J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 2(3) 183-198, 1993-94

UNJUST DISMISSAL AND THE REMEDY OF REINSTATEMENT*

GENEVIEVE EDEN
University of Victoria
British Columbia, Canada

ABSTRACT

This study analyzes unjust dismissal decisions for nonunion workers under the *Canada Labour Code* to determine the extent to which adjudicators have awarded reinstatement and to analyze the factors associated with reinstatement. The results show a distinct shift from an earlier pattern: since 1986, adjudicators have been awarding compensation more frequently than reinstatement. Logit analysis reveals factors that are significant predictors of the reinstatement remedy; however, overall there is a lack of stated rationale in adjudication decisions. Adjudicators may be influenced by the notion that reinstatement is less effective in a nonunion setting, and, thus the presence of a union may be a key variable in the effectiveness of the remedy of reinstatement.

Statutory protection against unjust dismissal for nonunionized workers is receiving increasing attention in North American employee-employer relations. In the United States, legislation to require some form of "just cause" to dismiss employees was *introduced* in ten state legislatures between 1981 and 1988, but was *passed* only in Montana (in 1987). In 1991, the National Conference of Commissioners on Uniform State Laws adopted a Model Employment-Termination Act, which urges reliance on arbitration as the preferred dispute resolution system. As unionization has declined, the growing nonunion sector has paid increasing attention to adopting some of the procedures developed in the union sector.

*Financial assistance was provided by the Social Sciences and Humanities Research Council of Canada.

doi: 10.2190/WAP6-0CNY-7ACK-9LVM
http://baywood.com

In Canada, three jurisdictions have enacted legislation governing the adjudication of unjust dismissal complaints for nonunionized employees—Nova Scotia (1976), the federal jurisdiction (1978), and Quebec (1980). Recently, it has been suggested that consideration be given to extending such legislation to other jurisdictions in Canada [1]. Interest in such legislation may become even more acute if the decline in the percentage of workers covered by collective agreements continues, resulting in a decreased percentage of the work force with some protection against unjust dismissal over and above the common law.

The interest in statutory protection against unjust dismissal for nonunion workers has been accompanied by considerable debate and speculation regarding the most appropriate remedy. It has been suggested that reinstatement is not a viable remedy because of the lack of union presence to protect the reinstated worker from employer reprisals. In jurisdictions where such statutes have already been enacted, additional controversy has been generated by the apparent unwillingness of adjudicators to exercise their authority to reinstate.

This study analyzes adjudicator decisions dealing with complaints of unjust dismissal under the Canada Labour Code. Section 240 *et seq.* of the code provides statutory protection against unjust dismissal for nonunion employees under the federal jurisdiction. The objective is to determine the extent to which adjudicators have exercised their authority to award reinstatement as opposed to monetary compensation and to determine what factors influenced adjudicators' decisions to award a particular remedy.

The federal jurisdiction covers only about 10 percent of all employees, but federal legislation often set precedents for other jurisdictions. Moreover, it covers workers in a number of particularly important areas of the economy. Federally regulated industries include interprovincial air, rail, shipping, ferry, and trucking operations as well as banks, radio broadcasting, grain elevators, uranium mines, atomic energy, and certain Crown corporations.

Prior to the enactment of the legislation, federal workers were governed by the common law and were forced to pursue their claims of wrongful dismissal in the courts, with the remedy restricted to damages. With the enactment of federal legislation, these workers could challenge their dismissal through an adjudication process, similar to arbitration in the unionized sector, with the potential of reinstatement, if they were deemed to have been dismissed without just cause.

This study is the first to conduct a systematic analysis of the factors influencing adjudicators' choice of remedy. In contrast to legislation governing the unionized sector where, generally, the remedial authority granted to arbitrators is restricted to reinstatement, the provisions of the *Code* grant adjudicators the option of awarding monetary compensation as well. The few past studies of unjust dismissal decisions under this regime have been based on citations, whereas this study employs multivariate statistical procedures.

COMPETING PERSPECTIVES ON REINSTATEMENT

There are divergent theories about the remedy of reinstatement. While some researchers have studied reinstatement in general, others have focused specifically on the viability of reinstatement in a nonunion setting.

Several arguments favor reinstatement. One frequently raised is that reinstatement provides workers significantly greater job security. For many employees, the social and psychological support they gain from a well-established employment relationship is irreplaceable. Further, in times of high unemployment, it may be difficult to find another job. Short of an astronomical sum for loss of future income, a monetary award cannot compensate for the hardship [2, pp. 6-7]. For long-service employees, the loss may be even more severe because they suffer an acute and largely irrecoverable loss of the investment of a significant part of their working lives [3].

Another potential advantage of reinstatement is that the threat of this remedy may force a reshaping and civilizing of the process of termination by employers. To avoid having a termination decision reversed by an adjudicator, employers must ensure fair treatment toward employees; this contributes to the enhancement of the quality of their work life [4, p. 377]. Reinstatement may also serve employee interests by placing them in a better position to obtain another job than would be the case if they were dismissed. Removing the stigma associated with dismissal may well increase their future job prospects [5, p. 167].

While regarded by many as a significant advance in job protection, others suggest that reinstatement can encounter grave difficulties in realization. Generally, employers resist policies that infringe on management flexibility. When an employer's discharge decision is overruled by another party, the employer may seek to get even. Reinstatement in the firm may be illusory and short-lived. Employers may either discourage dismissed employees from returning to work or make their lives miserable upon return through harassment tactics such as changing job duties or reducing status or employment benefits [6, p. 46; 7, p. 326].

In a nonunion setting, reinstatement may be even less effective. Most workers are governed by the common law, which limits the remedy to damages. With increasing attention being paid to statutory protection against unjust dismissal for nonunionized workers, there has been considerable controversy and speculation regarding the most appropriate remedy for these regimes. While some analyses have suggested that compensation might be the only viable remedial option [8, pp. 1404-1435], others have expressed the belief that reinstatement is realistic even in nonunionized environments [9, p. 531; 5, pp. 167-168; 10, pp. 67-68; 11, pp. 59-60; 12, p. 212; 13, p. 228].

The lack of union representation could be a key variable in the effectiveness of reinstatement. In the organized sector, the union will generally make the employer comply with the arbitrator's order to reinstate the complainant. Further, the worker returns to work under the umbrella of a well-defined set of contract rights

that limit management's authority and possible reprisals. Union officers at the work place can mediate the reestablishment of the employment relationship and can aid the reinstated employee faced with employer harassment and discrimination [7, pp. 79-80]. Further, union members may be more likely than nonmembers to seek reinstatement, knowing that their return will be monitored by the union. There is less likelihood of unpleasantness or victimization [5, p. 163]. Such assistance is absent in nonunionized organizations.

PREVIOUS STUDIES

The Unionized Sector

In the unionized sector, the remedy of reinstatement is well-established. From the beginning, arbitrators asserted a remedial authority to reinstate dismissed employees. There was a brief period when the courts rejected this extension of arbitral authority, but legislatures soon overturned judicial opposition, and now most arbitrators in Canada have been given express authority to order reinstatement.

Rates of Reinstatement

Studies of discharge arbitration outcomes in the unionized sector in both the U.S. and Canada have shown that arbitrators have not hesitated to order reinstatement. Almost every study shows that arbitrators reinstated employees 50 percent or more of the time [14-22].

Post Reinstatement Experience

The predominant view is that reinstatement has proved successful in unionized workplaces. Reinstatement has a high "success rate"—defined as actual return to work as well as positive evaluations of employee performance subsequent to reinstatement [16, 17, 23-25]. However, these findings are based on responses to questionnaires sent to employers, with typically low response rates between 40 and 50 percent. Voluntary responses may not be representative of the population of all reinstated workers; employers may be reluctant to report a subsequent discharge or anything negative regarding an employee. Given that the response rate in these studies generally covers less than half the cases, the proposition that reinstatement has been successful in the unionized sector is questionable.

The Nonunion Sector

The continuing debate concerning the viability of the remedy of reinstatement in the nonunionized sector has recently been accompanied by controversy over the apparent unwillingness of adjudicators to reinstate. Both British and Australian literature dealing with unfair dismissal mechanisms have focused on this issue.

Rates of Reinstatement

In Britain, more than a decade of experience with a statutory system has demonstrated the practical difficulties involved in establishing an effective reinstatement remedy in the nonunion sector. Although the primary remedy provided by law for unfair dismissal is reinstatement, Dickens et al. found the most common remedy for successful claimants to be compensation [26]. Between 1973 to 1981, the highest reinstatement rate among successful applicants was 4 percent [26, p. 506]. Tribunals ordered reemployment only in cases where employers seemed willing to accept it or where there were special circumstances relating to the claimant (such as apprenticeship or physical disability). Since employers were generally opposed to reemployment, the alternative remedy of compensation was usually adopted. The authors concluded that the legislation was not achieving the aim of employee job security: hardly any are reemployed.

In an analysis of unjust dismissal decisions in three Australian jurisdictions (New South Wales, South Australia, and Western Australia) from 1980 to 1985, Sherman [13, p. 221] found that only a small minority of claimants in the non-unionized sector obtained orders for reemployment. Sherman observed that it is impossible to say whether any justice-oriented system in the nonunionized sector would be capable of reinstatement levels approaching that achieved under grievance arbitration in the unionized sector.

On the other hand, Trudeau in his analysis of dismissal decisions rendered by adjudicators under the Canada Labour Code between 1978 and 1982, found that just over half of successful complainants obtained orders for reinstatement as opposed to monetary compensation [7]. It is unclear why these results differ so much from the findings of the British and Australian studies. In the British context, the authors observed that tribunals were sensitive to employer interests and views; and employers were generally opposed to rehiring. In the Australian study, the researcher suggests that the absence of a union to protect the reinstated worker from a potential hostile supervisory environment figures prominently in the minds of many arbitrators, although such rationale is not documented in their decisions.

During the time period covered by Trudeau's study, adjudicators acting under the Code may have been more sensitive to employee interests in awarding reinstatements. Further, they may have been less influenced by the view that reinstatement is not as effective in a nonunion setting; however, this reasoning can only be speculative, given that the cases do not address this issue.

Post Reinstatement Experience

The suggestion that reinstatement is less effective in a nonunion setting is supported by Trudeau's analysis of the reinstatement experience of nonunionized employees covered under the Quebec Labour Standards Act [7]. A survey of workers reinstated by arbitrators acting under this legislation revealed that

67 percent of respondents believed they were unjustly treated by their employer after having returned to work. Trudeau attributed this treatment to the lack of union presence to monitor the employer's behavior and protect the reinstated employee from harassment and discrimination. This study suggests that legal efforts to transplant the reinstatement remedy from the union to the nonunion sector have not met with much success.

Factors Influencing Remedy Awarded

Section 240 *et. seq.* of the Canada Labour Code is an extremely interesting piece of legislation in that it gives adjudicators the power to award reinstatement as arbitrators in the unionized sector, or damages akin to those awarded in the courts. Discharged workers can indicate their preferred remedial option at the time of lodging a complaint; this may be a consideration in adjudicators' choice of remedy, however, adjudicators can exercise their own discretion.

Two major studies of decisions rendered under ss. 240 of the Code have examined the factors considered by adjudicators in their choice of remedy [2, 7]. These studies reveal that a major factor considered by adjudicators was the remedy initially requested by the discharged worker. Other factors were also given weight. Subsequent employment of the complainant in a new job, and abolishment of the job formerly occupied by the complainant were cited as reasons for awarding compensation rather than reinstatement. A conflict of personalities between the parties and a breakdown of the employment relationship also attracted the remedy of compensation given that, in such cases, reinstatement could have a disruptive and negative effect on the workplace. Compensation was also justified where the discharged worker failed to acknowledge fault for the wrongdoing, since complainants were unlikely to change behavior that they did not recognize as inappropriate or wrong.

While these studies have made a significant contribution to the field, the analysis was based on the citing of cases; only select decisions were cited in support of the assertions made. To date, no systematic analysis employing the use of statistical procedures has been conducted.

THE RESEARCH MODEL

This study has two main purposes: 1) to examine the extent to which adjudicators acting under the Code have awarded the remedy of reinstatement as opposed to monetary compensation, and 2) to examine the factors influencing adjudicators' choice of remedy, employing multivariate statistical procedures.

In the unionized sector, generally, the only remedy available to arbitrators is reinstatement. Under the common law, which governs most nonunion workers, the remedy is restricted to damages. An interesting question is: what remedial

approach has been adopted by adjudicators acting under the Code, that of the common law, or arbitral law?

The factors potentially influencing adjudicators' choice of remedy, generally, were derived from a review of the legal literature dealing with the early experience of ss. 240 [2, 7]. The complainant's request for reinstatement was hypothesized to be positively associated with reinstatements. Factors expected to be negatively associated with reinstatement included subsequent employment of the complainant in a new job, abolishment of the complainant's job, a conflict of personalities that would make reinstatement impractical, and a breakdown of the employment relationship.

Other factors were included in the model that could, conceivably, influence adjudicator decision making. It was expected that poor labor market conditions or difficulty finding another job (relating to circumstances peculiar to the complainant, such as the specialized nature of the occupation) would be positively associated with reinstatements. The time lapse from the date of the decision was also considered. It was predicted that the delay in months between the discharge and the adjudication award is inversely associated with the decision to reinstate, since in such cases, the employer is more likely to have found a replacement for the discharged worker.

Other variables in the model for which no hypotheses were drawn are gender, occupation, and the year of the decision. Gender has been a factor influencing arbitral outcomes in the unionized sector [21, 22]. Occupation was examined, given some suggestion in the literature that reinstatement of managers and professionals is difficult to apply [2]. The year of the decision was included to control for possible differences over time. Since economic conditions varied considerably in the decade covered by the analysis, the author was interested in seeing whether the number of reinstatements increased during the recession of the early 1980s; in such economic times, adjudicators may give more weight to the factor of alternative employment.

DATA AND METHODOLOGY

Data for the analysis was collected from decisions rendered under the Code from September 1, 1978 to March 31, 1989. There were 503 decisions rendered during this period. The analysis excludes decisions dealing solely with preliminary objections regarding jurisdiction and those in which adjudicators merely incorporated the parties' agreed settlement. Of the 395 cases that reflected adjudicator decision making regarding the merits of the case, 65 percent (258 cases) were sustained.

An examination of the raw data revealed that, in virtually all instances where complaints were sustained and workers requested compensation (93 cases), adjudicators complied with that request. However, a request for reinstatement by the complainant was not automatically complied with. Thus these cases (53), as

well as cases in which there was no indication regarding the complainant's preference (112), were included, resulting in 165 cases for analysis of the factors associated with reinstatement.

Coding of Variables

The dependent variable in this study is the adjudicator's award in each case. The decision was assigned a value of one if reinstatement was awarded and zero if monetary compensation was awarded.

The independent variables were coded either as continuous or dummy variables. The year of the award was coded from seventy-nine to eighty-nine, while the time lapse from the date of discharge to the decision was coded in months. Occupation was assigned one of seven broad classifications; gender was dichotomously coded as one for females, zero for males. The remaining variables were coded as one if specifically mentioned by the adjudicator in the written decision, zero otherwise.

Procedure

LOGIT analysis was employed to identify the significant predictors of the dichotomous dependent variable, choice of remedy (i.e., the probability of reinstatement as opposed to monetary compensation). The logistic function is a nonlinear function appropriate for obtaining probability estimates based on dichotomous dependent variables. As well, it enhances the analysis of adjudicator decisions in that it enables estimation at various probability levels. This aids our understanding of the effect of an increase or decrease in a particular independent variable when the probability of reinstatement is already high or already low. For example, this functional form may highlight that, when the probability of reinstatement is already quite high, for example, $P = .80$, it may be very difficult to increase that probability. When the probability is low, for example, $P = .25$, an increase in the independent variable may have a substantial effect.

RESULTS

For the 258 cases in which complaints were sustained, the frequency and percentage of reinstatements versus awards of monetary compensation are reported in Table 1. Table 1 reveals that, in the early years under this legislation, adjudicators tended to award reinstatement in approximately 50 percent of cases. However, the last three full years covered by the analysis show a distinct shift from the earlier pattern, with adjudicators awarding reinstatement less frequently than compensation. Reinstatements declined during this period from 60.7 percent in 1985 to 16.7 percent in 1988. While figures reported for the first three months of 1989 could suggest a possible reversal of this trend, it is still too early to be certain.

Table 1. Remedy by Year (N = 258)

	Compensation		Reinstatement	
	Frequency	Percent	Frequency	Percent
1979	7	50.0	7	50.0
1980	6	42.9	8	57.1
1981	10	52.6	9	47.4
1982	10	43.5	13	56.6
1983	15	50.0	15	50.0
1984	16	55.2	13	44.8
1985	11	39.3	17	60.7
1986	16	64.0	9	36.0
1987	24	75.0	8	25.0
1988	30	82.9	6	16.7
1989[a]	3	37.5	5	62.5
Totals	148	57.2	110	42.8

[a]January 1, 1989 to March 31, 1989

Complainants who had their complaints sustained, but were not reinstated, were awarded an average of five months salary with a maximum award of eighteen months.

Descriptive Statistics

Descriptive statistics for the variables potentially influencing adjudicators' choice of remedy, along with the sign expectation indicating their expected effect on the probability of reinstatement, are presented for 165 cases in Table 2. It is interesting to observe that a clear request for reinstatement was exhibited in only 32 percent of these cases.

There was a 63/37 percent ratio of male and female complainants. A significant proportion of complainants were clerical workers prior to discharge (37%), followed by professional and technical workers (19%), skilled workers (18%), and administrative and managerial workers (16%). Few were sales (7%) and unskilled workers (3%).

The low frequencies of the variables with a clear sign expectation are indicative of the absence of any rationale for the choice of remedy in many awards. This confirmed the author's overall impression from reading the cases; adjudicators usually do not state a rationale for their choice of remedy.

Examination of the raw data revealed that some variables are perfect predictors of the outcome in that they are always associated with either an award of

Table 2. Descriptive Statistics (N = 165)

Variable	Frequency	Percent	Sign[a]
REMEDY REQUESTED			
No request	112	67.9	?
Reinstatement	53	32.1	+
EMPLOYEE			
Gender			
Male	104	63.0	?
Female	61	37.0	?
Occupation			
Administrative	27	16.3	?
Unskilled	5	3.0	?
Skilled	29	17.6	?
Clerical	61	37.0	?
Sales	11	6.7	?
Professional and technical	32	19.4	?
Remorse	12	7.3	+
No remorse	5	3.0	–
OTHER VARIABLES			
Personality conflict	14	8.5	–
Year (1979-1989)	84.1[b]		?
New job	43	20.6	–
Job abolished	3	1.8	–
No find job	8	4.8	+
Time (mos.)	12.3[b]		–
Employment relationship broke down	15	9.1	–
Labor market conditions	1	.6	+

[a]Expected direction of effect on probability of being reinstated.
[b]Mean

reinstatement or one of monetary compensation. Specifically, the remedy of reinstatement was always awarded for unskilled employees, while monetary compensation was always awarded where adjudicators found a breakdown of the employment relationship. Given that these variables are perfect predictors of the outcome, they were excluded from the logit analysis. However, since their frequencies were so low, caution must be exercised in the interpretation of these perfect predictors. Complainants in unskilled occupational categories represent only 3 percent of the subsample of cases, while a breakdown of the employment relationship was referred to in only 9 percent of cases. Poor labor market conditions was also a perfect predictor; however, no conclusions whatsoever can be

drawn from the labor market variable, given that it was mentioned in only one case in the subsample. (Surprisingly, monetary compensation rather than reinstatement was awarded when the labor market condition was recognized as poor.)

Logit Results

Table 3 presents logit estimates of the effect of the explanatory variables on the probability of reinstatement for the subsample of 165 cases discussed in the preceding section. Changes in the probability of reinstatement are evaluated at the mean of the dependent variable, .66, which is the average probability of complainants reinstated (complainants were awarded reinstatement in 66 percent of the 165 cases). In addition, results are shown for a higher probability level, .80, and a lower probability level, .25. For expositional purposes, the variables are listed under three categories: the employee's request of remedy, characteristics of the employee, and other.

When evaluated at the mean probability of .66, the empirical results are mixed. Generally, where there was a sign prediction as given in Table 2, the logit coefficient was in the expected direction; however, only five variables are statistically significant.

Other things being equal, where the remedy of reinstatement was specifically requested (reinstatement), the complainant was 21.6 percent more likely to be reinstated relative to the omitted reference category "no request." This result is statistically significant.

Where adjudicators explicitly mentioned that employees showed remorse or accepted fault for the misconduct (remorse), the complainant was 26.6 percent more likely to be reinstated relative to cases where there was no mention of remorse. Conversely, when adjudicators explicitly stated there was no remorse shown, the complainant was 48.6 percent *less* likely to be reinstated. Both variables are statistically significant.

Personality conflict between the employer and the employee is also a significant predictor of the outcome. The negative coefficient indicates that, relative to other cases, complainants are 40.4 percent less likely to be reinstated when evaluated at the mean probability of $P = .66$.

The year of the decision (YEAR) is a significant predictor of the probability of reinstatement. The trend illustrated in Table 1 that adjudicators have been less likely to reinstate over time is confirmed.

There are no significant gender nor occupational differences in the likelihood of the complainant to be reinstated or awarded monetary compensation. Relative to administrative occupations (the omitted reference category), employees in skilled, clerical, professional and technical occupations are more likely to be reinstated, while employees in sales are less likely to be. However, the estimates are statistically insignificant and quantitatively small. Contrary to earlier suggestions that reinstatement of managers and professionals has been difficult to apply,

Table 3. Logit Analysis of Probability of Reinstatement (N = 165)

Independent Variable	Logit Coefficient	t-Statistic	Change in Probability Evaluated at P = .25	P = .66	P = .80
Constant	21.660	3.39	0.750	0.339	0.200
REMEDY REQUESTED					
(No Request)					
Reinstatement	1.298**	2.73	0.300	0.216	0.137
EMPLOYEE					
Gender					
(Male)					
Female	–0.481	–1.04	–0.079	–0.144	–0.088
Occupation					
(Administrative)					
Skilled	0.790	1.12	0.173	0.150	0.099
Clerical	0.093	0.15	0.018	0.020	0.014
Sales	–0.967	–1.16	–0.138	–0.235	–0.197
Professional and technical	0.165	0.27	0.032	0.036	0.025
Remorse					
(No mention)					
Remorse	1.866**	1.66	0.433	0.266	0.163
No remorse	–2.218**	–1.86	–0.215	–0.486	–0.497
OTHER VARIABLES					
Personality conflict	–1.730**	–2.56	–0.194	–0.404	–0.385
Year (1979-1989)	–0.248**	–3.27	–0.047	–0.056	–0.040
New job	–0.228	–0.48	–0.040	0.053	–0.039
Job abolished	–1.452	–1.08	–0.178	–0.348	–0.317
No find job	–0.839	–0.97	–0.124	–0.204	–0.166
Time (mos)	–0.006	–0.23	–0.001	–0.001	–0.001

Note: Significance is denoted by ** at the .05 and * at the .10 level, where the critical values, respectively, are 1.65 and 1.28 for the one-tailed test (when the expected sign is unambiguous) and 1.96 and 1.65 for the two-tailed test (when the expected sign is ambiguous).

occupational differences are not significant predictors of reinstatement or monetary compensation.

The remaining variables, new job subsequent to dismissal, abolishment of job held prior to dismissal, time lapse from date of discharge to award (time), and difficulty finding a job (no find job) are not statistically significant. Contrary to

expectations, difficulty finding a new job is negatively associated with the complainant being reinstated. However, since the logit coefficient is not statistically significant, this factor does not play an important role in adjudicator decision making.

Examination of results at probabilities of reinstatement at values other than the mean illustrate interesting effects. For example, if the complainant is otherwise only 25 percent likely to be reinstated ($P = .25$), the failure to exhibit remorse reduces the probability by 22 percent. For complainants who would otherwise be 80 percent likely to be reinstated ($P = .80$), the failure to exhibit remorse would reduce their likelihood of being reinstated quite dramatically by 50 percent.

The multiple regression results (not reported but available on request) reveal that the regression coefficients give a very good approximation of the logit results. The same variables are statistically significant, and the magnitudes of the probabilities are very close. Given that the two estimating techniques show such similar results, the R^2 generated by regression is a good test for the goodness of fit of the model. The variables used in the regression equation explain only 21 percent of the variance in complainants reinstated. These results confirm the overall impression gained from reading the cases—adjudicators usually do not state the rationale for their choice of remedy.

CONCLUSION

The analysis reveals that adjudicators have not followed the arbitral scheme of the unionized sector and automatically awarded reinstatement. Indeed, in the last three full years covered by the analysis, the primary remedy obviously has been monetary compensation. It can be argued that the trend toward awarding compensation more often than reinstatement reflects a common law approach.

This study reveals an important weakness in the jurisprudence: the lack of rationale in adjudicator decision making. Although the legislation requires adjudicators to state the reasons for their decision, the low frequencies indicate that this requirement is often not met. It is not clear whether the lack of a stated rationale is a function of systematic consideration of information beyond the scope of this study or a result of idiosyncracies (such as personal values) of individual adjudicators. Whatever the explanation, this reminds us that we should be modest about our ability to explain such arbitral outcomes.

There may be several unstated reasons for adjudicators' choice of remedy. The arguments advanced against reinstatement discussed earlier in this study may well figure prominently in the minds of adjudicators, although they are not documented in the written decisions. It's conceivable that adjudicators are becoming more influenced by the suggestion that reinstatement is less effective in a nonunion setting [7] since no union is present to monitor the employer's behavior and protect the reinstated employee from employer harassment and discrimination. Adjudicators may be responding to these perceptions by awarding monetary compensation more frequently than reinstatement. Since adjudicators generally do

not provide an explanation for their choice of remedy, one can only speculate as to possible reasons for these trends.

Other unstated factors may also influence adjudicator decision making. Given that the remedy of reinstatement is sometimes viewed as a significant benefit to the employee, it could be argued that the trend toward monetary compensation is indicative of adjudicators adopting a more conservative attitude favoring the employer. Perhaps the pronounced and lingering effect of the recession of 1981-1983 and the demand for a high commitment workforce to remain competitive in the global market have had an influence on adjudicators. There may be less inclination to reinstate workers when others are being laid off, and less pressure to reinstate when competitive pressures on employers are such that they cannot afford to deal with potential problems of this nature.

The recent tendency to award monetary compensation more frequently than reinstatement could be viewed as a deficiency of the application of this legislation from the employee's perspective. (The unavailability of reinstatement as a remedy is perceived by many as a major deficiency of the common law regime.) However, from the information available, when discharged workers initially filed their complaints, they appeared to seek a remedy of monetary compensation more often than reinstatement. Thus, traditional assumptions about the desirability of reinstatement may not actually reflect workers' preferences. The suggestion that the jurisprudence rendered under the Code may signal a common law approach does not necessarily limit the effectiveness of this legislation.

From one perspective, it could be argued that, in comparison to the common law and arbitral law, the remedial approach of adjudicators is more sensitive to the interests of both employees and employers. The broad remedial powers available to adjudicators provide a more flexible approach that, potentially, can be tailor-made to fit individual circumstances. The fact that adjudicators fairly frequently award compensation rather than reinstatement, and that the average amount of compensation awarded is five months, seems not particularly onerous for employers and could allay their objections to this type of legislation. Further, employers might support such legislation as an acceptable alternative to the threat of heavy damages awarded by the courts, and as a step toward maintaining a union-free environment.

From another perspective, it could be argued that this legislation is not as sensitive to employees' interests as it might appear. As suggested earlier, non-union workers may be less inclined to seek reinstatement given lack of union protection against possible reprisals by employers on their return. The lack of union representation may well be a key variable in the effectiveness of the reinstatement remedy in unjust dismissal disputes.

Clearly, assessment of the Code requires further empirical research, particularly on the reinstatement experience of workers. Such an analysis of an existing mechanism would constitute important data in any consideration of its extension to other jurisdictions.

ACKNOWLEDGMENT

The author is grateful for the advice and guidance of her thesis committee: Morley Gunderson (supervisor) and John H. House of the University of Toronto, and Paul Weiler of the Harvard Law School.

* * *

Genevieve Eden is Assistant Professor in the School of Public Administration at the University of Victoria, British Columbia, Canada. This analysis is based on the author's Ph.D. dissertation. Professor Eden has extensive experience in Industrial Relations, most recently as a third party neutral. Her publications include articles in the area of employment law and human rights in the workplace.

ENDNOTES

1. G. Simmons, Unjust Dismissal under Federal Jurisdiction, in *Labour Arbitration Yearbook*, W. Kaplan, J. Sack, Q. C. and M. Gunderson (eds.), Butterworths-Lancaster House, Toronto, vol. II, pp. 41-54, 1991.
2. M. D. Failes, Statutory Protection from Unjust Dismissal for Unorganized Workers in Canada, LL.M. thesis, Queen's University, Kingston, 1986.
3. P. C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law*, Harvard University Press, Cambridge, Massachusetts, 1990.
4. G. Trudeau, Employee Rights versus Management Rights: Some Reflections Regarding Dismissal, in *Canadian Readings in Personnel and Human Resource Management*, S. L. Dolan and R. S. Schuler (eds.), St. Paul: West Publishing Co., pp. 367-377, 1987.
5. L. Dickens, M. Hart, M. Jones, and B. Weekes, Re-employment of Unfairly Dismissed Workers: The Lost Remedy, *Industrial Law Journal, 10*, pp. 160-175, 1981.
6. R. J. Adams, The Unorganized: A Rising Force?, *Proceedings McGill University Annual Conference*, McGill University, Montreal, pp. 40-58, 1983.
7. G. Trudeau, Statutory Protection Against Unjust Dismissal for Unorganized Workers, SJD. Dissertation, Harvard Law School, 1985.
8. L. Blade, Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, *Columbia Law Review, 67*, pp. 1404-1435, 1967.
9. C. W. Summers, Individual Protection against Unjust Dismissal: Time for a Statute, *Virginia Law Review, 62*, p. 481, 1976.
10. K. C. Mennemeier, Protection from Unjust Discharges: An Arbitration Scheme, *Harvard Journal on Legislation, 19*, pp. 49-96, 1982.
11. T. J. St. Antoine, Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come, in *Arbitrations Issues for the 1980s*, J. Stern and B. Dennis (eds.), Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, pp. 43-62, 1982.
12. S. A. Youngblood and L. Bierman, Due Process and Employment-at-Will: A Legal and Behavioral Analysis, *Research in Personnel and Human Resources Management, 3*, p. 212, 1985.
13. M. Sherman, Unfair Dismissal and the Remedy of Re-employment, *The Journal of Industrial Relations, 31*:2, pp. 212-228, 1989.

14. J. F. Holly, The Arbitration of Discharge Cases: A Case Study, *Critical Issues in Arbitration Proceedings of the Tenth Annual Meeting National Academy of Arbitrators*, Bureau of National Affairs, Washington, D.C., pp. 1-20, 1957.
15. K. Jennings and R. Wolter, Discharge Cases Reconsidered, *The Arbitration Journal, 31*, pp. 164-180, 1976.
16. G. W. Adams, *Grievance Arbitration of Discharge Cases*, Queen's University, Industrial Relations Centre, Kingston, 1978.
17. E. M. Shantz and R. Rogow, Post-Reinstatement Experience: A British Columbia Study, *Proceedings of the 21st Annual Meeting of the Canadian Industrial Relations Association*, Department of Industrial Relations, Laval University, Quebec, 1985.
18. J. Stieber, R. N. Block, and L. Corbitt, How Representative Are Published Arbitration Decisions?, *Proceedings of the 37th Annual Meeting, National Academy of Arbitration*, W. J. Gershenfeld (ed.), BNA, Washington, pp. 172-192, 1985.
19. A. Ponak and C. Sahney, Discharge and Reinstatement in Grievance Arbitration, *Proceedings of the 23rd Annual Meeting of the Canadian Industrial Relations Association*, University of Manitoba, Winnipeg, pp. 158-166, 1986.
20. B. Brody, Reinstatement of Unjust Dismissals: New Evidence from Quebec, *Proceedings of the 24th Annual Meeting of the Canadian Industrial Relations Association*, McMaster University, Hamilton, pp. 1-25, 1987.
21. B. Bemmels, The Effect of Grievants' Gender on Arbitrators' Decisions, *Industrial and Labor Relations Review, 41*:2, pp. 251-262, 1988a.
22. B. Bemmels, Gender Effects in Discharge Arbitration, *Industrial and Labor Relations Review, 42*:1, pp. 63-76, 1988b.
23. A. M. Ross, The Arbitration of Discharge Cases: What Happens After Reinstatement, *Critical Issues in Arbitration Proceedings of the Tenth Annual Meeting National Academy of Arbitrators*, Bureau of National Affairs, Washington, D.C., pp. 21-56, 1957.
24. T. J. McDermott and T. H. Newhams, Discharge-Reinstatement: What Happens Thereafter, *Industrial and Labor Relations Review, 24*:4, pp. 526-540, 1971.
25. A. A. Malinowski, Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labour Arbitrators, *Arbitration Journal, 36*:1, pp. 31-46, March 1981.
26. L. Dickens, M. Hart, M. Jones, and B. Weekes, The British Experience Under a Statute Prohibiting Unfair Dismissal, *Industrial and Labor Relations Review, 37*:4, pp. 497-514, 1984.

Direct reprint requests to:

Dr. Genevieve Eden
University of Victoria
Box 1700
Victoria, B.C., Canada V8W 2Y2