there is no statistically significant relationship between the type of error made by the employer in actioning the dismissal and arbitration decisions favourable to the worker.*

$H_{1(7)}$ *As the severity of the misbehaviour increases, errors in the employer's dismissal process, will be negatively related to arbitration decisions favouring the worker.*

Results: Do not reject $H_{0(7)}$, $p > .05$ for MANAGEMENT_CONTRIBUTED x SEVERITY where B = -.428 df = 1 $p = .317$

Do not reject $H_{0(7)}$, p > .05 for PROBLEMATIC_INVESTIGATION x SEVERITY where B = .177 df = 1 $p = .391$

Do not reject $H_{0(7)}$, $p > .05$ for PROBLEMATIC_ALLEGATION x SEVERITY where B = .545 df = 1 $p = .232$

Reject $H_{0(7)}$, $p < .05$ in favour of $H_{1(7)}$ for PROBLEMATIC_ RESPONSE x SEVERITY where B = -1.541 df = 1 $p = .013$

The interaction effects between the severity of the offence and the different types of errors management could make in administering their dismissals reveals that the severity of the offence lessens the impact of the mistake made by management in only one type of error: weaknesses in allowing the worker to respond to the allegations of misconduct (PROBLEMATIC_RESPONSE). In the event management commits such an error, decisions that favour the worker are reduced by 1.541 in the log odds for every point increase in severity of the offence: meaning workers are 31 percent less likely to win their claim for every point increase in severity. Apart from this error, the non-significant results for the other management

errors suggest the severity of the offence does not appear to lessen the impact of managerial errors on the final arbitration decision.

6.3.8 Sub-question (a) – hypothesis 8 (re: union advocacy for worker)

The first sub-question asked: **Is the arbitration decision influenced by the presence of expert advocates representing the parties?** The first hypothesis under this sub-question was:

$H_{0(8)}$ *There is no statistically significant relationship between union advocacy and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(8)}}$ *Union advocacy will be positively related to arbitration decisions favourable to the worker.*

Result: Reject $H_{0(8)}$, $p < .05$ in favour of $H_{1(8)}$

WORKER ADVOCACY:
Represented by union B = 2.095 df = 1 $p = .009$

There is a statistically significant, positive relationship between workers who were represented at the arbitration table by a union advocate and arbitration decisions that ultimately favour the worker. The log odds increase by a unit of 2.095 for a worker win when they engage a union advocate, instead of self-representing, which equates to a 42 percent improved chance of winning a claim.

6.3.9 Sub-question (a) – hypothesis 9 (re: legal advocacy for worker)

$H_{0(9)}$ *There is no statistically significant relationship between the type of advocacy used by the worker and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(9)}}$ *Worker advocacy by independent lawyers will have a greater positive relationship to decisions favouring the worker than other advocacy services, who in turn will have a greater positive relationship to those workers that self-represent their claim at the arbitration hearing.*

Result: Reject H_0, $p < .05$ in favour of $H_{1(9)}$

WORKER ADVOCACY:

Represented by union	B = 2.095	df = 1	$p = .009$
Represented by independent lawyer	B = 2.559	df = 1	$p = .001$

The alternate hypothesis is accepted because both union advocates (who may use a lawyer) and independent lawyers show a strong, statistically significant influence on the arbitration decision and independent lawyers display a stronger positive relationship to 'worker wins' than union advocates. Compared to workers who self-represented at the hearing, the log odds show a unit increase of 2.095 to 2.559 when they use an independent lawyer as an advocate instead of a union advocate. Thus, compared to self-representing, a worker improves his or her chance of winning a claim by 46 percent if an independent lawyer is used, and 42 percent if a union advocate is used.

6.3.10 Sub-question (a) – hypothesis 10 (re: employer advocacy)

$H_{0(10)}$ *There is no statistically significant relationship between the type of advocate used by the employer and arbitration decisions favouring the worker.*

$H_{1(10)}$ *Employer advocacy by independent lawyers will have a more negative relationship to decisions favouring the worker than other types of advocates.*

Result: Do not reject $H_{0(10)}$, $p > .05$

EMPLOYER ADVOCACY:

Represented by association	B = 1.270	df = 1	$p = .121$
Represented by independent lawyers	B = -.989	df = 1	$p = .107$

Acceptance of the alternate hypothesis fails in this case because the choice of advocate used by the employer is not of statistical significance in the arbitration decision - even though the direction of the hypothesised relationships appears correct. Although not statistically significant, the model indicates that employers who engage independent lawyers *reduce* the chance of workers winning their claims by 22 percent. Whereas, employer advocates from either employer or industry associations (who may use a lawyer) actually put the employer at a disadvantage. In such cases, the chance of a favourable outcome to the worker *improves* by 29 percent when an employer's defence is presented by an association representative.

It is also of interest to note that independent legal counsel for employers during the arbitration proceedings, is statistically significant in the simple regression (p = .065).

It is negatively associated with favourable decisions to the degree that a worker's chance of a win is reduced by 12 percent if an employer uses a legally qualified advocate. However, this significant effect disappears in the hierarchical model which controlled for other factors.

6.3.11 Sub-question (a) – hypothesis 11 (re: self-representation)

$H_{0(11)}$ *There is no statistically significant relationship between self-representation and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(11a)}}$ *'Self-representation' by a dismissed worker will reflect the strongest, positive relationship with decisions favouring the worker.*
$\boldsymbol{H_{1(11b)}}$ *'Self-representation' by an employer will reflect the strongest, positive relationship with decisions favouring the employer.*

Result: Do not reject $H_{0(11a \text{ and } 11b)}$, $p > .05$

WORKER ADVOCACY:

Represented by union	B = 2.095	df = 1	$p = .009$
Represented by independent lawyers	B = 2.559	df = 1	$p = .001$

EMPLOYER ADVOCACY:

Represented by association	B = 1.270	df = 1	$p = .121$
Represented by independent lawyers	B = -.989	df = 1	$p = .107$

Acceptance of the alternate hypothesis fails for two reasons. First, the employer advocacy types fail to reach statistical significance. Second, the directions of the relationships are, in the main, *opposite* to the anticipated directions. To explain, the model applied 'self-representation' as the reference group for advocacy. Workers who self-represent display the *weakest* relationship with decisions favouring workers on the basis of positive relationships observable for the alternative forms of worker advocacy: unions and independent lawyers. Unions (who may engage a lawyer) and independent lawyers are more likely to incur a worker win than a self-represented worker. Note that these relationships are also statistically significant.

From the employer's perspective, whilst the influences of advocacy tested statistically insignificant, if one still wished to ponder the direction of the relationships it can be seen that self-representing employers have a lower chance of successfully defending the dismissal action compared to those employers using legal advocates that hold the strongest chance for an employer 'win'. This is in spite of

some employers using their own legally-qualified staff to 'self-represent'. This conclusion is drawn by taking the converse of the model coefficients suggesting employers with legal advocates possess a negative relationship with worker 'wins' (B = -.989). Thus, self-represented employers held the mid-position in terms of impact, with independent lawyers showing the strongest relationship with decisions favouring the employer and association advocates possessing the weakest relationship with decisions favouring the employer (the converse of possessing a more positive relationship with worker wins in the model, B = 1.270).

6.3.12 Sub-question (b) – hypothesis 12 (re: worker gender)

The second sub-question considered: **Is the arbitration decision influenced by characteristics of the dismissed worker?** The first hypothesis considered under this question was:

$H_{0(12)}$ *There is no statistically significant relationship between the* ***worker's*** *gender and arbitration decisions favouring the worker.*

$H_{1(12)}$ *Females will be more positively related to decisions favouring the workers than males.*

Result: Do not reject $H_{0(12)}$, $p > .05$

WORKER GENDER: B = 1.741 df = 1 $p = .087$

The null hypothesis is retained for this hypothesis because the *p*-value did not come within the a priori significance level. Although it is observed that worker gender is *approaching* statistical significance with a one-tail *p*-value of .087. Furthermore, the direction the relationship predicted in the alternate hypothesis is correct in that female workers have a 37 percent improved chance of a favourable decision compared to male workers.

6.3.13 Sub-question (b) – hypothesis 13 (re: arbitrator gender)

$H_{0(13)}$ *There is no statistically significant relationship between the* ***arbitrator's*** *gender and arbitration decisions favouring the worker.*

$H_{1(13)}$ *Male arbitrators will be more positively related to awarding arbitration decisions favouring the worker than female arbitrators.*

Result: Do not reject $H_{0(13)}$ $p > .05$

ARBITRATOR GENDER: B = .345 df = 1 $p = .292$

The null hypothesis is again retained for this hypothesis because arbitrator gender displays an unacceptable one-tailed *p*-value of .292. And, high *p*-values again occur in both the bivariate and multivariate models. Further, the hypothesised direction of the influence of the arbitrator's gender is also inaccurately predicted in the alternate hypothesis. Compared to male arbitrator decisions, the log odds (.345) of female arbitrator decisions favouring the worker indicate that female arbitrators – and not male arbitrators – provide workers a better chance of receiving a favourable decision. This is to the tune of a 9 percent higher chance.

6.3.14 Sub-question (b) – hypothesis 14 (re: gender interaction effects)

$H_{0(14)}$ *There is no statistically significant relationship between **female arbitrators** and arbitration decisions favouring **female workers**.*

$\boldsymbol{H_{1(14)}}$ *Females will be positively related to favourable arbitration decisions from female arbitrators.*

Result: Do not reject $H_{0(14)}$, $p > .05$

FEMALE ARBITRATOR * FEMALE WORKER: B = -1.551 df = 1 $p = .145$

This hypothesis specifically measures the interaction effect between female arbitrators determining claims for women. Although the relationship between gender and arbitration decision moves in a negative direction, that is, appearing before a female arbitrator reduces a female claimant's chance of a favourable decision by 30 percent; such a pattern is statistically insignificant.

*6.3.15 Sub-question (b) – hypothesis 15 (re: interact employment status*worker gender)*

$H_{0(15)}$ *There is no statistically significant relationship between employment status, gender and arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(15)}}$ *Females that performed part-time hours will be positively related to favourable arbitration decisions.*

Result: Do not reject $H_{0(15)}$, $p > .05$

FEMALE * STATUS: B = 1.937 df = 1 $p = .132$

The null hypothesis is retained, as the interaction effect between arbitration decisions and female workers dismissed from part-time working hours (STATUS) was statistically insignificantly. Although insignificant, the direction of the relationship predicted by the alternate hypothesis is correct, with the model revealing that part-time females have a 40 percent improvement in winning their claim.

*6.3.16 Sub-question (b) – hypothesis 16 (re: interact occupation*worker gender)*

$H_{0(16)}$ *Women dismissed from jobs typically performed by men, are not statistically significantly related to arbitration decisions favourable to the worker.*

$\boldsymbol{H_{1(16a)}}$ *Females employed in an area of male dominated work, will be negatively related to favourable arbitration decisions.*

$\boldsymbol{H_{1(16b)}}$ *Females working in female dominated occupations will be positively related to favourable arbitration decisions.*

Result: Reject $H_{0(16a)}$, $p < .05$ in favour of $H_{1(16a)}$ (managerial or professional work)

Do not reject $H_{0(16b)}$, $p > .05$

WORKER GENDER * OCCUPATION:

female / manager or professional	B = -5.395	df = 1	$p =$ .013
female / technical or trade worker	B = 9.258	df = 1	$p =$ .500
female / community/personal service	B = .986	df = 1	$p =$ .275
female / clerical/admin or sales worker	B = -1.721	df = 1	$p =$ .152

To explain the results of Hypothesis 16 it is necessary to recap on how jobs in Australia are occupationally segregated. The list below displays the percentage of females according to the collapsed occupational categories used in this analysis, based on labour force statistics produced by the ABS (2012a).

female / managers and professionals	46%	= male dominated
female / technical or trade worker	14%	= male dominated
female / community/personal service	68%	= female dominated
female / clerical/admin or sales worker	71%	= female dominated
female / machinery operators, drivers, labourers	24%	= male dominated

This hypothesis tested the interaction effects between gender and occupational category on arbitration decisions favouring the worker. It uses as a reference category, females working as machinery operators, drivers and labours. The model reveals that females working in managerial or professional positions are negatively related to favourable arbitration decisions. As managers and professionals are marginally dominated by male workers in Australia (only 46 percent female), this finding reflects the negative direction of the relationship anticipated in the alternate hypothesis and is statistically significant with a one-tailed *p*-value of .013. Thus the null hypothesis is rejected in favour of the alternate hypotheses for this particular occupational group. The conversion of odds ratio to percentage chance suggests the females in managerial or professional positions have a 44.96 percent *lower chance* of a favourable decision compared to females working as operators, drivers or labourers.

The null hypothesis is retained for women working as tradespeople and technicians. The model does not accurately estimate the interaction between female workers in this category, as the descriptive statistics show there are only two cases in this category. Because both cases return favourable decisions to the female worker, the odds ratio conversion to percentage shows that females in trade or technical work are 54.8 percent more likely to win a claim compared to females working as operators, drivers or labourers. However, this finding is discounted because it is highly statistically insignificant (p = .5), based on a couple of cases.

Furthermore, due to the high one-tailed *p*-values the null hypothesis is also retained for women working in the female-dominated job categories of community or personal services work (p = .275) and clerical, administration or sales work (p = .152). Bearing in mind the lack of statistical significance, out of interest, women dismissed from community and personal service related occupations are shown by the model to possess a positive relationship with favourable arbitration decisions (as anticipated in the alternate hypothesis). These women possess a 24 percent improved chance of a favourable arbitration decision. Conversely, women dismissed from clerical, administration or sales work are negatively related to favourable claims, whereby the model indicates a 32 percent decreased chanced of a favourable decision for them, compared to women working as operators, drivers or labourers.

6.3.17 Sub-question (b) – hypothesis 17 (re: occupation)

$H_{0(17)}$ *There is no statistically significant relationship between the worker's occupation and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(17)}}$ *Lower-skilled occupations will be more positively related to arbitration decisions favouring the worker than higher-skilled occupations.*

Result: Do not reject $H_{0(17)}$, $p > .05$

OCCUPATION:

manager or professional	B = 1.703	df = 1	$p = .023$
technician or trade	B = .546	df = 1	$p = .252$
community or personal service	B = 1.512	df = 1	$p = .051$
clerical/administration or sales	B = 1.375	df = 1	$p = .033$

The null hypothesis is retained as the direction of influence is incorrectly predicted. The model utilises the lowest-skilled occupational category of '*operator, driver or labourer'* as the reference group and by comparison, the other four occupational groups all possess positive log odds. This suggests that operators, drivers and labourers are the *least* likely to receive a favourable arbitration decision of all the occupational groups, which is counter to the alternate hypothesis.

Importantly, three of the occupational groups actually possess statistically significant one-tailed *p*-values: manager or professionals ($p = .023$); clerical/administration or sales workers ($p = .033$); and, with minor tolerance on the a priori *p*-value, community or personal service workers ($p = .051$). These three occupational groups indicate that a statistically significant difference exists between higher skilled groups compared to the lower skilled group in terms of favourable decisions awarded to the worker, yet the strength of the positive relationship actually *declines* for the lower skilled workers. When the odds are converted to chance, the model reveals that compared to operators, drivers and labourers, dismissed workers that had been engaged as managers or professionals have a 37 percent improved chance of receiving a favourable arbitration decision; whilst community and personal service workers show a 34 percent improved chance of a favourable decision. And, at the same time, clerical and administrative workers have a 31 percent improved chance of a win. Out of interest, the occupational group that acquires a statistically insignificant

p-value is the technician and trade workers who possess a 14 percent improved chance of a win compared to the lower skilled workers.

6.3.18 Sub-question (c) – hypothesis 18 (re: arbitrator work background)

The third sub-question considered: **Is the arbitration decision influenced by characteristics of the arbitrator?** The first hypothesis under the question was:

$H_{0(18)}$ *There is no statistically significant relationship between an arbitrator's work background and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(18)}}$ *A union background will be more positively related to decisions favouring the worker than a management background.*

Result: Reject $H_{0(18)}$, $p < .05$ in favour of $H_{1(18)}$

ARBITRATOR BACKGROUND:

Union work background	B = 1.282	df = 1	$p = .014$
No strong preference	B = .950	df = 1	$p = .065$

The alternate hypothesis is accepted on the basis that arbitrators with a previous work history of employment with union bodies are statistically significantly more likely to find in the worker's favour than arbitrators with a management history. This statistical significance holds constant in the simple regression, as well as in the two blocks of the hierarchical model. The constancy of its significance indicates it is a robust predictor remaining steadfast even when other factors are controlled for in the final model. In the final block of the hierarchical model, workers that appeared before arbitrators with a union background show a 30 percent improved chance of a favourable decision.

The background of arbitrators with 'no strong preference' toward either union or managerial positions before their appointment to the tribunal approaches statistical significance ($p = .065$) and the direction of the relationship is also positive for this characteristic, but to a lesser degree than arbitrators with a union background. Workers show a 23 percent improved chance of a favourable decision if they appear before arbitrators without a prior tendency towards either union or management positions. In summary, if arbitrators are ranked for returning favourable decisions to workers, on the basis of their work backgrounds, the odds suggest that arbitrators

with a management background are the least likely to make decisions favouring the worker, those with a union background most likely to decide in favour of the worker, and those with 'no strong preference' holding mid-position.

6.3.19 Sub-question (c) – hypothesis 19 (re: arbitrator experience and seniority)

$H_{0(19)}$ *There is no statistically significant relationship between either the experience an arbitrator has in determining unfair dismissal claims or their seniority, and arbitration decisions favouring the worker.*

$H_{1(19)}$ *Each of these factors has a separate, negative relationship with arbitration decisions favouring the worker: 1) decision making experience; 2) seniority.*

Result: Reject $H_{0(19)}$, $p < .05$ in favour of $H_{1(19)}$ for EXPERIENCE

Do not reject $H_{0(19)}$, $p > .05$ for SENIORITY

ARBITRATOR_EXPERIENCE:	B = -.431	df = 1	$p = .008$
ARBITRATOR_SENIORITY:	B = .171	df = 1	$p = .288$

Arbitrator experience, measured via the number of decisions made in relation to misconduct-related unfair dismissal claims, is strongly statistically significant (p = .008) with the arbitration decisions favouring the worker. The anticipated negative direction of the relationship between experience and decisions is also upheld; with the model revealing that the chance of a worker receiving a favourable decision *decreases* by 10 percent, as each level of experience increases. It is also notable that this characteristic holds constant in terms of statistical significance, in the both the bivariate model and the final block of the hierarchical model. The constancy of its significance indicates it is a robust predictor remaining steadfast even when other factors were controlled for in the final model.

Arbitrator seniority displays a statistically insignificant one-tailed p-value of .288, thus the null hypothesis that the seniority of the arbitrator will not influence the arbitration decision, was retained. Furthermore, the direction of the relationship is opposite to that hypothesised, such that the more senior the arbitrator, the more likely they are to find in favour of the worker. The probabilities calculated show that workers see an improvement in their chance of a win by 4 percent for each status increase of the arbitrator.

6.3.20 Sub-question (d) – hypothesis 20 (re: formality and support person)

The fourth sub-question considered: **Is the arbitration decision influenced by characteristics of the employer?** The first hypothesis under this question was:

$H_{0(20)}$ *There is no statistically significant relationship between the formality of the dismissal process; or the presence of a support person for the worker during the dismissal process; and arbitration decisions favouring the worker.*

$H_{1(20)}$ *Each of these factors has a separate, negative relationship with arbitration decisions favouring the worker: 1) the formality of the process; 2) presence of a support person for the worker.*

Result: Do not reject $H_{0(20)}$, $p > .05$ for FORMALITY

Reject $H_{0(20)}$, $p < .05$ in favour of $H_{1(20)}$ for SUPPORT

FORMALITY :	B = -.563	df = 1	p = .113
SUPPORT:			
companion present	B = -3.518	df = 1	p = .019
worker unaccompanied	B = .581	df = 1	p = .174

Formality of the dismissal process fails to reach statistical significance in the final block of the model (p = .113), thus the null hypothesis in respect of formality of the dismissal process by the employer, is retained. Interestingly, it is statistically significant in the simple regression (p = .017) and the base block of the hierarchical model (p = .000). Its dispersion from a strongly significant result in the base model, to a highly statistically insignificant result, suggests that when other factors about the dismissal are taken into account by the arbitrators, the degree of formality has a decreased influence on the arbitrator. Although statistically insignificant, the direction of the relationship is negative - as anticipated in the alternate hypothesis - with the chance of an arbitration decision favourable to the worker decreasing by 13 percent for each increase in the degree of formality (measured on a three point scale).

Support for the worker during the dismissal process, specifically in the form of the worker being allowed to have a 'companion' of their choice present, is found to be a statistically significant factor in the arbitration decision (p = .019). Thus the alternate hypothesis is accepted for this predictor variable. Utilising 'union delegate present' as the comparison group, the model reveals that workers with the feature of having a

companion present during their dismissal, endure a 42 percent *decrease* in their chance of receiving a favourable decision compared to a worker that has either a union representative present. The remaining option measured under the SUPPORT variable is that the worker is 'unaccompanied', with the finding that unaccompanied workers have a 14 percent *improved* chance of a favourable decision, compared to those workers who have the union present. This specific relationship is statistically insignificant in the hierarchical model, although is statistically significant as an unadjusted factor in the simple regression (p = .013) wherein unaccompanied workers also show a 14 percent improvement in their chance of a favourable decision.

6.3.21 Sub-question (d) – hypothesis 21 (re: HR expertise and firm size)

$H_{0(21)}$ *There is no statistically significant relationship between the presence of HR expertise and/or the size of the business; and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(21)}}$ *Each of these factors has a separate, negative relationship with arbitration decisions favouring the worker: 1) employers with HR experts; 2) larger businesses.*

Result: Do not reject $H_{0(21)}$, $p > .05$ for HR EXPERTISE

Do not reject $H_{0(21)}$, $p > .05$ for FIRM_SIZE

HR_EXPERTISE:			
yes, HR expert	B = -.085	df = 1	p = .459
not identified	B = 1.390	df = 1	p = .113
FIRM_SIZE:			
20 to 199 workers (medium)	B = -.874	df = 1	p = .188
200 plus workers (large)	B = .801	df = 1	p = .207
not identified	B = .643	df = 1	p = .270

The null hypothesis is retained because both factors fail to reach statistical significance. Only one aspect shows statistical significance in the simple regression, and that was employers with ***HR expertise*** are negatively related to arbitration decisions favouring the worker (p = .019) which equates to 12 percent reduced chance for a worker win if the employer engages an HR expert. However, this effect is dispersed in the hierarchical model to the point of showing an extreme statistically

insignificant influence (p = .459) and where the chance of a favourable decision for the worker decreases by a mere 2 percent if an HR expert is involved.

Firm size is also statistically insignificant with each size category, from smallest to largest, containing one-tail p-values of .188; .207; and .270 respectively. Although statistically insignificant, the model utilises small businesses (up to 19 workers) as the comparison group. The model coefficients suggest that workers from a large business (200 plus workers) have a 20 percent improved chance of winning their claim compared to the small business worker. At the same time, workers from medium sized businesses (19 to 200 workers) had a 20 percent decreased chance of winning a claim compared to small business workers.

6.3.22 Sub-question (d) – hypothesis 22 (re: type of industry)

$H_{0(22)}$ *There is no statistically significant relationship between the type of industry in which the employing business operated and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(22)}}$ *Employees dismissed from workplaces associated with either the manufacturing industry or service industries will be more positively related to arbitration decisions favouring the worker, than those from other industries.*

Result: Reject $H_{0(22)}$, $p < .05$ in favour of $H_{1(22)}$ for transport, postal and warehousing

INDUSTRY:			
manufacture, wholesaling	B = 2.038	df = 1	p = .096
construction, utility supply	B = 2.051	df = 1	p = .134
retail	B = 1.633	df = 1	p = .155
hospitality, recreation	B = -.925	df = 1	p = .312
transport, postal, warehousing	B = 2.710	df = 1	p = .039
communication, technical, professional ser.	B = 1.791	df = 1	p = .140
administration & support services	B = .777	df = 1	p = .328
public administration & safety	B = .000	df = 1	p = .500
education, health, social assistance	B = .658	df = 1	p = .343

The alternate hypothesis is accepted for two reasons. First on the basis that the transport, postal and warehousing – an industry associated with manufacturing and service provision - returns a p-value of .039 in the final block of the hierarchical model. Furthermore, the manufacturing and wholesaling industries demonstrate that

they are approaching statistical significance with a *p*-value of .096. Workers dismissed from the transport, postal and warehousing industry have a 47 percent improved chance of winning a claim, compared to workers in the reference industries of agriculture and mining. Meanwhile, workers in manufacturing and wholesaling industries show similar output, possessing a 41 percent improved chance of winning a claim.

The second reason is, as predicted, that those with the strongest positive relationship with successful claims will be workers in manufacturing and service related industries. The results show that higher B values are possessed by industries associated with: transport, postal and warehousing; manufacture; wholesaling; construction; utility supply; retail; communication, technical and professional services. In comparison, smaller B values, indicating a weaker positive relationship, are possessed by the non-manufacturing and non-service related industries of: education; health; social assistance; public administration and safety; administration and support services.

A further insight, although statistically insignificant ($p = .312$), is that workers from the hospitality and recreation industry are the only group to possess a negative relationship with favourable decisions – with these workers facing a 20 percent reduced chance of a favourable decision.

Finally, the simple regressions reveal that only the administration and support services worker industry was statistically significant, with a one-tail *p*-value of .042, (B = .955). Workers in this industry have a 23 percent improved chance of a favourable decision compared to agriculture and mining workers. However, this effect is tempered to insignificance when other factors are taken into account in the hierarchical model.

6.3.23 Sub-question (d) – hypothesis 23 (re: private and public sector)

$H_{0(23)}$ *There is no statistically significant relationship between the sector in which the employing business operated and arbitration decisions favouring the worker.*

$\boldsymbol{H_{1(23)}}$ *The private sector will be more positively related to arbitration decisions favouring the worker than those from the public sector.*

Result: Do not reject $H_{0(23)}$, $p > .05$ (NB. approaching statistical significance at .07)

SECTOR: B = 1.026 df = 1 $p = .07$

The null hypothesis is retained because, whilst sector reveals to be approaching statistical significance (p = .07), the direction of the relationship was incorrectly predicted in the alternate hypothesis. The results suggest that it is actually public sector workers who are more positively associated with favourable decisions. Public sector workers hold a 25 percent improved chance of a favourable decision compared to private sector workers.

6.4 Chapter 6 conclusion

This chapter initially provided the reader with insights into the descriptive statistics, followed by a full review of the logistic regression analyses performed on the data collected from the unfair dismissal arbitration decisions. The culmination of the analysis was to determine whether or not it was possible to accept the alternate hypotheses proposed under each of the research questions. A number of statistically significant matters warrant discussion in the next and final chapter. Not to be discounted are the findings into the arbitral decision making dynamics offered by the alternate hypotheses that were not accepted because they either had statistically insignificant *p*-values, or the direction of influence ran counter to that hypothesised. These too will be considered in the next chapter.

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CHAPTER 7

DISCUSSION AND CONCLUSIONS

7.0 Introduction

The discussions and investigations presented in the previous chapters in this thesis contributed toward addressing the major research objective:

> ***To identify factors influencing the arbitral decisions of members in Australia's federal industrial tribunal when they determine unfair dismissal claims from workers who have been terminated from their employment due to 'misbehaviour'.***

This final chapter contains the discussions and conclusions drawn from the investigation that addressed the above research objective. To do so, this chapter discusses first, the findings ascertained with a high degree of statistical confidence. These findings are divided into two dimensions: those contributing new and original knowledge to the literature, and those which confirm or deny prior research literature. Then, attention will be paid to the variables in the analysis that were either statistically insignificant, or statistically significant but counter to the hypothesised direction of influence. These variables reveal insights by the fact that they did not meet hypothesised expectations. Throughout these discussions, the author will provide reasons that may explain each of the findings.

The final aspect of this chapter presents the author's conclusions for the total research effort detailed in this thesis. First, a summary response to the research objective is presented, before discussing the theoretical implications of these findings from three perspectives: immediate discipline theories, parental theories, and broader disciplinary perspectives. After this discussion, the implications of the findings on policy and practice are provided. Two additional limitations that arose during the implementation of the investigation are noted, before finalising this thesis with suggestions for further research.

7.1 Breakthrough insights revealed by the arbitral decision-making model

This section focuses purely on discussing *statistically significant* findings not identified by previous empirical investigations. Recall in chapter 3 that existing theories of arbitral decision-making in relation to termination of employment claims were examined. Namely, the decision making models developed by Nelson and Kim (2008), Gely and Chandler (2008), Ross and Chen (2007), Chelliah and D'Netto (2006), along with the seminal Bemmels' investigations between 1988 and 1991, were reviewed. Whilst each of these models and investigations possessed differing strengths and weaknesses (as discussed in chapter 3), collectively, they failed to identify the following points to which the author's model contributes *original* insights:

7.1.1 New insight: influence of misbehaviour type on decisions (question 1)

The first research question sought insight as to how the type of misbehaviour influenced the arbitrator's decision. The application of Robinson and Bennett's (1995) employee deviance typology of personal aggression, production deviance, political deviance and property deviance provided suitable distinctions for assigning *all* acts of misbehaviour to a framework, from which it was possible to identify the tolerance for such behaviours within the context of the arbitration decisions. This differed to previous studies that focused on either a single or a few specific acts of misconduct, thus narrowing their discoveries into the influence of the narrowly defined misconduct acts on arbitral decisions. In essence, this investigation successfully united a theory developed originally to describe norm breaking, intentional acts of employee behaviour within the organisational behaviour literature, to a broader application of situations where *'reprimandable offences'* – as defined in chapter 2 – were committed by employees and examined through the lens of the arbitral decision-making associated with the industrial relations.

The author noted in chapters 1 and 2 that arbitrators' decisions pertaining to misbehaviour in the workplace could set the public standard (Donaghey 2006) and reflect societal values (Wright 2002) for how tolerant employers and unions must be towards employees who engage in, or who are believed to have engaged in misbehaviour. The author can now progress this position and present insights on

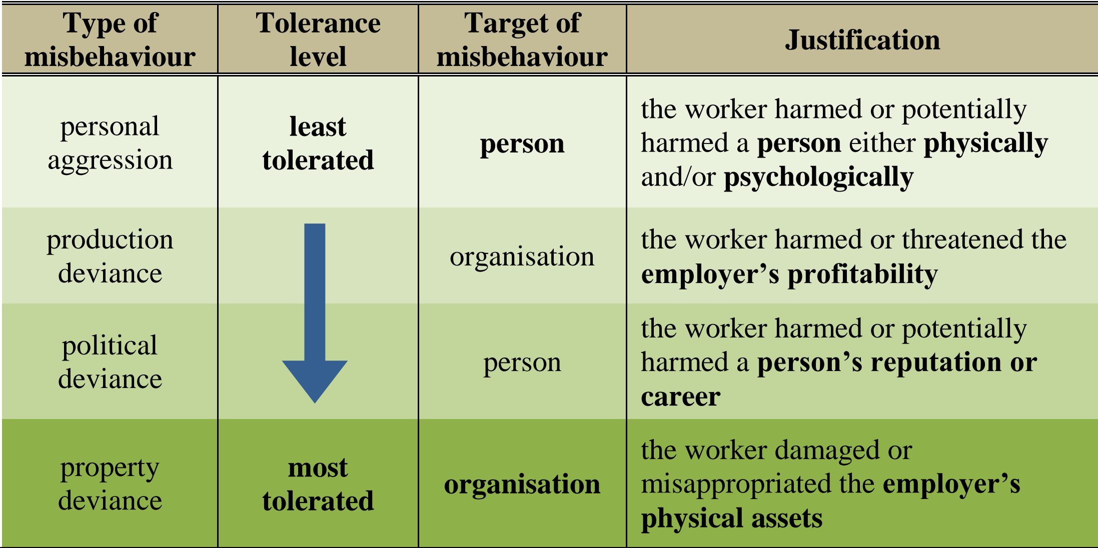
arbitral tolerance for various misbehaviours. This is because the investigation measured - with strong statistical significance - the amount of influence the various types of misbehaviour had on the arbitration decisions when controlling for factors concerning employer, worker and arbitrator characteristics. It is noted that all four categories of misbehaviour were negatively related to favourable decisions to the workers, so upfront, it can be stated that none of the behaviours were considered acceptable in Australian workplaces. However, as this thesis delves into the 'dark-side' of workplace behaviours (Griffin & O'Leary-Kelly 2004), the results provide insights about which of these dark-side behaviours are more tolerated and those which are less tolerated, when it comes to arbitrators determining claims for employees who have lost their job because they engaged, or supposedly engaged, in some form of misbehaviour.

The author contends that the *lowest level* of tolerance for a particular category of employee misbehaviour is synonymous with the category that was *least likely* to result in decisions favourable to the workers - which happened to be acts of personal aggression. This means these behaviours possessed the strongest negative relationship with favourable decisions. At the other extreme, acts under the banner of property deviance were found to be those *most tolerated* by arbitrators as these behaviours were *most likely* to result in decisions favourable to the worker. This means these behaviours possessed the weakest negative relationship with favourable decisions. According to the Robinson and Bennett (1995) typology, acts of personal aggression are targeted at individuals within the organisation whilst acts of property deviance are targeted at the organisation itself. Therefore, a picture emerges as to what factor may be framing the extremities of the arbitrators' tolerance for the misbehaviours: *the target of the behaviour*.

Table 7.1 presents the tolerance exhibited by arbitrators toward the four categories of misbehaviour in ascending order. It can be seen in Table 7.1 that arbitrators had the least tolerance, and were least likely to overturn a dismissal, where the behaviour involved *personal aggression* such as fighting, verbal abuse and sexual harassment. Between the two extremes were acts of production and political deviance. At the other extreme, arbitrators' greatest tolerance was for behaviour involving *property deviance* targeted towards the material nature of the business' physical assets, such

as pilfering the employer's property or wilful damage to equipment. When such behaviours occurred the arbitrators were more inclined to overturn dismissals. Because aggressive acts against individuals are more heavily influencing the arbitrators to sustain the employer's punishment than property related misdeeds, this suggests people are valued over property; a welcome finding from a humanistic perspective.

Table 7.1 *Increasing degree of tolerance exhibited by arbitrators towards misbehaviour*



Type of misbehaviour	Tolerance level	Target of misbehaviour	Justification
personal aggression	**least tolerated**	**person**	the worker harmed or potentially harmed a **person** either **physically** and/or **psychologically**
production deviance		organisation	the worker harmed or threatened the **employer's profitability**
political deviance		person	the worker harmed or potentially harmed a **person's reputation or career**
property deviance	**most tolerated**	**organisation**	the worker damaged or misappropriated the **employer's physical assets**

(*Source:* Developed for thesis)

Personal aggression, as the behaviour least tolerated, reflects Collin's (1992) suggestion that people in the workplace are entitled to dignity, which means respecting each person's attempt to bring meaning to their life through work. It was noted in chapter 3 that employees causing dysfunction in the workplace need to be removed because a dysfunctional worker infringes on the autonomy and dignity rights of the engaged and loyal employees (Collins 1992). And, the Wheeler and Rojot (1992) international investigation into employer responses to serious misconduct identified a global alliance in terms of personal aggression, whereby a worker instigating a physical fight causing injury to the other party, would likely be dismissed, even if it was a first offence. The low tolerance for personal aggression also reflects tenets of retributive justice. Recalling from chapter 4 that retributive justice seeks actions that can be done *for* the victim and *to* the harm-doer to remove or deal with an injustice (Darley & Pittman 2003), arbitrators have a role to restore justice to those harmed. Acts of personal aggression are high impact behaviours as

they tend to inflict abrupt and palpable harm (Baron & Neuman 1996; Bennett 1998; Bjorkqvist, Osterman & Lagerspetz 1994; Hershcovis & Barling 2010; LeBlanc & Kelloway 2002; Neuman & Baron 2005; O'Leary-Kelly & Newman 2003). It appears acts of personal aggression lend themselves to high visibility retribution, demonstrated by arbitrators being most willing to support employer decisions to terminate perpetrators when these types of behaviours occur in the workplace.

After personal aggression, the second least tolerated behaviour was **production deviance**. Production deviance involves behaviours which are directly harmful to the employer's business, but excludes property and asset damages (Robinson & Bennett 1995). Thus production deviance captures behaviours – typically covert in nature **-** that threaten the prosperity and profitability of the business, such as wasting resources and dishonest reporting of worked hours. The lower tolerance for production deviance is perhaps influenced by the broad economic context of the employer-employee relationship, wherein labour market efficiencies are supported with balanced institutional regulation so as to support societal goals of economic competitiveness and growth (Collins 1992; World Economic Forum 2010). Recognising that employers exist within a competitive economy and, in most cases, are motivated by profit (Alexander, Lewer & Gahan 2008) combined with the fundamental common law understanding of the exchange of fair day's work for a fair day's pay (Collins 1992; Compton, Morrissey & Nankervis 2002; Riley 2005), the arbitral decisions in relation to production deviance appear to reinforce a societal standard that workers should not behave deceitfully so as to harm the viability of their employers business.

Acts of misconduct under the **political deviance** umbrella revealed to be more tolerated than acts of personal aggression and production deviance. The Robinson and Bennett (1995) typology suggests political deviance targets one or more people as victims of covert type behaviour, such as gossiping or showing favouritism. Political deviance is conceived to be 'minor' in nature according to Robinson and Bennett (1995) and it appears the arbitral decisions reflected a similar position on such offences, with it being the second most tolerated category of misbehaviour. Under this category, workers engage in unethical and/or insidious type behaviour towards another person causing harm or potentially harming the person's character or

prospects, although the immediate impact of the behaviours may not be evident or significant (Edwards & Greenberg 2010; Kish-Gephart, Harrison & Trevino 2010). The nebulous nature of politically deviant acts may make it more challenging for either the employer to present a sound case defending the dismissal, and/or the arbitrator to comfortably support an employer's ejection of the perpetrator from the workplace. This may explain why an arbitrator could show a higher tolerance for this type of behaviour, resulting in a reversal of the dismissal.

Interesting on several counts is the finding that **property deviance**, such as damages to and theft of employer property, was the most tolerated of all the behaviours – wherein workers that were dismissed for such offences were the most successful in their claims. Wheeler and Rojot's (1992) international research revealed that employers from the ten countries examined, agreed unanimously that theft of product from the employer should be met with instant dismissal. This suggests that whilst globally *employers* have a low tolerance for property deviance, it is in discord with the arbitrators' level of tolerance. Further, if a societal expectation exists that employees should not undermine the profitability of the business, à la production deviance, property deviance can also threaten the employer's viability – although indirectly. Such points run counter to the result produced by the investigation. Two suggestions are proffered as to why property deviance appears to be the most tolerated.

First, arbitral rulings are more likely to support the employer's decision to terminate the worker's employment where the employer produces *strong evidence* of the dismissed employee's misconduct to support the employer's retaliatory action of dismissing the employee (Klass, Mahony & Wheeler 2006). Thus, one explanation for property deviance being the most tolerated may be that the material, objective nature of property related offences may make them the simplest cases for arbitrators to identify weaknesses in employer investigations and rationales leading to a dismissal. If this is the case, then it is not a situation of arbitrators having a high tolerance for property deviance, but rather a weakness in the employers' ability to execute fair and just investigations and dismissal processes when it is believed employees engaged in acts of property deviance. However, an alternative explanation for this result may be, simply, that deviant acts against a piece of property are

tolerated more than acts of aggression against people; and the forced ranking in the statistical modelling brings this to the fore.

7.1.2 New insight: influence of employee explanations on decisions (question 2)

The second research question sought to find out how the explanation employees provided for their behaviour influenced the arbitrator's decision. This question progresses the conceptual work of the author on the employee explanation typology (Southey 2010), where any conceivable explanation could be categorised according to whether they were workplace-related reasons, personal-inside reasons or personal-outside reasons. Incorporating the employee's explanation into the arbitral decision making model offers another major enhancement to the arbitral decision-making models present in the current literature. Although Nelson and Kim (2008) made reference to 'contested and uncontested facts' and Gely and Chandler (2008) referred to 'factual strength of the case', both only captured partially and indirectly some form of the employee defence. This thesis' model was the first to incorporate the employee explanation as a distinct element of arbitral decision making.

The statistical modelling provided strong statistical confidence that the **complexity** of the workers' explanations influence the arbitration decisions, when factors are held equal in terms of the type of misbehaviour, employer, worker and arbitrator characteristics. This breakthrough finding suggests that for each additional category of explanation from Southey's (2010) three domain typology which was incorporated into a workers' defence, workers experienced a consequent decrease in the chance of winning their claim. This means the best chance for workers to win their claim of unfair dismissal was to draw their defence from only a single category in the Southey (2010) typology. As the three categories of explanations address three discrete domains, it is reasoned that the most logical explanations are concentrated, focused explanations, such as: the misbehaviour occurred as a result of poorly maintained equipment (a workplace-related explanation); or frustration due to a confrontation with a colleague (a personal-inside reason) or because of a illness in the family (a personal-outside reason). It appears that providing an explanation that canvases two, particularly three, categories – addressed in Southey's typology as a 'conflated rationale' – destabilises the worker's explanation, perhaps on the basis that it could

sound either muddled or over-orchestrated, ultimately disadvantaging the worker at the arbitration table.

It was also suggested in chapter 4 that during the deliberations about whether or not to uphold a dismissal, arbitrators need to process information-rich, inter-related pieces of evidence by forming a mental summary framed by their own mental model, orientations and prior experiences, incurring – quite likely – any biases resulting from the cognitive heuristics used to draw inferences from the material before them (Das & Teng 1999; Hastie & Pennington 2000; Korte 2003; Malin & Biernat 2008; Sangha & Moles 1997; Tversky & Kahnemann 2000). It is reasonable to suggest that the clarity of a single explanation provided less opportunity for an arbitrator to experience a cognitive bias that might otherwise occur whilst trying to assess explanations pulled from two or three different explanatory domains. Potentially, conflated explanations obstruct the arbitrator's mental summarising, increasing the chance of cognitive biases, that may make arbitrators less inclined to reverse the employers' dismissal actions.

7.1.3 New insight: influence of employer's dismissal process (question 3)

Research question three focused on identifying the influence of the employer's dismissal process on the arbitration decision. It is the arbitrators' obligation to assess, retrospectively, the delivery of natural justice to the worker whilst they were being scrutinised by their employer for their purported misbehaviour, enabling arbitrators to form opinions on the consequent quality of the organisational justice delivered to the worker (Brown, Bemmels & Barclay 2010; Forbes 2006; Greenberg 1990). This investigation measured the arbitral assessments of the quality of the employer's dismissal process by identifying errors that employers tended to make in dismissing workers, based on the work of Blancero and Bohlander (1995) and Australian legislative requirements under the Fair Work Act 2009. It is recalled that Table 4.3 in chapter 4 demonstrated the author's view of how breaches in natural justice and organisational justice were reflected in the managerial errors in Blancero and Bohlander's (1995) typology as well as Australia's legislative protections against 'unfair, unjust or unreasonable' dismissal. Thus, an absence of errors in the

employer's process was considered synonymous with an appropriate, fair and reasonable dismissal process having been executed.

Whilst this is not the first study to incorporate the employer's process into dismissal-related arbitral decision-making models; it is, possibly, the most comprehensive. For instance, Gely and Chandler (2008, p. 292) incorporated the employer's 'due process' and 'equal protection' as variables in the arbitral decision-making process in the form of dummy variables where problems in these areas were either identified, or not identified, for each case. These variables were found to be significant influences in decisions, but such a collective measurement of due process prevented the identification of the individual effects of various procedural errors on the arbitration decisions. Chelliah and D'Netto (2006) also paid attention to factors relevant in the employer's decision to discharge and found two statistically significant influences in cases of misconduct: failure to apply progressive discipline and improper promulgation of rules. The Chelliah and D'Netto study also found that 'procedural errors' and 'unequal treatment' were not statistically significant influences on the arbitration decision.

With links to procedural, distributive and interactional justice theories and legislative demands, this thesis identified *seven* statistically significant measures of weaknesses in the employer's dismissal process. Each error demonstrated a very strong positive relationship with arbitration decisions favouring the worker, and that committing any one of them is likely to find the arbitrator overturning the employer's dismissal action. By comparing the degree of influence each had on the arbitration decision, the significant new insight garnered in this study is that the arbitral decision-making process appears to reflect a 'stepped' process. Figure 7.1 displays the seven influential errors, demarcated into two stages by the arbitrator's initial assessment of the employer's reason or evidence to dismiss the worker, the harshness of the dismissal penalty and, associated with harshness, whether the employer neglected to take into account any mitigating circumstances rendering the dismissal harsher than if those circumstances were not present. It appears these fatal errors act as a set of preliminary 'filters' used by arbitrators. Errors caught by this preliminary filtering process result in the arbitrators deciding in the workers' favour.

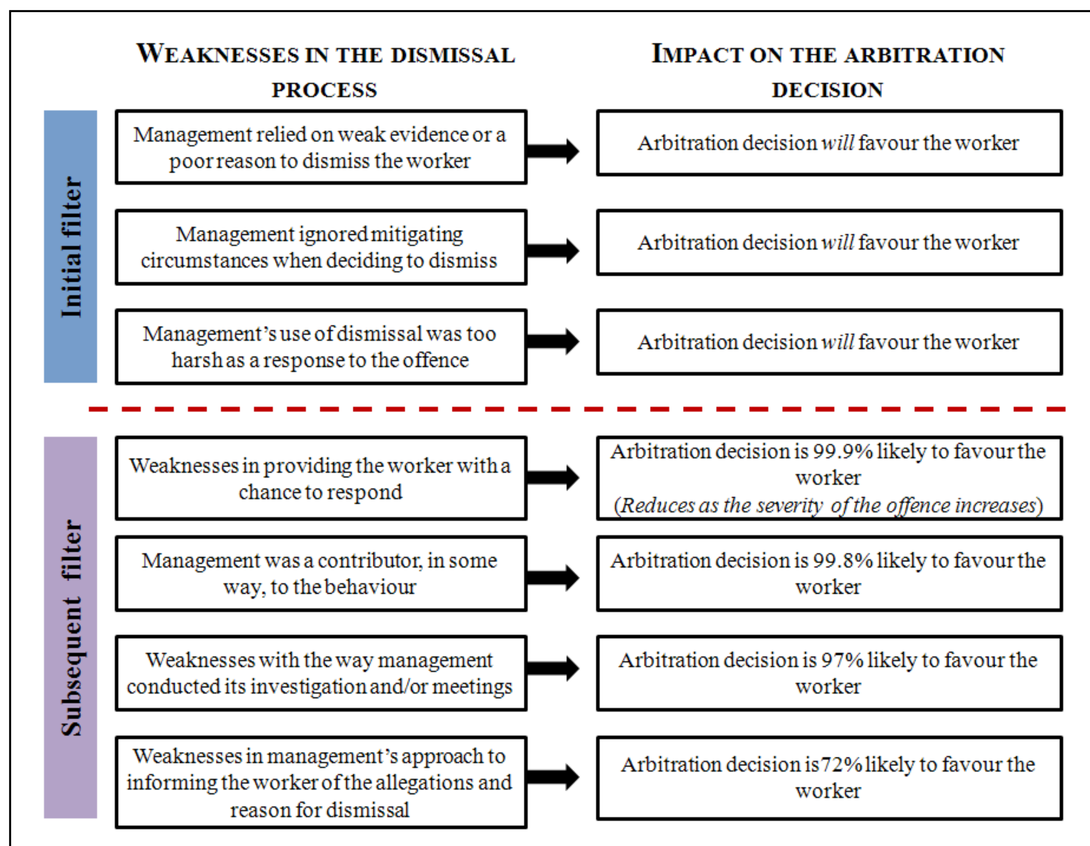


Figure 7.1 *The influence of managerial errors on arbitration decisions*

(*Source:* Developed for thesis)

The challenges borne out in the statistical modelling due to the zero counts for decisions favouring the employer where these errors occurred, as discussed in the methodology chapter, section 5.9.3, attest to the strength of these errors as 'perfect predictors' (Hosmer & Lemeshow 1989) of arbitration decisions favourable to the worker. This viewpoint is also supported by requirements under Australia's federal legislation to take into account whether there was a valid reason for the dismissal (Part 3-2 Section 387 of the Fair Work Act 2009) and for which arbitrators use, as a preliminary point in their deliberations, Justice Northrop's in *Selvachandran v Peteron Plastics Pty Ltd (1995)* description of a 'valid' reason (discussed in section 4.5.4). The POOR_EVIDENCE_OR_REASON variable parallels the 'valid reason' requirements. Appendix 8, containing an analysis of influences on the arbitrator finding weaknesses in the evidence or reason an employer used to dismiss a worker, revealed the arbitrator is *less inclined* to identify poor evidence or reason if the worker: had a companion present during workplace meetings, had a previous offence on the record, committed a more serious offence, or gave a more complex

explanation. At the same time, arbitrators were *more inclined* to identify poor evidence or reason as a managerial error if the worker possessed up to ten years experience and/or relied upon a union or legal advocate during arbitration.

Except for the worker's disciplinary record, these statistically significant, influential factors are mirrored in the full arbitral decision analysis central to this thesis and thus discussion of them is incorporated throughout this chapter. However, it is worth reflecting on the worker's disciplinary record. Whilst it was found to be an influential factor by previous investigators (Bemmels 1988a, 1991b; Harcourt & Harcourt 2000; Klass, Mahony & Wheeler 2006; Simpson & Martocchio 1997), the disciplinary record was not identified in the hierarchical model as an influence on the *final* arbitration decision (although was a significant predictor in the simple regression). On the surface, the lack of effect concurs with Chelliah and D'Netto's (2006) Australian study. Yet new insight is offered by the analysis in Appendix 8.

A worker's disciplinary record was found to influence the determination of whether the employer had a 'sound reason or evidence for the dismissal' (a valid reason) and because such an error forms one of the 'fatal' errors used as a preliminary filter, it is fair to suggest that a worker's disciplinary record is - ultimately - influencing the arbitration decision. So whilst the impact of a worker's disciplinary record was obscured in the full model, the findings suggest that the existence of a previous offence by the worker increases significantly the strength of the employer's evidence to support a valid reason for the dismissal. This finding is consistent with the premise of corrective-progressive discipline (Fenley 1998; Holley, Jennings & Wolters 2009; Huberman 1964) (discussed in section 2.3.1), where an employee has offended previously and the employer attempts to 'reform' the behaviour by recording a warning rather than administering a dismissal. The arbitrator may take this as an indication the employer took a considerate approach before the eventual dismissal.

Figure 7.1 next shows that three of the remaining four errors associated with the subsequent filtering of the employer's dismissal process, possessed near to a 100 percent chance of the arbitration decision favouring the worker, with it only being on rare occasions that the employer can commit these errors and the arbitrator finds for the employer. However *one* proviso was discovered. As the **severity of the offence**

increases, arbitrators became less willing to overturn dismissals if the employers' mistake concerned weaknesses in providing opportunities for the workers to respond to allegations. Severity was measured on a four-point scale anchored as: somewhat serious, serious, very serious and extremely serious. It was only for this type of error that the interaction between severity and managerial error was statistically significant, with the modelling estimates suggesting the chance of a decision favouring the worker decreased a considerable 31 percent for every incremental increase in the severity of the offence.

This significant interaction suggests the intensity of serious and extremely serious misconduct can mitigate, to some degree, weaknesses in the process management used to provide the worker with an opportunity to respond. And, as the arbitrator hears all evidence, the employee can be finally afforded an opportunity to provide a considered response via the arbitration hearing, albeit it occurs in retrospect. Perhaps, as employers are required to take into account mitigating circumstances when considering the dismissal of a worker, so too arbitrators may accommodate for procedural mistakes by employers when dealing with particularly grave offences. However, the scope for employers to mitigate procedural errors based on the severity of the offence is very narrow, recalling that this finding was significant only if weaknesses occurred in providing the worker an opportunity to respond to the allegation.

The error that exhibited *least influence* on the arbitration decision was a managerial lack of clarity in the allegation and/or reason for the dismissal. The analysis showed that employers had a 28 percent chance of escaping any sort of penalty in the face of this mistake. Two reasons may explain such a finding. First, the descriptive data revealed that *at least* 31 percent of workers were supported in the workplace during the dismissal process by a union delegate, and at least another 8 percent by a work colleague or friend. It may be that arbitrators anticipate the support person assisted the worker to clarify allegations and reasons, and facilitate the worker's understanding of the situation. Second, the finding also implies that whilst arbitrators are still highly likely to find in favour of the worker if this error occurs, arbitrators anticipate employees possess some *innate* understanding of why they were investigated and/or dismissed, even if management were not careful in the detail.

Such an expectation might hark back to the low ‘power-distance’ and high ‘individualism’ characteristics of Australia’s national culture (Hofstede 2001). These eminent features presuppose the *typical* worker is, first, not fearful of questioning authority and second, self-sufficient in managing his or her work life. The implication of these national features suggests workers are not passive passengers in the employer-employee relationship; particularly if one were being investigated or questioned about misconduct. Such an implication may temper – only slightly - the demands on employers to be clear and direct in presenting allegations and reasons for the dismissal.

A final point concerning the influence managerial errors have on the arbitration decision is made. Figure 7.1 depicts a noticeable division between ‘content’ and ‘process’ errors. The three areas of weaknesses shown in the initial filter consider the ‘content’ of the dismissal. These faults address the actual act of misbehaviour itself, and the context in which it occurs. This suggests a preliminary concern for distributive justice principles to be upheld for the worker, and confirms Australia’s legislative concerns under Section 387 of the Fair Work Act 2009 requiring a ‘valid reason’ for dismissal.

The subsequent filter reflects then four areas of weaknesses associated with management’s ‘process’ used in the discharge of the investigations and dismissal. This reflects a second order concern for the procedural and interactional justice ideals being afforded to the worker, reflected in the ‘unfair’ requirements noted in Section 387 of the Fair Work Act 2009. The filtering process appeals to Wheeler’s (1976) theory of *humanitarian arbitration* – considered in section 3.2.5 - in view of the weight arbitrators’ place on the behaviour and circumstances of the event, ahead of the rules of dismissal. It also crosses the boundary to Wheeler’s *corrective arbitration* because arbitrators, in addressing the ‘harshness’ requirements of the legislation, place significant weight on the circumstances surrounding the dismissal and attempt to rectify the situation for the worker if they have concerns about the worker’s career and/or income earning opportunities.

To conclude this section, it was established through research question one that employees engaging in any of the four categories of misconduct possessed extremely

low chances of winning their claim (between 4 and 12 percent were reported in Table 6.4). Considered in conjunction with the results for research question 3, we can see that the amount an act of misbehaviour influences the arbitration decision is influenced by the employer's treatment of the situation. Clearly, an incident viewed by the employer as a 'reprimandable offence' will, in most instances, be viewed differently by the arbitrator if the employer was negligent in its obligations to provide natural, distributive and procedural justice to the worker.

7.1.4 New insight: sub-questions a, b, c and d

Pioneering insights were not identified for the four sub-research questions; however, a number of statistically significant findings contributing to prior research were identified through them and are addressed in the next section.

7.2 Statistically significant results that either confirm or refute prior research

This section is devoted to improving our knowledge of arbitral decision-making involving cases of employee misconduct, by considering findings that were not only statistically significant but also supported their relevant hypotheses as presented in chapter 4. These are findings that occurred in addition to those covered in the previous section.

7.2.1 Further significant findings: research questions 1, 2 and 3

Research questions 1, 2 and 3 provided original insights which were discussed in the previous section, rendering it unnecessary to recount them in this section. However, the sub-research questions focused on the moderating variables that were captured in previous investigations. Thus, a number of statistically significant insights can be discussed in this section in relation to them.

7.2.2 Further significant findings: worker's advocacy (sub-question a)

Sub-research question (a) sought insights about the influence of advocates, used by both employers and workers at the arbitration table, on arbitration decisions. Whilst the investigation found the type of advocate used by the *employer* bore no statistically significant influence on the arbitration decisions (when controlling for

other factors), *workers* significantly improved their chances of winning a claim by electing to use either independent lawyers or a union representative (that can at times be a lawyer), rather than attempting to present their own claim. The use of a lawyer improved the chance of a favourable decision by 45 percent and 42 percent where a union advocate appeared on the worker's behalf. A number of important discussion points can be made of these findings.

The first point worth discussing is how exit/voice theory is substantiated by the significance of the success experienced by workers represented by an advocate. Descriptions of this theory tend to place 'voice' behaviours as those behaviours workers perform whilst within the employment relationship (Cappelli & Chauvin 1991). However, the context of this investigation places the employee outside the employment relationship. Provision exists within exit/voice theory for a third person or advocate to provide 'voice from without (after exit)' (Hirschman 1970; Luchak 2003) affording the worker a formal, representative voice to show dissatisfaction with the treatment received from their employer. This allows the dismissed worker to still exhibit 'voice' behaviours. Moreover, it supports the proposition that advocates are an essential resource for accessing this 'voice' behaviour, particularly as self-represented workers – attempting for themselves to access 'voice from without' - were significantly less likely to receive favourable decisions.

The next notable point is that independent lawyers were found to offer *greater* advantage than other sources of advocates, such as industrial relations consultants and union representatives (for which the Australian legislation permits them to be lawyer). The benefit of an independent lawyer reflects the discoveries of Crow and Logan (1994) and Block and Stieber (1987). Scholars have built a collection of explanations for such phenomena which, for the sake of brevity, will not be repeated here as they were discussed in section 4.6.2. However, the author will add to these discussions a comment about the effectiveness of union advocacy evidenced in the results. With a world-wide decline in union membership (Bender & Sloane 1999; Broadbent 2005; Gall, Hurd & Wilkinson 2011), which in Australia has been attributed to neo-liberal political agendas, precarious labour markets and an increase in lower-unionised, knowledge-based service jobs (Bray & Underhill 2009; Burgess 2000; Campbell & Brosnan 1999; Cooper 2005; Gall, Hurd & Wilkinson 2011;

Lewis 2004; Wooden 2002), one might think union advocates would be less resourced than they once were to provide effective advocacy services. However, quite the opposite appears to be happening. The union advocates are nearly matching the effectiveness of independent lawyers for unfair dismissal applicants. This may indicate unions, challenged by a decreasing presence in the workplace, are investing in training and skilling their advocates to demonstrate the benefits of union membership to current and potential members, as they etch a response to neo-liberal forces shaping the industrial relations environment.

A further point is the finding that non-represented workers were disadvantaged compared to represented workers, which is consistent with the research of Mesch and Dalton (1992), Bingham and Mesch (2000) and Gely and Chandler (2008). In addition to the points raised in the previous paragraphs about the benefits of advocacy, a further contingency in play may be that skilled advocates have the experience and prowess to expose *new information* that can change the outcome. For instance, the Australian legislation allows parties, during arbitration, to bring to light facts that were previously uncovered; in colloquial terms, ‘a second bite of the cherry’. A precedent often cited by tribunal members is *McLauchlan v Australia Meat Holdings Pty Ltd (Appeal No. 40215)1998 AIRC*, stating that arbitrators are bound to assess the ‘evidence in the proceeding before it’ provided such evidence was in existence when the dismissal was rendered. These new facts, which can be exposed through skilful advocacy, could influence the arbitrator’s willingness to render the dismissal harsh, unjust or unreasonable. As an example, see *Daniel V Hurstville Community (U2009/11308) 2010*.

The final point to be made is that, in spite of Australia’s federal legislative aims to limit (and possibly remove) the involvement of legal representation in unfair dismissal proceedings (Forsyth 2012; Mourell & Cameron 2009), the results show that this has not been the case, with 37 percent of workers represented by independent lawyers and only 15 percent self-representing (the remainder being presented by unions at 27 percent, and consultants or non-certified legal officers at 21 percent). The findings confirm that to limit legal representation would be disastrous for the worker with the results confidently showing independent legal advocates produce better outcomes for the workers. Regardless of the government’s

ambitions, this investigation indicates that the unfair dismissal arbitration process has clearly failed to be one that can be efficiently navigated by a layperson. Furthermore, Mourell and Cameron (2009) argued that restricted representation is detrimental not only to the dismissed workers emotionally; it increases the work demands on tribunal members, and the public at large financially. In closing, based on the complexity of the emotional, financial and technical dimensions of the employment contract, perhaps it is unrealistic to expect that the typical layperson could cope, let alone succeed, in the arbitration arena without the support system provided by experienced advocates.

7.2.3 Further significant findings: worker's gender (sub-question b)

Sub-research question (b) addressed characteristics about the worker that may be influencing the arbitration decision, with the statistically significant finding that gender – specifically women working in managerial and professional work – were negatively related to favourable arbitration decisions: to the point that they were 45 percent *less likely* to win a claim compared to their male counterparts. Along similar lines, Brescoll and Uhlmann (2008) detected a negative bias against professional women who expressed anger in the workplace – which some employers may see as analogous to misconduct - with the consequence that the women were considered incompetent. Harsh assessments of women professionals has not changed over thirty years, with Larwood, Rand and der Hovanessian (1979) finding that 'career' women had little margin for error to make mistakes – regardless of their field - *unlike* their male counterparts performing traditional male roles.

With 46 percent of professional and managerial positions in Australia occupied by women (ABS 2012a), it indicates gender desegregation at this broad occupational level (Moskos 2012; Wirth 2001); which is consistent with patterns found in a number of ILO countries (Wirth 2001). It is odd – and unfortunate - that as women steadily increased their presence in professional and managerial occupations since 1987 (ABS 2006), they failed to receive outcomes at the arbitration table that matched those given to male professionals and managers. This finding is reminiscent of Ryan and Haslam's (2007, p. 566) conclusion that '*having a more inclusive playing field does not necessarily mean that the field is any more level*'.

As a potential explanatory factor for this finding, we consider the horizontal segregation, or the ‘glass wall’ that exists between male and female professionals and managers. This segregation reinforces the community-work related expectations of females so that women professionals are found concentrated in nursing and teaching, and women managers in service related industries (Tiessen 2007; Wirth 2001). For instance, in 2011–12, Australian women were employed in managerial positions of the type concerning child care centre managers (96 percent), health and welfare services managers (78 percent) and school principles (48 percent) (ABS 2012b). Meanwhile women professionals represented the majority of early childhood teachers (97 percent), primary school teachers (86 percent), counsellors (82 percent), welfare, recreation and community arts workers (80 percent) and nurses (95 percent) (ABS 2012b).

How we as individuals, and society at large, develop a cultural awareness of the rights and obligations associated with a job, is thought to be shaped by identity-based role theories. These theories explain how occupations become socialised roles so that the incumbent can meet the expectations of their client and apply the logic of what is and is not appropriate in their line of work (Leavitt et al. 2012; Sluss, van Dick & Thompson 2011). To this end, women managers and professionals find themselves working in occupations that require the performer to possess a high degree of ‘*natural morality*’ and for which societal expectations reinforce that women are suited because they have the disposition to *‘uphold [the] moral standards and care about the needy perhaps because of their innate nurturance [and] perform good works in service orientated occupations such as social work and nursing’* (Reskin & Hartmann 1986, p. 41).

The implication for women working in the type of community related, professional and managerial fields in which they are stereotyped, exposes them to a largely vulnerable clientele, such as the elderly, the sick and children, which demands superior standards of moral judgements and ethical behaviours. It is conceivable that acts of misbehaviour in these work fields carry a very low tolerance threshold for worker misbehaviour from the perspective of employers, society and ultimately, arbitrators. Furthermore, the ‘evil woman’ theory contends that a transgressing female is judged more harshly because she engaged in ‘unladylike’ behaviour that

offended the female stereotype that women are good and moral beings (Herzog & Oreg 2008; Moulds 1978; Nagel & Hagan 1983; O'Neil 1999). Either separately or in combination, these factors may explain the poorer arbitration outcomes received by female professionals and managers who were dismissed for misbehaviour, compared to their male counterparts.

Before departing this discussion, it is noted that female workers, when considered in totality to also include intermediate and lower skilled women workers, were revealed to have a 37 percent *improved* chance of winning their claim compared to male grievants. This statement can be made with the confidence associated with a *p*-value of .087, which, in relation to the typical .05 *p*-value, may mean it is questioned by some. However, as the analysis accounted for the population of misconduct related arbitration decisions for the ten year period, the risk of incorrectly generalising patterns of behaviour from a sample to the population is reduced. Thus, we consider why female grievants can be more optimistic of a win than male grievants, particularly in light of the previous finding that females in the professional and managerial fields are unlikely to win their claim. This implies that females within the intermediate and lower skilled occupations are heavily weighted to winning a claim.

As a starting point, noted first are previous empirical investigations that identified a general finding that women are treated more favourably than men in workplace arbitration decisions: Knight and Latreille (2001), McAndrew (2000), Bingham and Mesch (2000) (in terms of the amount of backpay), Saridakis et al. (2006), Wagar and Grant (1996), Caudill and Oswald (1993), Bemmels (1988b, 1988a, 1988c, 1990b, 1990a, 1991a), Dalton and Todor (1985b), Oswald and VanMatre (1990) and for workers in small and medium enterprises in Southey and Innes (2010). This research adds to this list of studies supporting the presence of gender effects in dismissal arbitration favouring female grievants. However, other studies *did not detect* favourable conditions for women grievants: Gely and Chandler (2008), Chelliah and D'Netto (2006), Harcourt and Harcourt (2000), Dalton et al. (1997), Thornicroft (1995b), Bemmels (1991b), Scott and Shadoan (1989), Block and Stieber (1987), Crow and Logan (1994), Bigoness and DuBose (1985), Malin & Biernat (2008).

Two reasons may explain why there are studies inconsistent with the finding in this thesis. First, the different conditions and methodologies applied in the studies were extensive. To explain: there were studies that measured gender effects when dealing with a particular behaviour leading to the dismissal such as: alcohol and drug use (Crow & Logan 1994); workplace voilence (Gely & Chandler 2008), refusing unsafe work (Harcourt & Harcourt 2000) and sexual harassment (Oswald & Caudill 1991). Others identified a number of specific misconduct-related reasons: Block and Stieber (1987), Thornicroft (1995b). Then there were studies that incorporated reasons for dismissal in addition to misconduct, such as redundancy or work performance: Chelliah and D'Netto (2006); Dalton et al. (1997); Scott and Shadoan (1989). There was a study that did not include in the analysis the reason the case was before arbitration: Dalton et al. (1997). Other studies included lesser disciplinary actions such as suspensions: Steen, Perrewe and Hochwarter (1994); Dalton, Owen and Todor (1986); Malin and Biernat (2008). The majority of studies used actual arbitration decisions for investigation, but other investigators were experimental and used hypothetical cases that were assessed by a range of participant 'decision-makers' (including students), see for example: Bingham and Mesch (2000); Bemmels (1990a, 1991a); Malin and Biernat (2008); Oswald and Caudill (1991); and Bigoness and DuBose (1985).

Second, the country of origin – and its associated dispute resolution culture - was the **United States**: Bemmels (1988a, 1990b, 1990a), Crow and Logan (1994), Steen, Perrewe and Hochwarter (1994), Bingham and Mesch (2000), Dalton et al. (1997), Malin & Biernat (2008), Block and Stieber (1987), Oswald and Caudill (1991), Bigoness and DuBose (1985), Dalton, Owen and Todor (1986); **Canada**: Bemmels (1988b, 1988a), Thornicroft (1995b), Harcourt and Harcourt (2001) and **Australia**: Chelliah and D'Netto (2006). Interestingly, the studies conducted in the **United Kingdom:** Knight and Latreille (2001); Saridakis et al. (2006) and **New Zealand**: McAndrew (2000) were consistent with finding that women were more likely to receive favourable outcomes, which may be due to a closer cultural alignment between Australia and these two countries.

Particular attention must be paid to the Australian study by Chelliah and D'Netto (2006), which did not find the worker's gender influenced the arbitration result. This

investigation incorporated decisions dealing with redundancy and poor performance as additional reasons for dismissal, whilst the current study sought direct insights on only misconduct related offences. This factor alone could account for the variation in the finding, as workers subjected to disciplinary dismissals may face bias not applied to workers who were dismissed because they struggled to meet performance expectations or who were laid-off due to downsizing.

Considered briefly is the psycho-sociological premise that attempts to explain why females achieve better arbitration outcomes. As the majority of decisions were made by male arbitrators, one may think the 'paternalism and chivalry' thesis is at play (Franklin & Fearn 2008; Herzog & Oreg 2008; Staines, Tavris & Jayaratne 1974). Under this scenario, male arbitrators harbour a fatherly or protective role toward females while female arbitrators similarly provide maternal support for women under the 'maternalism' thesis (Luthar 1996; Southey & Innes 2010), as they project their own gendered challenges to succeed in the workplace, to the plight of other women (Eveline 2005; Gutek, Cohen & Tsui 1996). However, these explanations must be treated with caution, as the hypothesis test performed in this investigation for interaction effects between arbitrator gender and worker gender failed to be statistically significant.

Perhaps, therefore, one does not assume the bias sits with the arbitrators, and instead consider whether the bias might be occurring in the workplace. Although the descriptive statistics indicate male and female workers appear to be committing offences of similar severity (see Appendix 9, Table A9.1), women may be subject to a higher standard of behaviour by their employers, compared to male workers. Within the western traditions of a 'masculine' type workplace (Tiessen 2007; Watson & Newby 2005) the results may be showing that women were terminated for behaviour their employers perceive to be an offence warranting such extreme discipline, however the merits of the employer's case fails to withstand scrutiny by an arbitrator. Furthermore, the weaknesses in the merits of the employer's case may be reflecting procedural justice errors when dismissing females, rather than distributive justice errors. This suggestion is supported by the cross-tabulation appearing in Appendix 9, Table A9.2 between gender and employer errors in the dismissal. The largest disparity between the genders occurs with 18 percent of

females found to have been subjected to poor presentation of allegations from management, as opposed to only 13 percent of male workers experiencing this during the dismissal (a procedural justice error). Meanwhile, 21 percent of males were exposed to 'too harsh a punishment', compared to only 15 percent of females (a distributive justice error). When it comes to deciding whether to dismiss a female worker, it is postulated that management is not as thorough in informing women workers of the reason for their dismissal.

7.2.4 Further significant findings: arbitrator's background and experience (sub-question c)

Sub-research question (c) considered a range of attributes associated with the arbitrators that may influence their decisions. The effects of two of these attributes were correctly hypothesised. First, arbitrators would be influenced by their work background to the extent that those with union backgrounds were more inclined to favour workers, compared to arbitrators with a management background (as discussed in section 4.8.2). Second, arbitrators toughened their stance on finding in favour of the worker as their experience in making arbitration decisions increased (discussed in section 4.8.6).

Considered first is the **work background** of the arbitrator where the finding in this investigation supported the previous findings by Southey and Fry (2010, 2012) and Crow and Logan (1994). Other scholars have also identified the arbitrator's work background as an influential factor on their decisions, although notably these studies used different occupational categories or political ideology, such as legal background, academic background or 'conservatism/liberalism' (Bemmels 1990b, 1990a; Biernat & Malin 2008; Bingham & Mesch 2000).

On the other hand, arbitrator background, in two investigations identified from the literature, did not identify a significant relationship between work background and arbitration decisions (Heneman III & Sandver 1983; Nelson & Kim 2008). Nelson and Kim (2008) measured background by identifying whether or not being an arbitrator was their primary occupation. Whilst the earlier study by Heneman III and Sandver (1983) contained a sample where only 3.6 percent of the arbitrators had a

union background and the arbitration decisions were not limited to disciplinary dismissal cases. On balance, the evidence appears to be mounting that work history influences are apparent, particularly in the Australian context, taking into account the leading interest taken by the author of this thesis.

Judicial and activist arbitration theories suggest arbitrators remain neutral and impervious to the effects of their personal sentiments, agendas and attributes (Dabscheck 1980, 1983b; Perlman 1954; Romeyn 1980). Under such theories it should be inconsequential whether the arbitrator worked previously for either the interests of workers or employers, as it should have no influence on his or her decision. Yet Dabscheck (1981) and Perlman (1954) also proposed arbitrators, under the auspices of accommodative, autonomous or administrative arbitration, might submit to either the power of the stronger party or promote their own agenda. In addition, Carlston (1952) and Wheeler (1976) also conceived arbitration theories beyond a neutral framework, whereby arbitrators engage in educative, mediative, humanitarian or even disciplinarian roles. Within any of these alternate frameworks, the arbitrator may not always act as the 'neutral' third party – no doubt elevating scholarly interest on the predisposition of each arbitrator. In Australia, the persistent claims that successive governments have 'stacked' the tribunal echo the sentiments of these alternate arbitration theories, as stakeholders fear their interests may not be recognised by the arbitrators and the federal tribunal at large.

It is thought that a person's prior experiences, orientations and mental models inherently influence the cognitive heuristics and selectively used to assess information for decision making (Das & Teng 1999; Korte 2003; Sangha & Moles 1997; Tversky & Kahnemann 2000). Perhaps the reason why the arbitrators' professional work background was found to influence their decisions is the human impossibility to detach from the subconscious influences of their personal attributes, which inescapably shape their interpretations of the evidence, and subsequent decisions.

Second, **experience in arbitral decision-making** over unfair dismissal claims was found to be an influential factor on the arbitrator's decision. As discussed earlier, the result that more experienced arbitrators tend to support the employer's actions are in

line with previous investigations (Caudill & Oswald 1993; Nelson & Curry 1981; Nelson & Kim 2008; Oswald & Caudill 1991; Simpson & Martocchio 1997). As discussed earlier.

This negative relationship might be explained by the suggestion that arbitrators, as they make more arbitration decisions, become correspondingly accustomed to the psychological discomfort of administering a decision that has punitive consequences for a worker. Additionally, recalling that Collins (1992) suggests the fundamental principle of unfair dismissal laws are to support workers in their quest for dignity and autonomy in the employment relationship, the arbitrator's early decisions might express an austere application of these principles. Simply, less experienced arbitrators may err on the side of caution and support the party that, in the main, has lesser power: the worker. Inevitably, as they determine more claims, it is proposed their construction of these principles evolves, influenced by: their increasing expertise in the legislative minutiae, the decisions made by their colleagues and, as suggested by Nelson and Kim (2008), their improving ability to detect whether someone is telling the truth. As this experience increases, the arbitrator refines their decision-making so that they can balance more distinctly (Bemmels 1991a) the rights of the worker against the economic considerations for the employer's business. In this realm, we see arbitrators being more assured of upholding dismissals that, in effect, sustain the punitive consequences for the worker.

7.2.5 Further significant findings: collegial support and industry (sub-question d)

Sub-research question (d) concerned itself with descriptive factors about the employer that could be influencing the arbitration decisions. Collegial support in the workplace during meetings and industry were found to carry significant influences on the arbitration outcome.

It was found that workers, who were permitted by their employer to have a colleague, a friend or a *companion* present at meetings *prior to and at the dismissal*, tended to be less likely to win their unfair dismissal claim. This is possibility the first Australian study to have sought and detected such a finding. It is also one which is consistent with Saundry, Jones and Antcliff (2011) UK cross-industry analysis of

worker representation in disciplinary matters in the workplace. The statistical model estimated that accompanied workers were 43 percent *less likely* to win their claim compared to workers supported by union representatives or delegates. Discussed next are two insights that herald from this finding.

First, the employer, by allowing the worker to be supported by a companion during meetings associated with the dismissal, may be viewed by arbitrators as having made efforts towards administering a just and fair dismissal process. Additionally, the simple regression result of 'unaccompanied' workers being statistically significantly *more likely* to receive favourable arbitration decisions also supports the contention that the presence of a support person for the worker provides an indication of the employer's ambition to follow a procedurally fair process. Allowing the worker a support person during proceedings has been associated with the application of more 'formalised' disciplinary and dismissal procedures (Antcliff & Saundry 2009) and is recommended as a practice, provided the support person is not a lawyer, by Australia's Fair Work Commission (FWC 2013a).

Second, this finding suggests that workers supported by union representatives or delegates during the dismissal process, were more successful in their claims compared to those that relied on friends or colleagues to be present. It has been identified that Australian workplace union delegates are, in the majority, exposed to training opportunities which can improve delegates' activism and their confidence in 'organising' behaviours (Peetz & Pocock 2009; Peetz, Webb & Jones 2002). Thus, having a friend or colleague by the worker's side probably offers less effective protection against unfair dealings, as opposed to the assistance of a union delegate (or representative) who are anticipated to be more attuned to identifying and noting irregular treatment to the worker. Such shortfalls in the employer's treatment of the worker during the dismissal can then be provided by the union advocate to the arbitrator during the hearing. Even if well-intentioned, a colleague or friend is unlikely to possess similar know-how.

Sub-question (d) also ascertained that the *type of industry* in which the employer operates can have a significant influence on the decision. There was a trend indicating that workers engaged in the transport, postal, warehousing, manufacturing

and wholesaling industries are winning around 86 percent of their claims. This claim is somewhat tentative as the manufacturing and wholesaling industries possessed a .096 *p*-value. The same argument for confidence as per the gender effects finding discussed in section 7.2.3 may also offer a reason to give some brief thoughts on this finding.

These findings are congruent with scholarship suggesting secondary industries characterised by lower skill sets, physically demanding work and/or harsh work environments, are more likely to adopt aggressive disciplinary approaches (Antcliff & Saundry 2009; Green & Weisskopf 1990). In particular, the manufacturing industry has been identified as a high dismissal industry (Green & Weisskopf 1990; Klass, Brown & Heneman III 1998). The vulnerability of workers in these industries has further increased with the decline in union presence in the workplace when the evidence suggests unions have potential to facilitate resolutions rather than escalate disputes (Antcliff & Saundry 2009; Campbell III 1997; Klass, Brown & Heneman III 1998; Pyman et al. 2010). It is postulated that these high disciplinary industries have a culture of administering dismissal as a disciplinary response to behaviours viewed by management as ‘reprimandable offences’, which, by arbitrators’ standards, are considered too harsh and who consequently restore justice to the workers by issuing decisions in their favour.

A further point from this aspect of the investigation worthy of comment is that the solitary *negative* relationship with favourable arbitration outcomes was identified for workers in the hospitality and recreation industries. Akin to the secondary industries discussed above, the hospitality industry is also described in the literature as one that has historically applied ‘hard’ human resource practices (Head & Lucas 2004; Korczynski 2002; Mills & Dalton 1994). However it is also one that is complicated by its sole reliance on the intangible, human involvement in its delivery and where social and moral aspects of the work differ from product-related industries (Korczynski 2002; Lucas 2004). Although the negative relationship identified in this thesis cannot be stated with any statistical confidence (*p*-value of .3), it presents an oddity perhaps worthy of further investigation, that out of all the industries – where the customer cannot be taken out of the equation (Lucas 2004) - hospitality and recreation workers were negatively related to winning their claims.

7.3 Insights from retained, null hypotheses and unexpected influences

The final aspects to be discussed from the investigation performed in this thesis are those findings which ran counter to the alternate hypothesis, or alternatively, where unexpected negative or positive relationships occurred between certain variables and the arbitration decisions. These items will be discussed in relation to relevant literature and where necessary, possible explanations for the phenomena provided. Again, these insights will be discussed under the banner of their relevant research question.

7.3.1 Statistical insignificance: service periods and remorse (question 1)

Not supported was the prediction that workers could mitigate the allegation of misbehaviour by demonstrating loyalty on the basis of serving a lengthy period of employment (Chelliah & D'Netto 2006; Knight & Latreille 2001; Saridakis et al. 2006; Simpson & Martocchio 1997). In effect, the opposite was found, whereby workers with 15 to 20 years service were statistically significantly *the least likely* to win a claim. The general pattern observed in the analysis - although not statistically significant for the remaining service periods - showed workers with service periods up to ten years were more likely to win their claim and those with ten years or more service were less likely to win their claim.

Two possible interpretations might explain this finding about length of service. First, long-serving employees can be considered power-brokers in the informal learning that occurs in organisations (Wee & Lee 2010). With this in mind, it may be that longer-serving employees are expected to be role models to employees of less experience, and who should ‘know better’ about behaviour that offends the codes of conduct and idiosyncrasies with the norms of acceptable behaviour for their particular employer. Alternatively, as longer-serving employees come to recognise weaknesses in company processes and/or monitoring systems (Ermongkonchai 2010) they may attempt to exploit such faults - with disastrous consequences.

More challenging to explain is the failed prediction that showing remorse or making an ‘apology’ for one’s behaviour will soften the sentence. The simple regression model confidently revealed that remorse would improve the chance of a favourable

decision to the worker by 19 percent, yet this effect disappeared in the 'all things considered equal' context of the full model. The finding thus opposes the expectation presented in the literature that a demonstration of contrition can improve relations and soften the punishment (Brownlee 2010; Eylon, Giacalone & Pollard 2000; Friedman 2006; Skarlicki & Kulik 2005).

The dissolving influence of remorse between the simple and full model suggests that whilst there may be some combination of factors in which contrition can influence the arbitrator to find in the worker's favour, in the main, remorse is unlikely to improve the worker's ability to win his or her claim. A couple of factors might explain this negative relationship. First, it was shown in a previous finding that increasing the complexity of an explanation reduces the likelihood of win. Thus an apology may add another layer of complexity to workers' defences. Second, it is possible that an apology has the affect of compromising or undermining workers' explanations to justify why they engaged in the behaviour. It might be that through showing remorse or apologising, the workers' culpability for their behaviour is reinforced to the arbitrators.

7.3.2 Statistical insignificance: employee explanations (question 2)

The second research question concerning the workers' explanation for their behaviour – predicated on attribution theory (discussed in section 4.4.2) - showed that the anticipated relationships between the three types of explanation (work related, personal-inside, and personal-outside) and favourable arbitration decisions to the workers were predicted correctly – however they approached, but did not achieve, statistical significance (p-values of .112 and .148). Thus the null hypothesis stood, suggesting that there is no particular explanation that can be used to improve the chances of a favourable decision. If the null hypothesis is in fact true, the disconcerting implication is that the content of the explanation proffered by the workers has minor consequence in the dynamics of arbitral decision-making. Instead, based on the other significant findings in this study, the worker's explanation would be overshadowed by the complexity of the explanation, the actual type of misbehaviour and the dismissal process itself. This suggests worker advocates focus

on presenting a simplified defence aimed at discrediting the employer's process, and less concern about the content of the worker's explanation.

However, the argument presented previously promoting the benefits of analysing the population of misconduct related decisions, lessening the impact of the a priori *p*-value for rejecting the null hypothesis (noted in sub-section 7.2.3), is noted again to support the suggestion that the directions of influence shown by the different explanations, with *p*-values of .112 and .148, might possibly be actual patterns and not random observations. If the alternate hypothesis is the truth, the influential elements of arbitral decision-making combine to present a more balanced approach than suggested in the previous paragraph. Arbitral decision-making under this interpretation would then also incorporate the internal and/or external attributions the workers attributed their behaviour – according to the Southey (2010) employee explanation typology - which reflects explanations that either implicated the operations of the workplace and/or personal issues to which the workers succumbed.

This interpretation of the finding also places the employer in an even more culpable position than in the scenario under the null hypothesis. According to attribution theory, a situation caused by external factors beyond the control of the individual lessens judgements of responsibility on the individual (Heider 1958; Judge & Martocchio 1996; Klass, Mahony & Wheeler 2006; Robbins et al. 2011). Thus, employers are potentially exposed to being incriminated if workers plead externally-attributed, workplace-related reasons for their behaviour. And, where this happens, the workers are better placed to win their claim than if they relied on personal motivations to explain their behaviour.

7.3.3 Statistical insignificance: severity of the offence (question 3)

It was predicted that employers could mitigate weaknesses in their dismissal process if workers committed a severe offence. Severity of the offence is believed to be an important control measure when analysing arbitral decision-making (Dalton et al. 1997; Mesch 1995; Scott & Shadoan 1989). However, the analysis supported this contention in only one error - where the employer was lax in seeking the worker's response to the allegation. This finding was discussed in section 7.1.3. For the

remaining six errors, the null hypothesis was retained. This means employers are unable to claim that the offence was so obnoxious in nature that they expedited the dismissal and may have (even if inadvertently) missed steps in natural and procedural justice. These insights are positive as it suggests that arbitrators hold employers to workplace justice practices congruent with the societal expectation that 'everyone deserves a fair trial'. Despite the fact that a worker may have actually engaged in serious and offensive misconduct, the modelling shows that the employer must show the worker the respect of following a procedurally fair process to investigate the incident and determine a course of action, if the employer aims to not have its actions overturned at arbitration.

7.3.4 Statistical insignificance: employer's advocacy (sub-question a)

The investigation did not support the prediction that employers would benefit from engaging advocacy services at the arbitration table. A similar finding was produced by Kirschenbaum, Harel and Sivan (1998) whilst findings suggesting employer advocates provide no advantage when facing unrepresented workers were noted by Harcourt (2000) and Thornicroft (1994). On balance, the finding in this thesis is counter to the overall trend reported in prior examinations that advocates are beneficial in representing workers and employers, particularly if an imbalance in the representation exists between the opposing parties (Block & Stieber 1987; Crow & Logan 1994; Knight & Latreille 2001; McAndrew 2000).

Whilst this investigation found *workers* benefited significantly by using advocates (discussed in section 7.2.2), it did not find the same for *employers*. If the null hypothesis can be accepted, an explanation as to why advocacy services do not appear to benefit Australian employers could point to the political agenda for unfair dismissal claims to be resolved without the parties resorting to expensive, legal advocacy (Mourell & Cameron 2009). With the legislative onus to subdue the reliance on legal advocacy, the tribunal may more arduously scrutinise employers that use advocates to defend their dismissal of a worker, than employers that self-represent their defence. In effect, despite the superior advocacy skills of independent legal counsel, their influence over the employers' defence is neutralised by the anti-legal agenda. At the same time workers, due to their lower power (Mourell &

Cameron 2009), are afforded the benefit of an advocate to adequately present their claim.

Even though the results sustained the null hypothesis, it is worth considering the direction of influence revealed in the analysis, because the implications from this perspective are quite different from those discussed in the previous paragraph. The modelling showed that the direction of influence for employers that engaged independent lawyers decreased the chances of the worker winning a claim by 22 percent (confidence equals a *p*-value of .107). Subsequently, taking into account the previous scholarly discoveries promoting the effectiveness of legal advocacy, and the fact that the *p*-value is not excessively high, a *cautious* argument could be made that advocacy by independent lawyers may be beneficial for employers. This would bring Australia into line with the majority of previous empirical investigations.

However, more concerning for the efficiency of employer advocacy is that - bearing in mind the lack of statistical confidence - a worker had a 29 percent *improved* chance of winning a claim if the employer used an advocate from an industry or employer association (*p*-value of .121). An explanation may be that associations feel duty-bound to support an employer at arbitration, regardless of the strength of the case and regardless of the fact that they may be lawyers themselves. Perhaps there are more complex reasons, even though explanations are challenging due to limited scholarship about the behaviour of employer associations (Barry & Wilkinson 2011).

One train of thought is that employer associations are facing membership and renewal challenges, similar to unions, as they adapt to the decentralised industrial relations landscape (Hearn Mackinnon 2009; Sheldon & Thornthwaite 2004). And, although associations serve as the employers' counterbalance to the workers' unions (Barry & Wilkinson 2011), this investigation hints at the possibility that they may have fallen behind the unions' performance as advocates at the unfair dismissal arbitration table. Unions have engaged in a proactive advocate training (Brown & Yasukawa 2010) allowing performance for dismissed workers at arbitration. Perhaps similar training and development efforts are not mirrored by employer associations. Alternatively, the hiring of legally qualified staff within the association may be limited.

Yet the employer associations' performance may not be a matter of skill but rather a matter beyond the control of association advocates: in the form of cognitive biases on behalf of the arbitrator. It may be that arbitrators are influenced by stereotypical, preconceptions about the advocate's incentive to appear on behalf of a party at the arbitration table. To explain, legal counsel advocates may be viewed as having 'mercenary' interests, ready to sell their advocacy expertise to a willing party (Daniels & Martin 2012); unions advocates may be seen as campaigners pursuing an honourable fight to restore the underdog worker with the opportunity to attend the workplace; whereas employer association advocates may be seen as 'capitalist delegates' bolstering the managerial prerogative of the power-wielding employer. In an industrial mechanism that aims to counterbalance the employer's power; of these three scenarios, one might anticipate that employer association advocates face the largest barrier to winning a favourable response for their client.

7.3.5 Statistical insignificance: employment status (sub-question b)

Discussed under this sub-question is the employment status of the worker for which the alternate hypothesis was not supported. Recognising that both full-time and part-time employment can be precarious in nature – this factor was considered because of the increase in part-time work being performed in Australia. Part-time workers may be associated with job insecurity if one deduces that part-time workers may be more likely to be engaged on a casual or non permanent basis. Precarious employment is associated with substandard employment security, conditions and rights (Campbell 2010) and lower union membership (ABS 2011c).

Without guidance from previous empirical studies on this factor in relation to arbitration decisions, it was contended that substandard conditions and lower union membership may impact treatment of part-time workers during investigation, dismissal and pursuit of a claim. However, the null hypothesis was retained because the analysis (with a high *p*-value of .335) did not confidently support the notion that people performing part-time hours would be more likely to win their claim. This is an optimistic finding, as it suggests that part-time workers appear to be in neither a better nor worse situation with their arbitration outcomes than their full-time counterparts: in spite of lower union presence amongst such workers.

Noting that women are disproportionally engaged to perform the work of precarious part-time employment (Vosko, MacDonald & Campbell 2009), an interaction was performed to consider if *women* in *part-time* employment were facing disproportionate disciplinary hardships. Again the null hypothesis was retained, with the *p*-value at .132. While the direction of influence suggested women of part-time status are (40 percent) more likely to win their claim over women of full-time status, the *p*-value provides weak evidence to make such a claim with statistical assuredness.

7.3.6 Unexpected direction of influence: occupational skill level (sub-question b)

In relation to the occupational skill level held by the dismissed worker, the null hypothesis was retained because the directions of influence were incorrectly predicted. The analysis in this thesis could not sustain the alternate hypothesis that lower-skilled workers, due to their vulnerability in the workplace and labour market, would be more likely to receive favourable decisions than higher-skilled workers (as detected in Southey 2008b; Southey & Innes 2010). Two reasons are attributed for the lower-skilled worker's reversal of fortune from those reported in the author's previous investigations (in Southey 2008b; Southey & Innes 2010). The earlier investigations included dismissals on the basis of redundancy and unsatisfactory performance, whereas this investigation is tied solely to misconduct related dismissals. The cross-section of dismissal reasons incorporated into the prior studies is likely to impose different influences on the arbitration decisions. Second, the investigation in this thesis incorporated a broader range of control variables which sculpted a different, 'level' field from the prior studies, for detecting nuances in the arbitration decisions.

However, in spite of retaining the null hypothesis, the modelling for this thesis revealed a *statistically significant* trend that as skill level decreased, the chance that a worker would receive a favourable arbitration decision also decreased (this is opposite to the direction originally hypothesised). Such a finding is consistent with those suggested by Rosenthal and Budjanovcanin (2011), Antcliff and Saundry (2009), Cappelli and Chauvin (1992) and Block and Stieber (1987) and Bemmels

(1988b). Several schools of thought can assist with developing plausible reasons for this finding.

First, the *organisational deviance* literature suggests market power can legitimatise misconduct at the organisational level. It suggested more powerful, high status organisations are able to construct public accounts that legitimise their actions, particularly if there is demand for its product or service (Vaughan 1999). If this presumption about the influence of status and competitiveness is applied to *individuals* within organisations, it is argued that higher skilled staff, on the basis of their stronger labour power, can present more persuasive defences for their behaviour compared to lower skilled workers who have less labour power.

Add to this the suggestion that the quality of resources people can access for assistance bear a strong influence on successful case outcomes (Rosenthal & Budjanovcanin 2011). Compared to lower skilled workers, people dismissed from higher skilled occupations presumably have access to better resources to assemble their claim. This is a point supported by the descriptive statistics collected for this thesis, with 51 percent of professionals and managers engaging legal counsel to perform their advocacy at arbitration, as opposed to 33 percent of labourers, drivers and operators doing the same (cross-tabulations appear in Appendix 9 Table A9.3). And, as discussed in section 7.2.2 it was found that employees who used legal counsel had, statistically significantly, the strongest chance of winning their claim.

Second, class and occupational status are irretrievably linked, as well established in the literature – with seminal works by Marx and Weber – that a person's social class is defined by their occupation (Hyman 2006; Inkeles & Rossi 1956; Watson 2008; Weber 1978). Keeping this point in mind, a second plausible explanation is sourced through insights found in the *criminology* literature. Frequently premised on the seminal works by Merton (1938), who suggested that the social structure directly pressures particular groups to engage in deviant behaviour, criminology scholars have argued that social class influences both people's tendency to commit crime, and the type of crime they are likely to engage (Clelland & Carter 1980; Farnworth et al. 1994). Typically, white-collar crime associated with the 'powerful' class is distinguished from lower-class 'street crime' against people and property, such as

burglary and theft (Schwartz & DeKeseredy 2010, p. 108). Further, the harsh conditions associated with low-skilled, repetitious work are believed to make such workers susceptible to particular deviant behavioural responses (Bruursema, Kessler & Spector 2011). Thus, it may be that certain *types* of misbehaviour are associated more commonly with particular occupational contexts. And, it may be that these types of misbehaviour may also be the behaviours that are the least tolerated by the arbitrators and society at large.

The findings discussed in section 7.1.1 contended that acts of *personal aggression* followed by acts of *production deviance* were the least tolerated acts of misbehaviour. The descriptive statistics collected for this thesis also show that the lower-skilled occupations of operator, driver or labourer committed the higher percentage of such least tolerated acts. The cross-tabulations are contained in Appendix 9 Table A9.4, however in summary, they revealed that 50 percent of the *personal aggression* incidents were performed by a person in the operator, driver or labourer category (lower skilled), whereas only 14 percent of such incidents were performed by a person in the managerial or professional category (higher skilled). Meanwhile, 45 percent of *production deviance* incidents were performed by a person in the operator, driver or labourer category, compared to 12 percent by a person in the managerial or professional category. These figures appear to support the proposition that variations in the type of offences may account for workers of lower occupational status receiving decisions that are less frequently in their favour, because they engaged in behaviours under the least tolerated categories.

7.3.7 Statistical insignificance: arbitrator's gender and seniority (sub-question c)

The *arbitrator's gender* was not an influential factor in the arbitration decision. This suggests that a male arbitrator is no more or less likely than a female arbitrator to find in favour of the worker or employer. Also not detected in the analysis were interaction effects between the gender of the dismissed worker and that of the alternate gendered arbitrator. This suggests that male arbitrators are no more or less likely than a female arbitrator to find in favour of a female grievant and a female arbitrator is no more or less likely than a male arbitrator to find in favour of a male grievant. This finding is consistent with works such as Gely and Chandler (2008),

Malin and Biernat (2008), Chelliah and D'Netto (2006), Thornicroft (1995b), Crow and Logan (1994), Oswald and Caudill (1991), Bemmels (1991b), Bigoness and DuBose (1985). The retention of these null hypotheses is positive for the federal tribunal, as it bolsters the tribunal's ability to promote that its arbitration decisions are not a product of the *arbitrator's* gender. Note though, section 7.2.3 discusses the significant influence of the *worker's* gender on the arbitration outcome.

The *seniority* of the arbitrator, as per the appointment hierarchy of the Australian federal industrial tribunal, is not statistically significant as a factor in the arbitration decisions. This prediction was underpinned by the logic that more experienced arbitrators would be appointed at higher levels of seniority. The insight offered from the failed prediction is that the arbitrator's status (commissioner, deputy commission, senior deputy commission, vice president) is not analogous to arbitrator's experience – which we recall was a significant factor influencing the arbitration decision (discussed in section 7.2.4). The implication is not to assume a senior arbitrator is more experienced at arbitral decision-making (in unfair dismissal matters) than a junior arbitrator.

7.3.8 Statistical insignificance: employer characteristics (sub-question d)

This section will consider four variables concerning employer characteristic that failed to support the acceptance of the alternate hypotheses addressing formality of the dismissal process, the presence of HR expertise, business size and business sector.

Initially addressed are the three variables: the formality of the dismissal process, the presence of HR expertise and the size of the employer's business. These three features are inextricably linked, because the size of the employer's business is likely to predicate whether a human resource expert is appointed to the firm, which is likely to influence the formality of the dismissal process (Antcliff & Saundry 2009; Harris 2002; Kotey & Slade 2005; Mazzarol 2003; Saridakis et al. 2006; Southey 2007). These three factors were, in the end, statistically insignificant in the final block of the hierarchical model, yet two factors, *HR expertise* and *formality* of the dismissal process, were statistically significant in the simple regression (and formality in the

base model of the multiple regression), with both showing a negative relationship to decisions favouring the worker. Thus, in fundamental terms, it is beneficial for employers to have the expertise of a human resource officer, and to apply formal dismissal processes, such as documenting meetings, providing written and informative advice to the worker of the situation, and allowing collegial support for the worker. However, when HR expertise and formality are considered with a range of other variables that might also influence arbitral decision making, these factors are eclipsed by stronger influences.

There appears to be a dearth of empirical investigations about the direct influence of these factors on dismissal related arbitration decisions, although the statistical significance of *formality* in the simple and base models is consistent with Knight and Latreille (2001); and with Southey and Innes (2010) regarding *HR expertise* in the simple regression. The dissolution of the statistical significance for these factors within the final block of the hierarchical model (p =.113 for formality and .459 for HR expertise), rendering them incongruent with previous scholarship, is attributed to the fact that a broader range of control variables was introduced into the modelling for this thesis, compared to those incorporated in earlier studies. For instance, the earlier studies did not take into account factors such as arbitrator work history and experience, worker explanations, and type of misconduct.

In relation to the *business size*, Earnshaw, Marchington and Goodman (2000) noted small business-sized employers where quite successful at arbitration, which contradicted Saridakis (2006) finding that the employer's chance of a favourable decision decreased as the business size became smaller. Both scholars presented findings that resembled the direction of influence for firm size detected in this thesis. Bearing in mind the finding in this thesis is statistically insignificant (p = .188, .207), the pattern detected was that, small businesses (up to 19 workers) were more likely to win than medium business (20 to 199 workers), but less likely to win than large business (200 plus workers). Therefore, smaller businesses, compared to medium business, are more successful at arbitration (as per Earnshaw, Marchington and Goodman's finding), but compared to large business, less successful (as per Saridakis' finding). Moreover, these findings reflect previous work of the author, in Southey (2007), that businesses employing between 50 and 100 staff had a

significantly lower number of cases determined in favour of the employer. However, this result was founded on simple, bivariate analysis for two years worth of decisions, dealing with dismissal for an array of reasons of which misconduct was only one reason.

Subsequently, without the assurance of statistically significant *p*-values, it may be the detected directions of influence are incidental, in which case the lack of statistical significance in the final model surrounding these three variables may be reflecting Australia's commitment to the 'fair go all round' principle (The Fair Work Act 2009, Section 382). To this end, under Section 387 of The Act, arbitrators must consider the employer's position in relation to:

> (a) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (b) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal.

These provisions were adopted from the preceding legislation and were initially legislated via the *Workplace Relations Amendment (Termination of Employment) Act 2001*. This means the HR expertise and business size provisions were in place for most of the ten year period of arbitration decisions examined in this thesis. The 'Small Business Fair Dismissal Code' introduced in the 2009 Act further recognised the challenges of small business operations, specifically, their limited HR expertise and redeployment opportunities (Chapman 2009). However, as the intent of this Code is complementary to, rather than counter to, Section 387 provisions, its existence during the 2009 and 2010 decisions included in the dataset, is unlikely to have significantly altered the results. In spite of scholarship to the contrary, the retention of the null hypotheses suggesting no relationship exists between arbitration decisions and *business size, HR expertise* and *formality* – may be viable. It suggests the legislative controls are effective at fettering arbitral decision-making so that small business are not disadvantaged on the basis that the formalised procedures associated with HR expertise evades them.

This leads to the final variable to be addressed under this section, the *sector* in which the employer operates: be it the public sector or private sector. The null hypothesis

was retained, mainly as it was hypothesised incorrectly that private sector workers would be more likely to win a claim than public sector workers. However with a *p*-value of .07 it could be argued that the actual finding, which was that public sector workers had a 25 percent improved chance of winning a claim compared to private sector workers, is possibly an accurate insight. It appears this investigation - if the *p*-value of .07 is accepted as statistically significant - runs counter to previous works incorporating the public/private sector variable in the arbitration of dismissal claims. None of the identified studies detected statistically significant effects for sector (Bemmels 1988b; Block & Stieber 1987; Caudill & Oswald 1992; Knight & Latreille 2001; Thornicroft 1994; Wagar 1994). These studies were conducted on arbitration decisions made in the United States, United Kingdom and Canada, that incorporated a variety of methodologies, and were not necessarily limited to misconduct related dismissals. These factors may account for the variation. However, two further explanations can be tendered.

First, the outcomes might reflect variations in advocacy used between public and private sector workers. It was revealed previously that legal counsel, followed by union representation, benefited the worker at the arbitration table, whilst self-representation was least successful (see section 7.2.2). Thus, if public sector workers are more likely to hire legal and union advocacy and less likely to self represent, compared to private sector workers, it may explain the better success rate for public sector workers.

The descriptive statistics support this suggestion about use of advocacy by public sector workers. Cross-tabulations presented in Appendix 9 Table A9.5, show that a total of 72 percent of public sector workers used legal counsel (50 percent) and unions (22 percent) for advocacy, compared to only 63 percent from the private sector (35 percent legal and 28 percent unions). Meanwhile, only 11 percent public sector workers were likely to employ the least successful strategy of self-representation, compared to 16 percent in the private sector. An interesting point is that private sector workers used union representation (28 percent) more often than public sector workers (22 percent). Paradoxically, union density in the private sector at 14 percent, is much lower than the public sector at 41 percent (ABS 2010c). Perhaps unionised workers in the private sector are more acutely aware of their rights

to pursue unfair dismissal, or it may indicate differences in vigilance, and/or operational strategies between private and public sector unions. And, not to be overlooked is that the private sector contains particular industries that culturally, are more union organised than others. For instance, in 2010 union membership was 41 percent in electricity, gas and water, 32 percent in transport, postal and warehousing, and 21 percent in manufacturing (ABS 2010b).

Second, for public sector workers to have been more successful in their claims, it means public sector management were either making more mistakes in the dismissal process and/or were administrating harsher punishment than private sector management. The descriptive statistics in Appendix 9 Table A9.6 suggest both of these factors are occurring. Public sector management were more susceptible to two of the three 'fatal' errors discussed in section 7.1.3, compared to private sector management. First, public sector managers were guilty of *ignoring mitigating circumstances* in 15 percent of the cases compared to only 5 percent in the private sector. The risk of ignoring mitigating circumstances is that a punishment is open to being judged as too harsh. To this end, public sector dismissals were considered *too harsh a punishment* by the arbitrator in 26 percent of cases, compared to 19 percent of private sector cases.

The variations in dismissal errors between public and private sector managers may be the consequence of equity obligations of the public sector to administer decisions through a framework of 'precedents'. Public sector managers 'can be hamstrung by precedent and constrained by well-intentioned bureaucratic practices' (Du Gay 2000; Goldsmith & Eggers 2004, p. 56). Thus, a public sector employee could be dismissed for taking home the staff newspaper from the tearoom at the end of the day – because the policy states theft will result in summary dismissal. So whilst one may have doubts whether dismissal is warranted for taking home the newspaper, public sector managers may be reluctant to take into account mitigating circumstances, such as the minor value of the newspaper, or that maybe that is was not habitual behaviour and the worker wanted an extra copy for an article of personal interest. For the public sector manager, to not dismiss the worker could be viewed as deviating from a disciplinary precedent, and/or setting a new, unwanted precedent. However,

arbitrators can detach their deliberations from such bureaucratic traditions and consider the dismissal for its severity in relation to the offence.

7.4 Conclusions about the research problem

The previous sections in this chapter contained comprehensive discussions for each of the research hypotheses. This section provides a summary conclusion for the *whole* research effort (Perry 1998), to identify factors influencing the arbitral decisions of members in Australia's federal industrial tribunal, when they determine unfair dismissal claims from workers who have been terminated from their employment due to 'misbehaviour'. At the commencement of this investigation, it was unclear how different types of misbehaviour events that occasion a dismissal might vary the arbitration decisions. It was not known how the employee's explanation influenced the decision, and it was unclear how much managerial mistakes in the dismissal process influenced arbitration decisions. Even less was known about unfair dismissal arbitral decision-making in the Australian legislative and cultural context. The evidence uncovered in this investigation suggests that Australia's federal tribunal arbitration decisions are a product of three primary inputs: (1) the *nature of the offence committed by the worker*; (2) the *complexity of the worker's explanation*; and (3) the *employer's facility to*, first, *make the assessment that dismissal was an appropriate punishment*, and second, *administer a sound process to action the dismissal*. At the same time, secondary factors of a biographical and demographical nature inject nuances into the arbitrator's decision-making and these factors can be categorised according to the advocacy mechanisms utilised during arbitration, worker characteristics, employer characteristics, and the arbitrator's experience and political orientation.

Paramount in the findings is that the Australian arbitration decisions reflect patterns that people are valued more than property. In essence, behaviours deemed harmful to people are less tolerated than behaviours committed against property. Employee defences for their behaviour should be minimalist in complexity to provide them with best chance for a favourable decision. At the same time, employers are assessed foremost on their delivery of distributive justice (whether the dismissal was rational), and thereafter on the procedural justice elements involved in their administering of

the dismissal (whether the dismissal was conducted in a procedurally fair manner). During arbitral assessments of distributive justice, a previous misbehaviour incident recorded against the worker improves the employer's justification to dismiss. However, misjudgements in distributive justice result in reversals of the employer's dismissal. By the same token, within arbitrators' assessment of procedural justice, employers are afforded minor scope to make errors in administering a dismissal. In particular, the most heinous offences have potential to offset the employer's obligation to provide the worker with the opportunity to respond to the allegation.

To improve their chance of a favourable arbitration decision in the federal tribunal, Australian workers should use either legal counsel or union advocates to present their claim to the arbitrators, yet employers are not likely to receive similar advantages if they rely on advocacy services. Workers will also benefit at the arbitration table, if they engaged the union *before* the actual dismissal, so that a delegate or representative was present during investigations and meetings, rather than seeking this support from colleagues, friends or family. Save for women in managerial and professional work, a positive bias towards women workers, in general, appears to be at play. Workers with longer service periods, workers from the private sector and those with lower skill sets can anticipate tougher arbitration outcomes compared to workers with shorter service periods, those dismissed from the public sector, or those in higher skilled occupations. However, workers engaged in the transport, postal and warehousing industries can anticipate positive gains at the arbitration table. Finally, as arbitrators determine more unfair dismissal decisions they become increasingly more likely to support the employer's decision to dismiss a worker. And it appears arbitrators have yet to fully detach their decisions from their predispositions towards either the power-poor worker or managerial prerogative of the employer.

Both theoretical and empirical reasons existed for incorporating further secondary variables that should influence the decisions of arbitrators over unfair dismissal claims. Nevertheless, *all* variables considered, the impact of the following factors on the decisions of Australia's arbitrators, could not be stated with confidence: the content of the worker's explanation implicating the employer and/or personal reasons, the state of the dismissed worker's disciplinary record, whether the worker was hired as a full-time or part-time employee, the arbitrator's gender, the

arbitrator's seniority, the severity of the offence, whether the worker demonstrated some form of apology or remorse, the type of advocacy services used by the employer, various industry sectors, the size of the employer's business, the degree of formality in the employer's dismissal processes, and whether the employer's operations included a human resource expert. In simpler versions of the arbitral decision-making model, it occurred that the following factors could significantly influence the arbitration decision: HR expertise, formality, the administrative and support services industries, the worker's disciplinary record, and the severity of the offence. However, when allowing for the constraints of the other factors in the full modelling process, opposing and suppressing effects of different variables come into play, and the impact of these separate variables was surpassed by those outlined in the previous two paragraphs.

7.5 Implications for theory

The objective for the remainder of this chapter is to 'make sense' of this new knowledge within theoretical and practical contexts surrounding employee misbehaviour and unfair dismissal arbitral decision-making. This section on implications for theory will consider first the implications of this research on the immediate theories used to build the conceptual model concerning employee misbehaviour and arbitral decision making (discussed in sections 2.2 and 3.7) combined with the theories used in developing the hypotheses (discussed throughout chapter 4). This will be followed by comment on the implications of the findings on the parental theories of industrial discipline, employee grievance scholarship, and dignity and autonomy values (discussed in sections 2.3 and 3.1 to 3.4). Finally, the discussion will turn to consider the implications of this research for related disciplines within the broad field of study concerning employee misbehaviour (discussed in Section 2.1).

7.5.1 Implications for immediate theories used to develop the conceptual model

This thesis combines the employee deviance typology and the arbitral decision making literature to arrive at a conceptual model incorporating these two fields of scholarship. The conceptual model fundamental within this thesis is now furnished with variables found to be influencing the arbitrator's final decision. Figure 7.2

displays the conceptual model, refined to identify the final array of variables that statistically significantly influenced arbitration decisions. This new model contributes substantially to theories on arbitral decision-making, specifically when arbitration decisions are made over misbehaviour event based, unfair dismissal grievances. This claim is made on the basis that the model was produced from a comprehensive conceptual model in which each element represented a research question that emerged from theory and practice.

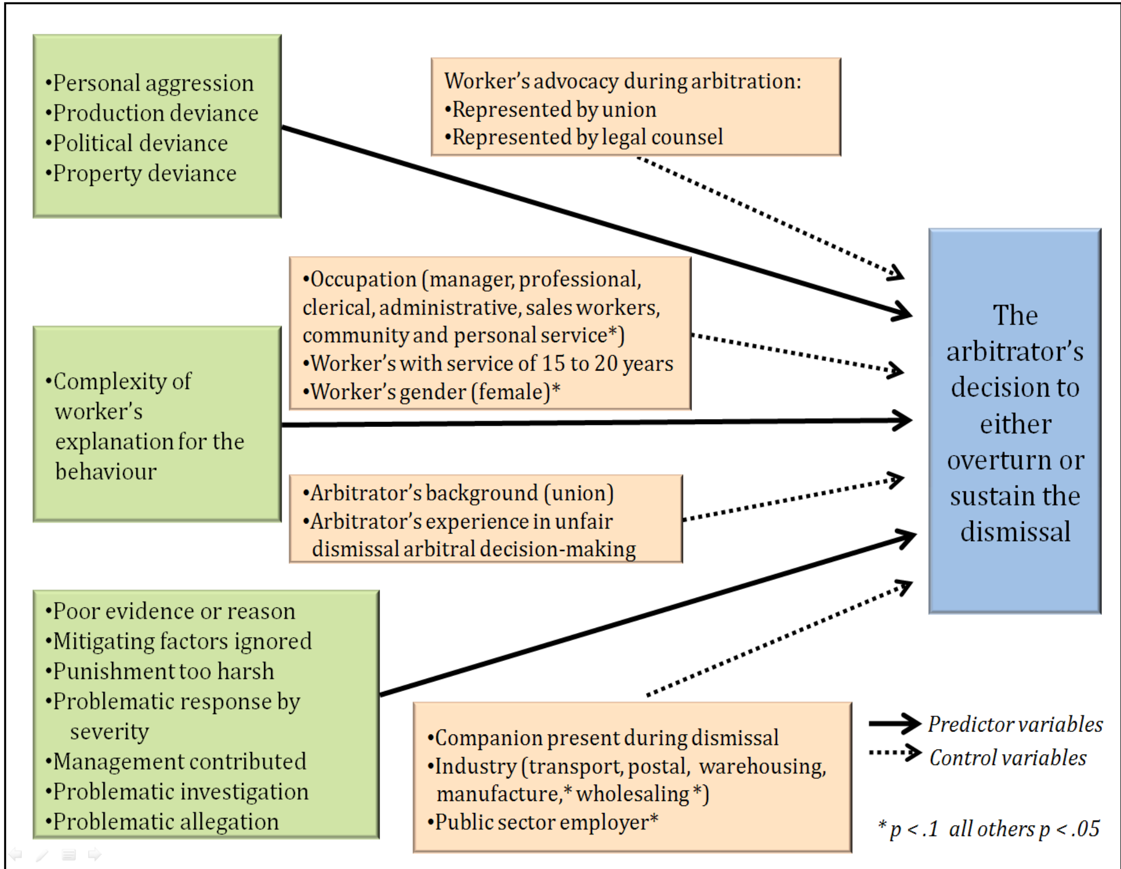


Figure 7.2 *A model of arbitral decision making concerning unfair dismissal claims from workers dismissed due to misbehaviour*

(*Source:* Developed for thesis)

It is now clear that the ***employee deviance typology*** (Bennett & Robinson 2000) which was verified for measuring employee deviance by organisational behaviour scholars (Stewart et al. 2009), also provides a suitable framework for categorising any variety of employee misbehaviour acts to measure their influence on disciplinary actions directed at workers in an industrial relations context. This typology was successfully incorporated as an essential element in the arbitral decision-making

model presented in Figure 7.2, which is a process that ultimately determines whether or not the disciplinary actions of the employer were appropriate.

Further theoretical knowledge gained is that the complexity of the explanation used by the worker to defend their behaviour has an impact on the arbitration decision. To this end, the concept of a 'conflated rationale' within the ***employee explanation typology*** (Southey 2010) was successfully incorporated as an essential element in the arbitral decision-making model. A further theoretical implication arising from this aspect of the investigation is the use of ***attribution theory*** to underpin the categorisation of the explanations. The investigation did not support the contention that externally attributed causes (explanations involving workplace related triggers for the behaviour) would be the most successful defence for a worker. The implication arises that the application of attribution theory, when used in the context of arbitral assessments of employee dismissals due to misbehaviour in Australia, may alter its efficacy as a predictive theory of human decision-making. Alternatively, the implication for arbitral decision-making theory is that the content of the workers' defences have, in reality, limited impact on the arbitration decisions.

The impact of the quality of the employer's actions in administering a dismissal on the arbitration decisions demonstrated consistency with the ***theories of distributive, procedural and interactional justice*** expectations (Brown, Bemmels & Barclay 2010; Greenberg 1990; Rawls 1972, 1999) with the added insight that distributive justice appears to have a stronger emphasis on the determination of arbitration decisions, followed closely by procedural and interactional justice. Managerial errors reflecting failures in administering these forms of justice, using as a basis Blancero and Bohlander's (1995) typology, was successfully incorporated as an essential element in the arbitral decision making model.

Additional theories were used to determine some of the moderating effects that secondary characteristics may have on arbitration decisions. It is now clear the investigation corroborated ***exit-voice theory*** (Budd & Colvin 2008; Hirschman 1970; Luchak 2003) within the arbitral decision-making context, clearly indicating that workers benefited most when they used a third party advocate to represent their 'voice from without' following their ejection from the employer-employee

relationship. Perhaps the continued relevance of exit-voice theory in the workplace is being underscored by this investigation. It alludes to the importance of a method to provide workers with a 'voice' in present industrial relations, as neo-liberal agendas of the government expose workers to less protective regulations, combined with higher expectations that workers self-navigate the demands of their employer within the workplace forum. Also corroborated by the results of the research was the ***award orientation theory*** (Crow & Logan 1994) which is the extent to which an arbitrator determines decisions that either favour management or the union, on the premise that people have a subliminal preference for the philosophical stance of either union or management.

The findings also have implications for the gamut of ***gender interaction theories*** used to deduce hypothesis about the influence of the arbitrator's gender when judging female offenders: 'paternalism/chivalry' (Staines, Tavris & Jayarantne 1974), 'queen bee' (Cooper 1997), 'evil women' (Moulds 1978) and the 'Garden of Eden effect' (Hartman et al. 1994). As these *interaction effects* were not detected (although worker gender *alone* still appears to influence outcomes), it may indicate that these theories may not extend to arbitral judgements of dismissal cases, or alternately to the Australian context. This is a promising finding as it could be evidence that arbitrators are aware of and contain the affects of their personal gender-generated experiences and opinions, so as to not influence their decision making. Enlightenment from ongoing feminist scholarship identifying inequality between men and women in the workplace may be causing attitudinal shifts, over time, which may mean these theories are becoming less significant in judgements of women in the arbitration of rights disputes in the industrial relations context.

7.5.2 Implications for theories in the parental literature

Integral to this thesis is the occurrence of the harshest form of discipline - dismissal - being enacted by management on an employee who had, or may have, misbehaved. To this end, the ***corrective-progressive discipline*** and ***punitive discipline theories***, under the umbrella of industrial discipline, were discussed in section 2.3 as relevant parental theories. It was discovered that employers who provided evidence that the worker had committed at least one previous offence, were more likely to have the

arbitrator judge the employer had a valid reason for the dismissal. The implication for theory is that the use of progressive discipline – reflected in cases where the employee had offended before but not dismissed – influences the employers' ability to defend their dismissal actions at arbitration. Additionally, scholars advocate the use of progressive discipline over punitive discipline, even though both disciplinary approaches provide scope for terminating the employment relationship. This thesis uncovered that workers who engaged in acts of personal aggression were least likely to convince the arbitrator they were dismissed unfairly. This finding has implications for industrial discipline theory, as it signifies that personally aggressive behaviours are the type of 'heinous behaviour' that scholars suggests warrants dismissal over progressive-corrective discipline (Heery & Noon 2001; Holley, Jennings & Wolters 2009, p. 529; Huberman 1964; O'Reilly & Weitz 1980). Extending this line of thinking to property deviance, which was the type of misbehaviour found to be most tolerated by the arbitrators, alludes to the fact that such behaviour might be best met with a corrective-disciplinary response from employers.

Various ***arbitration theories*** describing how industrial arbitrators administer their role were considered in section 3.2, with the discussion demonstrating that '*there is no single mode of adjudication in the tribunals and different functions call for different methods*' (Rathmell 2011, p. 606). It was determined that ***judicial arbitration*** (Dabscheck 1980; Perlman 1954; Romeyn 1980), Wheeler's (1976) ***industrial arbitration*** and Thornthwaite's (1994) regulatory and containment functions of bureaucratic structures could be isolated as theories that were relevant to the situation of a rights dispute arising from an employee appealing his or her dismissal.

Common to these three arbitration theories is the expectation of arbitral neutrality. Whilst this thesis confirmed that arbitrators' decision making experience can predict their decisions, a major implication that runs counter to the neutrality tenets of these theories is that influences from the arbitrators' award orientations were detected in their decisions. Sub-section 3.6.4 presented opposing positions as to whether Australia's federal tribunal members show bias in their decisions. The knowledge gathered in this investigation calls into question the practicality of the impartiality assumption of the judicial thesis, insofar that the human decision-making reflected in

this study failed to be nonpartisan - even if unwittingly - on two grounds: previous work history and previous experience in determining unfair dismissal claims.

Recalling that this thesis straddles both industrial relations scholarship and organisational behaviour scholarship, discussed in section 3.3 was the importance for organisational behaviour researchers to inject theory into scholarship on the ***employee grievance process***. This recommendation has been observed in this thesis by incorporating Bemmels and Foley's (1996) suggestions to consider testing, among others, exit-voice theory, attribution theory, and procedural and distributive justice theories for their applicability in grievance procedure research. For brevity, the author refers to the comments regarding the applicability of these theories discussed previously in sub-section 7.5.1.

Section 3.4 addressed the ideals of ***dignity and autonomy***, within the limits of a sustainable business operation, being afforded to workers. Whilst dignity and autonomy are aspirational principles rather than theories, these tenets are believed to provide sound reasons for regulatory authorities or governments to provide unfair dismissal protection mechanisms where common law protections fail to reach. This thesis revealed that, in the small majority of cases, employers were supported in their prerogative to dismiss misbehaving workers. The implication of this finding is that a large number of remaining workers still became victims of a misuse of managerial prerogative, stripping these workers of the dignity and autonomy ideals of the employment relationship. In these instances, the unfair dismissal protection mechanism assisted them to restore a sense of dignity and autonomy by either enabling them to re-attend the workplace, or to move on in their life with some reparation.

Several ***misbehaviour-related arbitral decision-making theories*** were presented in section 3.7. Each of these models has application to one or a few *specific misbehaviour* events. For instance, an alcohol fuelled event in Nelson and Kim (2008), physical or verbal violence in Gely and Chandler (2008), breach of confidentially in Ross and Chen (2007), insubordination, alcohol and dishonesty in Chelliah and D'Netto (2006). The major enhancement the model in Figure 7.2 provides is that it is a *generalised misbehaviour* model, measuring how *categories of*

misbehaviour influence arbitral decisions. This thesis now informs scholarship so that we can suggest that misbehaviour events categorised according to the target of the behaviour (discussed in section 7.1.1, particularly Table 7.1.) can significantly influence the arbitration decision.

A second significant enhancement to our knowledge not captured in previous models, is that increasing the complexity of the worker's explanation will significantly influence the arbitration decision to the worker's detriment. Gely and Chandler (2008) identified that unions are best to focus on inconsistencies in the employer's treatment of the worker or due process in administering the investigation and dismissal, to overshadow the misbehaviour event committed by the worker. The evidence agrees with these scholars. A further implication from the modelling in this thesis is that unions will also benefit the worker by presenting a single reason for the behaviour, as opposed to giving two or three reasons why the event occurred.

Finally, there are implications for our theoretical understanding about the effect of how management administers the dismissal on the arbitration decision. Earlier models providing insight in this area were by Gely and Chandler (2008) in their measurement of the employer's proportionate response and disciplinary consistency; and Chelliah and D'Netto's (2006) measurement of failure to apply progressive discipline, failure to provide warnings and improper promulgation of rules. With reference to the discussion in sub-section 7.1.3, particularly Figure 7.1, the implication for arbitral decision-making theories is that arbitrators separate errors in distributive justice from errors in procedural justice and filter their decisions according to these two frames of reference. Importantly, distributive justice errors are fatal to the employer's defence of a dismissal, whilst there is minor scope for employers to commit procedural errors and still find the dismissal is sanctioned by the arbitrator.

7.5.3 Implications for broad disciplinary perspectives of misbehaviour

Section 2.1 acknowledged the scholarship being conducted on the phenomenon of employee misbehaviour, from a range of disciplinary perspectives. Beyond the

implications for the immediate and parental theories relevant to this thesis, the findings also produced a range of propositions that may be of interest these scholars.

Feminism

Gender and feminist theorists can be informed by this thesis' exposition of the experience of women seeking arbitral intervention into their dismissal. It appears that the government endorsed mechanism of the federal industrial tribunal is empowering women with a useful avenue to appeal actions of their employer, provided the woman is not from a professional or managerial occupation. For most female workers, their positive chance of success may indicate that women from medium and lower skilled occupations faced harsh disciplinary actions by employers in the first place. The quandary for female professionals and managers facing poorer outcomes to male counterparts reminds us of the gendered nature of work in Australia. Women professionals and managers are associated with 'caring' work which demands high moral and ethical standards and therefore carries lower tolerance for acts of misbehaviour.

Political science

Political science scholars can be informed by this thesis' demonstration of an example of a control mechanism on employer prerogative, set in place by the Australian government via the federal industrial tribunal (currently The Fair Work Commission). This federal institution umpires individual conflicts between dismissed workers and their employers, with the small majority of decisions favouring employer prerogatives to dismiss workers that misbehaved. In spite of the balance of interest tipped slightly towards employers, the lack of extremity in the overall results indicates the tribunal provides a significant justice mechanism for workers to redress the imbalance of power they experience when they find themselves ejected from the workplace due to apparent misbehaviour. In relation to judging acts of misbehaviour in the workplace, over the last decade, Australia appears to have mastered a delicate balance between politics, legislation, authorities, unions and industry so that the pendulum has not swung too far in the interests of either worker rights or employer prerogative.

Political scientists may also be interested to note that public servants appear to draw harsh disciplinary penalties for engaging in misbehaviour, administered by the government departments employing them. This alerts us to difficulties or even conflicts of interest, faced by a government when performing competing roles: policy maker, regulator, umpire, and in this case, as a major employer in the economy.

Anthropology

Anthropologists can take note of the suggestions that the national culture of a country produces expectations about how employers and employees are to conduct themselves during investigations and meetings associated with a worker's actual or purported misbehaviour. Particularly, the low power-distance and high individualism profile of Australia's national culture is thought to have implications for employees so that they take responsibility for understanding their rights and obligations during investigations and dismissals, as well as expectations associated with behavioural standards in the workplaces, particularly for people working in service industries.

Sociology

Sociologists, with their interest in understanding the wider societal context of employee misbehaviour, can draw insights about societal values on how people are to conduct themselves in the workplace. The pattern shown by the arbitrators' decisions can be viewed as a measure of the public's tolerance towards different acts of misbehaviour, so that in descending order, acts of personal aggression are seen as the most abhorrent, followed by acts that harm the viability of the employer's business, followed by acts that harm a person's reputation or career potential, and finally those acts against the employer's physical property.

Psychology

Psychology scholarship describes misbehaviour as 'irrational' behaviour (Collinson & Ackroyd 2005). This thesis offers insights about the personal perspective that comes into play when determining the rationality of one's behaviour. This thesis alerts us to the knowledge that behaviours, which are viewed by some as irrational behaviour, can be viewed by others as justifiable behaviour. The concept of 'reprimandable offences' presented in this thesis, establishes that employers will view misbehaviour as unreasonable. However, through the appeal mechanisms provided by an industrial tribunal, a number of workers are able to rationalise their

behaviour to third party advocates and arbitrators, to the point of having the employer's disciplinary actions overturned. The implication is that the misbehaviour, in some instance, can be dissolved of its irrational element.

7.6 Implications for policy and practice

This section will first address the implications arising in this thesis for policy makers in government, industry and unions. The second section will address the practice implications for employers, workers and unions.

7.6.1 Policy implications

First, this investigation considered the dark side of workplace behaviours, and it is evident that **all four categories of deviance** are intolerable to arbitrators, which would be reflective of our general societal values. If we can reduce the occurrence of these behaviours, economic efficiencies, happier workplaces and healthier workers, hopefully ensue. Personal aggression in the workplace is considered the most offensive behaviour in which a worker can engage. With this knowledge, policy efforts can be concentrated on reducing these behaviours by promoting national workplace cultures that reinforce the societal intolerance for personally aggressive acts. The recent announcement by the Workplace Relations Minister that the government will seek to give the Fair Work Commission powers to resolve workplace bullying complaints (ABC News 2013) provides an example of a political move that may contribute to such a culture.

Industry associations can promote similar behavioural expectations by providing resources such as running awareness sessions that support employers in the implementation or revision of codes of conduct, with a view to reinforcing the vilification of personally aggressive behaviours. Unions could offer similar support, but in particular could engage with employers to develop workplace 'behaviour charters'. And, as the remaining three deviance categories - production, political and property – were only marginally less abhorred, they too can inform future codes of conduct, behaviour charters in the workplace and policy directions at a national level.

Second, the arbitration decisions revealed that the arbitrators disagreed with employers' actions to dismiss 'misbehaving' workers in nearly half of the cases. This means workers and unions have a reasonable incentive to pursue arbitration if they felt conciliation failed to achieve a satisfactory resolution. The federal tribunal's arbitration system thus provides a sound justice mechanism for the lesser-powered, ill-accused worker, as intended ideologically, legislatively and in the ILO conventions. However, it also means a gap exists between employers' and arbitrators' beliefs about what constitutes appropriate applications of an employer's managerial prerogative when employees 'misbehave'. Employers appear to hold workers to higher standards of behaviour than those expected by people in broader circles of society, and this incongruence has financial and emotional implications for the worker and employer, as well as economic impacts on the taxpayer dollars funding the federal tribunal to adjudicate these grievances.

It is not the act of misbehaviour itself that acts as a catalyst for arbitration; rather it is the employer's choice of dismissal as a disciplinary response to misbehaviour that means arbitration may be sought. Consequently, the onus falls upon employers to first, determine when a dismissal is appropriate for misbehaviour, and second, administer these dismissals in an appropriate manner. It would be a benefit for all stakeholders if the dissonance between employer standards and public standards could be reduced. Policy needs to incorporate proposals that focus on aligning employer understandings of behaviours that signal the death knell of the employment relationship and those which may warrant a lesser discipline without over-compromising business viability. Just as important, policy needs to incorporate proposals that bolster employers' appreciation for natural justice, procedural justice and workplace investigations.

Third, the knowledge that decisions are influenced by the **arbitrator's work history** for either a union or management employer is relevant to the opinions expressed by industrial relations stakeholders that respective government appointments to the tribunal are biased towards the ideals of the party in power. Legislative and systematic measures are in place to provide transparency and limit the opportunity for bias, such as providing an appeals avenue, holding public arbitration hearings and providing publicly accessible decisions. And, in recent times, public advertisements

have appeared for appointments to the tribunal '*meaning for the first time any appropriately qualified Australian can put him or herself forward to be considered for appointment to the nation's workplace relations tribunal*' (Gillard 2010). This initiative could be extended to also include the selection of commission members by government employees and administering appropriately validated psychometric tests to candidates as part of their selection.

The FWC website could provide a summary of the work history of each of their members along with its official tally of employer and union appointments. Consideration could be given to the annual publication of arbitration decision metrics for each FWC member according to type of claim, whether lodged by the union or employer and whether upheld or overturned. Such measures might improve the impression amongst Australians that appointments to the tribunal consist of people that have the temperament and attitude for the impartial demands of their work.

Fourth, legislators in Australia aimed to avoid legalising the unfair dismissal arbitration process by incorporating legislative provisions which can be used to limit **legal representation** by the parties. However we now have further knowledge from this study that legal advocacy is most beneficial for workers (and possibly employers). It is unfortunate that legal advocacy costs can be prohibitive for many workers and with declining union representation in the workforce, the number of workers (and small business employers) attempting to self-represent, to their own detriment, may only increase. Consideration of tribunal appointed advocates may be an option, for workers and employers that meet a set of hardship criteria. Although this option may come at public expense, these expenses may be offset by efficiencies achieved when hearings are not delayed as arbitrators' take time to accommodate inexperienced, self represented applicants and respondents.

Fifth, **The Small Business Fair Dismissal Code,** an employer resource available from the Fair Work Commission (2013a) website, states:

> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.... In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed.

Reflecting on the results of this investigation, it is the author's contention that this wording may mislead employers, regardless of whether they are small business employers or medium and larger business employers who may also refer to this resource for information. For those unfamiliar with the technicalities of 'warnings' and 'notice', the wording is open to being misconstrued so that the employer is excused from providing the worker with the allegations before them and moreover, that they do not need to investigate the incident, in essence, that the employee has no right to natural justice.

The results of this thesis revealed that employers are never excused from conducting an appropriate investigation about the 'misbehaviour' event in order to determine whether a sound or valid reason exists to dismiss the worker. Furthermore, the results were clear that weaknesses in providing the worker with a chance to respond to the allegation were also highly likely to see the dismissal overturned by the arbitrator. The advice needs to be revised so that employers, even in the event of serious misconduct, are aware of the requirement to obtain the facts using appropriate processes, and give the worker the right of response, before determining whether a dismissal is to be sanctioned. Employers need to be advised that only after fulfilling these obligations, might it be appropriate to consider a summary dismissal – a dismissal without notice or warnings.

Sixth, the recent Australian work-life index for **women managers and professionals** revealed women professionals and managers worked the longest hours of all female workers, anticipating women professionals will experience, to a higher degree, their work interfering with their personal lives, compared to their male counterparts (Pocock, Skinner & Pisaniello 2010). This thesis further uncovered the knowledge women managers and professionals are unlikely to win their unfair dismissal claims. In essence, if women managers and professionals are experiencing tougher work-life balance issues, we can anticipate these challenges have the potential to cause them distress. Such distress may be associated with behaviours unacceptable in the workplace. Governments, industry associations, professional associations and unions representing these women need to remain mindful of the pressures under which women in high skilled work occupations are evidenced to be operating.

7.6.2 Practice implications

This research provides a better understanding about the circumstances in which employee misbehaviour may be, and may not be, viewed as an appropriate signal to end the employer-employee relationship. The following points provide guidance to **managers and unions** when determining an employee's future with the organisation, due to an incident of employee misbehaviour:

1) If the misbehaviour constituted production deviance, political deviance or property deviance *and* it is the worker's first incident, meaning that no other **recorded occurrence** of misconduct exits on the employee's record – it is recommended that management avoids dismissal and applies progressive discipline. In such a circumstance, all parties may be best served if management issues a written warning to the worker advising that no further acts of misbehaviour will be tolerated and that dismissal is a potential result in the event the worker commits a further incident.

2) When prior misbehaviour offences are recorded, management is better situated to consider dismissal – even if the misbehaviour event was for a different reason – for instance, the first event was for unexplained absence and the next event was for theft. Practice wisdom tends to suggest the offences need to be of the same nature, however, the modelling discovered that *any* previous offence on record was positively related to the employer being able to justify the dismissal.

3) If the misbehaviour involved an act of **personal aggression**, the employer has the strongest prerogative to consider dismissing the worker, even if the worker has no other offences on record. The employer still remains obligated to ensure the worker receives natural justice in the course of determining whether or not to terminate the employment relationship.

Employers - and the associated industry and employer bodies - as they hold the greater power in the employer relationship, are obligated to transact a just dismissal and have regard for the dignity and autonomy of their employees. This research provided the following practical insights about dispensing these obligations and responsibilities:

1) Dismissing workers for incidences of either property deviance or political deviance places employers at the highest risk of having the dismissals overturned by arbitrators. Managers must take particular caution in administering a dismissal, particularly if it is the first instance for these behaviours, carefully considering the process used to gather evidence, and ensuring they present the evidence to the worker to respond.

2) Employers should seriously consider settling at conciliation, if on reflection, they erred in using doubtful information on which to 'convict' the worker, or they dismissed the worker in spite of a unique or special circumstance surrounding the case. In such instances, management can anticipate they made the type of error that makes it impossible to justify they had a valid reason for the dismissal.

3) Industry and employer associations could assist employers in ensuring natural justice is provided to accused workers, by providing training programs on conducting workplace investigations. Current practice wisdom tends to be directed at making the employer aware of fulfilling the procedural obligations associated with the enacting of the dismissal itself. However, the seminal information about the incident on which an employer bases the decision to dismiss is often flawed. And, when the premise for the dismissal or method of collecting the evidence is flawed, the employer can anticipate their actions will be overturned at arbitration. If employers improve their investigative techniques, they may see fewer dismissals overturned on the basis they had an 'invalid' reason to dismiss the worker.

4) To ensure their advocates are best able to serve their clients, industry and employer associations may wish to consider undertaking an evaluation of the selection, training and development processes used to identify and prepare their advocates for representing employers in the unfair dismissal arena.

5) To ensure their disciplinary processes are not too harsh or procedurally flawed, employers in the transport, postal, warehousing, manufacturing and wholesaling industries may wish to evaluate the investigative, disciplinary and decision-making policies and processes adopted in relation to discharging workers due to misconduct.

6) Workers engaged in lower-skilled occupations appear to have a higher propensity to engage in personally aggressive acts. The value of management providing employee assistance programs is underscored by such a finding. Training programmes addressing conduct expectations and consequences are vital, but such efforts need to be supported by effective leadership from immediate supervisors. Thus supervisors could be exposed to leadership programmes that include coaching and mentoring, as well as techniques for managing distressed workers.

   Employers could also consider providing more immediate means within the workplace that enable workers to relieve frustrations that may arise during the work day, such as installing a punching bag, allowing a 20-minute time release for a distressed worker to go for walk, run or to drink cold water, putting up posters depicting deep breathing exercises, or implementing workplace health and wellbeing programs which could incorporate relaxation techniques. Also consider job re-design to reduce frustrations, referring to Hackman and Oldham's (1976) job characteristics theory, with a view to providing work for employees that is more psychologically engaging and intrinsically rewarding.

7) Within a culture that champions precedent, public sector employers should be mindful of engaging in pattern disciplinary practices and administering a dismissal for misbehaviour, at the risk of ignoring mitigating circumstances.

Helpful **insights for workers** (and their unions) facing disciplinary actions were also garnered from this investigation:

1) Workers need to be alert to their right to obtain the support of another person during workplace investigations and meetings with management. Support at this early stage of the disciplinary journey provides the worker with information and evidence about the employer's process to be presented in the event the worker decides to pursue a dismissal claim.

2) The most effective support person is a union delegate or representative, more so than a family member, friend or colleague; unless these support people have expertise in the procedural requirements of a fair disciplinary process.

3) In the event of pursuing an unfair dismissal claim through to arbitration, it is important to use the services of either a legal or union advocate to present the claim to the arbitrator, rather than attempting to self-represent a claim.

4) In providing an explanation for the behaviour that led to the dismissal, identify a single, critical cause for the behaviour – possibly one that implicates conditions about the working situation - rather than implicating a number of reasons drawn from personal circumstances. Further, workers should try to avoid inadvertently admitting guilt by apologising for their behaviour.

5) Longer serving employees (over fifteen years of service) need to be mindful that arbitrators expect they have gained a good understanding of the workplace culture, policy and rules in relation to appropriate conduct, thus they should avoid any defence that alerts to weaknesses in this area.

7.7 Limitations

In addition to the anticipated limitations of this thesis that were outlined in chapter 1, several further limitations became apparent as this investigation unfolded. These limitations were curiosities relating to the statistical analysis and dataset.

The first to note was the non-occurrence of arbitral decisions favouring the employer when the employer committed one or more of three particular errors (as discussed in the methodology chapter in sub-section 5.9.3). When these errors occurred, due to their ability to 'perfectly predict' an outcome, the modelling process faltered. The author followed classic conventions for managing this - not uncommon - challenge associated with logistic regression modelling. It is noted that this aspect of the data analysis could be managed with more 'analytical finesse', such as Firth's penalised likelihood approach, to reduce the potential bias that might have occurred in the estimates by following the methods employed in this analysis.

The statistical model presented in this thesis incorporated a wide range of control factors for which scholars and practitioners are interested in knowing the impact. Australian research of this type is extremely limited and many questions need answering. In seeking to answer a number of them within a dataset of 565 cases, it

came at the cost of 'working the data hard' in the modelling computations. The recommended ratio for logistic modelling is at least 10 cases per variable. If one takes into account the number of individual values *within* each variable, in this study the ratio was around 7.8 cases per variable in the analysis.

The wide variety of factors at play in arbitration ultimately forced the investigator to sacrifice the inclusion of variables that could have broadened our knowledge even further, in order to run both a well controlled and stable statistical model. Misbehaviour was modelled using the Robinson and Bennett's (1995) four domain typology, and employee defences using Southey's (2010) employee explanations with a three domain typology. Whilst these typologies provided significant new insights on the influence of misbehaviour and explanations on arbitral decisions, our understandings would have been enhanced if the dataset were sizeable enough to have delved into a further level of data describing the actual reprimandable offences and explanations. Data at these finer descriptive levels were collected and described in the results chapter, but the size of the dataset would need to have been at least four times the size in order to have supported their inclusion in the regression analysis. At this point in time, such a vast number of misconduct related, substantive arbitration cases heard by the federal tribunal are unavailable. Even if these decisions had existed to enlarge the dataset, the data extraction method via a content analysis is expensive and labour intensive, a sure impediment to future research of this nature.

The size of the dataset also prevented analysis of the data according to the distinct shifts over the three legislative regimes covered during the 10 year period. Dividing the dataset into three periods so that decisions made under the Workplace Relations Act 1996, were isolated from those made under the Work Choices Act 2005 and more recently, The Fair Work Act 2009, was simply not possible in this analysis. The different legislative regimes may have 'filtered' some of the cases that qualified for arbitration on basis of the information supplied in Tables 3.4 and Table 3.5. Although the majority of the guidelines and practices for determining a claim, such as the presence of procedural fairness and a number of the items under the fair-go-all-round considerations, were in some form, in place across the study period. Having stated this limitation, it makes sense to investigate the potential nuances

between legislative regimes, and this could be achieved in future research, at the cost of reducing the number of explanatory and/or control variables in the model.

Another variable that felt the fate of the data limitations was the apology or remorse variable. Whilst a measure of the genuineness of a worker's apology or remorse would have provided an extra layer of insight about how apologies might affect the outcome, it was not incorporated into the variable measurement design. Many arbitration decisions will identify that the worker either apologised or was remorseful. However, far fewer decisions record whether the arbitrator believed the apology or remorse had substance. To measure the degree of sincerity would have ultimately resulted in vast amounts of missing data, reducing the variable's viability in the analysis. Again, this aspect is worthy of further investigation.

Whilst this is possibly the first Australian study to attempt to measure the impact of arbitral decision making experience on the unfair dismissal decision outcome, there were limitations that occurred as a result of using the current dataset as a measure of experience in arbitral decision making. First, a long-serving AIRC member may have been treated as inexperienced if they retired early in the period being studied. Further, the experience of dual appointees or "transfers" from State tribunals was not captured. Once again, it would be a useful future study which could involve supplementing the information available in decisions with general knowledge on members' arbitral decision making experience.

In relation to the 'work history' analysis of members in the federal tribunal, undoubtedly people will debate the assignment of whether a particular member should be considered 'union', 'employer' or 'other'. The author has responded to this issue previously in Southey and Fry (2012) and Southey and Fry (2010).

7.8 Implications for further research

Several research suggestions have already been identified in the limitations. The following comments are in addition. This investigation employed a quantitative methodology using non-self reported data, to determine general patterns of arbitral decision-making over misbehaviour-related unfair dismissal claims. To detect

nuances in people's experiences, these generalised findings can provide insights for qualitative explorations into the perceptions of participants that have been involved in this type of unfair dismissal arbitration process.

This study was limited to termination due to misbehaviour. However, for IR scholars interested in the efficacy of the operations of the federal industrial tribunal and the arbitration mechanism, redundancy and under-performance are other reasons workers are faced with involuntary termination. As the root cause for the dismissal is different, it would be reasonable to assume variations exist in the factors at play in the arbitration decision. Furthermore, the statistics on the performance of the federal tribunal unfair dismissal dealings reveal that presently around 81 percent of unfair dismissal claims are settled via conciliation. Limited research exits on conciliation, as these proceedings occur privately. Advancements in knowledge about managerial responses to misbehaviour in the workplace and its impact on the employment relationship could be obtained by determining whether the variables that influence a bipartisan settlement are different from those variables that influence a third party's arbitral determination.

This thesis acknowledged the potential influences of national culture on the Australian tolerance for misbehaviour in the workplace. The research propositions arising from this connection would be to measure the relationship between the features of Hofstede's national culture, the types of misbehaviours prevalent in various workplaces, and the disciplinary treatments they attract.

It was discovered that women are, overall, receiving better arbitration outcomes, yet not so for professional or managerial women. Scholars could pursue explanations as to why these women have little success at redeeming themselves of misbehaviour related offences. It may be worth gathering insights about gender interaction effects within the workplace discipline setting, with particular interest in the gender of the supervisors and/or those people making the decision to dismiss these professional women. Another hypothesis worthy of further investigation is whether the typical 'caring' nature of the work performed by highly skilled women – premised by role identity theory - associates them with highly moralistic work, with limited tolerance for misbehaviour.

This investigation appears to be the first Australian study to statistically measure the degree to which advocates influence the termination of employment arbitration decisions; and it appears the influence of Australian advocates is not unlike the effects of their counterparts in the United States, Canada and the United Kingdom. However, the advocacy service provided by employer and industry associations was not competitive with independent legal counsel for both employers and workers, or union organisations for workers. Further research could be conducted into the operations and ambitions of employer and industry associations to assist them best serve their clients.

It was articulated in section 1.2 that arbitrators' decisions pertaining to misbehaviour in the workplace set the public standard (Donaghey 2006) and reflect societal values (Thornicroft 1989; Wright 2002) for how tolerant employers and unions must be towards employees who engage, or who are believed to have engaged in misbehaviour. Now that an order of tolerance for misbehaviour categories has been determined in this study, it would be worthwhile to measure whether arbitrators are congruent with societal values by surveying the general public for their opinions about the type of misbehaviour events for which dismissal would be appropriate.

Full Bench appeal decisions also provide an avenue for further investigation. The research objective and quantitative methodology in this thesis required the isolation of single arbitrator decisions. However, appeal decisions are significant for setting precedents. They can provide insights on the decisions that were arbitrated by single members of the tribunal that were either reversed or affirmed on different grounds to those originally given.

This investigation focused on misbehaviour at the terminal stage of the employment relationship. It appears that in many cases, employees are well intentioned people placed into workplace situations that triggered a misbehaviour event, or alternatively they were people mismatched for the work they were performing or the culture of the organisation in which they worked. For organisational behaviour and HR scholars, much can be gained by investigating whether employers can mitigate the occurrence of misbehaviour in their organisations – ultimately sparing workers the drama of a dismissal and employers the replacement costs of an employee - by modelling the

relationship between the types of recruitment, selection, training and development practices and the occurrence and type of misbehaviour in which employees behave.

Finally, for international scholars, this thesis provides detailed information about the contextual nature of arbitral decision-making over unfair dismissal claims in Australia. It also provides information about Australia's legislative guidelines, and finally, about statistically influential variables in the determination of unfair dismissal claims arising from terminations due to misbehaviour. These insights can provide a point of comparison with other countries. Furthermore, the use of the deviance typology as a measure of misbehaviour can be replicated in studies beyond Australia's boarders, as well as the features of the employee explanation typology and managerial errors in the dismissal process. Comparative scholarship in these aspects of arbitral decision-making would provide insights about international variations and similarities in the tolerance for misbehaviour in the workplace.

7.9 Concluding statement

This thesis contains an investigation that delved into the most contentious aspect of the power dynamics in the employment relationship: managerial prerogative to dismiss a purportedly misbehaving employee in order to maintain business viability, against the employee's right to respectful, dignified and just treatment and to retain his or her employment. This quantitative research revealed that neutral, third party arbitral determinations as to whether the worker should remain employed or whether the employer was justified to dismiss the worker, are influenced by variables beyond those appearing in the current literature. From here, further research into the impact of misbehaviour on the employment relationship can continue.

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APPENDIX 1

Depictions of 'employee misbehaviour' in the literature.

Table A1.1 *Sixteen depictions of 'employee misbehaviour' in the literature*

(3 of 16)

DIMENSION	*1. Anti-social behaviour*	*2. Counter-productive work behaviour*	*3. Deviance (organisational / employee)*
Definition	*Any behaviour that brings harm or that is intended to bring harm to an organisation, its employees, or to the organization's stakeholders* (1997)	*Wilful behaviours by employees that have the potential to harm an organisation, its members or both* (Krischer, Penney & Hunter 2010)	*Intentional acts initiated by org. members that violate norms of the organisation and have the potential to harm the organisation or its members* (Bennett & Robinson 2003)
Theoretical influences	- Theoretical opposite of pro-social behaviour; - social learning theory; - justice theories; - job performance feedback	- justice theories; - personality - cognitive ability (intelligence)	- job satisfaction - organisational citizenship - justice theories - conflict theories
Target	- employee/s - organisation - external stakeholders	- employee/s - organisation - external stakeholders	Either - individual employees (known as interpersonal deviance) or - the firm (organisational deviance)
Actor	Generally an individual employee but can be groups of employees	employee	employee
The actor's intention/ motive	Actor must either cause harm or intend to cause harm	Must be intentional (non accidental)	Voluntary behaviour with a wide range of motivations such as perceived injustice; job dissatisfaction; thrill seeking
Duration of incident/s	Single or multiple incidents, or persistent over a period of time	Can be a once only action or sustained behaviour	Can be a once only action or sustained behaviour
Role of power or status	Not a mandatory element of anti-social behaviour, however, it is implicated in certain types of behaviour	Power differences not necessary. It can occur between employees at same level	Power differences not necessary. It can occur between employees at same level.
Role of norms	The necessity to violate a norm appears not to be a feature in the literature although is perhaps implicit in the construct	Not necessary for a norm to be violated	Organisational, or in its absence a societal norm, must be violated or non-conformed. BUT organisational norm has authority over societal norms
Severity	Can be verbal and/or physical and range from less severe to being severe	Mild to high severity: - verbal and covert to - physical and overt	Scaled from minor to serious: (production & political on the 'minor' side of the scale) & property & personal aggression as 'serious'
Outcome	Negative, dysfunctional outcomes for individuals and organisations	Unproductive but debated that it can have productive outcomes (eg, coping mechanism for individual workers)	Threatens the well being of individuals and/or the entire organisation. Has scope for constructive outcomes
Sources	(Giacalone & Greenberg 1997; O'Leary-Kelly & Newman 2003)	(Krischer, Penney & Hunter 2010; Spector & Fox 2010; Spector et al. 2006)	(2000, 2003); (Griffin & Lopez 2005)

DIMENSION	*4. Organisational retaliatory behaviour*	*5. Organisational misbehaviour*	*6. Workplace incivility*
Definition	*Adverse reactions to perceived unfairness by disgruntled employees toward their employer* (Skarlicki & Folger 2004)	*Pervasive and for the most part, intentional work related behaviour mostly (yet not necessarily) which defies and violates shared org. norms and expectations, and/or core societal values and standards of proper conduct* (Vardi, Y & Weitz 2004)	*Low-intensity deviant (rude, discourteous) behaviour with* ***ambiguous intent to harm*** *the target in violation of workplace norms for mutual respect* (Pearson, Andersson & Porath 2005)
Theoretical Influences	- justice theories - social exchange theory - deontic emotions	Moral development; locus of control; ego/ identity; social bonding; org culture; cohesiveness; social information; job design / satisfaction	power / resistance; affect and emotions; technological impact and coping with change; societal irreverence; psychological contract
Target	Typically the firm but can also be targeted at co-workers	- the work itself - the firm's property - co-workers - the organisation - external stakeholders	Individual employee - tend to be lower level workers
Actor	An individual employee reacting to another individual's or the organisation's provocation	'most members of work organisations it appears engage in some form of misbehaviour' (Vardi & Wiener 1996)	Individual employee - tend to be high performers - more likely to be male
The actor's intention/ motive	Intended in a desire to restore justice, equity to someone who has done harm or in 'moral retaliation' to those who violate the system of social rules	Must be intended to benefit: - self (type S); or - the organisation (type O in loyalty to the firm); or - to hurt others/inflict damage (type D)	Can be ambiguous in its intent to do harm. May be in resistance to authority/ power structures or in response to another's rudeness or disrespect
Duration of incident/s	Can be a once only action or sustained behaviour	Can be a once only action or sustained behaviour	*Generally*, more of a process rather than a single event
Role of power or status	Implicated as it is integral to the quality of the exchange relationship	Not directly identified as integral but inherent in certain acts such as sexual harassment, bullying	Implicated as generally aimed at people with less power
Role of norms	Not necessary that a norm is violated if that behaviour is typical of the workplace	Must violate core societal and/ or organisational norms but does not have to be both. Behaviour 'legitimatised' by the business is still OMB if it violates a societal norm	Violates norms of mutual respect and dignity
Severity	Can range from small and minor (but this may just be the 'tip of the iceberg') to large and serious (violence and aggression)	Benign to high - based on: the centrality of the value or norm; the degree of planning involved and strength of the intention to engage	Minor and low intensity (verbal, passive, indirect) but it can accumulate and trigger more severe negative behaviours
Outcome	Can result in functional outcomes such as change improvement or accountability	Organisation unlikely to be successful in the long run if violating rules of larger society. But also it can have constructive outcomes eg, whistleblowing	- Increased stress, turnover, job dissatisfaction - a toxic work environment - can have a negative effect on profits
Sources	(Skarlicki & Folger 2004)	(Ackroyd & Thompson 1999; Vardi, Y & Weitz 2004; Vardi, Yoav & Wiener 1996)	(Pearson, Andersson & Porath 2005; Penney 2007; Reio & Ghosh 2009)

DIMENSION	7. Organisational resistance	8. Dysfunctional behaviour	9. Workplace violence
Definition	*Action, inaction or process whereby individuals within a power structure engage in behaviours stemming from their opposition to, or frustration with, enactments of power. Deviant behaviour is one such form of resistance* (Lawrence & Robinson 2007)	*Motivated behaviour by an employee or group of employees that has negative consequences for an individual within an organisation itself* (Griffin, O'Leary-Kelly & Collins 1998)	*Instances of direct physical assault or threats of physical assault* (Griffin & Lopez 2005) *Covert forms of aggression* (Baron & Neuman 1996)
Theoretical Influences	- power and resistance theories - reactance theory - justice theories - social identity	Conceived as the theoretical opposite to 'pro-social' behaviours: thus a wide range of social psychology and behavioural science theories underpin this concept	Personal characteristics; job characteristics theory; affective commitment; stress; egotism; justice; organisational culture; HR practices; neutralisation
Target	The source blamed becomes the target, ie, Individuals where they exercise 'episodic' power and the organisation where it flexes 'systematic' power	- an individual - a group of individuals - the organisation	May be the person or group that is perceived by the actor to be responsible lack of freedom or who needs to be punished
Actor	Can involve any organisational members – not just 'unique deviant members'	- An employee - A group of employees	- Co-worker initiated - Public/outsider initiated
The actor's intentions / motive	Intentional: to protect the actor's needs for autonomy and sense of self-respect and fairness	Intends or is aware that their behaviour will have negative implications on the target	Intended to harm the victim, while incurring as little danger to themselves: the effect / danger ratio
Duration of incident/s	'episodic' power related to individual deviance act whereas 'systematic' power related to organizational deviance	Single or multiple incidents, or persistent over a period of time	Single or multiple incidents
Role of power or status	Central tenet to this construct: Organisational power has the potential to incite deviance	Not a mandatory element of dysfunctional behaviour, however, it is implicated in certain types of dysfunctional behaviour	Perceptions of powerlessness and/or control over a work situation or private situations that spill over into the workplace, may motivate actors to engage in violence
Role of norms	Deviance as a form of resistance implicates norms, as deviant behaviour are behaviours that violate important organisational norms	To capture a broader array of behaviours, dysfunctional acts do not have to breach 'norms' as required (for example) in 'deviance'	Violent behaviour conflicts with societal, legal and organisational norms
Severity	Severity of resistance positively associated to respond again the degree of power being enacted	Two classifications: - non-violent (gossiping, absence, theft) - violent (physical & verbal abuse)	Can be verbal (yelling swearing) and/or physical (hitting, sexual assault) and range from less severe to extreme severity
Outcome	Serves in part to cause harm / wreak revenge on the target. Inherently perceived as dysfunctional to the organisation but may be functional to perpetrators	Costs to the individual, groups and/or the organisation itself. Costs can be direct and measurable, and/or indirect and subjective. Has scope for 'functional' outcomes	Dysfunctional and costly outcomes for individuals and organisations
Sources	(Lawrence & Robinson 2007; Sims 2010)	(Griffin & Lopez 2005; Griffin, O'Leary-Kelly & Collins 1998)	(Baron & Neuman 1996; Bennett, R. 1998; Bjorkqvist, Osterman & Lagerspetz 1994; LeBlanc & Kelloway 2002; O'Leary-Kelly & Newman 2003)

Dimension	*10. Workplace aggression*	*11. Mobbing*	*12. Unethical behaviour*
Definition	*Any behaviour directed by one or more persons in the workplace toward the goal of harming one or more (or the entire organisation) in ways the targets would want to avoid* (Neuman & Baron 2005)	*Harassing, offending, socially excluding someone or negatively affecting someone's work ... repeatedly over a period of time ... escalating until the victim ends in an inferior position* (Zapf & Stale 2005)	*Any organizational member action that violates widely accepted (societal) moral norms* (Kish-Gephart, Harrison & Trevino 2010)
Theoretical influences	General affective aggression model (GAAM) which incorporates: cognitive, affective and physiological processes, plus past experience and culture	- leadership - work design - social climate - conflict theory - stress theory - power theory - group dynamics - affect and emotions	- cognitive moral development - Idealism/relativism - Machiavellianism - locus of control - job satisfaction - moral intensity - organisational climate & culture
Target	Another person(s) not welcoming the act/s (does not include aggressive actions towards inanimate objects)	An individual – can occur to workers, supervisors, middle and senior management – similar risks at all levels	- an individual within the organisation - the organisation as a whole - external stakeholders
Actor	Individuals	Individuals but generally by groups of perpetrators – more participate the longer the duration. Can be colleagues as much as supervisors	Individuals or groups generally working in a egoistic organisational climate
The actor's intentions / motive	Must be intended to cause harm to another or group of others - affective -reactionary - instrument - to obtain a desired end	Harmful intention is not an essential element (although some scholars disagree)	- May be more impulsive behaviour rather than deliberate - to avoid punishment - to orchestrate personal gain
Duration of incident/s	Single or multiple incidents	Ongoing and persistent – for a long period of time	- a single incident - multiple single incidents; or - persistent/ spiralling behaviour if climate encourages
Role of power or status	Could be in the pursuit of power – social power between co-workers. Aggression from supervisors with formal power has most detrimental effect on employees	Imbalance of power is a central feature: the target has 'little control' or is 'defenceless'	Can be invoked if worker(s) are being directed by superiors and fear punishment
Role of norms	Societal norms regulate aggression where it is condemned when used against weak or helpless victims	The necessity to violate a norm appears not to be a feature in the literature although is perhaps implicit in the construct	Widely accepted moral or societal norms are violated yet organisational norms may not
Severity	Can be overt or covert. Other scholars argue it is high-intensity and physical (violence)	Moderate to high intensity, physical and non-physical aggression. Individual acts may be minor but impact accumulates	Measured by the construct of 'moral intensity' which incorporates the magnitude of consequences
Outcome	- retaliatory aggression from the victim - it may produce benefits for the aggressor by successfully forcing opponent to yield	Focus is on the victim: - psychological illness - physical illness - career distress	Dysfunctional outcomes can occur across societal sectors
Sources	(Hershcovis & Barling 2010; Neuman & Baron 2005; Pearson, Andersson & Porath 2005)	(Pearson, Andersson & Porath 2005; Zapf & Stale 2005)	(Kish-Gephart, Harrison & Trevino 2010)

DIMENSION	13. Corruption	14. Insidious workplace behaviour	15. Non-compliant behaviour
Definition	*Pursuit of interests by one or more org. actors through the intentional misdirection of org. resources or perversion of org. routines* (Lange 2008)	*Intentionally harmful, legal, subtle but pervasive forms of deviance repeated over time* (Edwards & Greenberg 2010b)	*Approaching non-task behaviours (as opposed to focal task behaviours) in a way that produces negative implications for the organisation* (Puffer 1987). Conceptually opposite to 'pro-social behaviour'
Theoretical influences	- rationalisation - trait theory - agency theory - individual traits - social learning - org. culture - socialisation - individual & collective trust	- displaced aggression - retaliatory behaviour - social competence - negative affectivity - social learning theory - gender role theory - personality - culture	Motivational factors such as the need for achievement and situational factors such as competition in the workplace Reciprocity Herzberg's dual factor theory
Target	- The firm if it is an organisation of corrupt individuals (OCI); - competitors, public or share holders if it is a 'corrupt organisation' (CO)	Generally individuals but can be directed toward the organisation	Generally the organisation but can be directed towards individuals
Actor	- Individual (OCI) - executives or those with opportunity - colluding groups (CO)	Individual employees	Individual employees
The actor's intentions / motive	- Deliberate - Greed/enhance own interests - Competitive pressure -To benefit self (OCI) or organisation (CO)	Must intend to cause harm to the target	- Ignorance of rules or how to apply them in specific situations; but is generally deliberate in order to: - To achieve personal gain; or - 'Principled' non-compliance (as a protest against a rule)
Duration of incident/s	OCI – continuous tend to slowly escalate CO – may be discrete incidents	Repetitive with cumulative effects	Single or multiple acts (such as taking sales from others, being late, excessive breaks)
Role of power or status	Implicated with one definition of corruption being 'illicit use of one's position or power'	Lower level positions at risk but supervisors can also become targets. Can also occur in a form that is 'contrapower' (lower level upwards)	Not essential. Actor can invoke behaviour towards co-worker of same status.
Role of norms	Societal norms always in CO/ organisational usually in OCI. Org norms may encourage if there is an unbridled push to make profit	The necessity to violate a norm appears not to be a feature in the literature – it appears this behaviour is often 'under the radar' of what is considered unacceptable norms of behaviour	Central tenant as it involves not complying with established rules and norms set by the organisation
Severity	Increases as it becomes 'normalised' in the firm's culture. Extreme cases can lead to' sudden death' of the organisation	- Does not breach legal rules - Low-level acts which on their own may seem of little impact or significance	Can range from subtle to severe
Outcome	OCI - dysfunctional CO – the firm may benefit initially but can ruin the firm	- Anxiety and post-traumatic stress for victims - 'bottom line' impact on organisation	Negative image of the organisation
Sources	(Ashforth et al. 2008; Lange 2008; Pinto, Leana & Pil 2008)	(Edwards & Greenberg 2010a, 2010b)	(Puffer 1987)

DIMENSION	*16. Serious misconduct*
Definition	*Wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment* (Donaghey 2006)
Theoretical influences	Concept underpinned by industrial legislation and precedents of the Industrial Commission (Australia). Guiding principles: valid reason - fairness, justice, harshness; gravity of behaviour, mitigating factors that lead to the behaviour (such as the employee's work record, supervisory status of the employee, provocation); burden of proof/balance of probability
Target	Other individual/s The employer's business
Actor	An individual
The actor's intentions/ motive	Deliberate or wilful intentions
Duration of incident/s	Generally a single incident (eg, theft, assault, fraud, intoxication, refusal to carry out a reasonable instruction)
Role of power or status	Not essential. Actor can invoke behaviour towards co-worker of same status
Role of norms	Implicit. Misconduct occurs counter to the behaviour/values/expectations implied when party to an employment contract
Severity	Serious results or cause imminent and serious risk
Outcome	- Immediate dismissal of the employee - behaviour resulted in risk to health or safety of a person; or Reputation, viability or profitability of the employer's business
Sources	(Donaghey 2006)

APPENDIX 2

Australia's evolution of unfair dismissal arbitration

This appendix contains an account of industrial relations history pertaining to the evolution of Australia's system of *unfair dismissal* arbitration, commencing with federation in 1901.

The Commonwealth of Australia Constitution Act: Records in the Parliamentary Library of Australia show that prior to the 1900s, the states in Australia were operating autonomously, each under a 'responsible government' (Bennett, S. 1999). The passing of the Commonwealth of Australia Constitution Act 1900 (the Constitution) established the jurisdiction for an additional system of an overarching federal government from January 1901. For the players in Australia's industrial relations environment this Act resulted in a dual layer of state and federal government, separately empowered to regulate industrial issues, with the federal legislation overriding State legislation where discrepancies occurred (Dabscheck 1998; Walker 1970). Above all, the High Court of Australia held definitive power to determine disputes that arose in relation to the Constitution and conflicts between the state and federal systems (Dabscheck 1980). The Constitution prescribes 'heads of power' on which the Federal government can make legislation. The 'labour power' of the Constitution [Section 51(xxxv)] permits the federal government to make laws with respect to the '*conciliation and arbitration for the prevention and settlements of industrial disputes*'. However, for the next century and beyond, the federal government resorted to using different heads of power outside the 'labour power' used to form Australia's seminal federal industrial relations legislation (McCallum 2005) to regulate the employment relationship.

1904 - Australia's first federal tribunal – the Commonwealth Court of Conciliation and Arbitration: Bound by the 'labour power' parameters of the Commonwealth of Australia Constitution Act 1900, the first major initiative of the Federal Government on industrial issues was to enact the Commonwealth Conciliation and Arbitration Act (1904) and establish the Commonwealth Court of Conciliation and Arbitration. This court had power that was limited to preventing and settling industrial disputes that *crossed* State boundaries or industrial matters relating to international relations or corporations (Cooper & Ellem 2008; Dabscheck 1980; Walker 1970).

In relation to termination of employment matters, it was interpreted by the High Court of Australia that neither the Constitution nor the Conciliation and Arbitration Act allowed the federal level tribunal to provide arbitration services in relation to unfair dismissal practices (Stewart 1989). For instance, the High Court ruled that a claim from a single employee, was a local matter and outside the federal tribunal's jurisdiction. Secondly, awarding reinstatement to a dismissed worker was assessed by the High Court to be a 'judicial' decision which could only be handed down by a judicial court - a status it did not attribute to the Commonwealth Court of Conciliation and Arbitration. Thus the federal tribunal, could only 'entertain' claims and 'recommend' reinstatement of either unfairly or unlawfully dismissed workers, (O'Donovan 1976, p. 639). For most of the 20th century, unfair dismissal was a matter for the States and their respective industrial tribunals.

The role of state tribunals: Unlike the federal government that was bound by the parameters of the Constitution originally, the state governments were free to legislate on any industrial matter, such as those pertaining to wages, hours and conditions directly impacting the work environment (Dabscheck 1980, 1998). Each installed a state industrial tribunal to conciliate and arbitrate over state employment matters. Thus state regulation occurred through the tribunal's authority to settle intra-state disputes and make collective contracts binding on workers in similar occupations or industries, called (occupational) 'awards' (Barry & Wailes 2004; Petzall, Abbott & Timo 2007; Sappey et al. 2009).

The award system traditionally consisted of state and federal awards. Workers could have conditions prescribed by both jurisdictions, with state awards conditions applicable if the federal award was silent on the matter (Stewart 2009). As to which industries or occupational type were covered by either a state or federal award reflected the federal Government's labour powers under the Constitution. The labour powers allowed the federal tribunal to make awards that applied to interstate industries on the understanding that an 'industry' involved industrial processes or manual labour (McCallum 2005). In addition, the federal government used its 'trade and commerce' power to regulate the employment of sailors, waterside workers and airline crews. Much later the High Court's decisions on cases such as *The Motor Accident's Case* in 1981 and the *Australian Social Welfare Union Case* in 1983 broadened the interpretation of 'industry', after which white-collar unions and workers began to seek federal award coverage (Briggs, Meagher & Healy 2007; McCallum 1982). In general, for the majority of the 20th century, the individual states made awards that pertained to occupational groups such as white collar, administrative workers and professional workers such as teachers and academics (Bray, Waring & Cooper 2011; McCallum 1982, 2005).

The states legislated over the largest sector of the Australian workforce for the majority of the 20th century. Around half of Queensland, New South Wales and South Australia's workers had pay and conditions set by a state award, the majority covering female workers due to the, typically, small business sector work they performed (Sappey et al. 2009). In 1990, the Australian Bureau of Statistics (ABS) reported that 39.7 percent of employees were employed under federal awards, 48.4 percent under state awards, and 20.1 percent were not identified either way (O'Neil 1995). The Fair Work Ombudsman (2012) reports that by January 2011 most employers in Australia became part of the national workplace relations system, underpinned by the Fair Work Act 2009. Under the national system 'modern awards' apply. Modern awards are occupational and industry based awards that have been installed to reduce confusion about minimum employment entitlements. Respective state legislation remains in only several areas: Western Australian non-constitutional corporations; State government public sector entities; and some local government entities. The swing toward federal award domination occurred as a consequence of federal legislative changes in 2005, which are discussed later in this sub-section.

With particular reference to termination of employment matters, each of the states installed legislation that provided the various state tribunals with jurisdiction to reinstate and/or compensate employees of a state award who they determined had been unfairly and/or wrongfully dismissed (Pittard & Naughton 2010; Sherman 1989). Table A2.1 outlines inaugural legislation that provided some form of redress to workers who believed they had been unfairly dismissed..

Table A2.1 *Original state legislation providing unfair dismissal rights*

State	Year	Name of legalisation	Inaugural tribunal remedies for unfair dismissal
New South Wales	1940	Industrial Arbitration Act (NSW)	Reinstatement to job Reinstatement of lost wages
Queensland	1987	Industrial Conciliation and Arbitration Act (QLD)	Reinstatement to job
South Australia	1972	Industrial Conciliation and Arbitration Act	Re-employment *
Tasmania	1975	Industrial Relations Act (Tas)	Reinstatement to job
Western Australia	1979	Industrial Relations Act (WA)	Re-employment or
Victoria	1979	Industrial Relations Act (Vic)	Reinstatement to job Reinstatement of lost wages

* Jurisdiction to hear claims was vested originally in the SA Industrial Court

Adapted from: (*Termination, Change and Redundancy Case* 1984; Pittard 1998; Pittard & Naughton 2010; Stewart 1989)

The various state Acts underwent revisions to their respective unfair dismissal provisions over the years, for instance, in 1984 South Australia transferred jurisdiction from its Industrial Court to its Industrial Commission to hear unfair dismissal claims. As another example, Queensland amended legislation in 1999 favourably toward employees. It repealed the small business exclusion, increased the range of remedies available to the Commission, and upon request, the arbitrator did not need to take into account the effect of any remedy on the viability of the employer's business (Chapman 2000). And, as a final example, a substantial change occurred in 1996 in Victoria when it referred its industrial relations powers to the federal government and the people of Victoria came under the jurisdiction of the Workplace Relations Act 1996 (Commonwealth).

Originally, unfair dismissal in the state was a collectively initiated system (Bray & Underhill 2009; McCallum 2002; Sherman 1989; Stewart 1992). An individual could not lodge an unfair dismissal claim with a tribunal on their own standing and a person needed to have union support and if obtained, it was the union that notified the tribunal of an 'industrial dispute'. For instance, Victoria's industrial tribunal was restrained from hearing individually-instigated claims on the basis of the 1990 Victorian Supreme Court's *Downey* decision which held that without union support a claim was not of the character of an industrial dispute that could be resolved in the state tribunal (Bourke 1990). This collectivist approach to unfair dismissal bolstered union membership, yet times were to change for the union's ability to gate keep access to unfair dismissal claims. In 1972 South Australia was the first to establish an individually initiated unfair dismissal claim process that operated alongside union-initiated claims and in 1979 Western Australia installed a similar system (Sherman 1989). In 1991, NSW amended its legislation to allow the state industrial commission to resolve all dismissal claims - ending the unions' 'monopoly' on access to unfair dismissal for NSW workers (Stewart 1992, p. 72). Whilst people employed under state awards were being afforded varying degrees of unfair dismissal protections, until 1984 federal award employees had limited protection from unfair dismissal unless the federal award contained a saving clause permitting the jurisdiction of state industrial authorities on matters of unfair dismissal, yet the federal Commission rarely approved of such clauses into federal awards (*Termination, Change and Redundancy Case* 1984).

1956 - Separating the powers - The Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court: The 1956 Boilermaker's decision by the High Court and Privy Council reinforced its position that the Commonwealth Conciliation and Arbitration Commission did not have the authority to engage in both judicial and non-judicial arbitral judgements (McCallum 2005; Shaw 1994; Stewart 1989). In order to abide by the High Court ruling, the federal government amended the Conciliation and Arbitration Act 1904 by abolishing the Commonwealth Court of Conciliation and Arbitration (Pittard & Naughton 2010). The Commonwealth Conciliation and Arbitration Commission was established to perform non-judicial services and, separately, the Commonwealth Industrial Court was established to address cases requiring common law judicial decisions. Throughout this time though, unfair dismissal claims were primarily the responsibility of the states.

1973 - A new name for the Commission – The Australian Conciliation and Arbitration Commission: The name of the Commonwealth Conciliation and Arbitration Commission was changed to the Australian Conciliation and Arbitration Commission (Australian Industrial Relations Commission 2006).

1984 - The Termination Change and Redundancy (TCR) Case: A full bench of the Australian Conciliation and Arbitration Commission heard a log of claims from the Australian Council of Trade Unions (ACTU) to improve employment security for workers under federal awards. The Commission took lengthy submissions from the ACTU, one being that in the United Kingdom under its

Employment Protection Act 1980, federal employees had the right to complain of unfair dismissal to an industrial tribunal and that the tribunal had the power to order reinstatement, re-employment or compensation. A further arm of the ACTU's submission was the recent introduction of the International Labor Organisation's (ILO) Convention 158, Recommendation 166 on Termination of Employment standards. In its TCR Decision, the Australian Conciliation and Arbitration Commission stated:

> We acknowledge the desirability of one Federal tribunal being vested with all the powers to deal with complaints about unfair dismissal relating to employees under Federal awards ... if anything is to be done in this area for Federal award employees then it should be done by, and confined to, Federal tribunals ... Further, although we are of the opinion that the present log of claims would not enable the Commission to order re-employment, reinstatement or compensation for wrongful dismissal to employees unfairly dismissed, we do believe that the Australian Parliament could give an appropriate tribunal jurisdiction to award compensation to, or order reinstatement of, employees dismissed in breach of an award (*Termination, Change and Redundancy Case* 1984, p. 10).

The Commission prescribed fair dismissal standards in federal awards (Pittard 1994a) and indicated its willingness to exercise arbitral powers (de facto jurisdiction) and if necessary provide remedies for successful unfair dismissal claims. However, the High Court of Australia was not yet of the same opinion, although this opinion was soon to change. Nevertheless, at this point in time, Australia had a dual system where federal award provisions offered protection for federal employees whilst the state provisions covered workers employed under state awards. Yet, whilst state employees had access to remedies from their relevant state tribunals, federal employees still had to access the Commonwealth Industrial Court for absolute judgements. Further, whilst the TCR decision installed fair dismissal standards in federal awards, such standards were yet to be enshrined in federal legislation.

1984 to 1989 - A changing attitude from the High Court: Several decisions by the High Court of Australia indicated that it was softening its interpretation towards limiting the federal tribunal arbitrating unfair dismissal claims (Pittard & Naughton 2010; Stewart 1989). The literature reflects a number of decisions from the High Court that considered the jurisdiction of the Australian Conciliation and Arbitration Commission over unfair dismissals (see Pittard & Naughton 2010, Stewart 1989). For conciseness, two landmark cases are discussed here. The first landmark decision came in 1987 in the High Court's decision over the ***Ranger Uranium Case***. This High Court decision recorded:

> A finding that a dismissal is harsh, unjust or unreasonable involves the finding of relevant facts and the formation and expression of a value judgment in the context of the facts so found. Although findings of fact are a common ingredient in the exercise of judicial power, such findings may also be an element in the exercise of administrative, executive and arbitral powers... The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration (*Ranger Uranium Mines Case* 1987, pp. 10-1).

In this case, the High Court appeared willing to let the federal Commission reinstate unfairly dismissed workers because it considered that unfair dismissal claims related to disputes about the rights and obligations that should exist between employers and employees when a termination turns awry – an arbitral function, as opposed to ascertaining if a legal right existed in the first place – a court function.

The second landmark case is that of the ***Wooldumpers Case*** in 1989. Recalling that the Constitution only allowed the federal government to put in place conciliatory and arbitral systems to deal with 'interstate disputes' – and on which the Ranger Uranium case remained silent – it was still a hurdle preventing the Commission from exercising arbitral power on unfair dismissal claims. However, the High Court decision in the *Wooldumpers Case* implied that the Australian Conciliation and Arbitration Commission's ability to conciliate and arbitrate an unfair dismissal claims 'might be conducive to preventing an interstate dispute' (Smith 1990, p. 120).

1988 - The Industrial Relations Act and the new Australian Industrial Relations Commission: The Hawke Labor government introduced new federal industrial legislation and renamed the Conciliation and Arbitration Commission to the Australian Industrial Relations Commission (AIRC). The role of the AIRC remained, primarily, to prevent and settle interstate labour disputes and certifying enterprise agreements (Plowman 1992). At the same time, the Industrial Division of the Federal Court dealt with matters arising from the federal awards (which now included the fair dismissal conditions in federal awards as a result of the TCR case). For Australia's IR environment, the 1988 Act signalled the commencement of a neo-liberal agenda, by providing some scope for unions and employers to enter into enterprise agreements (Bray & Underhill 2009; Pittard & Naughton 2010; Plowman 1992). The succeeding Keating Labor government would continue the deregulated, decentralised agenda commenced by the 1988 Act in its 1993 revisions to the industrial legislation that saw federal awards being downgraded to a safety net of minimum conditions to protect those employees without an enterprise bargaining agreement (Pittard & Naughton 2010).

1993 - The Industrial Relations Reform Act – federal unfair dismissal standards and the setting up of the Industrial Relations Court of Australia: Coinciding with the High Court's interpretations indicating the Commission held quasi-judicial powers over matters of unfair dismissal, were the statutory remedies for unfairly dismissed employees that were introduced in the next wave of federal government industrial legislation. The Keating Labor government, in 1993 amended the 1988 *Industrial Relations Act* to meet Australia's obligations under the International Labour Organization's (ILO) Termination of Employment Convention 158 (Forsyth et al. 2008). The convention required ILO members to provide employees with an appeal process to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator in the event of a termination (ILO 1982). Titled *The Industrial Relations Reform Act 1993*, it directly adopted the full wording of ILO's Recommendation No. 166 to meet this obligation. Although Recommendation No. 166 identified three categories of excluded employees - specified period employees, specified task employees, and short term casuals - it was the first time that Australia's federal legislation provided protection to employees in the event they were dismissed on 'harsh, unjust or unreasonable' grounds (Pittard & Naughton 2010).

The manner by which the federal government legislated on a matter that was traditionally outside its labour powers ambit under the Commonwealth of Australia Constitution Act 1900 was to invoke the 'external affairs' power of the Constitution Section 51 (xxix) (Pittard 1994b). The external affairs power provided the Australian government with the ambit to make legislation addressing the country's obligations under international treaties and conventions (DFAT 2011). As a member country of the ILO, Australia was obligated to adopt Recommendation 166. It came to be that federal statute law prescribed minimum unfair dismissal standards for employees under federal awards or those under state awards that did not have a comparable minimum.

Facts recounted by Pittard (1994b) about the dismissal standards legislated in the 1993 Act were: first, affording appropriate notice of termination of employment (or payment in lieu of notice), however, immediate dismissal was appropriate in cases of 'misconduct'. Second, a person could not be

dismissed on the following grounds: temporary absence from work because of illness or injury, grounds relating to colour, sex, race, pregnancy, of the employee, and participation in union activity or non-membership of a union. Breach of either of these two requirements would be the basis of wrongful dismissal. Third, there must be a valid reason on the basis of the employee's conduct or capacity or for operational requirements of the business in order to terminate an employee. Fourth, employees facing dismissal on the basis of their conduct or capacity must be given an opportunity to defend their position before the employer decides to dismiss them. Breach of the third or fourth standard could be the basis of an unfair dismissal claim and such claims would be judged on the basis of the harshness, unjustness or unreasonableness of the employer's actions. The 1993 Act also prescribed remedies for wrongful or unfair dismissals. They were: reinstatement to the job the employee held; or re-employment in a job of similar standing; or, compensation to a maximum of six months wages/salary.

However, the administration of these judgements was not yet given to the Australian Industrial Relations Commission (AIRC). Instead, the Keating government created the Industrial Relations Court of Australia, a superior court of law that was to specialise in industrial relations matters (Shaw 1994). It had equal status to the Federal Court of Australia and the Family Court of Australia (The Federal Court of Australia 2009). In terms of termination of employment matters, the Industrial Relations Court of Australia could hear claims that pertained to unlawful termination but, in the main, only after the Australian Industrial Relations Commission (AIRC) had attempted conciliation with the parties (Pittard 1994a; Shaw 1994). The 1993 Act gave authority to the Industrial Relations Court of Australia to reinstate and/or compensate an employee who was found to have been terminated: on prohibited grounds; for an invalid reason; or in a 'harsh, unjust or unreasonable' manner (Pittard & Naughton 2010) on the proviso the claimant had no adequate alternative remedy (such as those provided in the state laws). Shaw (1994) suggested that the unfair dismissal remedies available to the Industrial Relations Court potentially overrode the state laws for unfair dismissal. The downside of this system was that dismissed employees would be subjected to the formality and expense of court processes.

1996 - The Workplace Relations Act and passing of the torch to The Australian Industrial Relations Commission: As legislation stood, a dismissed worker who had been employed under a federal award who was seeking an absolute finding and remedy for their dismissal had only recourse through common law or the specialist Industrial Relations Court. In 1996, Australia elected a Liberal-National Coalition government under Howard's leadership and it introduced *The Workplace Relations Act 1996*. The Howard government relied less on the 'external affairs' power to qualify its legislative ambit over the 1996 Act. Instead the 'corporations power' (Section 51 xx) was used as the foremost Constitutional basis of the legislation (Territories power and trade and commerce power also featured) (Dabscheck 2001; Gray 1996; McCallum 2005). The 'corporations power' provided the federal government the ambit to legislate on the operations of a foreign, trading or financial corporation within Australia. The government harnessed the wider industrial relations regulation that could be achieved through the 'corporations power' compared to the 'external affairs power'.

The 1996 Workplace Relations Act also conferred power to the Australian Industrial Relations Commission (AIRC) to fully adjudicate dismissals that were thought to be harsh, unjust or unreasonable in nature (Donaghey 2006). The power given to the AIRC to arbitrate unfair dismissal claims was a break-through in Australia's arbitration history after repeated attempts by unions and employers to bring unfair dismissal claims before the Commission. The result was that the various state unfair dismissal legislations became of limited utility with federal unfair dismissal legislation the primary source of appeal for dismissed employees. Furthermore, the 1996 Act transferred the jurisdiction of the Industrial Relations Court of Australia to hear wrongful dismissal claims -

dismissals occurring on prohibited grounds - to the Federal Court of Australia (Pittard & Naughton 2010; The Federal Court of Australia 2009). The Industrial Relations Court of Australia now only exists in name until the judges appointed to the Court resign or retire.

The 1996 Workplace Relations Act also instigated the 'fair go all round' principle in response to employers' concerns that the ILO conventions were weighted in favour of the employees (Pittard & Naughton 2010; Robbins & Voll 2005). Thus, the AIRC conciliated and arbitrated unfair dismissal claims taking into account the harshness, unjustness or unreasonable of the claim (Section 170CA).

2005 - The Work Choices glitch to unfair dismissal rights: In 2004 the Howard Coalition government won its fourth term in office, this time with control of both the Senate and the House of Representatives. This allowed the government to pass the overtly neoliberal legislation, the *Workplace Relations Act 1996 (Work Choices) Act of 2005* built on principles of deregulating and individualising the labour market (Bray & Underhill 2009; Waring & Bray 2006) and directly limiting union access and representation in the workplace (Alexander, Lewer & Gahan 2008). This legislation was based on the premise it would build a competitive, sustainable economy by increasing jobs, providing employers with 'flexibility' and improving the balance of work and family life for Australians (Lloyd Walker 2007).

Furthermore, active campaigning from employer and industry bodies resulted in this legislation excluding additional categories of workers from making unfair dismissal claims. This 2005 Act prohibited claims from, among others, workers employed in businesses with 100 or less employees, seasonal workers and those terminated for a 'genuine operational reasons' (Southey 2008). The 100 employee Work Choices exemption was legislated on the premise that small and medium sized businesses were restraining from increasing their workforces in fear of potential unfair dismissal claims, although the literature questioned the strength of the job growth-unfair dismissal link used to underpin this exemption (Department of the Senate 2005; Freyens & Oslington 2007; Robbins & Voll 2005). The impact of these unfair dismissal restrictions was that, as the high majority of Australian business had fewer than 100 employees, the majority of Australian workers were without unfair dismissal protection (Abbott et al. 2007).

The 2005 reforms used the same constitutional premise of the corporations power as the previous (1996) Act but, presumably because of the extreme deregulatory impact of the Work Choices legislation - through the provisions for AWAs, union restrictions and unfair dismissal limitations - it caused a much larger reaction. The corporations power had in fact been used as early as 1977 by the federal government to outlaw secondary boycotts and in the 1993 legislation to allow enterprise flexibility agreements (McCallum 2005). In any event, all the states, the Australian Workers Union and Unions NSW legally challenged Work Choices on the basis of the federal government's reliance on the corporations power to regulate employment standards for employees in constitutional corporations (Australia Workplace Insight 2011). The High Court, however, concurred with the government's interpretation that an employer, as a trading business entity that employs at least one other employee, is a constitutional corporation (Gray 1996). Also, within this definition of a constitutional corporation are commonwealth government and authorities; flight crew, maritime and waterside workers; and employing entities in a Territory in Australia. Thus, state legislation was left to cover employees in unincorporated businesses, not for profit corporations and state government employees (Peetz 2007).

The net effect of the corporations power was that the federal government legitimately included the majority of Australian workers under the coverage of its 1996 Act. The Howard government's use of the corporations power to legally override the power of the states, combined with a country of sitting

Labor state governments pledging their commitment to 'co-operative federalism', put estimates that the unfair dismissal provisions covered between 75 percent (Stewart 2009) and 85 percent of Australian workers (CCH Australia Limited 2008).

2009 – 2013 Current times under the Fair Work Act and **Fair Work Amendment Act 2012**: The next wave of industrial legislation at the federal level brings this discussion of Australia's evolution of its unfair dismissal system to its present situation under the Fair Work Act. Due to its currency, the implication of the Fair Work Act on unfair dismissal is addressed in the body of the thesis.

To conclude this account, it appears Australia's industrial relations environment has moved from highly regulated, via a myriad of detailed industry awards, compulsory arbitration and centralised wage setting mechanisms, through to the current, largely deregulated, system of 'modern' simplified awards and enterprise agreements unpinned by a dominant piece of federal legislation: the Fair Work Act 2009. It has taken over a century for Australia to develop a national system for providing unfair dismissal protections to workers. It was destined to be complicated by a variety of factors, such as early interpretations of the federal government's authority under the Constitution Act to directly legislate on individual employment matters, combined with reluctance from the High Court to grant power to a federal tribunal to make quasi-judicial decisions that award remedies to unfairly dismissed workers.

The states had made their respective advances in providing unfair dismissal provisions to employees within their territories and whilst the states were duly capable of continuing to provide this service, the unions were attracted to obtaining federal awards from the federal tribunal from which unions could necessitate broad representation and subsequent influence over a nation-wide industry. By implication, federal award coverage offered unions a stronger bargaining position. Furthermore, the state tribunals could be directed by their respective state governments to adopt particular positions, thus were more susceptible (than the federal tribunal) to political interference, whereas the federal tribunal – in theory - could not have its positions directed by the federal government (Dabscheck 1980).

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APPENDIX 3

Measures document and coding protocol

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The purpose of a 'measures document and coding protocol'

A 'measures document' is used in conjunction with a secondary data source to 'describe a set of variables that can be used in a consistent fashion' in a research project (Willms 2011, p. 35). In this research thesis, a range of variables need to be identified and recorded from each arbitration decision, in order to run statistical analysis on the hypotheses. Each variable contains a number of 'values' capturing the relevant 'hypothetical construct' that each variable aims to convey (Collis & Hussey 2003). The values provide a set of criteria, or behavioural analogues, for isolating the variables from the text of the arbitration decisions. The values for each variable are based on the literature relevant to each research question. This 'measures document' therefore contains the coding protocols with a view to increasing consistency in the identification of the appropriate value for each variable, from each decision.

Completing the coding sheet

Associated with this 'measurement document' is the corresponding 'coding sheet' that contains the code for every value within each variable. A sample of the coding sheet is provided at the end of this document. A separate coding sheet is required for each arbitration decision. The coding sheet requires completion as the 'coder' reads each decision and identifies occurrences in the text that are analogous to the variables described in this 'measures document'. The completed coding sheet for each decision is not unlike a completed survey capturing responses to the variables of interest from each research participant (Kelly 1999).

To complete the coding sheet, the selected value is to be circled, as per example:

8: **OCCUPATION**	
1	Manager
2	Professional
3	Technician or trade
(4)	Community & personal service worker
5	Clerical & admin worker
6	Sales worker
7	Machinery operator or driver
8	Labourer

Occasionally, variables require data to be recorded, for example:

11: **LENGTH OF SERVICE**
______3______ years

Decision identifiers

The following information must be collected in case the need arises to revisit the decision for which the coding sheet has been completed. This information enables an easy internet search in the event the original decision needs to be located.

Decision number: This is recorded on the top left of the front page of the decision. In most cases, it starts with an alphabetical code such as 'PR'.

Dismissed worker: The decision displays the name of the dismissed worker in a central heading on the front page. Occasionally, the name of the representing union will appear in place of the dismissed worker's name. It is only necessary to record the worker's surname or family name.

Multiple grievants: Occasionally, more than one worker lodges a claim. Complete a separate coding sheeting for each grievant in a claim.

Employer: The employer's business name is recorded in a central heading on the front page of the decision. It is only necessary to record an abbreviated or shortened version of the employer's name, for example, 'USQ' instead of 'University of Southern Queensland'. There is no need to record Pty Ltd.

Variable 1: Year of decision AND Variable 2: Region

1: **YEAR**		*2:* **REGION**	
1	2000	1	Adelaide
2	2001	2	Brisbane
3	2002	3	Canberra
4	2003	4	Hobart
5	2004	5	Melbourne
6	2005	6	Newcastle
7	2006	7	Perth
8	2007	8	Sydney
9	2008	9	Wollongong
10	2009		
11	2010		

Variable 1: Year of decision

This is the year in which the decision was made and can be identified on the top, right corner on the first page of the decision document.

Variable 2: Region

The region is identified on the front page on towards the top right side of each decision.

The Fair Work Australia (2011) website lists the location of sitting members in: (A) Adelaide, (B) Brisbane, (C) Canberra, (H) Hobart, (M) Melbourne, (N) Newcastle, (P) Perth, (S) Sydney, (W) Wollongong.

On the suggestion regional variations within a country may exist, several authors have considered regional areas in their studies of arbitral decision-making, such as McAndrew (2000); Crow and Logan (1994); Wagar (1994); and Bemmels (1990).

Variable 3: Industry

3: INDUSTRY	
1	Agriculture, forestry, fishing
2	Mining
3	Manufacturing
4	Electricity gas water & waste services
5	Construction
6	Wholesale trade
7	Retail trade
8	Accommodation & food services
9	Transport, postal and warehousing
10	Information media & telecommunications
11	Financial and insurance services
12	Rental, hiring & real estate services
13	Professional, scientific & technical services
14	Administrative & support services
15	Public administration & safety
16	Education and training
17	Health care & social assistance
18	Arts and recreation services
19	Other services

The type of industry in which the employment relationship occurred is classified according to the 19 major industrial categories identified in the most recent version of the Australian and New Zealand Standard Industrial Classification (ANZSIC). ANZSIC was developed for use in the compilation and analysis of industry statistics in Australia and New Zealand. It was jointly developed to improve the comparability of industry statistics between the two countries and with the rest of the world (Australian Bureau of Statistics 2006). The 19 values in this variable reflect the 19 ANZSIC classifications at the major group level. Industry examples for each major group follow:

Value 1. Agriculture, forestry and fishing
Horticulture and fruit growing; grain, sheep and beef cattle farming; dairy cattle farming; poultry farming; other livestock farming; other crop growing; services to agriculture; hunting and trapping; forestry and logging; marine fishing; aquaculture

Value 2. Mining
Coal mining; oil and gas extraction; metal ore mining; non-metalic mineral mining and quarrying, exploration and other mining support services

Value 3. Manufacturing
Food product manufacturing; Meat and meat product manufacture; dairy product; fruit and vegetable processing; oil and fat manufacturing; flour mill and cereal food; bakery product; other food manufacturing; beverage and malt; tobacco product; textile fibre, yarn and woven fabric manufacturing; textile product; knitting mills; clothing; footwear; leather and leather product; log sawmilling and timber dressing; other wood product manufacturing; paper and paper product; printing and services and printing; publishing; recorded media manufacturing and publishing; petroleum refining; petroleum and coal product manufacturing basic chemical; rubber; plastic; glass; ceramic; cement; lime; plaster; concrete product; non-metallic mineral product; iron and steel; non-ferrous metal; motor vehicle and parts; other transport equipment; photographic and scientific equipment; electronic equipment; electrical equipment and appliance; industrial machinery and equipment; furniture; other manufacturing.

Value 4. Electricity, gas, water and waste services
Electricity supply; gas supply; water supply; sewerage and drainage services; waste collection, treatment and disposal services

Value 5. Construction
Building construction; non-building construction; site preparation services; building structure services; installation trade services; building completion services; other construction services

Value 6. Wholesale trade
Basic material wholesaling; Farm produce; mineral, metal and chemical; builders supplies; machinery and equipment; motor vehicle; food, drink and tobacco; textile, clothing and footwear; household good; other wholesaling

Value 7. Retail trade
Supermarket and grocery stores; fuel retailing; specialised food; department stores; clothing and soft good retailing; furniture, house ware and appliances; recreational goods; other personal and household goods; household equipment repair services; motor vehicle; motor vehicle services; non-store retailing and retail commission-based buying and or selling.

Value 8. Accommodation and food services
Accommodation; pubs, taverns and bars; cafes and restaurants; clubs (hospitality); food and beverage services

Value 9. Transport, postal and warehousing
Road freight; road passenger; rail; water; air and space transport; other transport; services to road transport; services to water transport; services to air transport; other services to transport; Postal and courier pick up and delivery services; warehousing and storage.

Value 10. Information media and telecommunications
Publishing (except internet and music publishing); motion picture and sound recording activities; broadcasting (except internet); internet publishing and broadcasting; telecommunication services; internet service providers, web search portals and data processing services; library and other information services

Value 11. Financial and insurance services
Banks; deposit taking financiers; other financiers; financial asset investors; life insurance and superannuation funds; other insurance; services to finance and investment; services to insurance

Value 12. Rental, hiring and real estate services
Property operators and developers; real estate agents; non-financial asset investors; machinery and equipment hire and leasing; scientific research; technical services; computer services; legal and accounting services; marketing and business management services; other business services

Value 13. Professional, scientific and technical services
Architectural services; engineering services; surveying and mapping services; legal services; advertising services; accounting services; market research services; management consulting; photographic services; veterinary services; computer design services

Value 14. Administrative and support services
Labour supply services; call centre services; document preparation services; administrative support services; credit reporting and debt collecting services; building cleaning services; pest control services; gardening services; packaging services

Value 15. Public administration and safety
Local, state, federal Government administration; public order – police, fire, other inspectorial safety and regulatory services; justice; foreign government representation; defence

Value 16. Education and training
Pre-school; primary, secondary school; tertiary education; other adult education; sports and physical education services; arts education; education support services

Value 17. Health care and social assistance
Hospitals and nursing homes; medical and dental services; other allied health services; ambulance; child care services; community care services

Value 18. Arts and recreation services
Heritage activities; creative and performance arts activities; Film and video; radio and television; theatre; museums; parks and gardens; arts; services to the arts; sport; gambling services; other recreation services

Value 19. Other services
Repair and maintenance services: cars; electronics; appliances; machinery; clothing repair; other personal services – hairdressing, beauticians; weight and diet services; parking services; brothels and prostitution services; funeral services; religious services and organisations; interest groups; private households employing staff.

(Examples sourced from: Australian Bureau of Statistics, 2006 Australian and New Zealand Industrial Classification (ANZIC), Revision 1, Canberra, Catalogue no. 1292.0)

Variable 4: Business sector

4: **BUSINESS SECTOR**	
0	Public (Government or Gov. Authority)
1	Private

This variable collects information pertaining to the major industrial sector in which the employment relationship occurred: either the public (government) sector or the private sector. In addition to larger firms having the potential resources to influence a claim, Kirschenbaum, Harel & Sivan (1998) argued that public sector employers are most likely to be challenged because it is the largest, most diverse employer. There are two values in this variable:

Value 1. Public sector
The public sector consists of employers where their operations are *'either in State ownership or under contract to the State, plus those parts which are regulated and/or subsidised in the public interest'* (Flynn 2007, p. 2). The following definition by Dolton & Makepeace (2011, p. 274) might also assist in discerning whether to code a business as public or private sector.

> The definition of the public sector is those workers who are employed by an organisation that is financed by the government and for which the government has direct financial responsibility. All other individuals work in the private sector. This definition places some institutions in the private sector, such as universities that receive large amounts of public money ... together with many people providing services to the public sector such as many cleaners in hospitals. Further, some public sector services, such as refuse collection, will be contracted out to the private sector.

Value 2. Private sector
The private sector in Australia includes all business operating as sole proprietors, partnerships, trusts, or companies. At June 2009, there were 670,951 (32.7%) companies in Australia, followed by 605,015 (29.5%) sole proprietors, 414,020 (20.2%) trusts and 360,228 (17.6%) partnerships. There were a relatively small number of businesses (<1%) operating in the Public sector (Australian Bureau of Statistics 2010).

Variable 5: Business size

5: ***BUSINESS SIZE***	
1	4 or less workers (micro)
2	5 to 19 workers (small)
3	20 to 199 workers (medium)
4	200+ workers (large)
5	Not identified

A number of the arbitration decisions included information about the size of the business – that is the number of employees working in the firm. Kirschenbaum, Harel & Sivan (1998) argued that

business size may be associated with the resources and ability to influence a decisions. Arbitrators in both the AIRC and FWA, under Section 170CG(3)(da) of the Workplace Relations Act 1996, and later under Section 387 of the Fair Work Act 2009, are to consider: '*the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting termination'*. As a consequence, a reference to the size of the employer, in terms of staff headcount appears in many of the cases as part of the arbitrator's final deliberations.

For example, in *Habachi vs City of Melbourne* (2005), Commissioner Grainger mentions 'As at 30 June 2005, COM has 1,105 employees and employs qualified human resources expertise and these provisions do not require to be taken into account in this matter'. In *Belic vs Air Direct Transport* (2005), Commissioner Grainger states 'Direct Air employs about 20 people and may be characterised as a small employer'. And, as a final example, Commissioner Lloyd, in *Papegeorgiou vs McKinnons Decorative Finishers* (2005), states, 'Alliance Painting Services is small to medium sized firm that in November 2004 employed about 25 painters'.

There are five values for the business size variable (as shown above) reflecting the definitions supplied by the Australian Bureau of Statistics, (2002), Small Business in Australia, Catalogue no. 1321.0. The fifth value has been provided in the event the decision does not refer to the size of the business.

Variable 6: HR expertise of employer

6: **HR EXPERTISE OF EMPLOYER**	
1	No HR expert
2	YES HR expert
3	Not identified

This variable captures whether the employer had the 'benefit' of human resource management expertise, either through some type of HR manager/officer or if the employer approached a HR/legal consultant to take advice about administering a dismissal. It may be that the HR manager was not directly involved in the dismissal, particularly in a large corporation where dismissal guidelines could be developed by the HR experts but executed by line management. In such instances, the employer still had the benefit of HR expertise. This value is included on the basis that the literature suggests HR specialist function could underpin formal notions of disciplinary procedures (Antcliff & Saundry 2009). Three values occur in this variable.

Value 1: NO HR expert

Decisions may record whether or not there was a HR expert involved in the dismissal. This is because arbitrators in both the AIRC and FWA, under Section 170CG(3)(db) of the (*Workplace Relations and other Legislation Amendment Act (Cth)* 1996) and later under Section 387 of the (*The Fair Work Act (Cth)* 2009), are to consider: '*the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting termination'* when arbitrating whether a termination was harsh, unjust or unreasonable. As a consequence, a reference to the existence or non-existence of dedicated human resource expertise can appear in the cases as part of the arbitrator's deliberations.

Value 2: YES HR expert

Additional clues can be found in the decisions as to whether HR expertise existed. For instance, the initial listing of any witnesses and their position may give an indication. For example, in *Cameron and North Goonyella Coal Pty Ltd* (2004) heard by Commissioner Richards, states, 'The respondent's only witness was Mr Richard Williams Reid (Human Resource Manager).' In addition, references are often made by the arbitrator in their decisions about the human resource practitioner. For example, in *Follett v EDS (Services) Pty Limited* (2004), the only reference that the employer had HR expertise was found in the following statement by the arbitrator when summarising the facts and evidence. In it, Commissioner Cargill states 'There is an exchange of e-mails between the applicant and the various Human Resources personnel about this mater at Exhibits Applicant 27 and 28'. As another example, in *Collier vs Palm Springs (NSW) Pty Ltd* (2004), Senior Deputy President Duncan mentions 'evidence in support of the respondent's position was

given by Ms S. Oriander, manager, human resources of the respondent'. And, as a final example, in *De Santis vs MWT Australia* (2004), Commissioner Simmonds states:

> *Ms Carney was cross-examined by Mr McDonald, for the applicant, about the way in which the second agreement was drawn up. She said that the agreement had been created by the respondent's human resources person and that she had no input in its creation.*

Occasionally, the same respondent is involved in a hearing and the earlier case contains information about the presence of HR expertise. For example, the previously cited case involving North Goonyella Mines Pty Ltd as the respondent, contained the information on dedicated HR that was also applied to the *Milburn vs North Goonyella Coal Mines Pty Ltd* heard by Commissioner Bacon.

Value 3: Not identified
A third value has been provided in the event the decision is not clear as to whether a HR expert was in some way involved in the dismissal.

Variable 7: Worker gender

7: **WORKER GENDER**			
0	Male	1	Female

Values for this variable are dichotomised using the dummy coding protocol of '0' for male and '1' for female. Extensive literature exists in the effort to ascertain whether or not gender effects are occurring in arbitral decision-making, which is discussed in Chapter four of the thesis. The dismissed worker's name is generally listed on the decision. However, a name is not necessarily gender specific. Thus the gender of the aggrieved employee can be determined further from the text of the decisions where the arbitrator makes reference to gender inherently through the use of pronouns such as 'he/she' or 'his/her' when referring to the dismissed employee.

Variable 8: Occupation

8: **OCCUPATION**	
1	Manager
2	Professional
3	Technician or trade
4	Community & personal service worker
5	Clerical & admin worker
6	Sales worker
7	Machinery operator or driver
8	Labourer

Occupational groups are classified according to the Australian and New Zealand Standard Classification of Occupations (ANZSCO). In ANZSCO, occupations are grouped on the basis of their skill level and skill specialisation. There are eight 'major' groups at the broadest level of ANZSCO which are meaningful and useful for most (statistical and administrative) purposes (Australian Bureau of Statistics 2009).Thus, there are eight values in this variable reflecting the eight ANZCO classifications at the major group level. The following descriptions and examples have been sourced from: Australian Bureau of Statistics, 2009 Australia and New Zealand Standard Classification of Occupations (ANZSCO), 1st ed, Revision 1, Canberra, Catalogue no. 1220.0:

Value 1. Managers

Typical Tasks	*Occupational Examples*
• setting the overall direction and objectives of organisations and departments within organisations • formulating, administering and reviewing policy and legislation to ensure organisational and departmental objectives are met • directing and coordinating the allocation of assets and resources • directing, controlling and coordinating the activities of organisations and departments, either personally or through senior subordinate staff • monitoring and evaluating overall organisational and departmental performance, and adjusting policies, rules and regulations to ensure objectives are met • representing the organisation at official occasions, in negotiations, at conventions, seminars and public forums	Chief executives, general managers, farmers, construction manager, advertising manager, HR manager, ICT manager, hospitality manager, retail manager, specialist manager, customer service manager

Value 2. Professionals

Typical Tasks	*Occupational Examples*
• communicating ideas through language, printed and electronic media, and artistic media including the visual and performing arts • providing services in financial accounting, human resource development, publicity and marketing, and the efficient operation of organisations • flying aircraft, and controlling and directing the operation of ships, boats and marine equipment • conducting and analysing research to extend the body of knowledge in the field of the sciences and developing techniques to apply this knowledge • designing products, buildings and other physical structures, and engineering systems • researching and developing curricula, and teaching students in a range of educational settings • identifying, treating, and advising on, health, social, and personal issues; advising clients on legal matters	Actors, musicians, journalists, artistic directors, accountants, brokers, HR professionals, IT-database professionals, , librarians, engineers; doctors, nurses, teachers, chemists; scientists, vets, social workers, psychologists, economists, solicitors, photographers, pilots

Value 3. Technicians and trades workers

Typical Tasks	*Occupational Examples*
• carrying out tests and experiments, and providing technical support to Health Professionals, Natural and Physical Science Professionals and Engineering Professionals • providing technical support to users of computer hardware and software • fabricating, repairing and maintaining metal, wood, glass and textile products • repairing and maintaining motor vehicles, aircraft, marine craft and electrical and electronic machines and equipment • constructing, repairing, fitting-out and finishing buildings and other structures • operating printing and binding equipment • preparing and cooking food (not fast food: labourer) • shearing, caring for, training and grooming animals, and assisting Veterinarians ; propagating and cultivating plants, and establishing and maintaining turf surfaces for sporting events • cutting and styling hair • operating chemical, gas, petroleum and power generation equipment • providing technical assistance for the production, recording and broadcasting of artistic performances	Science technicians, medical technicians, draftspersons, engineering technicians, safety inspectors, ICT support technicians, all trades workers such as motor mechanics, panel-beaters, bricklayers, painters, tilers, butchers, bakers, chefs, cooks, florists, nurserypersons, hairdressers, printers, binders, upholsters, cabinetmakers, sign-writers, jewellers, library/gallery technicians, gas/chemical and power plant operators

Value 4. Community and personal service workers

Typical Tasks	*Occupational Examples*
• attending accidents, planning and implementing leisure activities for individuals in health care and the community, and providing nursing care for patients; • advising clients on emotional, financial, recreational, health, housing and other social welfare matters • planning and conducting educational and recreational activities to encourage the development of children • assisting Professionals in the provision of care and support to aged and disabled persons, patients in hospitals, clinics and nursing homes, and children in residential care establishments • serving and selling food and beverages in bars, cafes and restaurants, supervising staff in hotels, carrying luggage maintaining public order and safety and providing specialised military services to the defence forces • protecting, patrolling and guarding properties & security advice • providing a range of personal services such as beauty therapy, teaching people to drive, arranging funerals, and organising and providing advice about travel and accommodation; physical fitness goals and outdoor adventure, participating in and officiating at sporting competitions	Police, fire fighters, ambulance officers, defence forces, prison officers, security guards dental hygienists, massage therapists, welfare support workers, child care workers, aged care workers, bar attendants, waiters, hotel service managers, driving instructors, beauty therapists, funeral workers, travel consultants, fitness instructors, coaches

Value 5. Clerical and administration workers

Typical Tasks	*Occupational Examples*
• administering contracts, programs and projects • setting, reviewing and controlling office functions • performing clerical, secretarial, organisational and other administrative functions • entering, processing and editing text and data • greeting clients and visitors, and responding to inquiries and requests for information • producing, recording and evaluating financial, production, stock and statistical information • receiving, processing and sending mail, documents and information	Office managers, practice managers, personal assistants, secretaries, general clerks, data input operators, call centre workers, receptionists, book-keepers, accounting clerks, payroll clerks, bank workers, loans officers, insurance clerks, couriers, mail sorters, survey interviewers, switchboard operators, purchasing clerks, logistics clerks, despatch clerks, conveyancers, court and legal clerks/executives, debt collectors, HR clerks, inspectors, regulatory officers, insurance investigators, loss adjustors, risk surveyors library assistants

Value 6. Sales workers

Typical Tasks	*Occupational Examples*
• promoting and selling goods and services, properties and businesses to potential buyers • engaging prospective buyers ; determining buyers' requirements • receiving and processing payments for goods and services, properties and businesses purchased by a variety of payment method	Auctioneers, insurance agents, sales representatives, street vendors, motor vehicle salesperson, checkout operators, office cashiers, sales demonstrators, retail and wool buyers, service station attendants telemarketers, ticket salespersons, visual merchandisers

Value 7. Machinery operators and drivers

Typical Tasks	*Occupational Examples*
• setting up, controlling and monitoring the operation of machines, plant and equipment • cleaning machines, plant and equipment and performing minor repairs • transporting passengers and freight to set destinations; • receiving, loading, unloading and despatching goods	Machine operators such as: processing machines operators, photographic developers, sewing machinists; Stationary plant operators: crane, hoist and lift operators, miners, drillers, shot firers, Mobile plant operators: forklift drivers, earthmoving, horticultural, forestry, agricultural plant operators; Road and rail workers, bus drivers, train drivers, delivery drivers, truck drivers, store-persons

Value 8. Labourers

Typical Tasks	*Occupational Examples*
• cleaning commercial, industrial and domestic premises, vehicles and machines • spreading, levelling and finishing concrete and bituminous paving materials, and assembling and erecting scaffolding and rigging • loading and unloading machines, assembling components, and grading, inspecting and packing products • assisting with cultivating and harvesting crops, plants and forests, and with livestock production • processing meat and seafood, and assisting with producing and preparing food • loading and unloading freight from trucks, trains and ships, and stocking shelves in stores and supermarkets	Cleaners – commercial, domestic, laundry workers, car detailers, factory process workers: food and drink factory workers, slaughterers, packers, product assemblers, process workers in metal engineering, timber, plastics and rubber factories, forestry and logging workers, garden and nursery labourers, livestock workers, farm workers, fast food cooks, kitchen hands, shelf fillers, furniture handlers, caretakers, deck and fishing hands, handypersons, rubbish and recycling collectors, vending machine attendants.

Variable 9: Job title

9: **Job title:**

The arbitrator generally discloses the job title as part of stating facts at the outset in a decision, for example, 'truck driver' or 'receptionist'. This 'string' variable provides a simple context that might be of interest whilst coding, data inputting and interpreting the data. Alternatively, clues as to the occupation may be gathered throughout the decision.

Variable 10: Employment status

10: **EMPLOYMENT STATUS**

0	Full-time (permanent/casual)
1	Part-time (permanent/casual)

Wooden (2002) identifies the changing composition in the employment status, from full-time standard hours towards non-stand employment, as a one of the major labour market movements in recent decades. Values for this variable are dichotomised using the dummy coding protocol of '0' for full time and '1' for part-time. It is noted that it is possible to work part-time with permanency or full-time casually. The legislative exclusions control to some extent the presence of short term casuals (be they full-time or part-time) in the decisions. It is anticipated that the decisions reflect typically permanent, full-time or part-time workers or long-term casuals that performed either full-time or part-time hours.

Assume the worker is 'full-time permanent' time unless the decision contains information that the employee worked on either part-time or casual basis for the employer. This information would normally be noted in the early disclosure of facts in the decision.

Variable 11: Length of service

11: **LENGTH OF SERVICE**

_______________ years

This variable collects data on how long the employee worked for the employer before his or her dismissal. The arbitration decisions frequently contain this type of information, generally in the discovery of facts outlined by arbitrators at the commencement of the decision. The coding sheet provides space to record the actual number of year's service in the first instance. By recording the actual amount of service, it will provide information to formulate more reflective values, post data collection, if required.

Variable 12: Disciplinary record

	12: **DISCIPLINARY RECORD**
1	Unblemished record (Note: in more detailed decisions, select this option if no reference was made to previous offences)
2	Previous offences
3	Not identified (limited detail in the decision)

This variable is concerned with identifying whether or not the employee had been in the receipt of *any form* of previous warnings from his or her employer – be it verbal or written – for some aspect of their behaviour at work.

This variable assesses whether or not an unblemished record exists rather than number of previous warnings. This is done on the basis of Chelliah and Tyrone (2010) analysis of progressive discipline in Australian unfair dismissal cases which was predicated on whether or not a previous warning had been issued by management. They selected for analysis cases 'involving progressive discipline incorporating warnings' (Chelliah & Tyrone 2010, p. 102). Bemmels (1988) also used similar measurement values. This variable contains three values:

Value 1. Unblemished record
This applies if the behaviour that pre-empted the dismissal was the employee's first offence and the employee had an unblemished disciplinary record.

Value 2. Previous offence
This applies if the decision shows that the employer reports the employee had engaged in previous offences. The warning can be informal (such as a brief verbal warning by the supervisor) through to formal (written) in nature.

Value 3. Not identified
The third value has been provided in the event the detail in the decision is too brief to determine whether any warnings from previous incidents had been given.

Variable 13: Type of misbehaviour

	13. **TYPE OF MISBEHAVIOUR** (SELECT AS MANY **MAIN** CATEGORIES AS REQUIRED)
1	**Property deviance** (harmful to the business) *1.1 theft from firm* *1.2 sabotaging equipment* *1.3 fraud – tangible assets or property* *1.4 other property deviance*
2	**Production deviance** (harmful to the business) *2.1 tardiness/absenteeism/lying about hours worked* *2.2 not following procedures or instructions* *2.3 safety violations* *2.4 misusing resources* *2.5 other production deviance*
3	**Personal aggression** (harmful to a person) *3.1 verbal aggression* *3.2 physical aggression* *3.3 sexual harassment* *3.4 theft from co-workers or customers* *3.5 other personal aggression*
4	**Political deviance** (harmful to a person) *4.1 gossiping/breaching confidentiality* *4.2 disreputable actions towards others* *4.3 other political deviance*

This variable collects information about the misbehaviour the employee allegedly engaged in – according to the employer - that led the employer to make the decision to terminate the employment contract. Where the employee engaged in a series of misbehaviour incidents over a period of time, it is necessary to **record the final incident** that preceded the dismissal. (Variable 12 captures whether or not there have been previous incidents). This variable contains four values based on the deviance typology published by Bennett and Robinson (Bennett, R. & Robinson 2000; Robinson & Bennett 1995) which was based on the earlier work by Hollinger and Clark (1982).

NOTE: Property deviance (value 1) and production deviance (value 2) involve behaviours that ***harm the business***. These types of deviance are commonly called organisational deviance. Examples of behaviours used to measure such deviance by Robinson and Bennett (2000) were:

- Taken property from work without permission
- Spent too much time fantasising or daydreaming instead of working
- Falsified a receipt to get reimbursed for more money than you spent on business expenses
- Taken an additional or longer break than is acceptable at your workplace
- Come in late to work without permission
- Littered your work environment
- Neglected to follow your boss's instructions
- Intentionally worked slower than you could have worked
- Discussed confidential company information with an unauthorized person
- Used an illegal drug or consumed alcohol on the job
- Put little effort into your work
- Dragged out work in order to get overtime

Meanwhile, personal aggression (value 3) and political deviance (value 4) involve behaviours that ***harm individuals*** (be it customers, co-workers or supervisors) in the workplace. Examples of behaviours used to measure such deviance by Robinson and Bennett (2000) were:

- Made fun of someone at work
- Said something hurtful to someone at work
- Made an ethnic, religious, or racial remark at work
- Cursed at someone at work
- Played a mean prank on someone at work
- Acted rudely toward someone at work
- Publicly embarrassed someone at work

Value 1. Property deviance

Property deviance is generally serious in nature and **harmful to the organisation**. It involves incidents *'where employees acquire or damage the tangible property or assets of the work organisation without authorisation'* (Hollinger & Clark 1982, p. 333).

Value 2. Production deviance

Production deviance may be relatively minor in nature but still **organisationally harmful**. Hollinger and Clark (1982, p. 333) describe production deviance as '*behaviours that violate the formally proscribed norms delineating the minimal quality and quantity of work to be accomplished'*. It can include doing nothing, or little towards the work efforts of the organisation.

Value 3. Personal aggression

Personal aggression is generally serious in nature and **harmful to the individuals** within the workplace. This is defined as '*behaving in an aggressive or hostile manner towards other individuals'* (Robinson & Bennett 1995, p. 566).

Value 4. Political deviance

Political deviance may be relatively minor in nature but still **harmful to individuals** within the workplace. This behaviour means to *'engage in social interaction that puts other individuals at a personal or political disadvantage'* (Robinson & Bennett 1995, p. 566).

NOTE: AS THIS VARIABLE IS A MULTIPLE RESPONSE ITEM, THE FOUR MAJOR CATEGORIES WILL BE CONVERTED TO DUMMY CODES FOR STATISTICAL ANALYSIS

Variable 14: Severity of behaviour

14. **SEVERITY OF MOST PROMINENT MISBEHAVIOUR** ***(intuitive rating)***	
1	Not particularly serious
2	Somewhat serious
3	Serious
4	Very serious
5	Extremely serious

This variable serves to measure how obnoxious, offensive, harmful and /or violent the behaviour. The values reflect a five point scale. Scott & Shadoan (1989) and Bigoness and DuBose (1985) used a five point scale to assess the seriousness of the worker's offense, with the scale ranging from 'not particularly serious' to 'extremely serious'. This scale has guided the development of the descriptors in this study. The coder assigns a value ***based on his/her perception*** – not the arbitrator's - of the severity of the behaviour. The descriptors for the values below can act as a guide.

Value 1. Not particularly serious
Example: Thoughtless or selfish behaviour that may have trivial or minor impact. The employer may be exhibiting an over-reaction to the behaviour.

Value 2. Somewhat serious
Example: Low intensity, non violent misbehaviour that causes annoyance with each incident. May cause several hours of inconvenience, distraction or distress or minor financial loss to the employer.

Value 3. Serious
Example: Menacing, intimidating behaviour with each incident causing a days-length period of fear, distraction and/or lost productivity.

Value 4. Very serious
Example: Obnoxious, threatening behaviour that may cause a sustained period of inconvenience, distraction, distress and/or lost productivity. Employees or organisation exposed to a reasonable risk of harm or damage from the behaviour.

Value 5. Extremely serious
Example: Intolerable, dangerous, abhorrent, extreme or violent behaviour exhibited by the employee. Employees or organisation exposed to a high risk of harm or damage from the behaviour.

Variable 15: Worker apology or remorse

15:	**WORKER APOLOGY OR REMORSE**
0	No apology or indication of regret
1	Yes – apology or regret indicated

This variable reflects whether or not the worker apologised and indicated regret about their behaviour or incident leading to their dismissal. Values for this variable are dichotomised using the dummy coding protocol of '0' for no apology or remorse and '1' if an apology or regret is indicated in the decision. Friedman (2006, p. 2) defined regret or remorse as where the wrongdoer '*wishes she could go back in time and undo the bad deed*' and an apology can occur without a demonstration of remorse. We are limited in our ability to assess whether the worker was genuine in their apology because while many decisions briefly note an apology, far fewer decisions record whether the arbitrator believed the apology or remorse had substance. To measure the degree of sincerity will ultimately result in vast amounts of missing data, reducing the variable's viability in the analysis.

The importance of this variable is that it may moderate the arbitrator's decision, according to 'impression management' tactics by Eylon, Giacalone & Pollard (2000) and Friedman (2006, p. 8) finding that '*an apology causes the aggrieved party to have more empathy for the offending party. The aggrieved party, then, has less of a need to retaliate and is more likely to forgive*'.

Furthermore, Skarlicki & Kulik (2005, p. 198) suggest '*The more contrite a transgressor, the greater the third party's confidence that the individual will not violate the rule again ... the violation is seen as less purposeful and less threatening to the social order ... from an equity perspective, expressing remorse or providing an explanation can serve as a means of restoring equity to the injured party'.* Chelliah and D'Netto (2006) also incorporated a variable of this nature into their analysis of arbitration decisions.

Variable 16: Formality of the dismissal process

16: **FORMALITY OF THE DISMISSAL PROCESS**	
1	Informal (verbal or a brief/abrupt letter of dismissal that doesn't explain the dismissal)
2	Semi-formal (a single written notice alerting worker, most likely an explanatory termination letter with reason for dismissal)
3	Formal (2 or more written notices re: investigations, suspensions, warnings, reasons – genuine attempts to document)

This variable collects insights into the employer's approach to dismissing the worker. It focuses on how well the employer **'documents'** the dismissal process. Antcliff and Saundry (2009) consider the formality of the disciplinary process using, in part, the following descriptor for a 'formal' process: the workplace sets out in writing the reason for taking disciplinary action in the form of a letter or memo. This variable, in combination with Variable 7 on companion support or union presence at the dismissal, provide an indicator of the level of formality of the dismissal process. There are three values for this variable:

Value 1 – Informal
This reflects a process where the dismissal involved no or extremely limited written advice of the dismissal. If written advice was given to the employee – be it a memo, letter, email or SMS text, it is brief or abrupt and lacks an explanation of the employer's reasoning for the dismissal.

Value 2 – Semi-formal
The process did involve the employee receiving, **on a single occasion**, written notification of either their employment being under investigation or of their dismissal. Importantly, it contains some explanatory content as to why the employee is being investigated or dismissed.

Value 3 – Formal
In this process, it can be seen that the employer provided the worker with written documentation **on more than one occasion** as part of the dismissal process. For example, it may be that the employer provided written advice to the worker that he or she is under investigation - or the results of an investigation - and then wrote a second letter of dismissal, informing them of their decision. Essentially, two or more stages or steps, were documented.

Variable 17: Support for worker during dismissal process

17: **SUPPORT FOR WORKER DURING DISMISSAL PROCESS**	
1	Union present
2	Companion present
3	No-one present with worker
4	Not identified (limited detail in decision)

This variable captures whether the decision reflects the availability or presence of a union representative or staff union delegate, friend or companion (Antcliff & Saundry 2009) *at any time* whilst the employee was being investigated and/or terminated. Four values have been assigned to this variable.

Value 1. Union present
In decisions where there is no mention of union presence, it may be taken that there was no staff union delegate or official union representative present.

Value 2. Companion present
Indications of whether a union delegate/representative was present may be noted by the arbitrator in the listing of the facts or witnesses. Alternatively the text of the decision may produce an indication that a union representative or workplace delegate was involved at some point during the investigation and/or dismissal.

Value 3. No-one present with worker
This value should be selected if a detailed decision would suggest there was no person accompanying the worker as a support during the dismissal process.

Value 4. Not identified

The third value is to be used if the coder has doubts as to whether or not a union representative etc was present during any of the investigations and/or termination discussions – ie, those decisions where information is limited.

Variable 18: Employee's explanation for misbehaviour

	18: **EMPLOYEE'S EXPLANATION FOR BEHAVIOUR** (SELECT AS MANY MAIN CATEGORIES AS REQUIRED)
	Workplace related reasons
1	*1.1 accepted employer practice*
	1.2 poor communication /poor instructions
	1.3 poor employer policy or practice
	1.4 influence from another person
	1.5 job changes
	1.6 faulty equipment, hazardous conditions
	1.7 unreasonable performance expectations
	1.8 other workplace related reason
	Personal Inside reasons
2	*2.1 denial*
	2.2 felt inequity or tension
	2.3 self defence
	2.4 made a mistake
	2.5 intentional behaviour
	2.6 ignorance of rules
	2.7 frustration
	2.8 other personal inside reason
	Personal Outside reasons
3	*3.1 personal health issues*
	3.2 family commitments or family health issues
	3.3 financial pressures
	3.4 personal tragedy
	3.5 mood altering substances/addictions
	3.6 other personal outside reason

This variable is measured using the published work by Southey (2010) which classified the reasons/defences ***employees provide*** to arbitrators for engaging in misbehaviour. These explanations can be found in the decision where either the employee provides their testimony, or the arbitrator summarises the employee's explanation in his or her deliberations. There are three main values in this variable reflecting the three major categories in the Southey 'employee

explanation' model. More than one *value category* can be selected – that is because employees might give multiple explanations.

For each major category selected, also circle the most appropriate specific reason.

Value 1. Workplace related reasons category
Workplace related reasons are rationales that involve workplace issues or dynamics - either directly or indirectly. Examples are

Accepted employer practice
This is where the worker engaged in activities considered a regular practice in the organisation. As an example, an employee found guilty of giving away product defended the action by stating '*waste grain had no value and its disposal to farmers was a cost saving … the practice had gone on for a long time without any repercussions on individuals*' [Decision No. PR963731, 2005]. A second example is where an employee was dismissed for stealing responded *'it was normal practice to claim expenses as cash from the till*' [Decision No. PR955782, 2005].

Poor communication/poor instructions
Poor communication refers to defences such as employees claiming they: misunderstood instructions *'he saw the letter as implicit permission to absent himself';* poor quality communication with supervisors '*she was offered no communication distinguishing her situation from that of her [dismissed] husband'* [Decision No. PR952575, 2004]; misinterpreted communication *'it depends how you think smirking is ... I am not sure that you can actually tell whether I am smirking or whether I am trying to hold a hiccough of something like that'* [Decision No. PR954650, 2004]*;* and/or deficient methods of communication *'there had been difficulties in communications ...communication was largely by text messages and emails'* [Decision No. PR955782, 2005].

Poor employer policy or practice
This refers to defences accusing the employer of either lacking or poorly implementing a policy or procedure. For example one decision cites '*There were no guidelines or protocols to guide officers on how to behave on field trips … This (incident) occurred in circumstances where there were no limits on what he could do imposed by the Department'* [Decision No. PR955783, 2005]. In another decision, the employee claimed she '*was not given instructions by (the employer) as to correct procedures to be followed to identify a patient, or what to do if a patient was not wearing a wrist band'* [Decision No. PR955288, 2005].

Influence from another person
This occurred in cases where employees attributed their misbehaviour to appeasing the requests of others. In one case an employee accused of leaking confidential information '*provided the information not at her own initiative but in response to requests from (her former supervisor)...out of loyalty to her former longstanding boss'* [Decision No. PR955944, 2005]. Another employee sent an email of a sexual nature to a co-worker who '*had requested the email be sent to him and was aware of the content'* [Decision No. PR959994, 2005].

Job changes
This occurs where employees argued that their job had changed from their original employment contract. For example, an employee '*complained that his duties had changed and that he was not working as a boat builder. He requested confirmation that he would be given boat builder work which he was willing to perform'* [Decision No. PR956752, 2005]. A gardener dismissed for not complying with instructions claimed '*the weeding duties did not form part of his contract of employment*' [Decision No. 947369, 2004].

Faulty equipment or hazardous conditions
These employees defended their action by suggesting they were working with faulty equipment, for example, '*The applicant give clear evidence that the machinery was old and was maintained on a patch up basis, so as to maintain production*' [Decision No. PR962238, 2005].

Unreasonable performance expectations
This defence occurred when employees claimed that performance expectations triggered their errant behaviour, for example, '*one reason for her non attendance ... was that she was under pressure to reach her target hours*' [Decision No. 947653, 2004].

(Source: Southey 2010)

Value 2. Personal-inside reasons category
It was evident that some of the personal reasons were of a non-tangible nature. That is, reasons based on cognitive processes, reactions or emotions of the employee. Such reasons were presented as 'personal-inside reasons' in the model. Examples are:

Denial
A number of employees would not provide explanations for their behaviour and instead denied engaging in the accused misbehaviour. A typical example of denial is: '*That is not my behaviour. I would never do that to anybody. I would never get into anybody's face like that. And it is just not something I would do. It is something so – not me'* [Decision No. 954947, 2005].

Felt inequity or tension
This theme accounts for employees who built defences on perceptions that they were being treated unfairly or felt underlying tension. An example of an unfair treatment occurred when an employer reimburses petrol costs via payroll and the employee responded '*I got to pay tax on that now, and I can't claim it and it'll bugger up all my returns at the end of the year again… you can't do that. It's not fair*' [Decision No. PR961549, 2005]. Examples of underlying tension can be found in the employee claiming he '*was omitted from an email list about a meeting … had received calls from employees warning him to "watch out"*' and the employee claiming '*he was allocated an unfair workload and allocated unusual bids*' [Decision No. PR958849, 2005].

Self defence
This defence identifies those situations where employees felt the need to engage in self protective behaviours. In one such case the employee states, '*Obviously I would have raised my voice. It is a way of protecting oneself, but I mean, I'm not being the aggressor, I have not been put (sic) my hand up, but I mean, my voice would have been louder, really to stop the argument escalating'* [Decision No. PR957122, 2005].

Made a mistake
In some cases the employee's defence was that he or she made a mistake. Examples of employees admitting they made a mistake are: '*some of the alterations were done in error … he acknowledges the breach; apologises and indicates he acted stupidly and carelessly. He expresses sorrow and says he will never make this mistake again'* [Decision No. PR958166, 2005]. In another case, *'the employee had held an honest belief that he was not supposed to attend for work when he had a 'viral illness''* [Decision No. 963850, 2005].

Intentional behaviour
This defence captures incidences where the employee admits they behaved with intent to do wrong. For example, one employee *'conceded he had decided to tell a lie during his security interview … he went on to concede that most of the information he had given (the employer) in relation to the assault was, in fact, untrue'* [Decision No. PR956105, 2005]. In another case, an employee admitted he sent a major customer to a competitor with the intent of losing his job in the hope he could *'get the money (a past co-worker) got'* as a termination payout [Decision No. PR955902, 2005].

Ignorance of rules
In this circumstance, employees contend that they did not realise their behaviour breached a company policy or procedure, for example, an employee admitted sending inappropriate emails but explained to investigators that '*at the time he did not fully foresee the ramifications of the email and that he was now aware of the email policy*' [Decision No. PR959994, 2005].

Frustration
The emotion of frustration was identified as a defence for wayward behaviour. In one example, the employee took issue with a poster and admits '*he tore it down in the heat of the moment in frustration... out of frustration at (the supervisor's) attitude towards him and the way he had treated him in the past'* [Decision No. PR945691, 2004].

(Source: Southey, 2010)

Value 3. Personal-outside reasons category

The remaining personal reasons could be attributed to physical aspects surrounding the employee. These dimensions are classified as 'personal-outside reasons' in the explanation model and are defined as those reasons which are non work related and exist in a tangible or measurable form. Examples are:

Personal health issues
This defence relates to the use of poor personal health triggering some form of misbehaviour. For example, one employee failed to contact his employer about his absence because '*he was "laid up" for three days and could barely move*' [Decision No. PR957185, 2005]. In another case the arbitrator cites '*it was the employee's position that the boil or boils caused him to conduct himself in the manner he did*' [Decision No. PR945645, 2004]..

Family commitments/health issues
This sub-value covers defences using family or household responsibilities. In one case an employee failed to provide a medical certificate before a set date because '*his ex-partner and his children moved house during this period and he helped them do so*' [Decision No. PR957185, 2005]. Another employee indicated '*his wife was suffering a migraine headache attack and that he had to go home to look after her*' [Decision No. PR955063, 2005].

Financial pressures
Living in a strained financial state was also called upon as a defence. For example, an employee testified '*that his financial position became so poor that he could not afford to make telephone calls and says this is the reason for any gaps or failure on his part to contact (the employer) as he otherwise should have … he could not afford to telephone every day*' [Decision No. PR957185, 2005].

Personal tragedy
There were occasions were employees defended their behaviour on the basis of a major negative life event. For example, one employee's defence was *'the approaching anniversary of her son's death caused* (the employee) *to be initially upset'* [Decision No. PR957079, 2005]. In another example, an employee defence for hitting another employee was *'the comment by (co-worker) about my father was highly offensive to me ... At the time of the incident, I had not had the opportunity to properly deal with my father's death'* [Decision No. PR965161, 2005].

Mood altering substance/addictions
This accounts for defences for misbehaviour due to the use of drugs, alcohol or addictions such as gambling. One employee stated '*now in hindsight, and in light of what has happened to me, I am probably in need of some help in addressing my dependence on alcohol*' [Decision No. PR951124, 2004]. A similar plea was made by the employee reported in Decision No. PR952429 in [2004], '*The applicant's defence was that he had a serious problem with alcohol and gambling. The transgressions by him in Brisbane and Darwin were the result of being intoxicated which seriously hampered his judgement'*

(Source: Southey, 2010)

NOTE: AS THIS VARIABLE IS A MULTIPLE RESPONSE ITEM, IT WILL BE CONVERTED TO DUMMY CODES FOR STATISTICAL ANALYSIS

Variable 19: Complexity of explanation

19: **COMPLEXITY OF EXPLANATION**	
1	Single category explanation
2	Dual category explanation
3	Triple category explanation

The Southey (2010) typology of explanations also contends that multiple, cross categorical explanations can given. This variable collects summary data from the previous variable (employee explanation for misbehaviour). Each value represents how many categories were invoked by the worker's explanation.

Value 1. Single category explanation
The worker's explanation came from only one of the categories.

Values 2. Dual category explanation

The worker's explanation drew from two categories: ie, workplace related and personal-inside; or workplace related and personal-outside; or personal-inside and personal-outside.

Value 3. Triple category explanation
The worker's explanation drew on all three categories

Variable 20: Managerial errors in the dismissal process

22: MANAGERIAL ERRORS IN THE DISMISSAL PROCESS (SELECT AS MANY AS REQUIRED)	
1	Poor or flawed evidence or reason
2	Mitigating factors ignored
3	Rules violation *(eg rules not well communicated)*
4	Denied union/support person
5	Problematic investigation
6	Problematic response
7	Problematic allegation
8	Punishment too harsh
9	Management contributed

This variable summarises the arbitrator's assessment of managerial errors in the way in which the employer administered the dismissal process. Based on insights by Blancero and Bohlander (1995) about reasons arbitrators reverse or modify managerial action in dismissal cases.

It does occur that even when an arbitrator favours the employer in the final decision, they can still find fault with the employer's process. Nine values occur in this variable:

Value 1. Poor or flawed evidence or reason:
This means the charge of wrongdoing was not supported by enough substantive evidence. It may be that the employer had not gathered enough evidence to uphold the discipline imposed. Or the employer may have acted on strong suspicion of misconduct without solid documentation or collaborative evidence. This value is related not to the quality of the investigation but how the employer chooses to use the evidence *resulting* from an investigation – if it conducts one.

Value 2. Mitigating factors ignored
This means the arbitrator acknowledged the misbehaviour but considered additional circumstances that reduced the severity of the discipline imposed. Examples of mitigating circumstances could be:
- The employee was otherwise considered a good corporate citizen
- The employee was seen to be genuinely remorseful
- The employee had a long and satisfactory work record
- The employee was experiencing difficult personal/family situations

Value 3. Rules violation
Whilst management has the power to make the workplace rules and policies, they are responsible for four matters when making their rules:
(a) to make rules only within the boundaries necessary for safe and efficient operations of the business
(b) to make rules which are clear and unambiguous
(c) to effectively communicate these rules to all employees
(d) to enforce rules consistently and without bias
Rules violation therefore means that the employer breached one or more of these rule-making responsibilities.

Value 4. Denied union/support person
Concerned with natural justice, this value means the employer failed in some way to provide a procedurally fair process to the worker when considering dismissing him or her by not notifying the union of the matter or denying the employee representation/ support during the investigation/dismissal process

Value 5. Problematic investigation
Concerned with natural justice, this value means the employer failed in some way to provide a procedurally fair process to the worker when considering dismissing him or her by not taking corrective action within an appropriate time period of completing the investigation or not conducting an investigation or conducting an inappropriate investigation.

Value 6. Problematic response
Concerned with natural justice, this value means the employer failed in some way to provide a procedurally fair process to the worker when considering dismissing him or her by not giving the employee the opportunity to respond to investigation findings and allegations

Value 7. Problematic allegation
Concerned with natural justice, this value means the employer failed in some way to provide a procedurally fair process to the worker when considering dismissing him or her by not clearly detailing to the employee the alleged offences or making it apparent the worker's job was a risk of being terminated.

Value 8. Punishment too harsh
This means the arbitrator considered that whilst *procedurally the dismissal was executed correctly*, the dismissal from the workplace was too severe (or harsh) for the degree of seriousness of the misbehaviour.

An example of this would be Webster v Mercury Colleges (2011) where SDP Drake (the arbitrator) ruled: '*The termination of Mr Webster's employment was harsh because of the serious financial consequences to Mr Webster and the social dislocation which was clearly inevitable on summary termination of his employment. Mr Webster was required to leave the country and dislocate his life within twenty-eight days of the termination of his employment. As an employer of sponsorship visa employees I have concluded that the employer was likely to know of these consequences. Termination of employment in these circumstances, with this knowledge, was harsh.*'

Value 9. Management contributed
The arbitrator may find that management's own conduct contributed to the incident for which the employee was dismissed. Typical management infractions of this nature are:

(a) The employee acted on bad or wrong information provided by a supervisor or the employee acted under direction of someone assumed to be - but was not - in authority
(b) Management (or supervisor) neglected to provide the necessary equipment or materials to perform the work or maintain equipment to a standard to perform
(c) Where management (or supervisor) concurred with the rules violations (often considered 'custom and practice' that fly in the face of organisational rules)
(d) Where manager (or supervisor) and employee were involved jointly in the incident but only the employee was disciplined.

NOTE: AS THIS VARIABLE IS A MULTIPLE RESPONSE ITEM, IT WILL BE CONVERTED TO DUMMY CODES FOR STATISTICAL ANALYSIS

Variable 21: Worker advocacy at hearing

21: **WORKER ADVOCACY AT HEARING**	
1	Self represented
2	Represented by union
3	Represented by independent lawyer
4	Representation not clear

This variable captures whether an advocate appeared on behalf of the dismissed worker at the arbitration hearing itself. Sherman (1989) dichotomised the Australian context of advocacy into either union employed 'industrial officers' or the unions' use of 'outside legal counsel'. Legal representation (by a professionally qualified lawyer/solicitor) is subject to approval by the arbitrator. Section 596(1) of (*The Fair Work Act (Cth)* 2009) limits when a person may be represented in a matter before FWA only if the arbitrator considers:
a) it is a complex matter that may be dealt with more effectively by legal experts; or
b) one of the parties is unable to represent him or herself effectively; or
c) the 'power balance' between the two parties would make it unfair for one not to be represented.

Legal representation is separated from the non-legal representative, because Crow and Logan (1994, p. 181) suggest that lawyers 'are probably more eloquent in their presentation than advocates with non-legal backgrounds ... this may have a significant impact on decisions when the issues are clouded by uncertainty.' Four values have been assigned to this variable.

Value 1. Self represented
The employee may self-represent. In this case, it is likely to be noted by the arbitrator in the introductory sections of the decision. Alternatively turn to the end of the decision for the listing of 'appearances'.

Value 2. Represented by union OR Value 3. Represented by independent lawyer
Alternatively, the dismissed employee has an advocate represent his or her. The final page of the decision generally lists 'Appearances' and the person appearing for the applicant (the dismissed worker) and the respondent (the employer). The 'appearances' listing may indicate if it was a union representative/industrial officer or legal counsel which we will take as an independent lawyer.

Value 4. Representation not clear
If it is not specifically clear if the representative is 'legal counsel' it means it is probably an IR consultant or a legal associate acting under instructions.

Variable 22: Employer advocacy at hearing

22: **EMPLOYER ADVOCACY AT HEARING**	
1	Self represented: by a member of management
2	Represented by employer or industry association
3	Represented by independent lawyer
4	Representation not clear

This variable is a counter-balance to Variable 20 identifying the status of advocacy for the worker. The arbitrator's introductory paragraphs may also provide insight into representation.

Value 1. Self represented
The employer, particularly if it has HR expertise on board, may well self-represent. Self representation is where any employee of the business or the business owner presents their case. It may be noted by the arbitrator in the introductory sections of the decision. Alternatively turn to the end of the decision for the listing of 'appearances'.

Value 2. Represented by Association OR Value 3. Represented by independent lawyer
Alternatively, the respondent employer may engage the expertise of an advocate to represent its case. The 'appearances' listing may indicate if it was an employer association or industry association representative or legal counsel which we will take as an independent lawyer. The attempt to separate legal representation from the other advocacy services is supported by Crow and Logan (1994, p. 181) suggest that lawyers 'are probably more eloquent in their presentation than advocates with non-legal backgrounds ... this may have a significant impact on decisions when the issues are clouded by uncertainty.'

Value 4. Representation not clear:
If it is not specifically clear if the representative is 'legal counsel' it means it is probably an IR consultant or a legal associate acting under instructions.

Variable 23: The arbitration decision

23: **THE ARBITRATION DECISION**	
0	Employer's favour
1	Worker's favour

This variable is the **dependent variable** in this study.

This study dichotomises the final arbitration decision (which is the same as the outcome/results of the arbitration hearing) into either one which was favourable to the aggrieved worker, or one that was favourable to the employer. These values have been adapted from the Research Manual of Industrial Law (CCH 2007) and the Termination of Employment – General Information Guide (AIRC 2007). These dichotomous values are recorded using dummy codes of 0 and 1, where:

Value 0. Employer's favour
The worker's claim for unfair dismissal was **dismissed** because the arbitrator found in favour of the merits of the employer's case. That is, the arbitrator agreed with the employer. The dismissed worker may be ordered (although very rarely) to pay the employer's **legal costs** if the arbitrator found that the worker was acting vexatiously, continued the claim with no reasonable prospect of success or due to an unreasonable act or omission in connection with the conduct of the proceedings by the employee.

Value 1. Worker's favour
The worker's claim for unfair dismissal was upheld by the arbitrator. That is the arbitrator agreed with the worker. The arbitrator overturns management's decision to dismiss the worker in any of the following ways:

(a) He or she makes a **reinstatement** order which means the employee is to be returned to the same position held before his or her dismissal. They may also order **back-pay** for lost wages.
(b) He or she makes a **re-employment** order that the worker be re-employed by the employer - although not the same position.
(c) He or she makes a **compensation** order where reinstatement or re-employment is not considered a practical resolution. The amount of compensation is calculated based on lost remuneration.
(d) **Costs** may be ordered against the employer if the arbitrator found the employer acted unreasonably by not settling the claim or due to an unreasonable act or omission in connection with the conduct of the proceedings by the employer. The employer pays the dismissed employee's legal costs.

Variable 24: Remedy awarded

24: **REMEDY AWARDED**	
1	Re-employment or reinstatement
2	Compensation in lieu of reinstatement

Note: This variable only needs to be coded if value 1 in Variable 26 was selected. This variable collects data pertaining to successful claims from workers as to the type of remedy awarded by the arbitrator. Based on the Research Manual of Industrial Law (CCH 2007) and the Termination of Employment – General Information Guide (AIRC 2007), there are two main values reflecting the possible remedial outcomes.

Value 1. Re-employment or reinstatement
The arbitrator orders the worker to be re-employed (although not in the same position) OR the arbitrator orders the worker to be returned to the same position he or she held before dismissal.

Value 2. Compensation in lieu of reinstatement
The arbitrator orders the worker be given financial **compensation** (because reinstatement or re-employment was not considered a practical resolution). The amount of compensation is calculated based on lost remuneration.

Variable 25: Arbitrator gender

Values for this variable are dichotomised using the dummy coding protocol of '0' for male and '1' for female. It is necessary to identify the arbitrator's name as this allows additional details to be collated in relation to his or her gender, work history and arbitration experience. The arbitrator's name appears on the top, left side on the front page of each decision.

On the coding sheet, the listing of arbitrators' names has been ordered according to their gender – 54 males and 15 female arbitrators.

On the coding sheet, circle the gender value that contains the arbitrator's name AND identify the arbitrator's name on the list and circle its corresponding sub-value.

If the arbitrator's name does not appear on the list, record their name on the coding sheet.

25: **ARBITRATOR GENDER /**
26: **PROFESSIONAL BACKGROUND** / *27:* **EXPERIENCE**

0		**MALE**	** default values for 26*		*# default values 27*
Select	1	Bacon	*1*	*Employer*	
his	---	------------------------------			
name	3	Blain	*3*	*Indeterminable*	
	4	Blair	*2*	*Union*	
	5	Boulton	*2*	*Union*	
	6	Cartwright	*1*	*Employer*	
	7	Duncan	*3*	*Indeterminable*	
	8	Eames	*2*	*Union*	
	9	Gay	*1*	*Employer*	
	10	Grainger	*3*	*Indeterminable*	
	11	Hamberger	*3*	*Indeterminable*	
	12	Hamilton	*1*	*Employer*	
	13	Hampton	*1*	*Employer*	
	14	Harrison G (com)	*2*	*Union*	
	15	Hingley	*2*	*Union*	
	16	Hodder	*2*	*Union*	
	17	Hoffman	*1*	*Employer*	
	18	Holmes	*3*	*Indeterminable*	
	19	Ives	*1*	*Employer*	
	20	Jones	*1*	*Employer*	
	21	Kaufman	*3*	*Indeterminable*	
	22	Lacy	*3*	*Indeterminable*	
	23	Lawler	*3*	*Indeterminable*	
	24	Lawson	*1*	*Employer*	
	25	Lesses	*2*	*Union*	
	26	Lewin	*2*	*Union*	
	27	Lloyd	*3*	*Indeterminable*	
	28	Mansfield	*2*	*Union*	
	29	McCarthy	*1*	*Employer*	
	30	Munro	*2*	*Union*	
	31	O'Callaghan	*1*	*Employer*	
	32	O'Connor	*2*	*Union*	
	33	Polites	*1*	*Employer*	
	34	Raffaeli	*2*	*Union*	
	35	Redmond	*2*	*Union*	
	36	Richards	*1*	*Employer*	
	37	Roberts	*2*	*Union*	
	38	Ross	*2*	*Union*	
	39	Simmonds	*2*	*Union*	
	40	Smith	*1*	*Employer*	
	41	Thatcher	*1*	*Employer*	
	42	Tolley	*3*	*Indeterminable*	
	43	Watson	*1*	*Employer*	
	44	Williams	*3*	*Indeterminable*	
	45	Cambridge	*2*	*Union*	
	46	Cloghan	*3*	*Indeterminable*	
	47	Roe	*2*	*Union*	
	48	Ryan	*2*	*Union*	
	49	Sams	*2*	*Union*	
	50	Simpson	*2*	*Union*	

		25: **ARBITRATOR GENDER /** 26: **PROFESSIONAL BACKGROUND / 27: EXPERIENCE**			
	51	Connor	3	*Indeterminable*	
	52	Jennings	3	*Indeterminable*	
	53	Laing	3	*Indeterminable*	
	54	Wilks	2	*Union*	
1		**FEMALE**	** default value for 26*		*# default values 27*
Select	1	Acton	*2*	*Union*	
her	2	Cargil	*3*	*Indeterminable*	
name	3	Cribb	*3*	*Indeterminable*	
	4	Deegan	*3*	*Indeterminable*	
	5	Drake	*3*	*Indeterminable*	
	6	Foggo	*2*	*Union*	
	7	Harrison A (SDP)	*3*	*Indeterminable*	
	8	Larkin	*1*	*Employer*	
	9	Leary	*1*	*Employer*	
	10	Marsh	*2*	*Union*	
	11	Spencer	*1*	*Employer*	
	12	Whelan	*2*	*Union*	
	13	McKenna	*2*	*Union*	
	14	Gooley	*3*	*Indeterminable*	
	15	Bissett	*2*	*Union*	

Variable 26: Arbitrator professional background

	* 26: **DEFAULT VALUES FOR PROFESSIONAL BACKGROUND**
1	History of working for employers
2	History of working for unions
3	Indeterminable - history shows no strong preference

NOTE: No coding required –default values have been assigned to each arbitrator's name

Professional background captures the arbitrator's work history before joining the tribunal. The values in this variable used the measures appearing in Southey and Fry (2010). Southey and Fry noted it was difficult, at times, to allocate a member's background to one of the three categories. To limit the likelihood of classifying them incorrectly, a conservative approach was taken towards assigning a clear union or employer label to the various members. Thus, if their work history did not show a clear employer/union alliance, the 'Indeterminable' category was assigned. Legal appointments were classified also as 'Indeterminable' to avoid making a value judgement. If one considers we do not think of criminal lawyers defending a client in court to also be in agreement with their client's personal philosophies and principles. Similarly, as tempting as it may be, a value judgement cannot be made for IR barristers based on their client list. One of three values has been pre-assigned to each arbitrator.

Value 1. History of working for employers
Arbitrator had worked for an employer association or management of an organisation.

Value 2. History of working for unions
Arbitrator had worked for a union body.

Value 3. Indeterminable
Arbitrators were classified as 'Indeterminable' where they had worked for both a union and employer association. Alternatively, they were considered Indeterminable if they had careers in the legal, academic or public service.

Variable 27: Arbitrator experience

# 27:	VALUES FOR ARBITRATOR EXPERIENCE
1	Up to 5 decisions
2	6 to 10 decisions
3	11 to 15 decisions
4	16 to 20 decisions
5	21 to 25 decisions
6	26 or more decisions

NOTE: No coding required – Values for Variable 27 can only be ascertained and assigned to each arbitrator after the data collection has taken place which will allow the number of decisions made by each arbitrator to be counted

This variable aims to capture data about the amount of experience each arbitrator has in making arbitration decisions. Heneman III and Sandver (1983) measured this variable on the basis of the number of year's arbitration experience held by the arbitrator. In this study, such a method will not detect arbitrator's who have been in the tribunal for a period of time, but only heard a few unfair dismissal arbitration cases compared to those who may have less tribunal service, but frequently preside over unfair dismissal claims. Nelson and Kim (2008) measure this variable by considering whether or not arbitrators (in the US and Canada) are eligible members of the National Academy of Arbitrators that requires the arbitrator to determine fifty cases every five years. However, such a professional body does not exist in Australia.

This study uses the methodology employed by Nelson and Curry (1981), Crow and Logan (1994) and Bingham and Mesch (2000) to measure arbitrator's experience by calculating the number of cases decided by the arbitrator. The coding sheet reflects values for experience in '4 decision' groupings used by Bingham and Mesch (2000).

Variable 28: Arbitrator seniority

28:	ARBITRATOR SENIORITY
1	Commissioner
2	Deputy President (DP)
3	Senior Deputy President (SDP)
4	Vice President (VP) or Justice

This variable aims to capture data about the status of the arbitrator amongst their tribunal peers. It also complements the variable on arbitrator experience, if one were to follow the logic that the more senior the arbitrator, the more experienced the arbitrator.

This variable contains four values reflecting the hierarchical structure of the Australian Industrial Relations Commission and the current, Fair Work Australia. No information can be found to ascertain what characteristics reflect the more senior positions. However, this is not a measurement problem for this study as the seniority of the arbitrator is recorded clearly in each decision.

The arbitrator's seniority can be identified beside the arbitrator's name that appears on front page of each decision, on the top left side.

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Figure A3.1 *The coding sheet*

CODING SHEET FOR Southey PhD RESEARCH ____________ ____________ **VERSUS** ____________

Complete separate coding sheets if multiple grievants — DECISION NO. — *(Dismissed worker)* — *(Employer)*

1: YEAR

Code	Year
1	2000
2	2001
3	2002
4	2003
5	2004
6	2005
7	2006
8	2007
9	2008
10	2009
11	2010

2: REGION

Code	Region
1	Adelaide
2	Brisbane
3	Canberra
4	Hobart
5	Melbourne
6	Newcastle
7	Perth
8	Sydney
9	Wollongong

3: INDUSTRY

Code	Industry
1	Agriculture, forestry, fishing
2	Mining
3	Manufacturing
4	Electricity gas water & waste services
5	Construction
6	Wholesale trade
7	Retail trade
8	Accommodation & food services
9	Transport, postal and warehousing
10	Information media & telecommunications
11	Financial and insurance services
12	Rental, hiring & real estate services
13	Professional, scientific & technical services
14	Administrative & support services
15	Public administration & safety
16	Education and training
17	Health care & social assistance
18	Arts and recreation services
19	Other services

4: BUSINESS SECTOR

Code	Sector
0	Public (Government or Gov. Authority)
1	Private

5: BUSINESS SIZE

Code	Size
1	4 or less workers (micro)
2	5 to 19 workers (small)
3	20 to 199 workers (medium)
4	200+ workers (large)
5	Not identified

6: HR EXPERTISE OF EMPLOYER

Code	HR expertise
1	NO HR expert
2	YES HR expert
3	Not identified

7: WORKER GENDER

Code	Gender	Code	Gender
0	Male	1	Female

8: OCCUPATION

Code	Occupation
1	Manager
2	Professional
3	Technician or trade
4	Community & personal service worker
5	Clerical & admin worker
6	Sales worker
7	Machinery operator or driver
8	Labourer

9: Job title:

10: EMPLOYMENT STATUS

Code	Status
0	Full-time (permanent/casual)
1	Part-time (permanent/casual)

11: LENGTH OF SERVICE

____________ years

12: DISCIPLINARY RECORD

Code	Record
1	Unblemished record (Note: in more detailed decisions, select this option if no reference was made to previous offences)
2	Previous offences
3	Not identified (limited detail in the decision)

13: TYPE OF MISBEHAVIOUR
(SELECT AS MANY **MAIN** CATEGORIES AS REQUIRED)

Code	Category
1	**Property deviance** (harmful to the business)
	1.1 theft from the business
	1.2 wilful damage/sabotaging equipment or property
	1.3 fraud/misuse of assets or property
	1.4 other property deviance
2	**Production deviance** (harmful to the business)
	2.1 tardiness/absenteeism/lying about hours worked
	2.2 not following procedures or instructions
	2.3 safety violations
	2.4 misusing or wasting resources
	2.5 other production deviance
3	**Personal aggression** (harmful to a person)
	3.1 verbal or written acts of aggression
	3.2 physical acts of aggression
	3.3 sexual harassment: verbal and/or physical
	3.4 theft from co-workers or customers
	3.5 other personal aggression
4	**Political deviance** (harmful to a person)
	4.1 gossiping/breaching confidentiality
	4.2 disreputable actions towards others
	4.3 other political deviance

14: SEVERITY OF MOST PROMINENT MISBEHAVIOUR
(intuitive rating)

Code	Severity
1	Not particularly serious
2	Somewhat serious
3	Serious
4	Very serious
5	Extremely serious

15: WORKER APOLOGY OR REMORSE

Code	Apology
0	No apology or indication of regret
1	Yes apology or regret indicated

16: FORMALITY OF THE DISMISSAL PROCESS

Code	Formality
1	Informal (verbal or a brief/abrupt letter of dismissal that doesn't explain the dismissal)
2	Semi-formal (a single written notice alerting worker, most likely an explanatory termination letter with reason for dismissal)
3	Formal (2 or more written notices about investigations, suspensions, warnings and/or reasons – genuine attempts to document)

17: SUPPORT FOR WORKER DURING DISMISSAL PROCESS

Code	Support
1	Union present
2	Companion present
3	No-one present with worker
4	Not identified (limited detail in decision)

18: EMPLOYEE'S EXPLANATION FOR BEHAVIOUR
(SELECT AS MANY MAIN CATEGORIES AS REQUIRED)

Code	Category
1	**Workplace related reasons**
	1.1 accepted employer practice
	1.2 poor communication / poor instructions
	1.3 poor employer policy or practice
	1.4 influence from another person
	1.5 job changes
	1.6 faulty equipment, hazardous conditions
	1.7 unreasonable performance expectations
	1.8 other workplace related reason
2	**Personal Inside reasons**
	2.1 denial
	2.2 felt inequity or tension
	2.3 self defence
	2.4 made a mistake
	2.5 intentional behaviour
	2.6 ignorance of rules
	2.7 frustration
	2.8 other personal-inside reason
3	**Personal Outside reasons**
	3.1 personal health issues
	3.2 family commitments or family health issues
	3.3 financial pressures
	3.4 personal tragedy
	3.5 mood altering substances/addictions
	3.6 other personal-outside reason

19: COMPLEXITY OF EXPLANATION

Code	Complexity
1	Single category explanation
2	Dual category explanation
3	Triple category explanation

Continued over /.....

20: WORKER ADVOCACY AT HEARING

1	Self represented
2	Represented by union
3	Represented by independent lawyer
4	Representation not clear

21: EMPLOYER ADVOCACY AT HEARING

1	Self represented: by a member of management
2	Represented by employer or industry association
3	Represented by independent lawyer
4	Representation not clear

22: MANAGERIAL ERRORS IN THE DISMISSAL PROCESS
(SELECT AS MANY AS REQUIRED)

1	Poor or flawed evidence or reason
2	Mitigating factors ignored
3	Rules violation *(eg rules not well communicated)*
4	Denied union/support person
5	Problematic investigation
6	Problematic response
7	Problematic allegation
8	Punishment too harsh
9	Management contributed

23: THE ARBITRATION DECISION

0	Employer's favour
1	Worker's favour

(Only if worker's favour)

24: REMEDY AWARDED

1	Re-employment or reinstatement
2	Compensation in lieu of reinstatement

25: ARBITRATOR GENDER / 26 PROFESSIONAL BACKGROUND / 27: EXPERIENCE

0 — **MALE** — *Select his name*

No.	Name	* default values for 26		# default values 27
1	Bacon	1	Employer	VALUES FOR VARIABLE 27 WILL BE DETERMINED POST DATA COLLECTION
----	----------------------------------			
3	Blain	3	Undeterminable	
4	Blair	2	Union	
5	Boulton	2	Union	
6	Cartwright	1	Employer	
7	Duncan	3	Undeterminable	
8	Eames	2	Union	
9	Gay	1	Employer	
10	Grainger	3	Undeterminable	
11	Hamberger	3	Undeterminable	
12	Hamilton	1	Employer	
13	Hampton	1	Employer	
14	Harrison G (com)	2	Union	
15	Hingley	2	Union	
16	Hodder	2	Union	
17	Hoffman	1	Employer	
18	Holmes	3	Undeterminable	
19	Ives	1	Employer	
20	Jones	1	Employer	
21	Kaufman	3	Undeterminable	
22	Lacy	3	Undeterminable	
23	Lawler	3	Undeterminable	
24	Lawson	1	Employer	
25	Lesses	2	Union	
26	Lewin	2	Union	
27	Lloyd	3	Undeterminable	
28	Mansfield	2	Union	
29	McCarthy	1	Employer	
30	Munro	2	Union	
31	O'Callaghan	1	Employer	
32	O'Connor	2	Union	
33	Polites	1	Employer	
34	Raffaeli	2	Union	
35	Redmond	2	Union	
36	Richards	1	Employer	
37	Roberts	2	Union	
38	Ross	2	Union	
39	Simmonds	2	Union	
40	Smith	1	Employer	
41	Thatcher	1	Employer	
42	Tolley	3	Undeterminable	
43	Watson	1	Employer	
44	Williams	3	Undeterminable	
45	Cambridge	2	Union	
46	Cloghan	3	Undeterminable	
47	Roe	2	Union	
48	Ryan	2	Union	
49	Sams	2	Union	
50	Simpson	2	Union	

25: ARBITRATOR GENDER (MALE continued)/ 26: PROFESSIONAL BACKGROUND / 27: EXPERIENCE

0

No.	Name	26		27
51	Connor	3	Undeterminable	
52	Jennings	3	Undeterminable	
53	Laing	3	Undeterminable	
54	Wilks	2	Union	

25: ARBITRATOR GENDER / 26: PROFESSIONAL BACKGROUND / 27: EXPERIENCE

1 — **FEMALE** — *Select her name*

No.	Name	* default value for 26		# default values 27
1	Acton	2	Union	VALUES FOR VARIABLES 27 WILL BE DETERMINED POST DATA COLLECTION
2	Cargil	3	Undeterminable	
3	Cribb	3	Undeterminable	
4	Deegan	3	Undeterminable	
5	Drake	3	Undeterminable	
6	Foggo	2	Union	
7	Harrison A (SDP)	3	Undeterminable	
8	Larkin	1	Employer	
9	Leary	1	Employer	
10	Marsh	2	Union	
11	Spencer	1	Employer	
12	Whelan	2	Union	
13	McKenna	2	Union	
14	Gooley	3	Undeterminable	
15	Bissett	2	Union	

*** 26: DEFAULT VALUES FOR PROFESSIONAL BACKGROUND**

1	History of working for employers
2	History of working for unions
3	Undeterminable - history shows no strong preference

* Values for Variable 26 have been determined and pre-assigned to each arbitrator.

 # 27: VALUES FOR ARBITRATOR EXPERIENCE

1	Up to 5 decisions
2	6 to 10 decisions
3	11 to 15 decisions
4	16 to 20 decisions
5	21 to 25 decisions
6	26 or more decisions

 # Final values for Variables 27 can only be ascertained and assigned to each arbitrator after the data collection has taken place which will allow the number of decisions made by each arbitrator to be counted.

28: ARBITRATOR SENIORITY

1	Commissioner
2	Deputy President (DP)
3	Senior Deputy President (SDP)
4	Vice President (VP) or Justice

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APPENDIX 4

SPSS output of failed estimation due to the inclusion of 'POOR_EVIDENCE_OR_REASON' variable

```
  /METHOD=ENTER PublicPrivate_binary Industry_collapsed FirmSize_Collapsed HR_EXPERTISE FORMALITY
SUPPORT WORKER_GENDER Occupation_collapsed SERVICE_PERIOD DISCIPLINARY_RECORD
EMPLOYMENT_STATUS ARBITRATOR_GENDER ARBITRATOR_BACKGROUND ARBITRATOR_EXPERIENCE
ARBITRATOR_SENIORITY
  /METHOD=ENTER Property_deviance Production_deviance Personal_aggression Political_deviance
Misbehaviour_severity_collapsed Workplace_explanation PersonalInside_explanation Complexity_3_levels REMORSE
WORKER_ADVOCACY EMPLOYER_ADVOCACY
management_contributed investigation_flaw poor_allegation no_response ignored_mitigating too_harsh poor_evidence_or_
reason
  /METHOD=ENTER ARBITRATOR_GENDER*WORKER_GENDER Occupation_collapsed*WORKER_GENDER
EMPLOYMENT_STATUS*WORKER_GENDER Misbehaviour_severity_collapsed*management_contributed
Misbehaviour_severity_collapsed*investigation_flaw
Misbehaviour_severity_collapsed*poor_allegation Misbehaviour_severity_collapsed*no_response
  /CONTRAST (PublicPrivate_binary)=Indicator(1)
  /CONTRAST (Industry_collapsed)=Indicator
  /CONTRAST (FirmSize_Collapsed)=Indicator(1)
  /CONTRAST (HR_EXPERTISE)=Indicator(1)
  /CONTRAST (FORMALITY)=Indicator
  /CONTRAST (SUPPORT)=Indicator(1)
  /CONTRAST (WORKER_GENDER)=Indicator(1)
  /CONTRAST (Occupation_collapsed)=Indicator
  /CONTRAST (DISCIPLINARY_RECORD)=Indicator(1)
  /CONTRAST (EMPLOYMENT_STATUS)=Indicator(1)
  /CONTRAST (ARBITRATOR_GENDER)=Indicator(1)
  /CONTRAST (ARBITRATOR_BACKGROUND)=Indicator(1)
  /CONTRAST (ARBITRATOR_EXPERIENCE)=Indicator
  /CONTRAST (ARBITRATOR_SENIORITY)=Indicator(1)
  /CONTRAST (Property_deviance)=Indicator(1)
  /CONTRAST (Production_deviance)=Indicator(1)
  /CONTRAST (Personal_aggression)=Indicator(1)
  /CONTRAST (Political_deviance)=Indicator(1)
  /CONTRAST (Workplace_explanation)=Indicator(1)
  /CONTRAST (PersonalInside_explanation)=Indicator(1)
  /CONTRAST (REMORSE)=Indicator(1)
  /CONTRAST (WORKER_ADVOCACY)=Indicator(1)
  /CONTRAST (EMPLOYER_ADVOCACY)=Indicator(1)
  /CONTRAST (management_contributed)=Indicator(1)
  /CONTRAST (investigation_flaw)=Indicator(1)
  /CONTRAST (poor_allegation)=Indicator(1)
  /CONTRAST (no_response)=Indicator(1)
  /CONTRAST (ignored_mitigating)=Indicator(1)
  /CONTRAST (too_harsh)=Indicator(1)
  /CONTRAST (poor_evidence_or_reason)=Indicator(1)
  /CLASSPLOT
  /CASEWISE OUTLIER(2)
  /PRINT=GOODFIT
  /CRITERIA=PIN(0.05) POUT(0.10) ITERATE(20) CUT(0.5).
```

Logistic regression

[DataSet1] C:\Documents and Settings\southeyk\My Documents\PHD work\PhD data input into SPSS\DATA INPUT REFINED FOR PHD.sav

Warnings

Estimation failed due to numerical problem. Possible reasons are: (1) at least one of the convergence criteria LCON, BCON is zero or too small, or (2) the value of EPS is too small (if not specified, the default value that is used may be too small for this data set).

Case Processing Summary			
Unweighted Cases[a]		N	Percent
Selected Cases	Included in Analysis	565	100.0
	Missing Cases	0	.0
	Total	565	100.0
Unselected Cases		0	.0
Total		565	100.0
a. If weight is in effect, see classification table for the total number of cases.			

Dependent Variable Encoding	
Original Value	Internal Value
employer's favour (claim dismissed)	0
worker's favour (claim upheld)	1

Categorical Variables Codings

		Frequency	Parameter coding (1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Industry	agriculture, mining	25	1.000	.000	.000	.000	.000	.000	.000	.000	.000
	manufacture, wholesaling	122	.000	1.000	.000	.000	.000	.000	.000	.000	.000
	construction, utility supply	30	.000	.000	1.000	.000	.000	.000	.000	.000	.000
	retail	42	.000	.000	.000	1.000	.000	.000	.000	.000	.000
	hospitality, recreation	39	.000	.000	.000	.000	1.000	.000	.000	.000	.000
	transport, postal, warehousing	129	.000	.000	.000	.000	.000	1.000	.000	.000	.000
	communication, technical, professional services	46	.000	.000	.000	.000	.000	.000	1.000	.000	.000
	admin & support services	32	.000	.000	.000	.000	.000	.000	.000	1.000	.000
	public admin & safety	28	.000	.000	.000	.000	.000	.000	.000	.000	1.000
	education, health, social assistance	72	.000	.000	.000	.000	.000	.000	.000	.000	.000
Arbitrator experience	up to 5 decisions	56	1.000	.000	.000	.000	.000				
	6 to 10 decisions	118	.000	1.000	.000	.000	.000				
	11 to 15 decisions	98	.000	.000	1.000	.000	.000				
	16 to 20 decisions	146	.000	.000	.000	1.000	.000				
	21 to 25 decisions	113	.000	.000	.000	.000	1.000				
	26 or more decisions	34	.000	.000	.000	.000	.000				
Occupation	manager/professional	76	1.000	.000	.000	.000					
	technician/trade	57	.000	1.000	.000	.000					
	community/personal service	84	.000	.000	1.000	.000					
	clerical/admin/sales	97	.000	.000	.000	1.000					
	operator/driver/labourer	251	.000	.000	.000	.000					
Worker advocacy	self-represented	87	.000	.000	.000						
	represented by union rep	155	1.000	.000	.000						
	represented by legal rep	208	.000	1.000	.000						
	representation not clear	115	.000	.000	1.000						
Number of staff	up to 19 (small)	44	.000	.000	.000						
	20 to 199 workers	63	1.000	.000	.000						
	200 plus workers	406	.000	1.000	.000						
	not identified	52	.000	.000	1.000						
Support	union present	173	.000	.000	.000						
	companion present	44	1.000	.000	.000						
	no-one present	157	.000	1.000	.000						
	not identified	191	.000	.000	1.000						
Employer advocacy	self-represented	63	.000	.000	.000						
	represented by Association	49	1.000	.000	.000						
	represented by legal rep	322	.000	1.000	.000						
	representation not clear	131	.000	.000	1.000						
Arbitrator background	history of working for management	207	.000	.000							
	history of working for unions	199	1.000	.000							
	history shows no strong preference	159	.000	1.000							
Disciplinary record	unblemished record	218	.000	.000							
	previous offences	207	1.000	.000							
	not identified	140	.000	1.000							
Arbitrator seniority	commissioner	371	.000	.000							
	deputy president	48	1.000	.000							
	senior deputy/vice president/justice	146	.000	1.000							
Formality	informal	49	1.000	.000							
	semi-formal	191	.000	1.000							
	formal	325	.000	.000							
HR expertise	NO HR expert	104	.000	.000							
	YES HR expert	436	1.000	.000							
	not identified	25	.000	1.000							
Worker gender	male	454	.000								
	female	111	1.000								
Full-time or part-time:	full-time worker	518	.000								
	part-time or casual worker	47	1.000								

Categorical Variables Codings

		Frequency	Parameter coding (1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Arbitrator gender	male	405	.000								
	female	160	1.000								
Poor evidence or reason	no	452	.000								
	yes	113	1.000								
property deviance	no	444	.000								
	yes	121	1.000								
punishment too harsh	no	450	.000								
	yes	115	1.000								
ignored mitigating circumstances	no	532	.000								
	yes	33	1.000								
due process: chance to respond	no	439	.000								
	yes	126	1.000								
due process: allegation detailed	no	483	.000								
	yes	82	1.000								
due process: support/investigation	no	506	.000								
	yes	59	1.000								
management contributed	no	506	.000								
	yes	59	1.000								
Remorse	no apology or indication of regret	480	.000								
	yes - apology or regret indicated	85	1.000								
production deviance	no	287	.000								
	yes	278	1.000								
personal aggression	no	373	.000								
	yes	192	1.000								
political deviance	no	530	.000								
	yes	35	1.000								
Workplace reason	no	335	.000								
	yes	230	1.000								
Personal Inside reason	no	87	.000								
	yes	478	1.000								
Public or private sector	private	483	.000								
	public	82	1.000								

Block 0: Beginning Block

Classification Table[a,b]

	Observed		Predicted: THE DECISION: Whether the arbitrator decided in favour of the worker or employer — employer's favour (claim dismissed)	worker's favour (claim upheld)	Percentage Correct
Step 0	THE DECISION: Whether the arbitrator decided in favour of the worker or employer	employer's favour (claim dismissed)	311	0	100.0
		worker's favour (claim upheld)	254	0	.0
	Overall Percentage				55.0

a. Constant is included in the model.
b. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 0	Constant	-.202	.085	5.731	1	.017	.817

Variables not in the Equation					
			Score	df	Sig.
Step 0	Variables	PublicPrivate_binary(1)	.861	1	.354
		Industry_collapsed	6.445	9	.695
		Industry_collapsed(1)	.848	1	.357
		Industry_collapsed(2)	.196	1	.658
		Industry_collapsed(3)	.326	1	.568
		Industry_collapsed(4)	.001	1	.970
		Industry_collapsed(5)	.261	1	.609
		Industry_collapsed(6)	.161	1	.688
		Industry_collapsed(7)	.515	1	.473
		Industry_collapsed(8)	2.850	1	.091
		Industry_collapsed(9)	.026	1	.872
		FirmSize_Collapsed	5.223	3	.156
		FirmSize_Collapsed(1)	.033	1	.855
		FirmSize_Collapsed(2)	3.915	1	.048
		FirmSize_Collapsed(3)	2.706	1	.100
		HR_EXPERTISE	6.880	2	.032
		HR_EXPERTISE(1)	6.868	1	.009
		HR_EXPERTISE(2)	1.289	1	.256
		FORMALITY	31.760	2	.000
		FORMALITY(1)	29.166	1	.000
		FORMALITY(2)	.146	1	.703
		SUPPORT	8.936	3	.030
		SUPPORT(1)	2.276	1	.131
		SUPPORT(2)	7.411	1	.006
		SUPPORT(3)	.111	1	.739
		WORKER_GENDER(1)	.164	1	.686
		Occupation_collapsed	2.251	4	.690
		Occupation_collapsed(1)	.616	1	.433
		Occupation_collapsed(2)	1.036	1	.309
		Occupation_collapsed(3)	.033	1	.856
		Occupation_collapsed(4)	.579	1	.447
		SERVICE_PERIOD	5.091	1	.024
		DISCIPLINARY_RECORD	12.238	2	.002
		DISCIPLINARY_RECORD(1)	3.117	1	.077
		DISCIPLINARY_RECORD(2)	3.790	1	.052
		EMPLOYMENT_STATUS(1)	.773	1	.379
		ARBITRATOR_GENDER(1)	.000	1	.989
		ARBITRATOR_BACKGROUND	10.594	2	.005
		ARBITRATOR_BACKGROUND(1)	8.574	1	.003
		ARBITRATOR_BACKGROUND(2)	.008	1	.928
		ARBITRATOR_EXPERIENCE	21.975	5	.001
		ARBITRATOR_EXPERIENCE(1)	9.386	1	.002
		ARBITRATOR_EXPERIENCE(2)	.402	1	.526
		ARBITRATOR_EXPERIENCE(3)	1.762	1	.184
		ARBITRATOR_EXPERIENCE(4)	11.608	1	.001
		ARBITRATOR_EXPERIENCE(5)	2.317	1	.128
		ARBITRATOR_SENIORITY	1.962	2	.375
		ARBITRATOR_SENIORITY(1)	1.929	1	.165
		ARBITRATOR_SENIORITY(2)	.005	1	.944
	Overall Statistics		82.811	39	.000

Block 1: Method = Enter

Omnibus Tests of Model Coefficients				
		Chi-square	df	Sig.
Step 1	Step	90.709	39	.000
	Block	90.709	39	.000
	Model	90.709	39	.000

Model Summary			
Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	686.787[a]	.148	.198
a. Estimation terminated at iteration number 4 because parameter estimates changed by less than .001.			

Hosmer and Lemeshow Test			
Step	Chi-square	df	Sig.
1	7.287	8	.506

Contingency Table for Hosmer and Lemeshow Test

		THE DECISION: Whether the arbitrator decided in favour of the worker or employer = employer's favour (claim dismissed)		THE DECISION: Whether the arbitrator decided in favour of the worker or employer = worker's favour (claim upheld)		
		Observed	Expected	Observed	Expected	Total
Step 1	1	48	47.498	9	9.502	57
	2	42	42.539	15	14.461	57
	3	36	39.324	21	17.676	57
	4	44	36.877	13	20.123	57
	5	31	34.014	26	22.986	57
	6	30	31.123	27	25.877	57
	7	31	28.160	26	28.840	57
	8	24	24.194	33	32.806	57
	9	16	19.420	42	38.580	58
	10	9	7.850	42	43.150	51

Classification Table[a]

	Observed		Predicted		
			THE DECISION: Whether the arbitrator decided in favour of the worker or employer		Percentage Correct
			employer's favour (claim dismissed)	worker's favour (claim upheld)	
Step 1	THE DECISION: Whether the arbitrator decided in favour of the worker or employer	employer's favour (claim dismissed)	244	67	78.5
		worker's favour (claim upheld)	120	134	52.8
	Overall Percentage				66.9

a. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1[a]	PublicPrivate_binary(1)	.054	.353	.024	1	.878	1.056
	Industry_collapsed			5.983	9	.742	
	Industry_collapsed(1)	-.055	.598	.008	1	.927	.947
	Industry_collapsed(2)	.157	.431	.132	1	.716	1.170
	Industry_collapsed(3)	.157	.574	.075	1	.784	1.170
	Industry_collapsed(4)	.050	.488	.011	1	.918	1.052
	Industry_collapsed(5)	-.016	.479	.001	1	.974	.984
	Industry_collapsed(6)	.280	.400	.489	1	.484	1.323
	Industry_collapsed(7)	.512	.461	1.234	1	.267	1.669
	Industry_collapsed(8)	.917	.512	3.211	1	.073	2.503
	Industry_collapsed(9)	.561	.536	1.097	1	.295	1.753
	FirmSize_Collapsed			1.075	3	.783	
	FirmSize_Collapsed(1)	.101	.472	.045	1	.831	1.106
	FirmSize_Collapsed(2)	.191	.474	.162	1	.687	1.210
	FirmSize_Collapsed(3)	.466	.501	.866	1	.352	1.594
	HR_EXPERTISE			.795	2	.672	
	HR_EXPERTISE(1)	-.047	.374	.016	1	.899	.954
	HR_EXPERTISE(2)	.401	.541	.548	1	.459	1.493
	FORMALITY			15.643	2	.000	
	FORMALITY(1)	1.857	.475	15.293	1	.000	6.405
	FORMALITY(2)	.185	.231	.637	1	.425	1.203
	SUPPORT			1.537	3	.674	
	SUPPORT(1)	-.237	.396	.359	1	.549	.789
	SUPPORT(2)	.236	.279	.713	1	.399	1.266
	SUPPORT(3)	.040	.242	.028	1	.868	1.041
	WORKER_GENDER(1)	-.057	.265	.046	1	.831	.945
	Occupation_collapsed			2.371	4	.668	
	Occupation_collapsed(1)	-.384	.352	1.191	1	.275	.681
	Occupation_collapsed(2)	-.462	.356	1.684	1	.194	.630
	Occupation_collapsed(3)	-.223	.356	.391	1	.532	.800
	Occupation_collapsed(4)	-.146	.325	.202	1	.653	.864
	SERVICE_PERIOD	-.084	.053	2.521	1	.112	.919
	DISCIPLINARY_RECORD			10.542	2	.005	
	DISCIPLINARY_RECORD(1)	-.590	.220	7.178	1	.007	.554
	DISCIPLINARY_RECORD(2)	-.719	.255	7.963	1	.005	.487
	EMPLOYMENT_STATUS(1)	.175	.390	.201	1	.654	1.191
	ARBITRATOR_GENDER(1)	-.203	.281	.523	1	.469	.816
	ARBITRATOR_BACKGROUND			6.675	2	.036	
	ARBITRATOR_BACKGROUND(1)	.621	.277	5.047	1	.025	1.862

Variables in the Equation							
		B	S.E.	Wald	df	Sig.	Exp(B)
	ARBITRATOR_BACKGROUND(2)	-.001	.286	.000	1	.997	.999
	ARBITRATOR_EXPERIENCE			18.059	5	.003	
	ARBITRATOR_EXPERIENCE(1)	.655	.592	1.221	1	.269	1.924
	ARBITRATOR_EXPERIENCE(2)	-.288	.564	.261	1	.609	.750
	ARBITRATOR_EXPERIENCE(3)	.183	.543	.114	1	.735	1.201
	ARBITRATOR_EXPERIENCE(4)	-.759	.557	1.856	1	.173	.468
	ARBITRATOR_EXPERIENCE(5)	.123	.519	.056	1	.813	1.131
	ARBITRATOR_SENIORITY			3.242	2	.198	
	ARBITRATOR_SENIORITY(1)	-.155	.427	.132	1	.716	.856
	ARBITRATOR_SENIORITY(2)	.434	.273	2.539	1	.111	1.544
	Constant	-.181	.851	.045	1	.832	.835

a. Variable(s) entered on step 1: PublicPrivate_binary, Industry_collapsed, FirmSize_Collapsed, HR_EXPERTISE, FORMALITY, SUPPORT, WORKER_GENDER, Occupation_collapsed, SERVICE_PERIOD, DISCIPLINARY_RECORD, EMPLOYMENT_STATUS, ARBITRATOR_GENDER, ARBITRATOR_BACKGROUND, ARBITRATOR_EXPERIENCE, ARBITRATOR_SENIORITY.

Block 2: Method = Enter

Variables in the Equation[a]

a. An error was encountered in estimation.

APPENDIX 5

Table A5.1 *Shared observations: High influence cases and outliers (7 of 14)*

VARIABLE	OBSERVATION PROFILE						
Decision No.	(1) AIRC1097	(2) FWA1164	(3) FWA3690	(4) PR902030	(5) PR903625	(6) PR909750	(7) PR919842
Employer	Brisbane City Council	Parramatta Leagues Club	Magnetic Island Real Estate	The Hoyts Corporation	Star City	Vawdrey Body Repairs	Telstra
Arbitration decision	employer's favour	worker's favour	employer's favour	employer's favour	employer's favour	worker's favour	employer's favour
Sector	public	private	private	private	private	private	private
Industry	public admin & safety	hospitality, recreation	communication, technical, professional ser	hospitality, recreation	hospitality, recreation	manufacture, wholesaling	communication, technical, professional ser
Size	200 plus workers	200 plus workers	up to 19 (small)	200 plus workers	200 plus workers	20 to 199 workers	200 plus workers
HR presence	YES HR expert	YES HR expert	NO HR expert	YES HR expert	YES HR expert	NO HR expert	YES HR expert
Formality	semi-formal	formal	informal	semi-formal	formal	semi-formal	formal
Support	union present	not identified	no-one present	no-one present	union present	companion present	not identified
Worker gender	female	female	male	male	female	male	male
Occupation	operator/ driver/ labourer	manager/ professional	clerical/admin/ sales	clerical/admin/ sales	community/ personal service	technician/trade	technician/ trade
Service	2 up to 5 years	20 years and over	up to 2 years	up to 2 years	up to 2 years	up to 2 years	10 up to 15 years
Record	not identified	unblemished record	unblemished record	unblemished record	unblemished record	unblemished record	previous offences
FT / PT	full-time	full-time	full-time	part-time/casual	part-time/casual	full-time	full-time
Arbitrator gender	male	female	male	female	female	male	male
Background	management	no clear preference	management	no clear preference	management	management	union
Experience	21 to 25 decisions	21 to 25 decisions	21 to 25 decisions	11 to 15 decisions	26 plus decisions	6 to 10 decisions	16 to 20 decisions
Seniority	SDP/VP	commissioner	SDP/VP	commissioner	commissioner	SDP/VP	commissioner
Property	no	no	no	yes	yes	no	no
Production	no	yes	yes	yes	no	no	yes
Aggression	yes	no	yes	no	no	yes	no
Political	no	no	no	no	no	no	no
Severity	very serious	serious	somewhat serious	serious	very serious	very serious	somewhat serious
Workplace	no	no	yes	yes	no	no	yes
Personal Inside	yes	yes	yes	no	yes	yes	yes
Personal Outside	no	no	no	no	no	no	yes
Complexity	personal-inside reason/s only	personal-inside reason/s only	workplace-related & personal-inside reasons	workplace related reason only	personal-inside reason/s only	personal-inside reason/s only	all three categories of reasons
Remorse	yes - apology or regret indicated	yes - apology or regret indicated	no apology or indication of regret	yes - apology or regret indicated	no apology or indication of regret	yes - apology or regret indicated	no apology or indication of regret
Worker advocacy	represented by legal	not clear	self-represented	represented by legal	represented by union	not clear	represented by legal
Employer advocacy	represented by legal	represented by legal	represented by legal	represented by legal	self-represented	represented by Association	not clear
Invalid evidence	no	no	no	no	no	yes	no
Mitigating factors	no	no	no	no	no	no	no
Management contributed	no	no	no	no	no	no	no
Investigation flaws	n	no	no	yes	yes	no	yes
Poor allegation	yes	no	no	yes	no	no	no
No response	yes	no	yes	no	no	no	no
Too harsh	no	yes	no	no	no	yes	no

Table A5.1 (continued) *Shared observations: High influence cases and outliers (14 of 14)*

VARIABLE	OBSERVATION PROFILE						
Decision No.	(8) PR936112	(9) PR939942	(10) PR952744	(11) PR971014	(12) PR973914	(13) PR975252	(14) PR976758
Employer	Jordon Transport	Darnlee Private Nursing Home	Hillier	Allianz Australia Services	Ellison Finance Services	Aust Injecting & Illicit Drug Users League	Chubb Security
Arbitration decision	employer's favour	worker's favour	employer's favour	employer's favour	worker's favour	employer's favour	employer's favour
Sector	private	private	private	private	private	private	private
Industry	transport, postal, warehousing	education, health, social assistance	transport, postal, warehousing	communication, technical, professional ser	communication, technical, professional ser	education, health, social assistance	admin & support services
Size	20 to 199 workers	up to 19 (small)	up to 19 (small)	200 plus workers	up to 19 (small)	up to 19 (small)	200 plus workers
HR presence	NO HR expert	YES HR expert	NO HR expert	YES HR expert	NO HR expert	NO HR expert	YES HR expert
Formality	informal	semi-formal	informal	formal	formal	semi-formal	formal
Support	no-one present	union present	no-one present	companion present	no-one present	no-one present	union present
Worker gender	male	female	male	male	male	female	male
Occupation	operator/driver/ labourer	community/ personal service	operator/driver/ labourer	manager/ professional	clerical/admin/s ales	clerical/admin/s ales	community/ personal service
Service	up to 2 years	not identified	2 up to 5 years	up to 2 years	up to 2 years	2 up to 5 years	20 years and over
Record	previous offences	unblemished record	previous offences	unblemished record	previous offences	not identified	previous offences
FT / PT	part-time/casual	part-time/casual	full-time	full-time	full-time	full-time	full-time
Arbitrator gender	male	male	female	male	male	male	male
Background	management	management	no clear preference	union	union	no clear preference	no clear preference
Experience	21 to 25 decisions	6 to 10 decisions	21 to 25 decisions	6 to 10 decisions	6 to 10 decisions	up to 5 decisions	6 to 10 decisions
Seniority	commissioner	deputy president	commissioner	commissioner	commissioner	SDP/VP	commissioner
Property	no	no	no	no	no	no	no
Production	no	yes	no	no	no	yes	yes
Aggression	yes	yes	yes	yes	yes	no	no
Political	no	no	no	no	no	no	no
Severity	serious	extremely serious	very serious	very serious	very serious	serious	very serious
Workplace	no	no	no	no	yes	yes	yes
Personal Inside	yes	yes	yes	yes	no	yes	yes
Personal Outside	no	no	no	yes	yes	no	no
Complexity	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-inside & personal-outside reasons	workplace-related & personal-outside reasons	workplace-related & personal-inside reasons	workplace-related & personal-inside reasons
Remorse	no apology or indication of regret	no apology or indication of regret	no apology or indication of regret	no apology or indication of regret	no apology or indication of regret	no apology or indication of regret	yes - apology or regret indicated
Worker advocacy	represented by legal	represented by legal	represented by legal	represented by legal	self-represented	not clear	represented by legal
Employer advocacy	not clear	represented by legal	represented by legal	self-represented	self-represented	not clear	represented by legal
Invalid evidence	no	no	no	no	no	no	no
Mitigating factors	no	no	no	no	no	no	no
Management contributed	no	no	no	no	no	yes	no
Investigation flaws	no	no	no	no	no	no	no
Poor allegation	yes	no	no	yes	no	no	no
No response	yes	yes	yes	yes	yes	no	yes
Too harsh	no	yes	no	no	yes	no	no

Table A5.2 *Single observations of high influence cases (7 of 7 single observations)*

VARIABLE	OBSERVATION PROFILE						
Decision No.	(1) AIRC916	(2) FWA3096	(3) FWA3940	(4) PR901937	(5) PR923310	(6) PR954640	(7) PR976481
Employer	Depart of Human Services	'the bakery'	Pinky's Pizza Portland	Hawker de Havilland	Department of Defence	Australia Post	Veolia Transport
Arbitration decision	employer's favour	worker's favour	employer's favour	employer's favour	worker's favour	employer's favour	employer's favour
Sector	public	private	private	private	public	public	private
Industry	education, health, social assistance	manufacture, wholesaling	hospitality, recreation	manufacture, wholesaling	public admin & safety	transport, postal, warehousing	transport, postal, warehousing
Size	200 plus workers	up to 19 (small)	up to 19 (small)	200 plus workers	200 plus workers	200 plus workers	not identified
HR presence	YES HR expert	NO HR expert	NO HR expert	YES HR expert	YES HR expert	YES HR expert	YES HR expert
Formality	semi-formal	semi-formal	semi-formal	formal	formal	formal	formal
Support	not identified	no-one present	no-one present	union present	union present	not identified	not identified
Worker gender	male	male	female	male	male	male	male
Occupation	community/ personal service	technician/trade	community/ personal service	technician/trade	manager/ professional	operator/driver/ labourer	operator/driver/ labourer
Service	up to 2 years	2 up to 5 years	2 up to 5 years	10 up to 15 years	5 up to 10 years	20 years and over	2 up to 5 years
Record	not identified	previous offences	previous offences	unblemished record	unblemished record	unblemished record	previous offences
FT / PT	part-time/casual	full-time	part-time/casual	full-time	full-time	full-time	full-time
Arbitrator gender	female	male	female	male	male	female	male
Background	union	management	union	union	management	union	management
Experience	21 to 25 decisions	16 to 20 decisions	11 to 15 decisions	21 to 25 decisions	16 to 20 decisions	21 to 25 decisions	up to 5 decisions
Seniority	commissioner	SDP/VP	commissioner	commissioner	SDP/VP	commissioner	commissioner
Property	no	yes	no	yes	yes	no	no
Production	yes	yes	no	no	yes	no	no
Aggression	yes	no	yes	no	no	yes	yes
Political	no	no	no	no	no	no	no
Severity	very serious	very serious	serious	somewhat serious	serious	extremely serious	extremely serious
Workplace	yes	no	no	no	no	no	no
Personal Inside	yes	yes	yes	yes	yes	yes	no
Personal Outside	no	no	no	no	no	no	yes
Complexity	workplace-related & personal-inside reasons	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-outside reason/s only
Remorse	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology regret indicated	no apology or regret indicated
Worker advocacy	represented by union	self-represented	represented by legal	represented by union	represented by legal	not clear	not clear
Employer advocacy	represented by legal	self-represented	self-represented	not clear	not clear	represented by legal	not clear
Invalid evidence	no	no	no	no	yes	no	no
Mitigating factors	no	no	no	no	no	no	no
Management contributed	yes	no	no	no	no	no	no
Investigation flaws	no	yes	no	no	no	yes	yes
Poor allegation	no	no	no	yes	yes	no	no
No response	no	no	no	no	no	no	no
Too harsh	no	yes	no	no	no	no	no

Table A5.3 *Single observations of outliers (8 of 8 single observations)*

VARIABLE	OBSERVATION PROFILE							
Decision No.	(1) AIRC1127	(2) AIRC564	(3) FWA2605	(4) PR900405	(5) PR909342	(6) PR924004	(7) PR935561	(8) PR941688
Employer	Coles Group Supply Chain	Patrick Stevedores Holdings	TNT Express	Maroondah Hospital	South Pacific Tyres	Australia Post	Upper Yarra Community House	Cargill Beef Australia
Arbitration decision	worker's favour	worker's favour	worker's favour	worker's favour	worker's favour	worker's favour	worker's favour	worker's favour
Sector	private	private	private	public	private	public	private	private
Industry	transport, postal, warehousing	transport, postal, warehousing	transport, postal, warehousing	education, health, social assistance	manufacture, wholesaling	transport, postal, warehousing	education, health, social assistance	manufacture, wholesaling
Size	200 plus workers	200 plus workers	200 plus workers	200 plus workers	200 plus workers	200 plus workers	not identified	200 plus workers
HR presence	YES HR expert	YES HR expert	YES HR expert	YES HR expert	YES HR expert	YES HR expert	NO HR expert	YES HR expert
Formality	formal	formal	formal	semi-formal	semi-formal	formal	formal	formal
Support	union present	not identified	union present	not identified	not identified	not identified	union present	union present
Worker gender	male	male	male	male	male	male	female	male
Occupation	operator/driver/ labourer	operator/driver/ labourer	operator/driver/ labourer	manager/ professional	technician/ trade	clerical/admin/ sales	manager/ professional	operator/driver/ labourer
Service	up to 2 years	5 up to 10 years	5 up to 10 years	up to 2 years	10 up to 15 years	20 years and over	10 up to 15 years	5 up to 10 years
Record	previous offences	not identified	previous offences	unblemished record	unblemished record	not identified	unblemished record	previous offences
FT / PT	full-time worker	full-time worker	full-time worker	full-time worker	full-time worker	full-time worker	full-time worker	full-time worker
Arbitrator gender	female	male	female	female	male	male	male	female
Background	no clear preference	management	management	no clear preference	unions	management	no clear preference	no clear preference
Experience	21 to 25 decisions	6 to 10 decisions	26 plus decisions	21 to 25 decisions	11 to 15 decisions	16 to 20 decisions	11 to 15 decisions	21 to 25 decisions
Seniority	commissioner	deputy president	commissioner	SDP/VP	commissioner	SDP/VP	commissioner	SDP/VP
Property	no	no	no	no	yes	no	no	no
Production	no	no	no	no	no	no	yes	yes
Aggression	yes	yes	yes	yes	yes	no	no	yes
Political	no	no	no	no	no	yes	no	no
Severity	extremely serious	extremely serious	very serious	extremely serious	very serious	extremely serious	somewhat serious	serious
Workplace	no	no	no	no	no	yes	yes	yes
Personal Inside	yes	yes	yes	yes	yes	no	yes	yes
Personal Outside	no	no	no	no	no	no	yes	no
Complexity	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	workplace related reason/s only	all three categories of reasons	workplace-related & personal-inside reasons
Remorse	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated
Worker advocacy	represented by union	represented by legal	self-represented	represented by union	represented by union	represented by legal	represented by union	represented by union
Employer advocacy	represented by legal	represented by legal	represented by legal	not clear	represented by legal	represented by legal	represented by legal	represented by legal
Invalid evidence	no	no	no	yes	yes	yes	yes	yes
Mitigating factors	no	no	no	no	no	no	yes	no
Management contributed	no	no	no	no	no	no	no	no
Investigation flaws	no	no	no	no	no	no	no	no
Poor allegation	no	no	no	no	no	no	no	no
No response	no	no	no	no	no	no	no	no
Too harsh	no	no	yes	no	yes	no	yes	yes

Table A5.4 *Extreme leverage cases (5 of 5 single observations)*

VARIABLE	OBSERVATION PROFILE				
Decision No.	(1) PR917287	(2) PR952785	(3) PR954650	(4) PR977028	(5) PR981805
Employer	Australian Commercial Catering	Woolworths Limited	Mayne Group Limited	Chubb Security	Calvary Health Care Adelaide
Arbitration decision	worker's favour	worker's favour	worker's favour	employer's favour	employer's favour
Sector	private	private	private	private	private
Industry	hospitality, recreation	retail	education, health, social assistance	admin & support services	education, health, social assistance
Size	200 plus workers	200 plus workers	200 plus workers	200 plus workers	200 plus workers
HR presence	YES HR expert	YES HR expert	YES HR expert	YES HR expert	YES HR expert
Formality	semi-formal	formal	formal	formal	formal
Support	no-one present	union present	not identified	no-one present	companion present
Worker gender	female	male	female	male	female
Occupation	technician/trade	operator/driver/ labourer	manager/ professional	manager/ professional	manager/ professional
Service	2 up to 5 years	2 up to 5 years	15 up to 20 years	5 up to 10 years	2 up to 5 years
Record	unblemished record	previous offences	previous offences	previous offences	unblemished record
FT / PT	full-time	part-time/casual	full-time	full-time	part-time/casual
Arbitrator gender	male	male	male	male	male
Background	no strong preference	no strong preference	management	management	no strong preference
Experience	6 to 10 decisions	16 to 20 decisions	16 to 20 decisions	11 to 15 decisions	6 to 10 decisions
Seniority	SDP/VP	SDP/VP	deputy president	deputy president	SDP/VP
Property	no	yes	no	no	no
Production	no	no	yes	no	no
Aggression	yes	no	no	yes	yes
Political	no	no	no	no	no
Severity	serious	somewhat serious	somewhat serious	extremely serious	extremely serious
Workplace	no	no	no	no	no
Personal Inside	yes	yes	yes	yes	yes
Personal Outside	yes	no	no	no	no
Complexity	personal-inside & personal-outside reasons	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only	personal-inside reason/s only
Remorse	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated	no apology or regret indicated
Worker advocacy	represented by legal rep	not clear	not clear	self-represented	represented by legal
Employer advocacy	self-represented	represented by legal	not clear	represented by legal	represented by legal
Invalid evidence	no	yes	no	no	no
Mitigating factors	no	no	no	no	no
Management contributed	no	no	yes	yes	no
Investigation flaws	no	yes	no	no	no
Poor allegation	yes	yes	no	no	yes
No response	yes	no	no	no	yes
Too harsh	yes	no	yes	no	no

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APPENDIX 6

SPSS output of descriptive statistics

The arbitration decision

	Count	Percent
employer's favour (claim dismissed)	311	55.0%
worker's favour (claim upheld)	254	45.0%
Total	565	100.0%

Year of arbitration decision

			THE DECISION		Total
			employer's favour	worker's favour	
Year	2001	Count	42	27	69
		% of Total	7.4%	4.8%	12.2%
	2002	Count	25	36	61
		% of Total	4.4%	6.4%	10.8%
	2003	Count	27	37	64
		% of Total	4.8%	6.5%	11.3%
	2004	Count	23	23	46
		% of Total	4.1%	4.1%	8.1%
	2005	Count	19	7	26
		% of Total	3.4%	1.2%	4.6%
	2006	Count	49	33	82
		% of Total	8.7%	5.8%	14.5%
	2007	Count	21	23	44
		% of Total	3.7%	4.1%	7.8%
	2008	Count	32	19	51
		% of Total	5.7%	3.4%	9.0%
	2009	Count	38	25	63
		% of Total	6.7%	4.4%	11.2%
	2010	Count	35	24	59
		% of Total	6.2%	4.2%	10.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Location of tribunal

			THE DECISION		Total
			employer's favour	worker's favour	
City	Adelaide	Count	8	13	21
		% of Total	1.4%	2.3%	3.7%
	Brisbane	Count	34	20	54
		% of Total	6.0%	3.5%	9.6%
	Canberra	Count	10	2	12
		% of Total	1.8%	.4%	2.1%
	Hobart	Count	2	4	6
		% of Total	.4%	.7%	1.1%
	Melbourne	Count	111	114	225
		% of Total	19.6%	20.2%	39.8%
	Perth	Count	23	12	35
		% of Total	4.1%	2.1%	6.2%
	Sydney	Count	122	89	211
		% of Total	21.6%	15.8%	37.3%
	Wollongong	Count	1	0	1
		% of Total	.2%	.0%	.2%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Remedy

			THE DECISION		Total
			employer's favour	worker's favour	
Remedy	reinstatement	Count	0	104	104
		% of Total	.0%	18.4%	18.4%
	compensation	Count	0	150	150
		% of Total	.0%	26.6%	26.6%
	not applicable	Count	311	0	311
		% of Total	55.0%	.0%	55.0%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Property deviance

			THE DECISION		Total
			employer's favour	worker's favour	
Property deviance	no	Count	236	208	444
		% of Total	41.8%	36.8%	78.6%
	yes	Count	75	46	121
		% of Total	13.3%	8.1%	21.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Production deviance

			THE DECISION		Total
			employer's favour	worker's favour	
Production deviance	no	Count	165	122	287
		% of Total	29.2%	21.6%	50.8%
	yes	Count	146	132	278
		% of Total	25.8%	23.4%	49.2%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Personal aggression

			THE DECISION		Total
			employer's favour	worker's favour	
Personal aggression	no	Count	200	173	373
		% of Total	35.4%	30.6%	66.0%
	yes	Count	111	81	192
		% of Total	19.6%	14.3%	34.0%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Political deviance

			THE DECISION		Total
			employer's favour	worker's favour	
Political deviance	no	Count	293	237	530
		% of Total	51.9%	41.9%	93.8%
	yes	Count	18	17	35
		% of Total	3.2%	3.0%	6.2%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Severity of the misbehaviour

			THE DECISION		Total
			employer's favour	worker's favour	
Severity of the misbehaviour	somewhat serious	Count	26	54	80
		% of Total	4.6%	9.6%	14.2%
	serious	Count	62	72	134
		% of Total	11.0%	12.7%	23.7%
	very serious	Count	150	94	244
		% of Total	26.5%	16.6%	43.2%
	extremely serious	Count	73	34	107
		% of Total	12.9%	6.0%	18.9%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Disciplinary record

			THE DECISION		Total
			employer's favour	worker's favour	
Disciplinary record	unblemished record	Count	100	118	218
		% of Total	17.7%	20.9%	38.6%
	previous offences	Count	124	83	207
		% of Total	21.9%	14.7%	36.6%
	not identified	Count	87	53	140
		% of Total	15.4%	9.4%	24.8%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Length of service

			THE DECISION		Total
			employer's favour	worker's favour	
Length of service	up to 2 years	Count	42	46	88
		% of Total	7.4%	8.1%	15.6%
	2 up to 5 years	Count	64	53	117
		% of Total	11.3%	9.4%	20.7%
	5 up to 10 years	Count	63	63	126
		% of Total	11.2%	11.2%	22.3%
	10 up to 15 years	Count	51	29	80
		% of Total	9.0%	5.1%	14.2%
	15 up to 20 years	Count	19	17	36
		% of Total	3.4%	3.0%	6.4%
	20 years and over	Count	23	27	50
		% of Total	4.1%	4.8%	8.8%
	not identified	Count	49	19	68
		% of Total	8.7%	3.4%	12.0%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Worker remorse

			THE DECISION		Total
			employer's favour	worker's favour	
Worker apology or remorse	no apology or indication of regret	Count	278	202	480
		% of Total	49.2%	35.8%	85.0%
	yes apology or regret indicated	Count	33	52	85
		% of Total	5.8%	9.2%	15.0%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Workplace related reason

			THE DECISION		Total
			employer's favour	worker's favour	
Workplace related reason	no	Count	190	145	335
		% of Total	33.6%	25.7%	59.3%
	yes	Count	121	109	230
		% of Total	21.4%	19.3%	40.7%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Personal Inside reason

			THE DECISION		Total
			employer's favour	worker's favour	
Personal Inside reason	no	Count	44	43	87
		% of Total	7.8%	7.6%	15.4%
	yes	Count	267	211	478
		% of Total	47.3%	37.3%	84.6%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Personal Outside reason

			THE DECISION		Total
			employer's favour	worker's favour	
Personal Outside reason	no	Count	255	212	467
		% of Total	45.1%	37.5%	82.7%
	yes	Count	56	42	98
		% of Total	9.9%	7.4%	17.3%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Complexity_of_explanation

			THE DECISION		Total
			employer's favour	worker's favour	
Complexity of explanation	single category	Count	192	154	346
		% of Total	34.0%	27.3%	61.2%
	dual categories	Count	105	92	197
		% of Total	18.6%	16.3%	34.9%
	triple categories	Count	14	8	22
		% of Total	2.5%	1.4%	3.9%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Poor evidence or reason

			THE DECISION		Total
			employer's favour	worker's favour	
Poor evidence or reason	no	Count	311	141	452
		% of Total	55.0%	25.0%	80.0%
	yes	Count	0	113	113
		% of Total	.0%	20.0%	20.0%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Mitigating factors ignored

			THE DECISION		Total
			employer's favour	worker's favour	
Mitigating factors ignored	no	Count	311	221	532
		% of Total	55.0%	39.1%	94.2%
	yes	Count	0	33	33
		% of Total	.0%	5.8%	5.8%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Management contributed

			THE DECISION		Total
			employer's favour	worker's favour	
Management contributed	no	Count	307	199	506
		% of Total	54.3%	35.2%	89.6%
	yes	Count	4	55	59
		% of Total	.7%	9.7%	10.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Problematic support/investigation

			THE DECISION		Total
			employer's favour	worker's favour	
Problematic support/investigation	no	Count	300	206	506
		% of Total	53.1%	36.5%	89.6%
	yes	Count	11	48	59
		% of Total	1.9%	8.5%	10.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Problematic allegation

			THE DECISION		Total
			employer's favour	worker's favour	
Problematic allegation	no	Count	288	195	483
		% of Total	51.0%	34.5%	85.5%
	yes	Count	23	59	82
		% of Total	4.1%	10.4%	14.5%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Problematic response

			THE DECISION		Total
			employer's favour	worker's favour	
Problematic response	no	Count	283	156	439
		% of Total	50.1%	27.6%	77.7%
	yes	Count	28	98	126
		% of Total	5.0%	17.3%	22.3%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Punishment too harsh

			THE DECISION		Total
			employer's favour	worker's favour	
Punishment too harsh	no	Count	311	139	450
		% of Total	55.0%	24.6%	79.6%
	yes	Count	0	115	115
		% of Total	.0%	20.4%	20.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Worker advocacy

			THE DECISION		Total
			employer's favour	worker's favour	
Worker advocacy	self-represented	Count	63	24	87
		% of Total	11.2%	4.2%	15.4%
	union	Count	84	71	155
		% of Total	14.9%	12.6%	27.4%
	legal	Count	103	105	208
		% of Total	18.2%	18.6%	36.8%
	not clear	Count	61	54	115
		% of Total	10.8%	9.6%	20.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Employer advocacy

			THE DECISION		Total
			employer's favour	worker's favour	
Employer advocacy	self-represented	Count	29	34	63
		% of Total	5.1%	6.0%	11.2%
	Association	Count	21	28	49
		% of Total	3.7%	5.0%	8.7%
	legal	Count	189	133	322
		% of Total	33.5%	23.5%	57.0%
	not clear	Count	72	59	131
		% of Total	12.7%	10.4%	23.2%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Worker gender

			THE DECISION		Total
			employer's favour	worker's favour	
Worker gender	male	Count	248	206	454
		% of Total	43.9%	36.5%	80.4%
	female	Count	63	48	111
		% of Total	11.2%	8.5%	19.6%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Employment status of the worker

			THE DECISION		Total
			employer's favour	worker's favour	
Full-time or part-time	full-time worker	Count	288	230	518
		% of Total	51.0%	40.7%	91.7%
	part-time or casual worker	Count	23	24	47
		% of Total	4.1%	4.2%	8.3%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Public or private sector

			THE DECISION		Total
			employer's favour	worker's favour	
Sector	private	Count	262	221	483
		% of Total	46.4%	39.1%	85.5%
	public	Count	49	33	82
		% of Total	8.7%	5.8%	14.5%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Worker's occupation

			THE DECISION		Total
			employer's favour	worker's favour	
Occupational group	manager	Count	22	15	37
		% of Total	3.9%	2.7%	6.5%
	professional	Count	23	16	39
		% of Total	4.1%	2.8%	6.9%
	technician or trade	Count	35	22	57
		% of Total	6.2%	3.9%	10.1%
	community or personal service worker	Count	47	37	84
		% of Total	8.3%	6.5%	14.9%
	clerical or admin worker	Count	30	29	59
		% of Total	5.3%	5.1%	10.4%
	sales worker	Count	20	18	38
		% of Total	3.5%	3.2%	6.7%
	machinery operator or driver	Count	65	56	121
		% of Total	11.5%	9.9%	21.4%
	labourer	Count	64	56	120
		% of Total	11.3%	9.9%	21.2%
	not identified	Count	5	5	10
		% of Total	.9%	.9%	1.8%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Arbitrator gender

			THE DECISION		**Total**
			employer's favour	worker's favour	
Arbitrator gender	male	Count	223	182	405
		% of Total	39.5%	32.2%	71.7%
	female	Count	88	72	160
		% of Total	15.6%	12.7%	28.3%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Arbitrator background

			THE DECISION		Total
			employer's favour	worker's favour	
Arbitrator professional background	history of working for management	Count	130	77	207
		% of Total	23.0%	13.6%	36.6%
	history of working for unions	Count	93	106	199
		% of Total	16.5%	18.8%	35.2%
	history shows no strong preference	Count	88	71	159
		% of Total	15.6%	12.6%	28.1%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Arbitrator seniority

			THE DECISION		Total
			employer's favour	worker's favour	
Arbitrator seniority	commissioner	Count	200	171	371
		% of Total	35.4%	30.3%	65.7%
	deputy president	Count	31	17	48
		% of Total	5.5%	3.0%	8.5%
	senior deputy president	Count	73	60	133
		% of Total	12.9%	10.6%	23.5%
	vice president or justice	Count	7	6	13
		% of Total	1.2%	1.1%	2.3%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Arbitrator experience

			THE DECISION		Total
			employer's favour	worker's favour	
Arbitrator experience	up to 5 decisions	Count	20	36	56
		% of Total	3.5%	6.4%	9.9%
	6 to 10 decisions	Count	68	50	118
		% of Total	12.0%	8.8%	20.9%
	11 to 15 decisions	Count	48	50	98
		% of Total	8.5%	8.8%	17.3%
	16 to 20 decisions	Count	98	48	146
		% of Total	17.3%	8.5%	25.8%
	21 to 25 decisions	Count	55	58	113
		% of Total	9.7%	10.3%	20.0%
	26 or more decisions	Count	22	12	34
		% of Total	3.9%	2.1%	6.0%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Formality of dismissal process

			THE DECISION		Total
			employer's favour	worker's favour	
Formality of dismissal process	informal	Count	9	40	49
		% of Total	1.6%	7.1%	8.7%
	semi-formal	Count	103	88	191
		% of Total	18.2%	15.6%	33.8%
	formal	Count	199	126	325
		% of Total	35.2%	22.3%	57.5%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

HR expertise of employer

			THE DECISION		Total
			employer's favour	worker's favour	
HR expertise of employer	NO HR expert	Count	47	57	104
		% of Total	8.3%	10.1%	18.4%
	YES HR expert	Count	253	183	436
		% of Total	44.8%	32.4%	77.2%
	not identified	Count	11	14	25
		% of Total	1.9%	2.5%	4.4%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Support for worker during dismissal

			THE DECISION		Total
			employer's favour	worker's favour	
Support for worker	union present	Count	103	70	173
		% of Total	18.2%	12.4%	30.6%
	companion present	Count	29	15	44
		% of Total	5.1%	2.7%	7.8%
	no-one present	Count	72	85	157
		% of Total	12.7%	15.0%	27.8%
	not identified	Count	107	84	191
		% of Total	18.9%	14.9%	33.8%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Business size

			THE DECISION		Total
			employer's favour	worker's favour	
Business size	up to 19 (small)	Count	20	24	44
		% of Total	3.5%	4.2%	7.8%
	20 to 199 workers (medium)	Count	34	29	63
		% of Total	6.0%	5.1%	11.2%
	200 plus workers (large)	Count	234	172	406
		% of Total	41.4%	30.4%	71.9%
	not identified	Count	23	29	52
		% of Total	4.1%	5.1%	9.2%
Total		Count	311	254	565
		% of Total	55.0%	45.0%	100.0%

Industry in which employer operates

		THE DECISION		Total
		employer's favour	worker's favour	
Agriculture	Count	3	4	7
	% of Total	.5%	.7%	1.2%
Mining	Count	13	5	18
	% of Total	2.3%	.9%	3.2%
Manufacturing	Count	59	53	112
	% of Total	10.4%	9.4%	19.8%
Electricity, gas, water & waste services	Count	6	2	8
	% of Total	1.1%	.4%	1.4%
Construction	Count	9	13	22
	% of Total	1.6%	2.3%	3.9%
Wholesale trade	Count	6	4	10
	% of Total	1.1%	.7%	1.8%
Retail trade	Count	23	19	42
	% of Total	4.1%	3.4%	7.4%
Accommodation & food services	Count	17	12	29
	% of Total	3.0%	2.1%	5.1%
Transport, postal and warehousing	Count	73	56	129
	% of Total	12.9%	9.9%	22.8%
Information, media & telecommunications	Count	8	11	19
	% of Total	1.4%	1.9%	3.4%
Financial and insurance services	Count	7	2	9
	% of Total	1.2%	.4%	1.6%
Rental, hiring & real estate services	Count	5	5	10
	% of Total	.9%	.9%	1.8%
Professional, scientific & technical services	Count	2	4	6
	% of Total	.4%	.7%	1.1%
Administrative & support services	Count	13	19	32
	% of Total	2.3%	3.4%	5.7%
Public administration & safety	Count	15	13	28
	% of Total	2.7%	2.3%	5.0%
Education & training	Count	11	6	17
	% of Total	1.9%	1.1%	3.0%
Health care & social assistance	Count	34	21	55
	% of Total	6.0%	3.7%	9.7%
Arts & recreation services	Count	6	4	10
	% of Total	1.1%	.7%	1.8%
Other services	Count	1	1	2
	% of Total	.2%	.2%	.4%
Total	Count	311	254	565
	% of Total	55.0%	45.0%	100.0%

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APPENDIX 7

Hierarchically arranged logistic regression output of unfair dismissal arbitration decisions prepared in SPSS Statistics version 19

Logistic Regression

Notes		
Output Created		18-Jun-2012 16:50:45
Comments		
Input	Data	C:\Documents and Settings\southeyk\My Documents\PHD work\PhD data input into SPSS\DATA INPUT REFINED FOR PHD.sav
	Active Dataset	DataSet1
	Filter	<none>
	Weight	<none>
	Split File	<none>
	N of Rows in Working Data File	565
Missing Value Handling	Definition of Missing	User-defined missing values are treated as missing
Syntax	LOGISTIC REGRESSION VARIABLES ARBITRATION_DECISION /METHOD=ENTER SECTOR INDUSTRY FIRM_SIZE HR_EXPERTISE FORMALITY SUPPORT WORKER_GENDER OCCUPATION SERVICE RECORD STATUS ARBITRATOR_GENDER ARBITRATOR_BACKGROUND ARBITRATOR_EXPERIENCE ARBITRATOR_SENIORITY /METHOD=ENTER PROPERTY_DEVIANCE PRODUCTION_DEVIANCE PERSONAL_AGGRESSION POLITICAL_DEVIANCE SEVERITY WORKPLACE_RELATED PERSONAL_INSIDE COMPLEXITY REMORSE WORKER_ADVOCACY EMPLOYER_ADVOCACY MITIGATING_FACTORS MANAGEMENT_CONTRIBUTED PROBLEMATIC_INVESTIGATION PROBLEMATIC_ALLEGATION PROBLEMATIC_RESPONSE TOO_HARSH ARBITRATOR_GENDER*WORKER_GENDER OCCUPATION*WORKER_GENDER STATUS*WORKER_GENDER MANAGEMENT_CONTRIBUTED*SEVERITY PROBLEMATIC_INVESTIGATION*SEVERITY PROBLEMATIC_ALLEGATION*SEVERITY PROBLEMATIC_RESPONSE*SEVERITY /CONTRAST (SECTOR)=Indicator(1) /CONTRAST (INDUSTRY)=Indicator(1) /CONTRAST (FIRM_SIZE)=Indicator(1) /CONTRAST (HR_EXPERTISE)=Indicator(1) /CONTRAST (SUPPORT)=Indicator(1) /CONTRAST (WORKER_GENDER)=Indicator(1) /CONTRAST (OCCUPATION)=Indicator /CONTRAST (SERVICE)=Indicator(1) /CONTRAST (RECORD)=Indicator(1) /CONTRAST (STATUS)=Indicator(1) /CONTRAST (ARBITRATOR_GENDER)=Indicator(1) /CONTRAST (ARBITRATOR_BACKGROUND)=Indicator(1) /CONTRAST (PROPERTY_DEVIANCE)=Indicator(1) /CONTRAST (PRODUCTION_DEVIANCE)=Indicator(1) /CONTRAST (PERSONAL_AGGRESSION)=Indicator(1) /CONTRAST (POLITICAL_DEVIANCE)=Indicator(1) /CONTRAST (WORKPLACE_RELATED)=Indicator(1) /CONTRAST (PERSONAL_INSIDE)=Indicator(1) /CONTRAST (REMORSE)=Indicator(1) /CONTRAST (WORKER_ADVOCACY)=Indicator(1) /CONTRAST (EMPLOYER_ADVOCACY)=Indicator(1) /CONTRAST (MITIGATING_FACTORS)=Indicator(1) /CONTRAST (MANAGEMENT_CONTRIBUTED)=Indicator(1) /CONTRAST (PROBLEMATIC_ALLEGATION)=Indicator(1) /CONTRAST (PROBLEMATIC_RESPONSE)=Indicator(1) /CONTRAST (TOO_HARSH)=Indicator(1) /CLASSPLOT /PRINT=GOODFIT /CRITERIA=PIN(0.05) POUT(0.10) ITERATE(20) CUT(0.5).	
Resources	Processor Time	00 00:00:00.204
	Elapsed Time	00 00:00:00.204

Case Processing Summary

Unweighted Cases[a]		N	Percent
Selected Cases	Included in Analysis	565	100.0
	Missing Cases	0	.0
	Total	565	100.0
Unselected Cases		0	.0
Total		565	100.0

a. If weight is in effect, see classification table for the total number of cases.

Dependent Variable Encoding

Original Value	Internal Value
employer's favour (claim dismissed)	0
worker's favour (claim upheld)	1

Categorical Variables Codings

		Frequency	Parameter coding								
			(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Industry_collapsed	agriculture, mining	25	.000	.000	.000	.000	.000	.000	.000	.000	.000
	manufacture, wholesaling	122	1.00	.000	.000	.000	.000	.000	.000	.000	.000
	construction, utility supply	30	.000	1.00	.000	.000	.000	.000	.000	.000	.000
	retail	42	.000	.000	1.00	.000	.000	.000	.000	.000	.000
	hospitality, recreation	39	.000	.000	.000	1.00	.000	.000	.000	.000	.000
	transport, postal, warehousing	129	.000	.000	.000	.000	1.00	.000	.000	.000	.000
	communication, technical, professional services	46	.000	.000	.000	.000	.000	1.00	.000	.000	.000
	admin & support services	32	.000	.000	.000	.000	.000	.000	1.00	.000	.000
	public admin & safety	28	.000	.000	.000	.000	.000	.000	.000	1.00	.000
	education, health, social assistance	72	.000	.000	.000	.000	.000	.000	.000	.000	1.00
Length of service	up to 2 years	88	.000	.000	.000	.000	.000	.000			
	2 up to 5 years	117	1.00	.000	.000	.000	.000	.000			
	5 up to 10 years	126	.000	1.00	.000	.000	.000	.000			
	10 up to 15 years	80	.000	.000	1.00	.000	.000	.000			
	15 up to 20 years	36	.000	.000	.000	1.00	.000	.000			
	20 years and over	50	.000	.000	.000	.000	1.00	.000			
	not identified	68	.000	.000	.000	.000	.000	1.00			
Occupation_ collapsed	manager/professional	76	1.00	.000	.000	.000					
	technician/trade	57	.000	1.00	.000	.000					
	community/personal	84	.000	.000	1.00	.000					
	clerical/admin/sales	97	.000	.000	.000	1.00					
	operator/driver/labourer	251	.000	.000	.000	.000					
Business size	up to 19 (small)	44	.000	.000	.000						
	20 to 199 workers (medium)	63	1.00	.000	.000						
	200 plus workers (large)	406	.000	1.00	.000						
	not identified	52	.000	.000	1.00						
Support for worker during dismissal process	union present	173	.000	.000	.000						
	companion present	44	1.00	.000	.000						
	no-one present	157	.000	1.00	.000						
	not identified	191	.000	.000	1.00						
Employer advocacy	self-represented	63	.000	.000	.000						
	Association	49	1.00	.000	.000						
	legal	322	.000	1.00	.000						
	not clear	131	.000	.000	1.00						
Worker advocacy	self-represented	87	.000	.000	.000						
	union	155	1.00	.000	.000						
	legal	208	.000	1.00	.000						
	not clear	115	.000	.000	1.00						
Arbitrator professional background	history of working for management	207	.000	.000							
	history of working for unions	199	1.00	.000							

Categorical Variables Codings

		Frequency	Parameter coding (1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	history shows no strong preference	159	.000	1.00							
HR expertise of employer	NO HR expert	104	.000	.000							
	YES HR expert	436	1.00	.000							
	not identified	25	.000	1.00							
Disciplinary record	unblemished record	218	.000	.000							
	previous offences	207	1.00	.000							
	not identified	140	.000	1.00							
Arbitrator gender	male	405	.000								
	female	160	1.00								
Full-time or part-time	full-time worker	518	.000								
	part-time or casual	47	1.00								
Punishment too harsh	no	450	.000								
	yes	115	1.00								
Worker gender	male	454	.000								
	female	111	1.00								
Property deviance	no	444	.000								
	yes	121	1.00								
Problematic response	no	439	.000								
	yes	126	1.00								
Problematic allegation	no	483	.000								
	yes	82	1.00								
Management contributed	no	506	.000								
	yes	59	1.00								
Ignored mitigating factors	no	532	.000								
	yes	33	1.00								
Worker apology or remorse	no	480	.000								
	yes	85	1.00								
Personal Inside reason	no	87	.000								
	yes	478	1.00								
Workplace related reason	no	335	.000								
	yes	230	1.00								
Production deviance	no	287	.000								
	yes	278	1.00								
Personal aggression	no	373	.000								
	yes	192	1.00								
Political deviance	no	530	.000								
	yes	35	1.00								
Public or private sector	private	483	.000								
	public	82	1.00								

Block 0: Beginning Block

Classification Table[a,b]

	Observed		Predicted: THE DECISION: either in favour of worker or employer — employer's favour (claim dismissed)	worker's favour (claim upheld)	Percentage Correct
Step 0	THE DECISION: either in favour of worker or employer	employer's favour	311	0	100.0
		worker's favour (upheld)	254	0	.0
	Overall Percentage				55.0

a. Constant is included in the model. b. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 0	Constant	-.202	.085	5.731	1	.017	.817

Variables not in the Equation

			Score	df	Sig.
Step 0	Variables	SECTOR(1)	.861	1	.354
		INDUSTRY	6.445	9	.695
		INDUSTRY(1)	.196	1	.658
		INDUSTRY(2)	.326	1	.568
		INDUSTRY(3)	.001	1	.970
		INDUSTRY(4)	.261	1	.609
		INDUSTRY(5)	.161	1	.688
		INDUSTRY(6)	.515	1	.473
		INDUSTRY(7)	2.850	1	.091
		INDUSTRY(8)	.026	1	.872
		INDUSTRY(9)	1.854	1	.173
		FIRM_SIZE	5.223	3	.156
		FIRM_SIZE(1)	.033	1	.855
		FIRM_SIZE(2)	3.915	1	.048
		FIRM_SIZE(3)	2.706	1	.100
		HR_EXPERTISE	6.880	2	.032
		HR_EXPERTISE(1)	6.868	1	.009
		HR_EXPERTISE(2)	1.289	1	.256
		FORMALITY	24.498	1	.000
		SUPPORT	8.936	3	.030
		SUPPORT(1)	2.276	1	.131
		SUPPORT(2)	7.411	1	.006
		SUPPORT(3)	.111	1	.739
		WORKER_GENDER(1)	.164	1	.686
		OCCUPATION	2.251	4	.690
		OCCUPATION(1)	.616	1	.433
		OCCUPATION(2)	1.036	1	.309
		OCCUPATION(3)	.033	1	.856
		OCCUPATION(4)	.579	1	.447
		SERVICE	15.338	6	.018
		SERVICE(1)	.007	1	.933
		SERVICE(2)	1.667	1	.197
		SERVICE(3)	2.854	1	.091
		SERVICE(4)	.080	1	.778
		SERVICE(5)	1.813	1	.178
		SERVICE(6)	9.044	1	.003
		RECORD	12.238	2	.002
		RECORD(1)	3.117	1	.077
		RECORD(2)	3.790	1	.052
		STATUS(1)	.773	1	.379
		ARBITRATOR_GENDER(1)	.000	1	.989
		ARBITRATOR_BACKGROUND	10.594	2	.005
		ARBITRATOR_BACKGROUND(1)	8.574	1	.003
		ARBITRATOR_BACKGROUND(2)	.008	1	.928
		ARBITRATOR_EXPERIENCE	3.558	1	.059
		ARBITRATOR_SENIORITY	.140	1	.708
	Overall Statistics		78.028	38	.000

Block 1: Method = Enter

Omnibus Tests of Model Coefficients

		Chi-square	df	Sig.
Step 1	Step	84.580	38	.000
	Block	84.580	38	.000
	Model	84.580	38	.000

Model Summary

Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	692.916[a]	.139	.186

a. Estimation terminated at iteration number 4 because parameter estimates changed by less than .001.

Hosmer and Lemeshow Test

Step	Chi-square	df	Sig.
1	9.914	8	.271

Contingency Table for Hosmer and Lemeshow Test

		THE DECISION: either in favour of worker or employer = employer's favour (claim dismissed)		THE DECISION: either in favour of worker or employer = worker's favour (claim upheld)		
		Observed	Expected	Observed	Expected	Total
Step 1	1	47	48.378	10	8.622	57
	2	39	42.771	18	14.229	57
	3	44	38.772	13	18.228	57
	4	37	35.977	20	21.023	57
	5	31	33.654	26	23.346	57
	6	32	32.008	27	26.992	59
	7	26	27.430	31	29.570	57
	8	31	23.365	26	33.635	57
	9	15	18.554	42	38.446	57
	10	9	10.091	41	39.909	50

Classification Table[a]

	Observed		Predicted: THE DECISION: either in favour of worker or employer — employer's favour (claim dismissed)	Predicted: THE DECISION: either in favour of worker or employer — worker's favour (claim upheld)	Percentage Correct
Step 1	THE DECISION: either in favour of worker or employer	employer's favour (claim dismissed)	234	77	75.2
		worker's favour (claim upheld)	126	128	50.4
	Overall Percentage				64.1

a. The cut value is .500

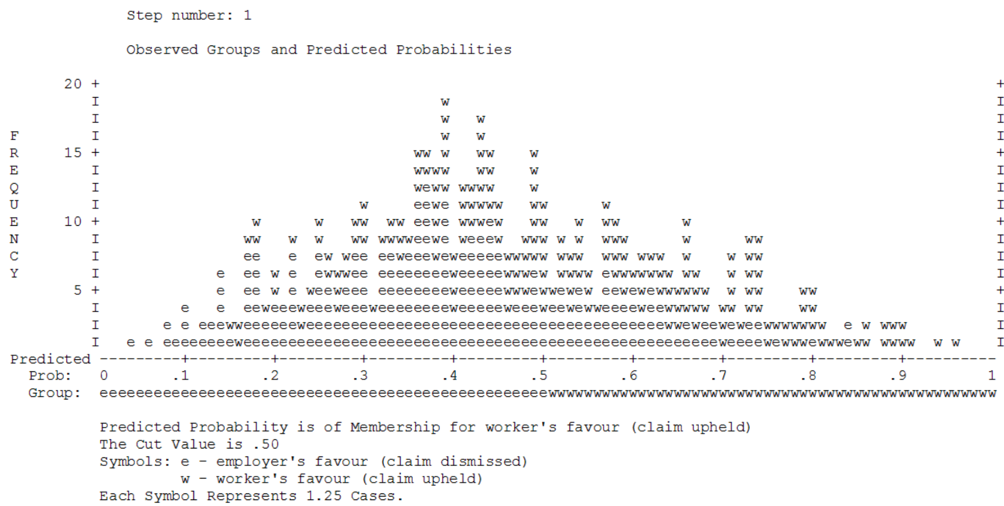
Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1[a]	SECTOR(1)	-.125	.353	.126	1	.723	.882
	INDUSTRY			8.004	9	.534	
	INDUSTRY(1)	.278	.511	.295	1	.587	1.320
	INDUSTRY(2)	.368	.633	.338	1	.561	1.445
	INDUSTRY(3)	.166	.608	.074	1	.785	1.180
	INDUSTRY(4)	-.091	.648	.020	1	.888	.913
	INDUSTRY(5)	.258	.512	.255	1	.614	1.295
	INDUSTRY(6)	.819	.596	1.887	1	.170	2.267
	INDUSTRY(7)	.978	.657	2.219	1	.136	2.660
	INDUSTRY(8)	.823	.701	1.377	1	.241	2.277
	INDUSTRY(9)	.235	.593	.157	1	.692	1.265
	FIRM_SIZE			1.557	3	.669	
	FIRM_SIZE(1)	.112	.452	.061	1	.805	1.118
	FIRM_SIZE(2)	.229	.462	.245	1	.621	1.257
	FIRM_SIZE(3)	.545	.484	1.269	1	.260	1.724
	HR_EXPERTISE			.354	2	.838	
	HR_EXPERTISE(1)	-.074	.364	.041	1	.840	.929
	HR_EXPERTISE(2)	.216	.511	.180	1	.672	1.242
	FORMALITY	-.668	.186	12.827	1	.000	.513
	SUPPORT			2.841	3	.417	
	SUPPORT(1)	-.292	.397	.542	1	.462	.746
	SUPPORT(2)	.314	.280	1.261	1	.261	1.369
	SUPPORT(3)	.184	.242	.576	1	.448	1.202
	WORKER_GENDER(1)	-.109	.265	.168	1	.682	.897
	OCCUPATION			5.733	4	.220	
	OCCUPATION(1)	-.655	.354	3.434	1	.064	.519
	OCCUPATION(2)	-.641	.351	3.331	1	.068	.527
	OCCUPATION(3)	-.337	.361	.871	1	.351	.714

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
	OCCUPATION(4)	-.157	.324	.235	1	.628	.855
	SERVICE			19.310	6	.004	
	SERVICE(1)	-.044	.320	.019	1	.891	.957
	SERVICE(2)	.208	.333	.389	1	.533	1.231
	SERVICE(3)	-.300	.382	.618	1	.432	.741
	SERVICE(4)	.135	.453	.089	1	.765	1.145
	SERVICE(5)	.793	.421	3.544	1	.060	2.209
	SERVICE(6)	-1.076	.407	6.991	1	.008	.341
	RECORD			8.560	2	.014	
	RECORD(1)	-.612	.219	7.792	1	.005	.542
	RECORD(2)	-.511	.257	3.960	1	.047	.600
	STATUS(1)	.389	.384	1.026	1	.311	1.475
	ARBITRATOR_GENDER(1)	.122	.251	.236	1	.627	1.130
	ARBITRATOR_BACKGROUND			11.158	2	.004	
	ARBITRATOR_BACKGROUND(1)	.808	.242	11.122	1	.001	2.244
	ARBITRATOR_BACKGROUND(2)	.287	.258	1.241	1	.265	1.333
	ARBITRATOR_EXPERIENCE	-.104	.075	1.896	1	.169	.901
	ARBITRATOR_SENIORITY	.137	.126	1.174	1	.279	1.147
	Constant	1.168	.785	2.216	1	.137	3.216

a. Variable(s) entered on step 1: SECTOR, INDUSTRY, FIRM_SIZE, HR_EXPERTISE, FORMALITY, SUPPORT, WORKER_GENDER, OCCUPATION, SERVICE, RECORD, STATUS, ARBITRATOR_GENDER, ARBITRATOR_BACKGROUND, ARBITRATOR_EXPERIENCE, ARBITRATOR_SENIORITY.



Block 2: Method = Enter

Omnibus Tests of Model Coefficients

		Chi-square	df	Sig.
Step 1	Step	487.544	31	.000
	Block	487.544	31	.000
	Model	572.124	69	.000

Model Summary

Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	205.372[a]	.637	.852

a. Estimation terminated at iteration number 20 because maximum iterations has been reached. Final solution cannot be found.

Hosmer and Lemeshow Test

Step	Chi-square	df	Sig.
1	3.761	8	.878

Contingency Table for Hosmer and Lemeshow Test

		THE DECISION: either in favour of worker or employer = employer's favour (claim dismissed)		THE DECISION: either in favour of worker or employer = worker's favour (claim upheld)		Total
		Observed	Expected	Observed	Expected	
Step 1	1	57	56.971	0	.029	57
	2	57	56.729	0	.271	57
	3	55	56.062	2	.938	57
	4	52	53.689	5	3.311	57
	5	49	47.689	8	9.311	57
	6	35	32.206	22	24.794	57
	7	6	7.428	51	49.572	57
	8	0	.226	57	56.774	57
	9	0	.000	57	57.000	57
	10	0	.000	52	52.000	52

Classification Table[a]

	Observed		Predicted		
			THE DECISION: either in favour of worker or employer		Percentage Correct
			employer's favour (claim dismissed)	worker's favour (claim upheld)	
Step 1	THE DECISION: either in favour of worker or employer	employer's favour (claim dismissed)	295	16	94.9
		worker's favour (claim upheld)	28	226	89.0
	Overall Percentage				92.2

a. The cut value is .500

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1[a]	SECTOR(1)	1.026	.696	2.173	1	.140	2.789
	INDUSTRY			12.361	9	.194	
	INDUSTRY(1)	2.038	1.559	1.711	1	.191	7.678
	INDUSTRY(2)	2.051	1.846	1.234	1	.267	7.774
	INDUSTRY(3)	1.633	1.604	1.036	1	.309	5.117
	INDUSTRY(4)	-.925	1.881	.242	1	.623	.396
	INDUSTRY(5)	2.710	1.536	3.113	1	.078	15.026
	INDUSTRY(6)	1.791	1.659	1.166	1	.280	5.997
	INDUSTRY(7)	.777	1.736	.200	1	.655	2.175
	INDUSTRY(8)	.000	1.759	.000	1	1.000	1.000
	INDUSTRY(9)	.658	1.627	.163	1	.686	1.930
	FIRM_SIZE			3.698	3	.296	
	FIRM_SIZE(1)	-.874	.986	.786	1	.375	.417
	FIRM_SIZE(2)	.801	.980	.667	1	.414	2.227
	FIRM_SIZE(3)	.643	1.049	.376	1	.540	1.902
	HR_EXPERTISE			1.745	2	.418	
	HR_EXPERTISE(1)	-.085	.828	.011	1	.918	.918
	HR_EXPERTISE(2)	1.390	1.182	1.381	1	.240	4.014
	FORMALITY	-.563	.464	1.469	1	.225	.570
	SUPPORT			7.465	3	.058	
	SUPPORT(1)	-3.518	1.690	4.331	1	.037	.030
	SUPPORT(2)	.581	.619	.882	1	.348	1.787
	SUPPORT(3)	-.266	.579	.211	1	.646	.767
	WORKER_GENDER(1)	1.741	1.279	1.852	1	.174	5.704
	OCCUPATION			5.374	4	.251	
	OCCUPATION(1)	1.703	.854	3.980	1	.046	5.490
	OCCUPATION(2)	.546	.819	.444	1	.505	1.726
	OCCUPATION(3)	1.512	.924	2.679	1	.102	4.537
	OCCUPATION(4)	1.375	.745	3.405	1	.065	3.953
	SERVICE			9.321	6	.156	
	SERVICE(1)	.219	.724	.092	1	.762	1.245
	SERVICE(2)	.790	.682	1.341	1	.247	2.203

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
	SERVICE(3)	-.576	.870	.438	1	.508	.562
	SERVICE(4)	-2.211	1.202	3.381	1	.066	.110
	SERVICE(5)	-.255	.945	.073	1	.787	.775
	SERVICE(6)	.208	.890	.054	1	.816	1.231
	RECORD			.424	2	.809	
	RECORD(1)	-.287	.538	.284	1	.594	.751
	RECORD(2)	-.331	.582	.324	1	.569	.718
	STATUS(1)	-.477	1.123	.180	1	.671	.621
	ARBITRATOR_GENDER(1)	.345	.630	.301	1	.583	1.413
	ARBITRATOR_BACKGROUND			5.594	2	.061	
	ARBITRATOR_BACKGROUND(1)	1.282	.581	4.879	1	.027	3.606
	ARBITRATOR_BACKGROUND(2)	.950	.628	2.293	1	.130	2.587
	ARBITRATOR_EXPERIENCE	-.431	.177	5.905	1	.015	.650
	ARBITRATOR_SENIORITY	.171	.306	.313	1	.576	1.187
	PROPERTY_DEVIANCE(1)	-1.819	.853	4.545	1	.033	.162
	PRODUCTION_DEVIANCE(1)	-2.189	.779	7.898	1	.005	.112
	PERSONAL_AGGRESSION(1)	-2.922	.833	12.314	1	.000	.054
	POLITICAL_DEVIANCE(1)	-1.952	.977	3.989	1	.046	.142
	SEVERITY	-.003	.338	.000	1	.992	.997
	WORKPLACE_RELATED(1)	1.078	.886	1.483	1	.223	2.939
	PERSONAL_INSIDE(1)	.889	.851	1.092	1	.296	2.434
	COMPLEXITY	-1.611	.782	4.239	1	.040	.200
	REMORSE(1)	-.761	.739	1.061	1	.303	.467
	WORKER_ADVOCACY			14.168	3	.003	
	WORKER_ADVOCACY(1)	2.095	.885	5.608	1	.018	8.129
	WORKER_ADVOCACY(2)	2.559	.793	10.418	1	.001	12.925
	WORKER_ADVOCACY(3)	.725	1.008	.517	1	.472	2.065
	EMPLOYER_ADVOCACY			7.864	3	.049	
	EMPLOYER_ADVOCACY(1)	1.270	1.084	1.372	1	.241	3.561
	EMPLOYER_ADVOCACY(2)	-.989	.794	1.551	1	.213	.372
	EMPLOYER_ADVOCACY(3)	-.808	.845	.914	1	.339	.446
	MITIGATING_FACTORS(1)	28.034	4369.130	.000	1	.995	1.496E12
	MANAGEMENT_CONTRIBUTED(1)	6.443	2.740	5.530	1	.019	628.405
	PROBLEMATIC_INVESTIGATION	3.805	1.914	3.949	1	.047	44.906
	PROBLEMATIC_ALLEGATION(1)	1.145	2.000	.328	1	.567	3.142
	PROBLEMATIC_RESPONSE(1)	7.562	2.040	13.745	1	.000	1924.222
	TOO_HARSH(1)	28.313	2330.173	.000	1	.990	1.977E12
	ARBITRATOR_GENDER(1) by WORKER_GENDER(1)	-1.551	1.465	1.120	1	.290	.212
	OCCUPATION * WORKER_GENDER			8.119	4	.087	
	OCCUPATION(1) * WORKER_GENDER(1)	-5.395	2.426	4.946	1	.026	.005
	OCCUPATION(2) by WORKER_GENDER(1)	9.258	25735.685	.000	1	1.000	10486.492
	OCCUPATION(3) by WORKER_GENDER(1)	.986	1.644	.359	1	.549	2.680
	OCCUPATION(4) by WORKER_GENDER(1)	-1.721	1.671	1.061	1	.303	.179
	STATUS(1) by WORKER_GENDER(1)	1.937	1.732	1.251	1	.263	6.935
	MANAGEMENT_CONTRIBUTED(1) by SEVERITY	-.428	.895	.228	1	.633	.652
	PROBLEMATIC_INVESTIGATION by SEVERITY	.177	.639	.077	1	.782	1.193
	PROBLEMATIC_ALLEGATION(1) by SEVERITY	.545	.744	.537	1	.464	1.725
	PROBLEMATIC_RESPONSE(1) by SEVERITY	-1.583	.704	5.054	1	.025	.205
	Constant	-2.198	2.612	.708	1	.400	.111

a. Variable(s) entered on step 1: PROPERTY_DEVIANCE, PRODUCTION_DEVIANCE, PERSONAL_AGGRESSION, POLITICAL_DEVIANCE, SEVERITY, WORKPLACE_RELATED, PERSONAL_INSIDE, COMPLEXITY, REMORSE, WORKER_ADVOCACY, EMPLOYER_ADVOCACY, MITIGATING_FACTORS, MANAGEMENT_CONTRIBUTED, PROBLEMATIC_INVESTIGATION, PROBLEMATIC_ALLEGATION, PROBLEMATIC_RESPONSE, TOO_HARSH, ARBITRATOR_GENDER * WORKER_GENDER , OCCUPATION * WORKER_GENDER , STATUS * WORKER_GENDER , MANAGEMENT_CONTRIBUTED * SEVERITY , PROBLEMATIC_INVESTIGATION * SEVERITY , PROBLEMATIC_ALLEGATION * SEVERITY , PROBLEMATIC_RESPONSE * SEVERITY .

APPENDIX 8

Logistic regression output of POOR_EVIDENCE_OR_REASON # for a dismissal identified by arbitrators prepared in SPSS Statistics version 19

INDEPENDENT VARIABLES	MODEL OUTPUT				
	B	S.E.	Wald	Sig.	Exp(B)
SECTOR (public)	-.310	.542	.326	.568	.734
INDUSTRY:			4.099	.905	
manufacture, wholesaling	.148	.782	.036	.849	1.160
construction, utility supply	.620	.909	.465	.495	1.858
retail	.145	.919	.025	.874	1.156
hospitality, recreation	-.396	1.005	.155	.693	.673
transport, postal, warehousing	.415	.791	.275	.600	1.514
communication, technical, professional ser.	.640	.919	.485	.486	1.896
administration & support services	.900	.982	.841	.359	2.461
public administration and safety	-.050	1.073	.002	.963	.951
education, health, social assistance	.360	.897	.161	.688	1.434
FIRM_SIZE:			5.828	.120	
20 to 199 workers (medium)	.113	.666	.029	.866	1.119
200 plus workers (large)	.427	.648	.434	.510	1.532
not identified	1.349	.682	3.905	.048**	3.852
HR_EXPERTISE:			1.089	.580	
yes, HR expert	-.143	.501	.082	.775	.867
not identified	-.755	.727	1.079	.299	.470
FORMALITY:	-.423	.272	2.421	.120	.655
SUPPORT:			7.500	.058	
companion present	-1.636	.738	4.910	.027**	.195
worker unaccompanied	.285	.432	.435	.510	1.330
not identified	.315	.365	.744	.388	1.370
WORKER_GENDER (female)	.504	.794	.403	.526	1.655
OCCUPATION:			3.807	.433	
manager or professional	.404	.533	.574	.449	1.498
technician or trade	.543	.490	1.227	.268	1.720
community or personal service	.263	.582	.204	.651	1.301
clerical/administration or sales	-.614	.589	1.087	.297	.541
SERVICE:			6.189	.402	
2 up to 5 years	.889	.460	3.731	.053*	2.433
5 up to 10 years	.819	.497	2.714	.099*	2.267
10 up to 15 years	.409	.587	.484	.486	1.505
15 up to 20 years	.264	.706	.140	.709	1.302
20 years and over	.660	.636	1.078	.299	1.936
not identified	.064	.623	.011	.918	1.066
RECORD:			8.001	.018	
previous offences	-.938	.336	7.785	.005**	.391
not identified	-.525	.386	1.855	.173	.591
STATUS (part-time or casual)	.020	.670	.001	.976	1.020
ARBITRATOR_GENDER (female)	-.381	.417	.832	.362	.684
ARBITRATOR_BACKGROUND:			1.756	.416	
Union work background	.077	.362	.045	.831	1.080
No strong preference	.518	.401	1.672	.196	1.679
ARBITRATOR_EXPERIENCE	.049	.115	.178	.673	1.050
ARBITRATOR_SENIORITY	-.246	.197	1.550	.213	.782
PROPERTY_DEVIANCE	-.153	.522	.086	.769	.858

INDEPENDENT VARIABLES	MODEL OUTPUT				
	B	S.E.	Wald	Sig.	Exp(B)
PRODUCTION_DEVIANCE	-.240	.485	.245	.620	.787
PERSONAL_AGGRESSION	.099	.504	.038	.844	1.104
POLITICAL_DEVIANCE	-.680	.713	.911	.340	.507
SEVERITY	-.615	.235	6.861	.009**	.541
WORKPLACE_RELATED	.356	.527	.457	.499	1.428
PERSONAL_INSIDE	.575	.549	1.098	.295	1.778
COMPLEXITY	-.959	.449	4.569	.033**	.383
REMORSE	-.493	.425	1.349	.246	.611
WORKER_ADVOCACY:			13.496	.004	
represented by union	2.028	.641	10.001	.002**	7.601
represented by legal counsel	2.188	.607	12.977	.000**	8.919
representation not clear	1.685	.674	6.252	.012**	5.391
EMPLOYER_ADVOCACY:			3.342	.342	
represented by association	-.291	.626	.217	.642	.747
represented by legal counsel	-.714	.486	2.154	.142	.490
representation not clear	-.913	.552	2.733	.098*	.401
MITIGATING_FACTORS	-2.376	1.623	2.144	.143	.093
MANAGEMENT_CONTRIBUTED	-2.327	1.132	4.223	.040**	.098
PROBLEMATIC_INVESTIGATION	2.388	1.224	3.808	.051*	10.894
PROBLEMATIC_ALLEGATION	-2.376	1.164	4.168	.041**	.093
PROBLEMATIC_RESPONSE	2.014	.964	4.369	.037**	7.494
PUNISHMENT_TOO_HARSH	1.839	.934	3.877	.049**	6.291
female arbitrator * female worker	-1.454	.888	2.680	.102	.234
worker_gender by occupation:			5.204	.267	
female * manager or professional	-1.733	1.271	1.859	.173	.177
female * technical or trade worker	-23.339	27933.0	.000	.999	.000
female * community/personal service	.491	1.049	.219	.640	1.634
female * clerical/admin or sales worker	.959	1.071	.801	.371	2.609
female * part-time or casual worker	.748	1.009	.550	.458	2.114
mitigating_factors * severity	.846	.610	1.923	.165	2.331
management_contributed * severity	.911	.455	4.014	.045**	2.488
problematic_investigation * severity	-.399	.448	.792	.374	.671
problematic_allegation * severity	1.317	.452	8.486	.004**	3.733
problematic_response * severity	-.524	.376	1.936	.164	.592
punishment_ too_harsh * severity	-.406	.360	1.269	.260	.666
Constant	-.599	1.563	.147	.701	.549
Model summary statistics					
-2 log likelihood	399.549				
Cox & Snell R Square	.254				
Nagelkerke R Square	.402				
Goodness of fit statistics	Chi-square		df		Sig.
Hosmer and Lemeshow Test	10.634		8		.223
Classification table	PREDICTED				
Cut value at 0.5	OBSERVED	***No*** *POOR REASON*	***Yes*** *POOR REASON*	*Percentage correct*	
	No *POOR REASON*	432	20	95.6	
	Yes *POOR REASON*	69	44	38.9	
	Overall percentage			84.2	

internal values for the independent variable were 0 = ***no*** POOR_EVIDENCE_OR_REASON (the comparison group) and 1 = ***yes*** POOR_EVIDENCE_OR_REASON (included in the model)

* $p < .1$ ** $p < .05$

^{T} comparison groups for categorical variables in the models: SECTOR = private; INDUSTRY = agriculture, mining; FIRM_SIZE = up to 19 (small); HR_EXPERTISE = No HR expert; SUPPORT = union present; WORKER_GENDER = male; OCCUPATION = operator, driver or labourer; SERVICE = up to 2 years; RECORD = unblemished record; STATUS = full-time worker; ARBITRATOR_GENDER = male; ARBITRATOR_BACKGROUND = management background; WORKER_ADVOCACY = self-represented; EMPLOYER_ADVOCACY = self-represented; all other dummy variables = condition not present

Comment about this model

The Hosmer and Lemeshow goodness of fit statistic showed the desired statistical insignificance, and the *Nagelkerke* R^2 suggests that the model accounted for 40 percent of the variation in cases judged to have terminated an employee for an invalid reason. The classification table suggests the model could accurately predict 84 percent of the outcomes, with it being clearly better at predicting when a poor-evidence-or-reason condition was *not present* with 95 percent accuracy.

The model performed poorly in classifying cases when the condition was present, with it correctly predicting only 39 percent of cases when poor-evidence-or-reason was present.

Using a priori significance level of .05, the results show that the presence of the employer using poor evidence or reason to dismiss the worker, was statistically significantly influenced in the following ways:

1. In a negative direction if the employer permitted the worker to have a ***companion present*** during the investigation and interviews (p = .027; .195 lower odds than those of an unaccompanied worker).

2. In a positive direction if the worker had ***2 to 5 years service*** (p = .053; 2.433 higher odds than those of a worker with less than 2 years service).

3. In a negative direction if the worker had a ***previous offence*** on the record. (p = .005; .391 lower odds than those of a worker with a clean disciplinary record).

4. In a negative direction as the ***severity of the misconduct*** increased. (p = .009; .541 lower odds for each unit increase in the severity of the misconduct – measured on a 1 to 5 scale).

5. In a negative direction as the ***complexity of the employee's explanation*** increased. (p = .033; .383 lower odds for each unit increase in the explanation – measured on a 1 to 3 scale).

6. In a positive direction when the employee engaged ***union advocates*** or ***legal counsel*** to present their claim at the arbitration table. (p = .002 and .000; 7.601 and 8.919 higher odds than those of a worker who self-represents).

7. In a positive direction if the following errors were also detected: ***problematic_ investigation***; ***problematic_response*** and ***punishment_too_ harsh***. (p = .051; .037 and .048; 10.894; 7.494 and 6.291 higher odds than those of a worker where this error was not commitment by management).

8. In a negative direction if the following errors were detected: ***management_ contributed*** and ***problematic_allegation***. (p = .040 and .041; .098 and .093 lower odds than those of a worker where this error was not committed by management).

9. In a positive direction if management, when dealing with more severe acts of misconduct, made the mistake of ***management_contributed*** (p = .045; 2.488 higher odds than acts of lower ***severity*** and where this error was not committed by management).

10. In a positive direction if management, when dealing with more severe acts of misconduct, made the mistake of a ***problematic_allegation*** (p = .004; 3.733 higher odds than acts of lower ***severity*** and where this error was not committed by management).

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APPENDIX 9

Crosstabulations based on SPSS output used in Chapter 7

(Table A9.1)
Worker gender * Severity of misbehaviour Crosstabulation

Gender		Severity of the misbehaviour				Total for gender
		somewhat serious	serious	very serious	extremely serious	
male worker	Count	60	113	192	89	454
	%	13.2%	24.9%	42.3%	19.6%	100.0%
female worker	Count	20	21	52	18	111
	%	18.0%	18.9%	46.8%	16.2%	100.0%
Totals for severity of misbehaviour	Count	80	134	244	107	565
	%	14.2%	23.7%	43.2%	18.9%	100.0%

(Table A9.2)
Worker gender * Managerial error Crosstabulation

Type of error		Gender		Totals for errors
		Male	female	
poor evidence or reason	Count	88	25	113
	%	18.7%	21.4%	19.3%
mitigating factors ignored	Count	27	6	33
	%	5.7%	5.1%	5.6%
punishment too harsh	Count	98	17	115
	%	20.9%	14.5%	19.6%
problematic response	Count	98	28	126
	%	20.9%	24.0%	21.5%
management contributed	Count	50	9	59
	%	10.6%	7.7%	10.0%
problematic support/investigation	Count	48	11	59
	%	10.2%	9.4%	10.0%
problematic allegation	Count	61	21	82
	%	13.0%	17.9%	14.0%
Totals for gender	Count	470	117	587
	%	100.0%	100.0%	100.0%

(Table A9.3)
Occupation* Worker advocacy Crosstabulation

Occupation		Worker advocacy				Totals for occupation
		self-represented	union	legal counsel	not clear	
managerial or professional	Count	13	8	39	16	76
	%	17.1%	10.5%	51.3%	21.1%	100.0%
technician or trade worker	Count	11	16	17	13	57
	%	19.3%	28.1%	29.8%	22.8%	100.0%
community, personal service worker	Count	16	24	29	15	84
	%	19.0%	28.6%	34.5%	17.9%	100.0%
clerical, admin or sales worker	Count	19	17	40	21	97
	%	19.6%	17.5%	41.2%	21.6%	100.0%
operator, driver or labourer	Count	28	90	83	50	251
	%	11.2%	35.9%	33.1%	19.9%	100.0%
Totals for type of advocacy	Count	87	155	208	115	565
	%	15.4%	27.4%	36.8%	20.4%	100.0%

(Table A9.4)
Occupation * Type of misbehaviour Crosstabulation

Occupation		Type of misbehaviour: Personal aggression	Production deviance	Political deviance	Property deviance	**Totals for occupation**
managerial or professional	Count	27	34	10	14	85
	%	14.1%	12.2%	28.5%	11.6%	13.6%
technician or trade worker	Count	16	30	1	15	62
	%	8.3%	10.8%	2.9%	12.4%	9.9%
community, personal service worker	Count	27	48	3	16	94
	%	14.1%	17.3%	8.6%	13.2%	15.0%
clerical, admin or sales worker	Count	26	42	18	23	109
	%	13.5%	15.1%	51.4%	19.0%	17.4%
operator, driver or labourer	Count	96	124	3	53	276
	%	50.0%	44.6%	8.6%	43.8%	44.1%
Totals for type of misbehaviour	Count	192	278	35	121	626
	%	100.0%	100.0%	100.0%	100.0%	100.0%

(Table A9.5)
Public or Private sector * Worker advocacy Crosstabulation

Type of advocacy		Sector: private	public	**Totals for type of advocate**
independent lawyer	Count	167	41	208
	%	34.6%	50.0%	36.8%
union advocate	Count	137	18	155
	%	28.4%	21.9%	27.4%
self-represented	Count	78	9	87
	%	16.1%	11.0%	15.4%
type of advocacy not clear	Count	101	14	115
	%	20.9%	17.1%	20.4%
Totals for sector	Count	483	82	565
	%	100.0%	100.0%	100.0%

(Table A9.6)
Public or Private sector * Managerial error Crosstabulation

Type of error		Sector: private	public	**Totals for errors**
poor evidence or reason	Count	102	11	113
	%	19.6%	16.5%	19.2%
mitigating factors ignored	Count	23	10	33
	%	4.5%	14.9%	5.6%
punishment too harsh	Count	98	17	115
	%	18.8%	25.5%	19.6%
problematic response	Count	118	8	126
	%	22.7%	11.9%	21.4%
management contributed	Count	52	7	59
	%	10.0%	10.4%	10.1%
problematic support/investigation	Count	52	7	59
	%	10.0%	10.4%	10.1%
problematic allegation	Count	75	7	82
	%	14.4%	10.4%	14.0%
Totals for sector	Count	520	67	587
	%	100.0%	100.0%	100.0%