

SOURCES OF PROTECTION AGAINST “WRONGFUL DISCHARGE” IN CANADA

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ABSTRACT

Despite its continuing erosion, the doctrine of “employment-at-will” remains a fundamental tenet of American employment law, although its continuing viability is a matter of some debate. Common law exceptions, and federal and state legislation, are hastening its demise. The contemporary American employment law landscape is a patchwork quilt of *laissez-faire* contract principles, common law exceptions, and *ad hoc* state and federal legislation. By contrast, the doctrine of “unjust dismissal,” or “wrongful discharge,” is well-entrenched in Canadian employment law. Wrongful discharge claims may be advanced under the common law of contract, pursuant to express or implied “just cause” provisions in collective bargaining agreements, or in accordance with the myriad federal and provincial statutory provisions that, in particular circumstances, constrain an employer’s ability to terminate employees. This article examines the “Canadian model” and suggests that it might be used as a springboard for continuing reform in the United States.

Despite its continuing erosion, the doctrine of “employment-at-will” remains a fundamental tenet of American employment law [1, 2]. Under the “at-will” doctrine, an employer may dismiss an employee “. . . for good cause, for no cause or even for cause morally wrong, without being guilty of legal wrong” [3]. Within the United States, Montana stands alone, having legislatively abolished the doctrine in 1987,¹ although a further nine states have introduced similar

¹ A constitutional challenge to the Wrongful Discharge from Employment Act [4] was unsuccessful, see *Meech v. Millhaven West, Inc.* [5].

legislation.² In addition, there exists a patchwork quilt of both statutory and common law exceptions to the at-will rule [2, 7]. Even so, it has recently been estimated that over 65 percent of the U.S. workforce are at-will employees [7].

By contrast, the doctrine of “unjust dismissal,” or “wrongful discharge,” is well-entrenched in Canadian employment law. Wrongful discharge claims may be advanced under the common law of contract, pursuant to express or implied “just cause” provisions in collective bargaining agreements, or in accordance with the myriad federal and provincial statutory provisions that, in particular circumstances, constrain an employer’s ability to terminate employees. Examples of the latter statutory provisions include, *inter alia*, federal and provincial human rights codes, provincial workers’ compensation and labor standards acts, and federal and provincial labor relations legislation.³

In Canada, the nature of the employment relationship (e.g., collective versus individual employment contracts) determines the type of wrongful discharge action that may be advanced. The governing jurisdiction (e.g., provincial versus federal; private sector versus public sector) determines the forum as well as the available remedies. In the nonunion sector, employees must bring their actions either under the common law or pursuant to an applicable employment-related statute. In unionized environments, the law of wrongful discharge is essentially the domain of third-party arbitrators who apply generally acknowledged arbitral principles. This article first briefly discusses the law of wrongful discharge as it has been developed by Canadian arbitrators and legislators, and then more fully reviews the common law. Where appropriate, the extant Canadian and American positions are compared and contrasted.

WRONGFUL DISCHARGE AND THE RIGHTS ARBITRATION PROCESS

In marked contrast to the United States, the Canadian unionized sector is relatively robust. The right to grieve an “unjust discharge” is a significant substantive

² The states are California, Colorado, Connecticut, Michigan, New Jersey, Pennsylvania, Vermont, Washington, and Wisconsin. On December 31, 1990 the National Conference of Commissioners on Uniform State Laws proposed a further draft of an “Employment Termination Act” that, *inter alia*, requires all employers to have “good cause” prior to discharging any employee, and establishes arbitration as the preferred dispute resolution mechanism [6].

³ Under sections 91 and 92 of the Canadian constitution (The Constitution Act, 1982), legislative powers are apportioned between the federal government (section 91), and the ten provincial governments (section 92). In the realm of employment relations (a generic category including, *inter alia*, collective bargaining, human rights, and employment standards legislation) both the federal and the provincial governments have legislative authority—the federal government regulates employment relations for federal government employees and those who are employed in federally regulated sectors such as interprovincial transportation, broadcasting, and banking; provincial governments regulate their own civil service as well as most private sector employees. It has been estimated that approximately 90 percent of the Canadian workforce is subject to provincial, not federal, regulation [8].

entitlement protecting about one in three Canadian employees, while only slightly better than one in ten American employees enjoys a similar protection.⁴ In both Canada and the United States, the governing principle in discharge grievance arbitration is that of “just cause.”

Just Cause

Virtually all collective bargaining agreements contain a “just cause” provision; i.e., the employer cannot discipline or discharge a bargaining unit employee without a legally defensible reason (effectively obviating any notion of an “employment-at-will” relationship within the unionized sector). Even in the unlikely event that such a clause does not appear in a collective agreement, most arbitrators will “rectify” the agreement to incorporate a just cause provision [13]. While arbitrators concede an employer’s right to discipline and discharge employees, this right is tempered by a requirement that any discipline, up to and including discharge, be administered only for “just cause.” What amounts to just cause depends on a variety of circumstances. In *Wm. Scott & Company Ltd.* the British Columbia Labour Relations Board postulated a number of essential criteria [14]:

1. How serious is the immediate offense of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
2. Was the employee’s conduct premeditated, or repetitive; or, instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
3. Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
4. Has the employer attempted earlier and more moderate forms of corrective discipline for this employee that did not prove successful in solving the problem (for example, for persistent lateness or absenteeism)?
5. Is the discharge of this individual employee in accord with the consistent policies of the employer, or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

These, or similar, criteria are applied by the overwhelming majority of arbitrators in determining whether a particular termination is permissible under the “just cause” provision of a collective bargaining agreement. In discipline and

⁴ Current estimates of the United States’ private sector union density rate (union members as a percentage of the nonagricultural workforce) fall into the 12-15 percent range; the 1988 estimate by the U.S. Bureau of Labor Statistics was 12.9 percent [9]. The picture in the U.S. public sector is somewhat brighter: the density rate is about 35 percent [10]. By contrast, the Canadian private sector union density rate stood at 36.6 percent in 1988 [11], and the Canadian public sector union density rate hovers near 100 percent [12].

discharge grievances, the burden of proving just cause lies with the employer because “. . . the employer alone knows the reason for the imposition of the penalty, and . . . the employee should not be obliged to have to prove that the employer did not have just cause for his actions” [13, p. 344].⁵ Regarding the quantum of proof, most Canadian arbitrators will apply the normal civil burden: proof on a balance of probabilities, although some arbitrators will require a somewhat higher burden (typically styled “clear and convincing evidence”) in discharge cases where the alleged conduct is most serious (say, in case of theft or on-the-job drug abuse) [13, pp. 347-8].⁶

However, the contractual protection that unionized employees have against arbitrary discharge is not absolute. While, as a matter of common law, an employer’s straitened financial circumstances (sometimes referred to as “economic necessity”) does not provide just cause for termination [16, 17], unions have typically bargained away this common law right in exchange for some control over the process of employee layoffs.⁷ Accordingly, as long as the employer follows the process mandated by the collective agreement (usually a seniority or a hybrid seniority-ability procedure), employees who are permanently laid off do not have any remedy beyond what is contained in the collective bargaining agreement.⁸

Arbitral Remedies

Arbitrators typically direct the employer to reinstate (with full back pay including the value of any forgone benefits) a wrongfully-discharge bargaining unit

⁵ This principle can be traced to the latin maxim *Ei incumbit probatio, qui dicit, non qui negat* (“The proof lies upon him who affirms, not upon him who denies”).

⁶ Empirical evidence from the United States suggests that American arbitrators follow similar patterns [15].

⁷ While some collective bargaining agreements contain severance pay provisions, many do not. Even when agreements contain severance pay clauses, such severance payments frequently fall below what would otherwise be payable as a matter of common law. For example, the most recent Newfoundland nurses’ contract mandates severance pay only after at least nine years’ continuous service, and then the severance pay formula is capped at twenty weeks. By contrast, a senior level private sector nurse pursuing a wrongful discharge claim in the common law courts could expect to receive severance pay ranging from twenty-five to fifty weeks’ pay [18].

⁸ Recent statistics (as of mid-June, 1991) provided to the author by Labour Canada, based on a national sample of 1240 collective bargaining agreements, indicate that only 55 percent of collective agreements contain severance pay provisions. Further, the necessary preconditions for the payment of severance pay often are quite restrictive; e.g., 70 percent of the agreements that contain severance pay provisions do not cover layoffs due to technological change; 84 percent do not apply in the case of a plant closure; and 40 percent do not apply in the case of an ordinary layoff due to lack of work. Nor are these severance pay provisions particularly generous—about one half of the severance pay provisions mandate severance pay based on a formula of one week’s pay for each year’s service; only 6 percent of the plans provide severance pay at a level of three week’s (5%) or more (1%) pay per year of service.

employee. Thus, the cost to the employer will be principally determined by the time interval from the initial termination to the date of the arbitrator's award. Recent evidence from both Canada and the United States suggests that grievance arbitration is no longer the expeditious and inexpensive process envisioned by its original proponents. The average time from initial filing of the grievance to delivery of the arbitrator's award now stands at about one year in both Canada and the United States [19]. Within Canada, I would estimate that an "average" discharge arbitration entails direct costs (arbitrator and counsel fees) of not less than five thousand dollars. However, unlike the situation faced by nonunion employees, the expenses associated with pursuing the claim are usually borne by a third party (the union), not by the individual employee.

Arbitrators frequently order that otherwise accrued back pay be reduced to the extent of any outside earnings of the employee prior to his or her reinstatement.⁹ Such an order is consistent with an employee's common law duty to mitigate—in essence, to make all reasonable efforts to secure new comparable employment. Accrued back pay will be reduced if the terminated employee has failed to properly mitigate his or her damages. At the present time, Canadian common law, despite some flirtation with the notion of "near cause,"¹⁰ does not allow evidence of employee misconduct, which by itself does not amount to just cause, to be used as an "offset" against damages that would otherwise be awarded [18, 21]. However, arbitrators routinely reinstate employees without full back pay on the basis that the misconduct is worthy of censure but not necessarily discharge [22-24]. Empirical evidence suggests that American arbitrators espouse a similar view [25-28].¹¹

But it should be noted that reinstatement often proves to be a less than fully satisfactory remedy from the grievant's point of view. Professors Ponak and Sahney examined the post-reinstatement experience of thirty-five grievants from the province of Alberta [24]. About 37 percent of the reinstated grievants chose not to return to work, perhaps reflecting, in part, the experience of those grievants who did return to work—less than four years later, over one third of the reinstated grievants were no longer employed by the organization. Nor are these data unique to Canada; a study conducted by Professor Arthur Ross found that in a sample of

⁹ American arbitrators also generally acknowledge an employee's duty to mitigate [20].

¹⁰Where there has been substantial misconduct that nevertheless falls short of just cause, the principle of 'near cause' is that the period of reasonable notice should be reduced [18, pp. 59-60].

¹¹A more recent empirical study of substance abuse discharge arbitrations in the United States found that grievants were reinstated without full back pay in 7 percent of the drug ($N = 102$) and in 50 percent of the alcohol cases ($N = 43$). The mean loss of back pay was 2.4 months in the drug cases, and 7.3 months in the alcohol cases [29].

123 grievants who had been discharged and subsequently reinstated, about half subsequently quit or were once again terminated by the employer [30]. Similarly, in a study of the reinstatement experience of New York teachers, about one third of those reinstated subsequently left their districts' employ, voluntarily or involuntarily [31].

STATUTORY PROTECTIONS AGAINST WRONGFUL DISCHARGE

The federal parliament and the ten provincial legislatures have all enacted laws that, to a greater or lesser degree, protect employees against wrongful discharge. Some enactments are of general application to a specific group of employees, while others apply to most employees, but only in specific circumstances. Examples of the former include section 240 of the Canada Labour Code [32] and provincial employment standard acts;¹² examples of the latter include the protections for labor organizers found in labor relations laws, and employment discrimination provisions found in human rights codes. Some of these legislative protections are outlined below.

The Canada Labour Code

Section 240 of the Canada Labour Code protects certain nonunion employees¹³ within the federal government's jurisdiction against unjust dismissal.¹⁴ Employees claiming unjust dismissal can proceed through an "adjudication" process akin to third-party rights arbitration under collective bargaining agreements.¹⁵ As in discharge arbitration, the adjudicator has the statutory right to reinstate the employee, although most frequently the adjudicator opts for a

¹²Every Canadian province has enacted employment standards legislation (typically styled the Employment or Labour Standards Act). These laws establish, *inter alia*, hours of work, minimum vacation entitlements, wage rates, overtime provisions, parental leave and pay equity programs. Additionally, most laws also mandate minimum notice provisions in the event of a discharge without just cause. The Quebec and Nova Scotia statutes are unique in that, as is the case under the Canada Labour Code, certain nonunion employees may be reinstated by a Labour Standards Tribunal in the event of a "wrongful discharge."

¹³"Managers" are excluded from the unjust dismissal provisions of the Act, *cf.* section 167(3) [32].

¹⁴Section 240(1) provides: "Subject to subsections (2) and 242(3.1), any person (a) who has completed twelve consecutive months of continuous employment by an employer, and (b) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust." [32].

¹⁵For further background information regarding section 240 of the Canada Labour Code [33-36]. The unjust dismissal provisions in the Canada Labour Code essentially mirror those of the "Employment Termination Act" recently proposed by the U.S. National Conference of Commissioners on Uniform State Laws.

damages award.¹⁶ According to a study conducted by Professor Genevieve Eden [33], complainants themselves would appear to prefer an award of damages¹⁷ to reinstatement.¹⁸

Labor Standards Legislation

The various provincial labor standards laws establish minimum notice periods to which employees are entitled in the event of their termination without just cause. Under these enactments, the employer can either give the requisite notice, or pay an equivalent amount of severance pay in lieu of notice. In Ontario, the severance pay obligation depends on both the employee's tenure and the organization's size.¹⁸

¹⁶Section 242(4) of the Canada Labour Code provides: "Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person; (b) reinstate the person in his employ; and (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal."

Professor Eden statistically analyzed the entire population of section 240 cases from its enactment in 1978 to March 31, 1989 ($N = 503$) [33]. Missing information reduced the useable sample to $N = 395$. In the first few years following the law's enactment, adjudicators frequently ordered reinstatement in cases of unjust discharge; more recently, that trend has been significantly reversed. In the first seven years of the law's regime, adjudicators ordered reinstatement about as often as they ordered compensation (52% versus 48%); from 1986 to 1988, however, adjudicators reinstated, respectively, only 36 percent, 25 percent, and 16.7 percent of the unjustly discharged complainants.

In 1989 and 1990, a total of 115 "unjust dismissal" cases were decided under the Canada Labour Code; the complainant was successful in sixty-two cases (or 53.9%). Both complainants and adjudicators demonstrated a continuing preference for monetary awards rather than reinstatement, although the dramatic trend noted by Professor Eden for the period 1986 to 1988 appeared to reverse course in 1989 and 1990. Of the sixty-two successful complainants, fourteen specifically waived any claim to reinstatement, and in another twenty-three cases the adjudicator refused to reinstate the employee although reinstatement had been sought (awarding damages instead). Overall, in twenty-four of the sixty-two cases (39%) the adjudicator ordered reinstatement; in the remaining cases a monetary award was given [37, 38].

¹⁷The mean award in Eden's sample was approximately five months' pay and benefits. In the 1989-90 sample, the mean monetary award was 4.7 months' notice (standard deviation = 4.6 months); the notice awards ranged from one week to nineteen months.

¹⁸This preference for an award of damages in favor of reinstatement may reflect the average employee's post-reinstatement experience that was originally noted by Arthur Ross [30]. However, in recessionary periods, when unemployment rises, grievants may prefer reinstatement because alternative employment may not be as readily available. This factor may explain the "reversal" noted in the 1989-90 sample of the "section 240" Canada Labour Code adjudications, *cf* footnote 16.

¹⁹The Ontario Employment Standards Act provides that wrongfully discharged employees (i.e., those discharged without just cause) with five or more years' service, employed by an employer whose annual payroll is at least \$2.5 million, are entitled to severance pay based on a formula of one week's regular pay for each year of service to a maximum of twenty-six weeks; if these threshold requirements are not met, then substantially lesser notice periods will apply.

Generally speaking, the basic notice periods are not overly generous and, as noted, are statutory minimums—the common law may impose a greater obligation [17, p. 133]. The mandated notice provisions typically range from one to six or eight weeks, depending on the employee's length of service.²⁰ Six provinces²¹ mandate somewhat longer notice periods in the case of "group terminations";²² i.e., terminations involving a threshold number of employees (frequently fifty employees).²³ It should also be noted that notice provisions established by employment standards legislation do not apply to certain employees, in which case reasonable notice is determined solely by the common law.²⁴ However, most excluded employees would have a superior remedy available at common law in any event, and thus they endure no real hardship by virtue of their exclusion from the legislation.

Other Statutory Provisions

In addition to the foregoing statutory protections, which are of a more general application, there are a number of specific statutory prohibitions against employee discharges in particular circumstances. All Canadian collective bargaining statutes protect union organizers and employees engaging in other lawful union activities such as strikes and picketing. If an employee is terminated for union activity, the labor relations board can determine that an unfair labor practice has been committed and order the reinstatement of the employee with full back pay.²⁵

²⁰The statutory notice provisions are summarized in [39]. By way of brief summary, the statutory maximums (and the requisite tenure) are as follows: Alberta—eight weeks (10 years); British Columbia—eight weeks (8 years); Manitoba—one pay period (2 weeks); New Brunswick—four weeks (5 years); Newfoundland—two weeks (2 Years); Nova Scotia—eight weeks (10 years); Ontario—eight weeks (8 years); Prince Edward Island—one week (3 months); Quebec—eight weeks (10 years); Saskatchewan—eight weeks (10 years).

²¹Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, and Quebec.

²²Statutory notice provisions in the case of group terminations are usually based on a sliding scale depending on the number of employees involved. For example, in Manitoba, the employer must give ten weeks' notice in the case of fifty to 100 employees, fourteen weeks' notice in the case of 101 to 300 employees, and eighteen weeks notice in the case of 301 or more employees.

²³These provisions are directed at plant closures, and thus are conceptually similar to the plant closing legislation signed into law in the United States on August 4, 1988 by then-President Reagan (the Worker Adjustment and Retraining Notification Act, generally known as the "WARN" law) [40]. For a very good summary of this legislation see [41].

²⁴Precisely who is excluded from the ambit of employment standards legislation varies from province to province, although the Newfoundland law is reasonably representative: ". . . [employee] does not include . . . an employee qualified in or training for qualification in and working for an employer in the practice of (i) accountancy, architecture, law, medicine, pharmacy, professional engineering, surveying, teaching, veterinary science, and (ii) such other professions and occupations as may be prescribed . . ." [42].

²⁵The Newfoundland Labour Relations Act, S.N. 1977, c. 64, as amended, is typical in this regard. Section 24(1)(a) and (b) create an employer unfair labor practice for refusing to employ or otherwise discriminating against a person because of his or her union activity. Section 119(5) gives the Labour Relations Board the authority to reinstate with full back pay or otherwise compensate an employee who has been terminated, contrary to section 24. United States labor laws impose similar restrictions [43].

Generally speaking, Canadian workers' compensation and occupational health and safety legislation create "whistleblower" protections (including the right to reinstatement and/or an award of compensatory damages) for employees who are terminated in retaliation for asserting their rights or for filing claims under these acts.²⁶ The various Canadian federal and provincial human rights codes also create an employer liability, and perhaps more importantly, an expeditious administrative remedy²⁷ for employees who are terminated for reasons of race, gender, age, marital status, religion, or physical mental disability.²⁸ Although human rights codes are intended to apply in a number of contexts, it seems clear that the great bulk of human rights complaints are employment-related.²⁹

WRONGFUL DISCHARGE AND THE COMMON LAW

Canadian common law does not recognize, except in a few limited contexts,³⁰ the doctrine of employment-at-will. Employees cannot be lawfully dismissed at the caprice of their employers. However, unless their wrongful discharge claims can be brought within a particular statutory provision, the actions of nonunionized employees must be advanced under the rubric of what was once known as the law of master and servant. This latter term has fallen into general disuse, but many of the basic principles have survived relatively intact.

²⁶E.g., sections 47-50 of the Newfoundland Occupational Health and Safety Act [44]. For a case example, see *Crossman v. Nova Scotia Textiles Ltd.* [45].

²⁷In many respects, human rights codes do not create any new substantive legal rights. The termination of an employee because of, say, gender, is undoubtedly actionable at common law. However, common law remedies are expensive to access and slow in resolution; frequently, the damages that might be awarded (especially for "lower-level" employees) are substantially offset by the legal costs involved in pursuing the claim. Additionally, many employees may fear a "blacklisting" effect such that they will not be able to secure new employment as long as their lawsuit is outstanding. Human rights codes offer a cost-free, expeditious alternative to the common law; as well, unlike in the common law courts, reinstatement is an available remedy.

²⁸United States statutes, at both the federal and state levels, frequently establish similar protections.

²⁹E.g., the Newfoundland Human Rights Commission reports that in 1988, 1989, and 1990, employment-related complaints comprised 55 percent, 80 percent, and 81 percent, respectively, of the Commission's total case load [46].

³⁰Certain senior Crown officials are said to be employed "at pleasure" and therefore are, in effect, at-will employees, but *cf. Hache v. Province of New Brunswick* [47]. Probationary employees are at-will employees during the currency of the probationary period [48]. It is, of course, open to the parties to expressly negotiate an "at-will" employment contract, but the courts have generally been reluctant to enforce such provisions, and generally construe such terms very strictly against the employer under the *contra proferentum* doctrine [49]. Employment contracts of a fixed duration terminate by operation of law at the end of the term (thus there is no need to give any notice), but should the employment relationship continue past the fixed termination date, the courts have held that a new employment contract has been entered into (in effect, a "novation" has occurred); one containing an implied "reasonable notice" term [18, pp. 61-67, 50].

Under the law of master and servant, the employee is taken to have surrendered certain prerogatives to his or her employer. For example, the employee must not neglect his or her duties, must obey all reasonable employer directions, and must not place him or herself in a position of conflict *vis-a-vis* the employer's interests [51, 52]. The employee also owes the employer duties of honesty, fidelity, and competence. Should the employee fail to meet these employment obligations, the employer is entitled to unilaterally and summarily terminate the employment contract. In effect, the employer would have "just cause" to terminate the employee. Further, while such actions are exceedingly rare, the employer may also be entitled to claim damages against the defaulting employee.³¹

In the case of an indefinite hiring (perhaps the most usual employment arrangement), either party is free to unilaterally conclude the contractual relationship by giving the other party "reasonable notice" of the impending dissolution. It is only when the employment relationship is terminated by one or the other party without giving "reasonable notice" that a potential wrongful discharge claim arises. A unilateral termination of the employment relationship *per se* is not a legal wrong; rather it is the concomitant failure to give "reasonable notice" that invokes potential liability. Further, employers can avoid liability, despite having failed to give reasonable notice, by paying to the employee severance pay equivalent to the total compensation that would otherwise have been earned over the course of the reasonable notice period. Thus, common law wrongful discharge actions are typically of two types: first, a termination, allegedly for cause, where no cause may in fact exist; or second, the employee is terminated admittedly without cause, but the notice given, or the severance pay tendered in lieu of notice, is allegedly insufficient. There is also a third class of actions, namely "constructive dismissals"—here the normal situation is reversed; rather than the employer terminating the employee, the employee, in effect, unilaterally terminates the employment contract. Each category will be discussed in turn.

Just Cause

In the case of a discharge allegedly for cause, the threshold question is whether or not the employer had legal cause to terminate the agreement. To a great extent, prevailing notions of "just cause" in grievance arbitration have been adopted by the common law courts. Employee conduct such as insubordination, conflict of interest, theft or other serious instances of dishonesty, and willful disobedience of an employer's reasonable work rules or policies are lawful justifications for an employee's termination. Further, incompetence in the carrying out of employment

³¹Such actions are often brought by employers against current or former employees for breach of the employee's duty of fidelity—usually an alleged disclosure of confidential information to third parties. In most cases, these actions are settled very quickly upon the hearing of an interlocutory (or preliminary) application for injunctive relief.

duties can also be considered “just cause,” although proving employee incompetence sufficient to support a discharge can be a very onerous task.³²

If an employer has just cause to terminate the employee, there can be no issue of “wrongful discharge.” In such cases, the employer is fully within its legal rights to summarily terminate the employee without any further liability beyond accrued pay and/or benefits. The employer, however, must act promptly once it has in its possession sufficient evidence to support a “just cause” termination. Undue delay may amount to a condonation of the employee’s misconduct, in which case the employer may lose its extant right to terminate the employee [17, 18, pp. 36-39, 55, 56].

Reasonable Notice

It is not correct to say that, in the absence of just cause, an employer cannot lawfully terminate an employee. Quite obviously, unless we are prepared to countenance involuntary servitude, the absence of express dissolution provisions in employment contracts does not mean that such contracts cannot be terminated unless the parties mutually concur. Canadian common law courts, relying on fundamental principles of contract law, have developed the concept of “reasonable notice.” When parties to a contract (and the employment relationship is understood to be essentially contractual in nature), do not *ex ante* prescribe what notice one party is required to give the other in order to terminate the contract, the law will imply a notice provision in order to give the contract “business efficacy.” An employer is free to unilaterally terminate an employment contract, provided that “reasonable notice” of the impending termination, or severance pay in lieu thereof, is given, and further subject to any statutory prohibition (e.g., the termination is based on, say, race, or lawful union activity). If the advance notice given is “reasonable” in all the circumstances, the employer incurs no further liability. Of course, most employers, for pragmatic reasons of business efficacy, prefer not to give advance notice, opting for severance payments instead.

Constructive Dismissal

There is also another line of wrongful discharge litigation, namely, the “constructive dismissal” cases.³³ It must be remembered that the employment relationship is essentially contractual in nature. Under the ordinary rules of contract, if one party fails to meet its fundamental obligations to the other party under the agreement, the party not in default may elect to terminate the contract. In effect, the defaulting party’s repudiation releases the nondefaulting party from any

³² As it is in arbitration [53]. The principles governing a dismissal for incompetence are set out in *Woodward v. Sound Insight Ltd.* [54].

³³ A similar doctrine has been accepted by American arbitrators and the U.S. federal courts in Title VII litigation [57, 58].

further contractual obligation. Of course, the party not in default can then bring an action for damages for breach of contract.³⁴ Constructive dismissal, then, is simply an application of the doctrine of repudiation within the context of employment contracts. If the employer unilaterally changes the employment “bargain” in some fundamental fashion, the employee may elect to treat such a “repudiation” as a constructive dismissal and consequently terminate the employment contract (i.e., quit), and bring an action for damages for breach of contract [60, 61]. Assuming that there has been a sufficiently fundamental unilateral alteration in the terms and conditions of employment, the court will then proceed to assess damages in accordance with the usual “reasonable notice” criteria. As always, if the employer had “just cause” to unilaterally alter the employment bargain (e.g., a disciplinary demotion), then no issue of constructive dismissal arises [17, pp. 47-64, 18, pp. 17-27, 62].

Lately there has been an interesting development in this area of the law. The Ontario Court of Appeal has recently held that an employee *may* be obliged, despite being “constructively” dismissed, to continue working as a way of mitigating his or her damages. The court stated that if there is little or no change in the salary and benefits offered, no undue acrimony between the parties, and if it would not be humiliating or demeaning for the plaintiff to continue, the duty to mitigate obliges the employee to accept the changed employment circumstances while seeking new employment elsewhere [63]. Should this doctrine take root, it raises an interesting employment policy issue. The constructively dismissed employee would be placed in the somewhat untenable position of continuing the employment relationship, while at the same time pursuing a damages claim against the employer. If, for example, the employee is a key employee or a senior officer, at least the appearance of a conflict of interest may arise. Surely this is a most problematic outcome from a human resources management perspective.

Calculating Reasonable Notice

Once it has been determined (or it has been admitted) that a particular termination (or constructive dismissal) was without “just cause,” the court must turn its attention to the issue of “reasonable notice.” The court must determine the appropriate notice period and then assess damages accordingly (reflecting the value of foregone pay and benefits during the “reasonable notice” period). If severance pay in lieu of notice was tendered, the issue is whether the proffered severance pay was legally sufficient. As is always the case when one seeks damages for breach of contract, the wrongfully discharged employee has a duty to mitigate his or her loss. The dismissed employee must make all reasonable efforts to secure

³⁴The law of repudiation is succinctly set out in *Anson's Law of Contract* [59].

comparable employment; if the individual fails in this regard, the damages that would otherwise have been payable can be reduced [17, ch. 9, 18, pp. 127-132, 64].

The relevant notice period is determined by an *ex post facto* examination of what "notice" should have been given to the employee at the time of his or her discharge. Canadian common law courts have adopted a "sliding scale" approach to the determination of "reasonable notice," taking into account a number of factors including, *inter alia*, the employee's relative age, tenure and position within the organization, precontractual representations, and the scope and relative vitality of the labor market at the time of termination [65]. The current upper limit of "reasonable notice" would appear to be about twenty-four months [66], with most middle-level managers securing awards in the twelve-to-eighteen-month range [67].

Professors Steven McShane and David McPhillips have empirically examined the separate impact of those factors identified by the common law courts as being most important [68]. They analyzed a sample of 102 British Columbia wrongful discharge cases, all decided during the period between January, 1980 and April, 1986. Using a multivariate statistical technique, "multiple linear regression," these researchers were able to isolate the independent effect of each factor on the quantum of notice specified by the court. Six factors were found to be most important, namely: the employee's age, tenure, job status and salary, the state of the labor market at the time of discharge, and the employee's costs incurred as a result of accepting the employment offer.³⁵ The plaintiff's gender was not a significant factor in the determination of reasonable notice.³⁶ McShane and McPhillips also identified an upward trend in the notice awards over the six-year period in question.³⁷ Overall, their linear model was able to explain about 69 percent of the variance in the respective notice periods awarded in the 102 cases—a very powerful result in the context of most social science research.

Canadian wrongful discharge awards are exceedingly conservative by U.S. standards. A Rand Institute study of 120 unjust dismissal lawsuits tried by California juries between 1980 and 1986 showed that the employee succeeded in nearly 70 percent of the cases, recovering an average award of nearly \$650,000, although on appellate review this average fell to about \$300,000 [72]. Similarly,

³⁵The practical import of McShane and McPhillips' results can be determined by assessing the incremental impact based on the mean for each variable. For example, the plaintiffs' mean age was forty-four years; approximately three additional months' notice were awarded for each extra ten years' age. The average tenure was about ten years—for each five years' additional service the court awarded 1.5 extra months' notice. Similarly, higher status and more highly-paid employees were awarded longer notice periods. Tight labor markets and high initial employment costs were also positively associated with longer notice periods.

³⁶This finding is at odds with a string of studies concerning gender effects in grievance arbitration conducted by Professor Brian Bemmels [69-71].

³⁷The average notice award increased at a rate of about 4 percent per annum.

in a nationwide study of 260 cases decided between 1986 and 1988, the average trial award was approximately \$600,000 [73].

SUMMARY

The right to challenge an allegedly “wrongful discharge” is enjoyed by almost all Canadian employees, irrespective of their employer or employment status. The American concept of “employment-at-will” has little relevance within Canada. Absent specific contractual terms that effectively establish an “at-will” employment relationship or otherwise permit the employer to unilaterally terminate the employment contract, employers must give employees reasonable notice (or severance pay in lieu thereof) of their intended discharge. The one prominent exception is when the employer has “just cause” to terminate (the proof of which rests on the employer) in which case no notice whatsoever need be given.

Unionized employees (about one third of the Canadian workforce) can grieve allegedly unjust discharges pursuant to the “just cause” provisions contained within their collective agreements—arbitrators have the jurisdiction to order reinstatement, or a monetary award, as they think best. A much narrower class of nonunionized employees can seek reinstatement or a monetary award pursuant to the adjudication provisions of the Canada Labour Code.

Nonunionized employees have other remedies open to them. Most frequently, wrongfully terminated (or constructively dismissed) nonunion employees will bring a common law action for damages for breach of contract. Such actions (excluding “constructive dismissals”) are principally of two types: breach of contract by reason of a failure to give “reasonable notice,” or alternatively, an allegation that the proffered severance pay in lieu of notice was insufficient as a matter of law. There are also particular statutory provisions that protect, in particular circumstances, employees against discharge (e.g., in the case of a retaliatory termination for filing a workers’ compensation claim). Although reinstatement is not generally available as a matter of common law [74-75]³⁸, administrative tribunals such as labor relations boards and human rights commissions, typically can order the reinstatement of a terminated employee.

There also appears to be a recent trend in Canadian common law to expand the types of claims that can be advanced within the employment arena. Canadian courts have now acknowledged that punitive damages, traditionally unavailable in most breach of contract claims, can be awarded in appropriate cases [76, 77]³⁸. Tort claims such as conspiracy to interfere with contractual relations [78], mental distress [76] and retaliatory discharge [80] are gaining a foothold in the common law, and it would appear that administrative tribunals are following suit.

³⁸*Vorvis* [76] is the subject of a case comment by Bruce Feldthusen [79].

Although the "at-will" doctrine remains a part of U.S. employment law, its continuing viability is a matter of some debate. Common law exceptions and, in some cases, federal and state legislation, are hastening its demise. The contemporary American employment law landscape is a patchwork quilt of *laissez-faire* contract principles, common law exceptions, and *ad hoc* state and federal statutory regulation. At a time when this area of U.S. law is in such flux, perhaps the "Canadian model" is worth a closer look.

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