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EMPLOYEE MISCONDUCT AND DISMISSAL FOR CAUSE: EVIDENCE FROM CANADA

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ABSTRACT

The purpose of this article is to examine factors influencing a court's decision that an employer had just cause for dismissal on the grounds of employee misconduct. Based on an analysis of 140 Canadian dismissal cases over the period 1975 to 1989, the results indicated that employers won about 47 percent of the cases. In addition to the nature of the misconduct, a number of factors including employer condonation, circumstances negating intent, the record of the plaintiff and whether the employee had obtained a new job were related to case outcome.

Previous research has addressed specific aspects of the law of wrongful dismissal in Canada, including an analysis of the law [1], the determination of reasonable notice [2], and the determination of just cause in incompetence cases [3]. As noted in past studies, the termination of a nonunion employee without just cause is wrongful, and the dismissed worker may sue the employer for damages based on the common law remedy of wrongful dismissal. A very common employer defense to a charge of wrongful dismissal is that the employee was justifiably terminated because of misconduct related to the job [4].

The present study outlines the results of an analysis of 140 Canadian misconduct cases decided over a fifteen-year period commencing in 1975. In all of the cases examined, the employer argued just cause existed for dismissal on the basis of employee misconduct.

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PRINCIPLES OF THE CANADIAN LAW OF WRONGFUL DISMISSAL

Canadian employees, as is common in a number of western countries, are subject to either an individual contract of employment or to a collective agreement between a representative union and the employer. Employees covered by a collective agreement are required to carry grievances through a defined process that may end in binding arbitration. These employees have no access to the court system for a common law remedy except to resolve points of law arising out of the arbitration process [5].

Nonunionized employees operating under an individual contract with the employer generally have access to the common law remedy of wrongful dismissal in the event of termination without just cause. Under wrongful dismissal law, an employee may be terminated at any time provided the employer gives reasonable notice of termination or severance pay in lieu of notice. The purpose of reasonable notice is to allow the employee adequate time to find alternative employment appropriate to the individual's status and training. Unlike unionized employees, workers in the nonunion sector are for the most part precluded from seeking the remedy of reinstatement in the event of dismissal in the absence of just cause [6]. The common law courts hold the view that the implied conditions and goodwill present at the outset of the employment relationship have been irreparably damaged with the discharge of an employee and consequently refuse to order reinstatement or specific performance of an employment contract.

While labor standards legislation provides minimum periods of notice for employees terminated without cause, these provisions are considered minimum allowances only. Common law notice periods frequently exceed the minimum and, on occasion, courts have awarded notice periods in the two-year range [7]. If the courts find the employer has demonstrated on the balance of probabilities that just cause for dismissal existed, no notice is required.

MISCONDUCT AS JUST CAUSE

Numerous causes for dismissal, ranging from economic redundancy and contract frustration to gross incompetence, exist in law. However, the present article focuses only on employee misconduct as a ground for termination.

Misconduct is one of those broad classes of cause which, because of the diverse nature of employee misconduct, complicates the generalization of guiding principles. The courts have repeatedly found that a case must be decided on its own merits, with reference to the unique factors of each case. Nevertheless, after an extensive examination of the case law, four classes of misconduct have been identified, including 1) unfaithful service to the employer, 2) misconduct of a general nature usually reflecting some human frailty, 3) willful disobedience of a reasonable and lawful order, and 4) theft, fraud, or dishonesty.

Acts of unfaithful service are generally considered to be in that class of misconduct justifying immediate dismissal and include conspiracy and competing against the employer, serious conflict of interest, repudiation of a fundamental aspect of service, or a breach of corporate culture (particularly, going over your superior's head). In describing the duty of faithful service, the court in *King and Martin v. Harris and Hiscock* stated:

> . . . It makes no difference whether one competes just a bit or quite a lot. It does not even matter that the employer may not suffer from the competition or that the competition never comes to fruition [8].

This is not to say that such a dismissal would always be successful since there may be reasonable explanations for such behavior. The employer must be careful not to over-react to what is perceived to be unfaithful service. When there is intent by the employee, and threat of loss is real, the employer's case is relatively straightforward. Nevertheless, loss or risk of loss must be demonstrated after considering the employee's intentions. The employee, because of the imbalance in bargaining power in the employment relationship, is given a certain amount of leeway to make inquiries and whatever else might be necessary to ensure his/her livelihood.

Senior employees are recognized to have a more severe duty of service to their employer placed on them by virtue of the degree of control their positions give them in corporate operations. This degree of control raises the employee's duty above day-to-day accountability to that of owning shareholders, which comes under scrutiny only occasionally at special meetings. It is in the public interest of accountability to compel obedience to norms of exemplary behavior of the corporation, its directors, and managers [9].

Misconduct due to frailty of character stems from a weakness of character or lack of social skill and judgment and may include drug or alcohol use, abuse of other employees, activity outside the workplace, or other general misconduct. The degree of misconduct required to show cause is extremely ambiguous, and varies with the nature of the misconduct and the position of the employee.

A single incident of misconduct is rarely a successful employer defense. Nevertheless, old offenses may be resurrected even in the light of condonation [10]. The employer should be sure, however, to bring all acts of misconduct of sufficient magnitude to the attention of the employee to ensure knowledge of expected behavior and compliance.

Willful disobedience, which has also been found to include breach of rules or policy and absenteeism or lateness, is considered to be an act of repudiation of the employment contract. As explained in *Laws v. London Chronicle Ltd.*:

> . . . willful disobedience of a lawful and reasonable order shows a disregard—a complete disregard—of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the

> master, and that unless he does so the relationship is . . . struck at fundamentally [11].

The employee must obey the lawful and reasonable orders of the employer or be in breach of contract. Petty disagreements and personality conflicts rarely amount to cause. Disobedience must be seen to be intentional and deliberate [12]; isolated incidents are rarely considered willful but rather simply aberrations of expected behavior. A reasonable excuse for disobedience will also negate the intent required for just cause, particularly where the employer did not suffer measurably or where compliance with the order constituted an unreasonable hardship. However, the excuse will be closely scrutinized [13].

Previous discipline is not a necessary requirement for a successful termination; it does, however, establish a pattern of disobedience. In many situations discipline may be inappropriate, particularly at the management level. In such cases, the courts look for other evidence that the employer made known and perhaps warned the employee of dissatisfaction with, or the unacceptability of, particular behavior.

Theft, fraud, or dishonesty is perhaps the most serious cause for dismissal because it can completely undermine the employee's trustworthiness or credibility. In theft cases, a single isolated act may be cause for dismissal [14], the standard of proof is on the balance of probabilities [15], and the court carefully scrutinizes any explanation provided by the employee concerning the theft [16]. In fraud cases, the employer need not be prejudiced by the misconduct; rather cause for termination exists when an employee in a position of trust demonstrates an untrustworthy nature [17]. However, dishonesty requires an intention on the part of the employee to act improperly [18].

METHOD

Data for this study were obtained by analyzing 140 Canadian wrongful dismissal cases over the 1975-to-1989 period. An on-line data base, Quick Law, was used to identify appropriate cases. Cases had to involve an allegation on the part of the employer that the individual was dismissed for just cause on the basis of the employee's misconduct in order to be included in the data set.

Case outcome was the dependent variable in this study. Cases were coded on the basis of whether the dismissed employee (plaintiff) or employer (defendant) was the "winner" in the case. That is, did the court find the employee was wrongfully discharged or the employer had cause to dismiss the former employee?

Sixteen independent variables were included in this study. It is possible to group the independent variables into a number of categories including type of misconduct, mitigating factors relating to the case, characteristics of the employee, and other factors.

With reference to type of misconduct, cases were coded depending on whether the misconduct involved unfaithful service, frailty of character, willful

disobedience, or theft, dishonesty, or fraud. Mitigating factors relating to the case included circumstances negating the intent of the alleged misconduct, whether a hearing was afforded the employee, employer condonation or waiver of past acts of misconduct, and whether the employer provided the employee with notice of termination.

Characteristics of the employee included sex, occupation (professional/managerial or service/sales/blue collar), the previous record (blemished or unblemished), performance evaluation (satisfactory or not), and whether the individual had a new job at the time the case was heard in court. Other factors included the presence of a limited labor market, the employer industry structure (manufacturing or nonmanufacturing), and the year of the decision (1975 to 1984 or 1985 to 1989).

RESULTS

Descriptive statistics relating to the 140 misconduct cases are reported in Table 1. When examining case outcome, the employer won 47.1 percent of the cases and the plaintiff employee was successful in 52.9 percent of the decisions.

In the majority of cases (57.9%) involving misconduct, the employer put forth the argument that the employee should be dismissed as a result of willful disobedience. Frailty of character was argued in almost 44 percent of the cases, while just over one-third of the decisions involved unfaithful service and 27 percent concerned theft, dishonesty, or fraud [19].

With reference to mitigating factors, there was heavy reliance on circumstances negating the intent of the alleged misconduct (59.3% of all cases). Other mitigating factors occurring with considerable frequency included the employer providing the dismissed employee with notice of termination (35.7%), providing the employee with a hearing (29.3%), and employer condonation or waiver of past acts of misconduct (25.0%).

Slightly less than 18 percent of the plaintiffs were female, and almost three-quarters were employed in managerial or professional occupations. Three-quarters of the plaintiffs had an unblemished work record and the majority were considered satisfactory performers. Over 35 percent of the plaintiffs had obtained a new job by the time the court hearing was conducted, and less than one-quarter of the plaintiffs faced a limited labor market. Slightly under 23 percent of the employers were in manufacturing, and almost half of the cases occurred during the period 1985 to 1989.

The results of probit analysis are provided in Table 2 [20]. There was some evidence suggesting that the employer success rate varies depending on the type of misconduct. Employers were most successful in cases involving theft, dishonesty, or fraud (66% win rate), fared slightly better than average (53%) in decisions involving willful disobedience and unfaithful service by the employee,

Table 1. Descriptive Statistics for 140 Canadian Misconduct Cases

Variable	Percent
Case Outcome	
Employer Victory	47.1
Employee Victory	52.1
Type of Misconduct	
Unfaithful Service	33.6
Frailty of Character	43.6
Willful Disobedience	57.9
Theft/Dishonesty/Fraud	27.1
Mitigating Factors	
Circumstances Negating Intent	59.3
Employee Hearing	29.3
Employer Condonation/Waiver	25.0
Employer Notice of Termination	35.7
Characteristics of Plaintiff	
Sex (Male)	82.1
Occupation (Professional/Managerial)	72.9
Previous Record (Unblemished)	75.7
Performance Evaluation (Satisfactory)	58.6
New Job (Yes)	35.7
Other Factors	
Limited Labor Market (Yes)	23.6
Employer Industry (Manufacturing)	22.9
Date of Decision (1985 to 1989)	49.3

and were least likely to win (38%) in cases dealing with frailty of character of the employee.

In terms of mitigating factors, the likelihood of the court not upholding a dismissal for cause was associated with a finding that there were circumstances negating the intent of the alleged misconduct ($p < .05$). In reviewing the cross-tabulation results, employers were successful in over 68 percent of the cases in which there was an absence of circumstances negating the intent of the alleged misconduct. However, where there was evidence of factors indicating no intent on the part of the employee to engage in misconduct, the employer win rate was only 32.5 percent. In addition, employer condonation or waiver of past acts of misconduct was highly significant ($p < .01$); as the results indicate, employers who fail to take corrective action when an employee commits an act of

Table 2. Probit Analysis of the Probability of an Employee Victory

Variable	Coefficient
Type of Misconduct	
Unfaithful Service	−.909***
Frailty of Character	−.260
Willful Disobedience	−.578*
Theft/Dishonesty/Fraud	−1.055***
Mitigating Factors	
Circumstances Negating Intent	.690**
Employee Hearing	−.505
Employer Condonation/Waiver	1.261***
Employer Notice of Termination	−.107
Characteristics of Plaintiff	
Sex (Male)	−.361
Occupation (Professional/Managerial)	.157
Previous Record (Unblemished)	1.211***
Performance Evaluation (Satisfactory)	.890*
New Job (Yes)	.917***
Other Factors	
Limited Labor Market (Yes)	.729*
Employer Industry (Manufacturing)	−.642*
Date of Decision (1985 to 1989)	−.715**

*$p < .10$
**$p < .05$
***$p < .01$

misconduct will have a much harder time dismissing for cause if a subsequent act of misconduct occurs.

The sex and occupation of the plaintiff were not related to the decision in dismissal cases. However, other characteristics of the plaintiff were of considerable significance. The performance and prior work record of the plaintiff were important factors in the court's determination of whether just cause for dismissal existed. The results suggest that an employee with a satisfactory performance assessment ($p < .10$) and an unblemished record ($p < .01$) with the employer is more likely to be successful. Employers won 82 percent of the cases in which the plaintiff's performance was unsatisfactory (compared to a 40% win rate if the employee was a satisfactory performer) and 74 percent of the decisions in which the plaintiff's work record was blemished (in comparison with a win rate of 39% if the employee had an unblemished work record). An isolated incident of

misconduct is often not sufficient to constitute just cause for dismissal, particularly if the employee is a satisfactory performer with a clean work record.

Employees were more likely to prevail if they had obtained a new job at the time of the hearing ($p < .01$). Individuals who had secured employment prior to the court hearing won 80 percent of the time, compared with a 38 percent win rate for cases in which the employee had not obtained a new job. It may be that courts are less likely to find an employee's actions amounted to misconduct if the employee was subsequently able to find reasonable employment.

While the existence of a limited labor market confronting the plaintiff should not relate directly to the issue of just cause for termination, the results suggest that this variable is important. Employers were successful in only 18 percent of the cases when the plaintiff was facing a limited labor market, compared with a 56 percent win rate if the labor market was more favorable. The potential difficulty of the plaintiff in obtaining future employment may have an impact on the court's determination of whether an alleged act of misconduct constitutes lawful grounds for dismissal without notice; in other words, judges may not look as harshly at certain types of improper behavior when job opportunities are scarce. In addition, the results indicate a more favorable employer win rate ($p < .05$) during the 1985-to-1989 period.

CONCLUSION

The purpose of this study was to investigate the impact of a number of factors on case outcome in Canadian wrongful dismissal cases in which the employer defense was based on the misconduct of an employee. The results indicated that employers won approximately 47 percent of the cases. This rate of success is somewhat higher than obtained by the authors in other studies in which the employer defense was based on alleged employee incompetence, business or economic reasons justifying dismissal, and contract principles.

The results of the probit analysis confirm expectations that the nature of the misconduct is a critical element in the court's decision. Although courts (and arbitrators) no longer treat theft or dishonesty as automatic grounds for termination, employers were most likely prevail in theft and dishonesty cases.

It appears, based on our findings, that the courts weigh a number of factors when deciding whether there was just cause for dismissal. Mitigating factors, most notably the presence of circumstances negating intent (that is, evidence indicating that the plaintiff had a reasonable explanation for the behavior in question) and employer condonation of past misconduct, are important considerations in the courts' deliberations. Employers are well-advised to respond fairly and quickly when an act of employee misconduct occurs.

Consistent with the arbitration literature in both Canada [5] and the United States [21], the past record and work characteristics of the terminated employee are examined; overall, courts are less likely to find just cause when employees

who are satisfactory performers or who possess an unblemished work record are dismissed. As well, the courts appear to pay some attention to the nature of the labor market the employee must compete in and seem to hold employers to a higher standard if the labor market is tight and job opportunities are scarce.

While this study is the first we are aware of to examine the factors affecting the courts' determination of just cause based on alleged employee misconduct, it should be noted that the findings are somewhat preliminary. The study is based on a relatively small sample of cases, and it is possible other criteria relevant to the courts' decision have been omitted from the model. Future research should examine whether the results are generalizable to other jurisdictions. In addition, while proceeding to court is often the last stage in the ultimate resolution of conflict between a dismissed employee and the employer, further attention should be focused on resolving conflicts in the workplace and examining how the actions of the parties contributed to the conflict.

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ENDNOTES

1. L. Sooklal, Identification and Analysis of the Wrongful Dismissal Lawsuit Problem in Canada, *Labor Law Journal, 38,* pp. 596-603, 1987.
2. T. Wagar and K. Jourdain, The Determination of Reasonable Notice in Canadian Wrongful Dismissal Cases, *Labor Law Journal, 43,* pp. 58-62, 1992. For earlier studies addressing the calculation of reasonable notice, see S. McShane, Reasonable Notice Criteria in Common Law Wrongful Dismissal Cases, *Relations Industrielles, 38,* pp. 618-633, 1983 and S. McShane and D. McPhillips, Predicting Reasonable Notice in Canadian Wrongful Dismissal Cases, *Industrial and Labor Relations Review, 41,* pp. 108-117, 1987.
3. T. Wagar and J. Grant, Dismissal for Incompetence: Factors Used by Canadian Courts in Determining Just Cause for Termination, *Labor Law Journal, 44,* pp. 171-177, 1993.

4. In a previous study, we found that in more than two-thirds of the cases in which an employer argued just cause for termination, the employer relied on employee misconduct as a ground justifying dismissal. See. T. Wagar and J. Grant, Determinants of Just Cause and Reasonable Notice in the Dismissal of Nonunion Employees: Evidence from Canada, *IRRA Working Paper Series,* IRRA, Madison, Wisconsin, 1992.
5. For further discussion of the principles relating to labor arbitration, see D. Brown and D. Beatty, *Canadian Labour Arbitration* (3rd Edition), Canada Law Book, Aurora, Ontario, 1993.
6. Some employees in Nova Scotia, Quebec, and the federal jurisdiction meeting a specified length of service with an employer may qualify to use a statutorily provided adjudication process somewhat similar to labor arbitration that permits reinstatement of an unjustly dismissed employee.
7. For a more in-depth discussion of how courts determine reasonable notice, refer to [2]. As well, see E. Mole, *The Wrongful Dismissal Handbook,* Butterworths, Markham, Ontario, 1990 and H. Levitt, *The Law of Dismissal in Canada* (2nd Edition), Canada Law Book, Aurora, Ontario, 1992.
8. *King and Martin v. Harris and Hiscock,* (1980), 30 Nfld. & P.E.I.R. 118 (Nfld.S.C.T.D.).
9. This principle is illustrated in *Roy v. Maple Creek Credit Union and Saskatchewan Cooperative Credit Society Ltd.* (1983), 24 Sask.R. 43 (Sask.Q.B.).
10. *Laird v. Saskatchewan Roughrider Football Club* (1982), 18 Sask.R. 333 (Sask.Q.B.).
11. *Laws v. London Chronicle Ltd.,* [1959] 1 W.L.R. 698 (C.A.).
12. *Lyons v. Miguel's Chili Chapter Restaurants Ltd.* (1990), 31 C.C.E.L. 181 (B.C.Co.Ct.).
13. *Doyle v. London Life Insurance Co.* (1984), 25 A.C.W.S.(2d) 369 (B.C.S.C.).
14. *Ball v. MacMillan Bloedel Ltd.* (1989), 29 C.C.E.L. 99 (B.C.S.C.).
15. *Housepian v. Work Wear Corp. of Canada Ltd.* (1981), 33 O.R.(2d), 575. However, as noted by Levitt [7], some courts have applied a higher standard of proof commensurate with the subject matter of the offense and the gravity and consequence of the findings.
16. See, for example, *O'Neill v. Environs Landscape Contracting Co. Ltd.* (1987), 4 A.C.W.S.(3d) 61 (Ont. Dist. Ct.) and *Iacono v. Mitchell* (1985), 34 A.C.W.S.(2d) 63 (H.C.J.).
17. *Roy v. Maple Creek Credit Union Ltd. and Saskatchewan Co-operative Credit Society Ltd.* (1983), 24 Sask.R. 43 (Sask.Q.B.).
18. *Smith v. Dawson Memorial Hospital and Flood* (1978), 29 N.S.R.(2d) 277.
19. Employers, in some of the cases, argued that more than one type of misconduct was present.
20. Probit estimation is preferable to OLS regression analysis when the dependent variable is dichotomous (such as win or lose). For an introduction to probit analysis, see J. Aldrich and F. Nelson, *Linear Probability, Logit and Probit Models,* Sage, Beverly Hills, 1984. More advanced discussion is contained in G. Maddala, *Limited-dependent and Qualitative Variables in Econometrics,* Cambridge University Press, London, 1983 and W. Greene, *Econometric Analysis* (2nd Edition), Macmillan, New York, 1993.

21. F. Elkouri and E. Elkouri, *How Arbitration Works* (4th Edition), Bureau of National Affairs, Washington, 1985.

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