

UNJUST DISMISSAL IN THE FEDERAL JURISDICTION: THE FIRST THREE YEARS

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On September 1st, 1978 non-organised workers in the federal jurisdiction acquired protection against "unjust" dismissal with the coming into force of section 61.5 of the Canada Labour Code.¹ The scheme resembles "just cause" arbitration under a collective agreement in that a neutral "adjudicator" determines whether discharge is "unjust" and, if it is, awards the appropriate remedy.² Canadian representatives to the General Conference of the International Labour Organisation had, as early as 1963, voted in favour of the adoption of national legislation which would make unlawful dismissals not related to the ability or conduct of the worker or the operating needs of the firm.³ Prior to the enactment of section 61.5, the only equivalent scheme in Canada was contained in the *Nova Scotia Labour Standards Code* introduced in 1975.⁴ The latter has rarely been utilised, largely due to the requirement that the employee have ten years service with the employer in order to file a complaint.⁵ In 1980 "unjust" dismissal protection was introduced in Quebec in respect to employees with at least five years prior service with their employer.⁶ It remains to be seen whether that requirement will result in relatively few complaints being filed. Thus three Canadian jurisdictions have brought their employment standards legislation into line with that of the majority of Western countries as regards unjust dismissal protection for non-organised workers.⁷

The purpose of this paper is to examine the first three years experience with section 61.5 of the *Canada Labour Code* in order to assess whether the avowed goals of the legislation have been achieved and to suggest what improvements should be made. That experience is significant because of the likelihood of other jurisdictions introducing similar schemes in the future. It is not proposed to gauge section 61.5 against an "ideal" dismissal procedure. This author undertook that task prior to the enactment of the section, and his views need not be repeated here.⁸

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1. R.S.C. 1970, c. L-1 as am. Bill C-8 was tabled on October 27, 1977. See H.C. Deb., 30th Parl., 3rd Sess., (1977) v. 1, p. 325. It was given Royal Assent on April 20, 1978. See *Act to amend the Canada Labour Code*, S.C. 1977-78, c. 27.
2. As of March 31, 1981 a total of 95 cases were remitted to adjudication; 59 decisions were rendered; 22 were settled prior to the hearing; and 14 were pending. Of the 59 decisions adjudicated, dismissal was upheld in ten and ruled unjust in 35. Of the latter, a lesser penalty was substituted in nine; reinstatement with compensation was ordered in nine; reinstatement without compensation was ordered in one; compensation without reinstatement was ordered in 15; and a declaration that unjust dismissal be removed from the work record was granted in one case upon request of the claimant. A total of 12 claims were dismissed by the adjudicator for lack of jurisdiction. "Arbitration Services Reporter" V. 5, No. 5, May 1981, pp. 2-3.
3. International Labour Conference, "Record of Proceedings", 47th Session, Geneva, 1963, published by I.L.O., Geneva, 1964, p. 443.
4. *Labour Standards Code*, S.N.S., 1972, c. 10, (L1-1), S. 67 A as am. by S.N.S. 1975, c. 50, s. 4.
5. *Labour Standards Code*, S.N.S., 1972, c. 10 (L-1), S. 67A 5.67A(1), as am. by S.N.S., 1975, c. 50, s. 4 as am. by S.N.S. 1976, c. 41(1), s. 15. For instance, between March 1975 and July 1977, only 30 complaints were filed, according to the author's communications with officials of the Labour Standards Tribunal.
6. *An Act Respecting Labour Standards*, S.Q. 1979, c. 45 as am., s. 124.
7. See C.W. Summers, "Individual Protection Against Unjust Dismissal: Time for a Statute" (1976) 62 *Va. L. Rev.* 481; G. De N. Clark, "Unfair Dismissal and Reinstatement" (1969), 32 *Modern Law Review* 532.
8. G. England, "Recent Developments in Wrongful Dismissal and Some Pointers for Reform" (1978), 16 *Alta. L. Rev.* 470. See also Summers, *supra*, n. 7; M. Mellish and N. Collis-Squires, "Legal and Social Norms in Discipline and Dismissal", (1976) 5 *Industrial Law Journal* 164.

The policy

The avowed objective was to afford non-organised workers in the federal jurisdiction, who numbered approximately 275,000 in 1977, similar protection against "unjust" dismissal as enjoyed by most unionised workers under collective agreements.⁹ The protection afforded by a common law action for wrongful dismissal was seen as deficient in several respects.¹⁰ It permits an employer to dismiss for any or no reason so long as the requisite formalities in the employment contract are observed and so long as the contractually based notice period, or wages in lieu thereof, is honoured. It applies an unrealistic standard of "cause" where summary dismissal is invoked, hampered as it is by the contract law concept of repudiation. It provides inadequate remedies: reinstatement is traditionally unavailable; and the measure of damages is restricted by the somewhat arbitrary presence of contract based notice periods and employment benefits which preclude "make whole" compensatory awards. The Federal Government felt that protection against "unjust" discharge was too important and employment interest to be left to the self-help method of union organising.¹¹

The rules of eligibility

A person is only eligible if he has "employee"¹² status with an employer in the federal jurisdiction¹³; he is not a "manager"¹⁴; he has 12 months "consecutive employment"¹⁵; he makes a timely application¹⁶; he is "dismissed"¹⁷; he has not been "laid-off"¹⁸; he is not covered by a collective agreement¹⁹, nor has any other statutory procedure for redress²⁰; and he receives ministerial approval for adjudication.²¹ Further, an eligible complaint may not proceed to adjudication if it is settled voluntarily in conciliation, which must precede adjudication.²²

As will be seen later, the foregoing often involve the determination of controversial questions of fact and law. The *Code* establishes a system of split

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9. See the comments of John Munro, Minister of Labour, at 30 Parl. Deb. H.C. (Vol. 121, No. 39) p. 1831 (1977). See also "A Better Deal for Canada's Unorganised Workers", an address by John Munro to the Annual Meeting of Canadian Association of Temporary Service, Edmonton, Alberta, May 28, 1977. Labour Canada.
 10. Those deficiencies are examined in more detail in G. England, *supra*, n. 8. See also I.M. Christie, *Employment Law in Canada* (Butterworths, 1980) pp. 337-407.
 11. The hostile reaction of employers to the legislation can be seen in the following: Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration, Respecting: Bill C.8, *An Act to amend the Canada Labour Code*, House of Commons, Thirtieth Parliament, 1977-78: Issue No. 5, February 28, 1978, Canadian Association of Broadcasters; Issue No. 9, March 14, 1978, Canadian Trucking Association; Issue No. 3, February 16, 1978, Canadian Manufacturers' Association and Chamber of Commerce; Issue No. 6, March 2, 1978, Railway Association of Canada; Issue No. 10, March 15, Canadian Bankers' Association. The reaction of organised labour was largely negative. See the Evidence 1. Proceedings and Evidence, Issue No. 8, 8A: 35 and 36. Contrast the positive response of the Confederation of National Trade Unions, L.M.I. Proceedings and Evidence, Issue No. 10, 10A: 51.
 12. Although section 61.5 uses "person", it means "employee" because an "employer" is defined as a person who employs "employees" (s.26) and "continuous employment" s. 61.5(1)(a) connotes "employee" status. For the common law test of "employee" status, see I. Christie, "Employment Law in Canada", pp. 17-27, *supra*, n. 10.
 13. The constitutional issue is beyond the scope of this paper. Only one adjudication has arisen on point, in which it was held that the company was subject to provincial jurisdiction. *Androkovich v. Cargill Nutrena Feed Ltd.*, Nov. 1980 (Virtue).
 14. *Canada Labour Code*, R.S.C. 1970, c. L-1, as am. by R.S.C. 1970, c. 17 (2nd Supp.) as am. by S.C. 1972, c. 18, as am. by S.C. 1977-78, c. 27, s. 27(4).
 15. Section 61.5(1)(a).
 16. Section 61.5(2).
 17. Section 61.5(1).
 18. Section 61.5(3)(a).
 19. Section 61.5(1)(b).
 20. Section 61.5(3)(b).
 21. Section 61.5(6).
 22. Section 61.5(5).

jurisdiction between the Minister and the adjudicator for their resolution. Section 61.5(b) confers discretion on the Minister to remit complaints to adjudication. In practice, a complaint is filed with a local level Labour Standards Branch inspector who makes a report to the regional level director. The latter effectively decides whether the claim is eligible, sometimes on the advice of departmental lawyers in Ottawa in disputatious cases. The policy is to weed out frivolous claims before they incur the public expense of adjudication. Only if the complaint is "borderline" will it be remitted to adjudication. If the matter does proceed it is established that adjudicators have jurisdiction to determine issues of fact and law as they relate to eligibility, although such determination is reviewable on the merits by the Federal Court of Appeal.²³ The danger is that contentious questions of fact and law which should properly be resolved by evidence and argument in adjudication may be decided behind closed doors by departmental bureaucrats, and meritorious complaints go unheard. In the first two years of the section's operation Ministerial consent to adjudication was denied in 19% of all cases in which it was requested.²⁴ No data is available on the specific reasons for those rollbacks, except that the claims were ineligible. It is difficult to envisage an alternative system for balancing the interest involved other than relying on the "good sense" of Labour Canada officials.²⁵ In contrast, the British legislation permits the employee to proceed to the tribunal as of right once conciliation has been exhausted.^{25A} The evidence suggests that approximately half of the total number of complaints filed are either dropped or settled prior to the tribunal stage.²⁶ It is therefore arguable that conciliation at inspector level may sift the clearly ineligible claims without the need for residual Ministerial discretion controlling access to adjudication.

Status as "employee" and "manager"

The rationale for restricting protection to "employees", generally defined as those who are integrated into the business and so may be said to depend economically on their employer²⁷, is that such dependency creates an imbalance of bargaining power so as to justify their protection. This does not take account of contractors who, though technically not "employees" are nevertheless dependant on their "employer" for their economic survival and are therefore subject to a similar inequilibrium of bargaining power. Oddly, Part V of the *Code* recognises that certain "dependant contractors" in trucking and fishing warrant the right to bargain collectively and to win "just cause" provisions in their collective agreements.²⁸ At the least one would expect that they be treated uniformly under the *Code*! It is arguable that the relatively narrow definition in section 107(1) be broadened to include those in a position

23. This is implicit in *Avalon Aviation Ltd.*, Feb. 1981, A-216-80 (Fed. Ct. App.); *A-G Canada v. Gauthier*, [1980] 2 F.C. 393 (C.A.); *Pioneer Grain v. Kraus*, April 1981 A-647-80 (Fed. Ct. App.).

24. Data cited is the result of the author's communication with Labour Canada officials in Ottawa and Edmonton.

25. Labour Canada has stated that it will remit to adjudication in "borderline" cases. See "Technical Guidelines Division V-7 - Unjust Dismissal Part I" in *Unjust Dismissal Manual* (Labour Canada loose-leaf service").

25(a) *Employment Protection (Consolidation) Act 1978*, c. 44 as am., s. 67(1), (U.K.).

26. B. Weekes, M. Mellish, L. Dickens and J. Lloyd, *Industrial Relations and the Limits of the Law* (Blackwell, 1975) pp. 16-17.

27. Christie, *Employment Law in Canada*, at pp. 17-27, *supra* n. 10.

28. *Canada Labour Code*, R.S.C. 1970 c. L-1, as am., s. 107(1).

of economic dependency in any industry, as exists in certain other jurisdictions.²⁹

Adjudicators have held that part-time workers who are otherwise "employees" do not lose that status so long as they work on a regular basis.³⁰ Labour Canada officials distinguish between permanent part-time workers who work for one employer because the nature of the work demands it and the worker who elects to work part-time for personal reasons or because he also has a part-time job with another employer. They treat the latter as excluded because of the possibility of the worker not being able to make himself available to both employers at all times.³¹ It is submitted that such workers should not be treated as ineligible on this ground so long as they work on a regular basis. Failure to work when required should properly go to the issue of whether dismissal is "unjust", not to eligibility.

The rationale for excluding "managers", originally covered under Bill C-8, are as follows.³² First, that they have ready access to the courts in order to recover damages for wrongful dismissal, unlike less well paid "employees". This misses the point that the common law rules governing the measure of damages do not permit the true losses of wrongful dismissal to be compensated, nor does the common law standard of "cause" entrench meaningful criteria for the assessment of managerial job performance.³³ Second, that since the purpose of the legislation is to equalate protections enjoyed by organised workers, "managers" do not warrant those protections because they cannot engage in collective bargaining under the *Code*. This misses the point that in certain jurisdictions at least lower level managers can organise and win "just cause" provisions in their agreements.³⁴ It may be that the standard of "cause" should differ in the case of higher level managers - for instance, they may be expected to judge for themselves whether their job performance is adequate without the necessity of prior warnings by their superiors³⁵ - but it does not follow that the common law standard is adequate, nor that adjudicators could not flesh out a unique standard of "managerial cause" for them. Third, it was thought that the remedy of reinstatement would be inappropriate as impairing the effectiveness of managers in the eyes of their peers and subordinates, especially when managerial positions are readily available elsewhere. This view fails to recognise that reinstatement of managers may be appropriate in some circumstances but not in others, just as in the case of non-managerial employees. A blanket denial of the remedy is too inflexible. Moreover, the labour market for managers is not necessarily bouyant, as witnessed by the plight of "unemployable" middle-aged executives. Lastly, it is no reason to

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29. Eg. British Columbia, *Labour Code* R.S. B.C. 1979, c. 212, s. 1(1); Ontario, *Labour Relations Act*, R.S.O. 1980 c. 228, s. 1(1)(h); Saskatchewan, *Trade Union Act* R.S.S., 1978, c. T-17 as am., s.2(f) (ii).
 30. *Campbell v. Reliance Moving and Storage Co. Ltd.*, Aug. 1979 (Williams).
 31. Memo dated May 15, 1977 from Department of Justice to Labour Canada, reproduced in *Unjust Dismissal Manual*, *supra* n. 25.
 32. See the comments in the House of Commons Standing Committee on Labour, Manpower and Immigration, Minutes of Proceedings, 1977-78, at 12:36-39.
 33. See generally England, *supra* n. 8 and Christie, pp. 354-373 and 385-407, *supra* n. 10.
 34. See R. Krindle, "Definition of Employer-Employee", Twenty Fifth Annual Conference of the Industrial Relations Centre, McGill University, p. 42.
 35. See eg. *James v. Waltham U.D.C.*, [1973] 1 C.R. 398 (N.I.R.C.), arising under the British legislation which does encompass managers.

deny managers "make whole" compensation awards provided for in the legislation on the ground only that reinstatement is deemed undesirable. Rather, it is submitted that "managers" should be covered by the *Code* and that the appropriateness of reinstatement and the standards of "cause" be subject to the discretion of adjudicators, as is currently the case with non-managerial workers.

It is possibly in response to the plight of these "forgotten men of industry" that adjudicators have interpreted "manager" in the narrow sense of persons having "some real independence and discretion as to the outcome of the affairs of that particular enterprise"³⁶, and having the "power to act independently, autonomously using one's discretion"³⁷. Further, that interpretation is buttressed by the statutory language. Section 27(4) specifically excludes "managers" from Division V7, whereas section 27(3)(a) specifically excludes from Division 1 "...employees who are managers or superintendants or who exercise management functions". The legislature must have intended that "superintendants or ...[employees]... who exercise management functions" means something different than "manager". Adjudicators have therefore held that persons who exercise "superintendent" functions or "management functions" in the sense of those words under collective bargaining legislation are not "managers" under section 27(4) without that essential element of effective personal authority and control.³⁸

"Twelve consecutive months of continuous employment"³⁹

One rationale for this requirement is to avoid the flood of applications and consequent administrative stresses that would ensue without a seniority qualification, given that most discharges occur within the first few months of employment.⁴⁰ It means that the statute does not apply where protection is most needed, and creates the danger of encouraging employers to dismiss in borderline cases before statutory protection is triggered. Another rationale is that the worker can only acquire a "property interest" in his job through a reasonable period of service and it is that "property interest" alone which justifies statutory protection.⁴¹ The myth of the "property interest" rationale of unjust discharge protection has been exploded elsewhere.⁴² Therefore it is submitted that this prerequisite be abolished. Bureaucratic stresses should be no justification for denying industrial justice. Most frivolous cases could be weeded out in conciliation or by Ministerial denial of adjudication. Adjudicators could tap the vast body of arbitral jurisprudence relating to the discharge of probationers in fashioning a standard of "cause" for low seniority rated employees.⁴³

36. *Smith v. Eastern Airlines Inc.*, April 82, 1981, p. 16 (Brown).

37. *Ibid.*, at p. 15. To the same effect see *Desgagne v. Avalon Aviation Limited*, March 1980 (Veale), affm'd February 1981, A-216-80 (Fed. C.A.); *Maritime Employers Association v. Perreault*, Dec. 1980 (Tremblay); *Gauthier v. National Harbours Board*, October 29, 1979 (Turcotte), rev'd on other grounds, sub-nom *A-G Canada v. Gauthier* (1980), F.C. 292 (C.A.); *Mayhew v. Eastern Airlines Inc.*, Oct. 1981 (Brown); *Auden v. Atomic Energy of Canada Ltd.*, May 1981 (Saltman); *Gill v. National Bank of Canada*, Nov. 1981 (Lauzon). Contrast *Mathews v. Bell Canada*, May 1980 (Chilcott).

38. See the authorities cited in footnotes 36 and 37, *supra*. In *Gill v. National Bank of Canada*, at p. 11, *supra* n. 37, it was held that the onus of proving that the worker is within the "manager" exception falls on the employer.

39. Section 61.5(a).

40. See Ross, "The Arbitration of Discharge Cases: What Happens After Reinstatement" (1957), at p. 29.

41. This has been stated to underlie the Nova Scotia legislation. See N.S. House of Assembly Debates and Proceedings (2nd sess.) March 24, 1975 at pp. 1499-1503.

42. See especially Jackson, "Unfair Dismissal, How and Why the Law Works" (Cambridge, 1975).

43. See D. Brown and D. Beatty, "Canadian Labour Arbitration" (Canada Law Book Ltd., 1977) pp. 385-392.

Unlike collective agreements which normally specify which events rupture seniority accrual, the *Code* does not state which absences from work shall interrupt "continuous employment" for the purpose of section 61.5, except that a "successor employer" situation will not interrupt continuity.⁴⁴ Sub-section (13)(1) of section 61.5 empowers the Governor in Council to make regulations defining which absences shall break continuity, but as of the date of writing none have been made. Provisions exist in the Regulations and in the *Code* itself regulating continuity in the context of statutory benefits other than unjust dismissal.⁴⁵ This is an unfortunate omission for it has resulted in adjudicators adopting a contract based response to the question. For instance, absence through sickness has been held not to break continuity "... until some affirmative action is taken by the employer to terminate the employment relationship"⁴⁶, presumably on the basis that the contract is impliedly suspended during sickness. In another case involving a construction maintenance crew worker who was laid off during the winter period of mid-December to early January, adjudicator Mitchell stated,⁴⁷

"The evidence is clear that (the complainant's) employment since the beginning has followed the same pattern. He ends his year around mid-December and receives his holiday pay. He is called back early the following year. In fact, he has been called in early January. This break in employment is one which is experienced by all of the construction employees. I am unable to accept that this is a break in employment which disentitles the construction employees ... in general and (the complainant) in particular from the benefits of Division V7. The employment of (the complainant) must be regarded as continuous within the meaning of the legislation."

Again this suggests that the employment contract was suspended during the lay-off.

It is submitted that whereas those decisions are probably justifiable on their facts, their contract orientated basis creates dangers. Thus, if the contract expressly or impliedly provides that a short duration lay-off, sickness or disciplinary suspension shall result in termination, then the worker automatically loses his seniority when he arguably ought not to. Conversely, a very long absence which does not rupture the contractual nexus arguably should not result in public funds financing adjudication for the worker concerned. Whether absences such as lay-off, sickness, illegal strikes and disciplinary suspension should count, and if so how long an absence is to be permitted, are matters of substantive public policy which should be addressed by regulations, not left to the vicissitudes of employment contract law.

Timeliness of the application

Section 61.5(2) requires that a complaint be made to an inspector^{47a} within 30 days from the date on which the complainant "was dismissed". Of the 24% of total applications which were turned back at inspector level, Labour Canada

44. Section 61.5(15), making applicable the "successor employer" provision in section 45.

45. Section 61.5(3), respecting the calculation of "pension and other benefits in the context of absence through illness or injury"; *Canada Labour Standards Regulations C.R.C. 1978 c.986* as am. section 29, respecting maternity leave, individual termination of employment and severance pay under Divisions I, III and V respectively of the *Canada Labour Code*.

46. *Fink v. Int'l. Carriers Limited*, at p. 4, April 1979, (Ianni). See Christie pp. 145-148 and 272, *supra* n. 10.

47. *Kraus v. Pioneer Grain Co.* at p. 2, September 1980 (Mitchell), *aff'd.* April 24, 1981 A-647-80 (Fed. Ct. App.). See Christie pp. 423-437, *supra* n. 10.

47(a). In *Sarlin v. National Bank of Canada*, December 1981 (Perkins), it was held that the post office is the agent of Labour Canada for the purpose of fixing the date of receipt as the date of mailing the complaint.

officials believe that a significant number are due to untimeliness, although they do not have the exact statistics. A worker who applies before the date of "dismissal" in anticipation thereof, and who subsequently "sits in the sun" for a further period beyond the 30 day deadline could inadvertently lose his case. The danger is maximised by the legal difficulties in determining the moment of "dismissal", as will be seen. Provision should be made, it is submitted, for pre-"dismissal" applications.

In this and other situations where the time limit is violated, section 61.5(2) permits the Minister to authorise an extension of such length as he sees fit where he is satisfied that "justice would be served by so doing". For the period under study there have been ten requests and nine extensions granted. Labour Canada has given three examples of situations in which extensions would be granted: where mail delay is caused by postal strikes; where delay is caused by sickness or incapacity; and where the employee has "expeditiously" followed the wrong forum for relief, such as an abortive unfair labour practice claim.⁴⁸ It is suggested that the test be whether the employee has been reasonably put on notice of the time limit and has failed to respond due to his own fault. Thus delays occasioned by professional misadvice, internal negotiations with the employer, and general postal delays^{48a} should be waived for the fault does not lay at the worker's door. Lastly, it has been held that the Minister's *personal* signature must appear on the extension authorisation, not that of his subordinates.⁴⁹

The requirement for a "dismissal"

Although the concept of "dismissal" is the cornerstone of section 65.1, nowhere is it defined. Adjudicators have therefore turned to the common law in the few cases that have arisen on point.⁴⁹ The common law focus is "contract" based - has the contract terminated by act of the employer? - rather than "real-world" based - has employment ended? The latter would be expected to have greater relevance for the worker. There is no problem in finding a "dismissal" where the worker is summarily discharged or discharged by notice, whether or not wages in lieu are given. So too where the worker is alleged to have "quit" and the common law test is his subjective intention (evidenced by objective manifestations thereof). There are three major problems.

First, Labour Canada officials take the view that "constructive dismissal" is not encompassed by the section following the decision in *Kowalik v. Toronto Dominion Bank*.⁵⁰ In that case the adjudicator refused to hold that an employee who resigned in response to a unilateral demotion had been "dismissed", notwithstanding that the evidence did not seem to establish an express or implied contractual right in the employer to demote. Ministerial consent to

48. "Technical Guidelines, Division V7 - Unjust Dismissal" at p. 3 in *Unjust Dismissal Manual*, *supra* n. 25.

48(a). This would be unnecessary if the view suggested in *Sartin*, *supra* n. 47(a) is correct, for the date of posting would constitute receipt. *Quaere* whether the claimant should not have to initiate inquiries if he does not hear anything back from Labour Canada after a reasonable time on pain of losing his claim.

49. *Colthorpe v. Bank of Montreal*, July 1980 (L'Ecuyer); *Duhamel v. Bank of Montreal*, February 1981 (BIRD); *Smith v. Eastern Airlines Inc.*, July 1981 (Brown).

49(a). Eg. *Walker v. Canadian Imperial Bank of Commerce*, August 1979 (Brent); *Rundt-Goodsell v. Canada Council*, June 1981 (Scott); *Crockford v. Kingcome Navigation*, June 1979 (Herbert). See generally Christie Chapter 7, *supra* n. 10.

50. October 1980 (McIver).

adjudication is being denied in such cases on the basis that the employee has quit.⁵¹ This makes for bad law and policy. The courts have long recognised that the requisite termination by act of the employer exists if the worker resigns in response to a repudiatory breach on the employer's part.⁵² Thus harrassment tactics often utilised to induce workers to quit - changing job duties, status, employment benefits or other conditions, and generally making life unpleasant - will result in "constructive dismissal" if those tactics involve breach of an express or implied terms of the contract, which very often they will not. This has caused English courts and tribunals to impose an implied contractual duty of "fairness" on employers, in order to bring such cases within the equivalent English legislation.⁵³

It is unfortunate that employers have been given a "carte blanche" under the *Code* to engage in such tactics. For instance, if an employee is reinstated by an adjudicator against the wishes of the employer, the latter could circumvent the reinstatement order by making life so miserable for the employee that he is forced to "quit". Further, it means that workers can never challenge a lengthy suspension in adjudication on the basis of "constructive dismissal", notwithstanding that the contract may not expressly or impliedly permit suspension and the absence of waiver or mutual rescission.⁵⁴ It is submitted that this loophole be blocked by including "constructive dismissal" within the section.

The second problem is that the non-renewal of fixed term contracts does not constitute "dismissal" because the contract expires under its own terms, not by act of the employer.⁵⁵ Thus employers could drive a coach and four through the legislation by forcing workers to accept engagement under such contracts. It is not known whether this practice has increased since the section came into force. The legislation should encompass such terminations.

Third, the precise moment when the contract terminates is crucial in determining the date of "dismissal" for the purposes of a timely application and the 12 month qualification period. The contract law perspective creates difficulties which can only result in uncertainty for the employee. For instance, where wages in lieu of notice are given the contract should end at the date wages are given provided that this manner of termination technically constitutes breach by the employer. If it operates as lawful termination, then the relevant date is presumably when the notice period would have expired. The common law authorities are divided as to which view represents the law.⁵⁶ Adjudicators have held that "dismissal" in this situation occurs at the date wages in lieu are given to the employee, although there remains some doubt whether this is technically correct.⁵⁷ If notice to terminate is given along with a

51. Technical Guidelines, Division V7 - *Unjust Dismissal Manual*, *supra* n. 25.

52. See England, at pp. 488-491, *supra* n. 8.

53. Eg. *Gardner Ltd. v. Beresford* (1978), I.R.L.R. 63 (E.A.T.); *Warner v. Barber Stopes*, [1978] I.R.L.R. 109 (E.A.T.); *Robinson v. Crompton Parkinson* (1978), I.R.L.R. 61 (E.A.T.). The English legislation expressly incorporates "constructive dismissal" in section 55(2)(c) of the *Employment Protection Consolidation Act*.

54. The legality of disciplinary suspensions under the employment contract is described in Christie, "Employment Law in Canada", at pp. 423-425, *supra* n. 10.

55. *Christopher v. C.K.X.M. - F.M. Ltd.*, at p. 8, Sept. 4, 1981 (Lucas). See to the same effect *B.B.C. v. Ioannu*, (1975) I.C.R. 267 (C.A.), arising under the English legislation.

56. The cases are discussed in England pp. 580-581, *supra* n. 8.

57. *Rundle-Goodsell*, *supra* n. 49(a); *Crockford*, *supra* n. 49(a).

lump sum payment, with the worker remaining on the job, it may be that "dismissal" occurs when notice is served, not when it expires as would normally be the case.⁵⁸ Presumably the employee would continue work under some form of hiring at will. On the other hand, if notice is given but the worker is required to leave the job, the contract may terminate at the date notice expires.⁵⁹ It is unfortunate that such matters are not regulated in substance by the legislation rather than left to the vagaries of contract law.

Lay-off

Section 61.5(3)(a) provides that no complaint shall be considered if the employee "has been laid-off because of lack of work or because of the discontinuance of a function". The rationale is presumably to avoid the conundrum of reinstating workers in jobs that are no longer available. This fails to recognise that it may be fair to compel the employer to re-engage such workers in other areas of the enterprise, and that compensation may be an appropriate remedy for procedural "unjustness" in administering the lay-off, for example where the employer has not made reasonable efforts to give advance notification or to relocate employees elsewhere.^{59a}

This section is fraught with uncertainties, few of which have been clarified by adjudication. For instance, it is unclear whether the exclusion is intended to apply only to lay-offs where the employer has expressly or impliedly promised to rehire the worker when work resumes. The presence of such a promise suggests that the contract is suspended, not terminated. If so, employees who are not subsequently rehired could bring a claim for "dismissal" at that point, which would presumably require the fashioning of some seniority system to govern the order of recall as work picks up. If the correct view is that "dismissal" occurs at the moment of lay-off, it is unclear whether the exception applies because the "dismissal" will also be worded, at least in the vocabulary of the statute, as "lay-off". It would be at odds with the ostensible legislative policy were the employee eligible to claim in this situation. If he were able, this would raise the thorny question whether the decision of the Nova Scotia Court of Appeal in *Town of Yarmouth v. Manser*⁶⁰, which held that permanent disappearance of the job does not constitute "discharge" under the then section 67A of the *Labour Standards Code*, applies to the meaning of "dismissal" under section 61.5. The advice of the Department of Justice to Labour Canada is equivocal, simply being that "... no substantial difference exists between 'dismissal' and 'laid-off' except for the fact that the latter implies that the dismissal was for reason of lack of work or the discontinuance of a function."⁶¹ The Department has further suggested that "... as a matter of policy ... where it seems apparent that the lay-off is for a temporary period of time, a complainant should await the expiration of a three month period before requesting referral to an adjudicator".⁶² The "policy" in question is to tie section 61.5 into section 30(b) of the Canada Labour Standards Regula-

58. *Rundle-Goodsell*, *supra* n. 49(a).

59. *Ibid.*

59(a). Thus in *Geoffrion v. National Bank of Canada*, Sept. 1981 (Gravel), the adjudicator held that so long as there was a factual and real discontinuance of a function, then the employer's procedural fairness in implementing lay-offs is irrelevant (at p. 25).

60. (1977), 72 D.L.R. (3d) 285, criticised in Christie p. 423, *supra* n. 10.

61. "Technical Guidelines Division V7 - Unjust Dismissal", at p. 3 in *Unjust Dismissal Manual*, *supra* n. 25.

62. At p. 4, *supra* n. 25.

tions, which provide that there is no termination of employment where the period of lay-off is three months or less for the purposes of Division V2, V3 and V4 of the *Code*.

It is odd that there have been only two adjudications on point.^{62a} Given that the factual issues - is the employer setting up the lay-off as a smoke screen to get rid of undesirables? - as well as the legal ones are so controversial, it is hoped that consent to adjudication is not being readily withheld in such cases. It is not known how many applications have been rolled back under this sub-section. It is clear that the governing words "no complaint shall be considered under this section"⁶³ are not being construed by Labour Canada as conferring an absolute discretion on the inspector to rule on the admissibility of a complaint under sub-section (3). Quite properly, the word "consider" is sufficiently ambiguous to confer jurisdiction in the adjudicator and it is being construed in the "mischief" sense so as to guarantee adjudicative jurisdiction.

The collective agreement⁶⁴ and alternative statutory relief bars⁶⁵

These exceptions are based on the assumption that collective agreement "just cause" articles and other statutory redress make section 61.5 protection otiose. The collective agreement bar applies to employees who are in the bargaining unit even though not union members.⁶⁷ The union is precluded by the duty of fair representation in section 136.1 of the *Code* from denying such employees access to arbitration by reason only of their non-membership. The collective agreement bar is not trouble free. For instance, not all agreements contain "just cause" protections, and even if they do they may not provide equivalent protections as the statute. Thus the parties may prohibit absolutely the application of any form of "progressive discipline" by mandatory language in the agreement which an arbitrator will be bound to apply.⁶⁸ It is highly debatable whether the policy of collective "freedom to contract" should outweigh the "public interest" as reflected in the statutory standard of "un-just" discharge.

Assuming that organised employees were to be given the option of proceeding under section 61.5 in the "less favourable protection" cases, unions with "equally favourable" dismissal procedures might justifiably argue that this is unfair to them.⁶⁹ After all, they have had to "pay" for their protection, not only by winning the provision in bargaining, but also by contributing to arbitration costs. One solution might be for the Federal Government to contribute financially to the costs of private arbitration in discharge grievances.⁷⁰ This would still leave open the question of whether the union

62(a). *Courshegne v. Canada Mortgage and Housing Corporation*, June 1981 (Descôteaux); *Geoffrion*, *supra* n. 59(a). Both cases illustrate that the adjudicators examined very closely the evidence in order to substantiate whether, objectively speaking, there had been budgetary restraints and consequent work reductions, as alleged by the employers, resulting in lay-off.

63. Section 61.5(3).

64. The privative clauses in section 61.5(10) and (11) refer only to the decision of the adjudicator.

65. Section 61.5(1)(b).

66. Section 61.5(3)(b).

67. *Eg. Gagnon v. Empire Stevedoring Company Ltd.*, Feb. 1980 (Cossette).

69. See 30 Parl. Deb. H.C. (Vol. 121, No. 39) p. 1836 (1977); 30 Parl. Deb. H.C. (Vol. 121, No. 40) p. 1884 (1977).

70. *The Nova Scotia Trade Union Act* S.N.S. 1972, c. 19 as am., s. 41(2) and (3) provides for one third government contribution to the costs of a single arbitrator or chairman of an arbitration board.

should have some control of employee access to adjudication. Under collective bargaining law it is generally recognised that a union can refuse access to arbitration in discharge cases, provided that it does not violate its duty of fair representation, ancillary to its legal status as exclusive bargaining agent. The author's preference is that the balance be struck by permitting the organised employee to proceed under section 61.5 in all cases, irrespective of the relative "favourability" of the collective agreement procedures. However, the employee should be required as a pre-requisite to section 61.5 adjudication to have proceeded through the internal grievance procedure in the collective agreement and to have been refused access to arbitration by the union. Further, the Federal Government should bear the costs of the arbitrator or chairman of the arbitration board (but not the nominees) in discharge grievances under collective agreements. Whichever route the employee pursues - arbitration or adjudication - the decision of the arbitrator or adjudicator should be final and binding. The employee should not be given two kicks at the cat.

A further problem with the collective agreement bar arises from the words "subject to a collective agreement". It is uncertain whether the bar applies when a collective agreement is not actually in force e.g. during a bargaining hiatus between successive collective agreements or a lawful strike. Often the subsequent collective agreement will contain a retroactivity clause, but this is not always the case. There are no adjudications on point as yet.

It is not known how many complaints have been ruled ineligible on the ground that there is available an alternative statutory procedure for redress. As yet, no cases have been remitted to adjudication. Although the sub-section does not require that the alternative procedures be equally as favourable to the employee as section 61.5, for example by making available reinstatement and "make whole"⁷¹ compensatory awards, Labour Canada is directing its inspectors to apply it in that spirit.⁷² Thus inspectors are being advised that discharges which could be pursued under the Human Rights Act or under Parts IV (unsafe work) and V (trade union activities) of the *Canada Labour Code* do activate the bar.⁷³ Conversely, the courts' power under s.71 of the *Code* to reinstate and compensate employees as a result of convictions against the employer for violating Part II of the *Code* is not treated as falling within section 61.5 (3)(b) because that power is predicted upon the initial finding that the employer has committed an offence.⁷⁴

Lastly, it has been held that where discharge involves both section 61.5 and breach of another statutory provision, for example discharge by reason of pregnancy, an adjudicator does not have jurisdiction to consider the legality of the other statute.⁷⁵ This can be very inconvenient for the employee who must pursue his remedy under the other statute in the appropriate forum. In British Columbia⁷⁶ and Nova Scotia⁷⁷ the labour relations legislation has sought to

71. *Infra*, p. 24 ff.

72. "Technical Guidelines Division V7 - Unjust Dismissal", at pp. 4-5 in *Unjust Dismissal Manual*, *supra* n. 25.

73. *Ibid.*

74. *Ibid.*

75. *A-G Canada v. Gauthier* (Fed. C.A.), *supra* n. 23.

76. *Labour Code* R.S.B.C. 1979 c. 212 s. 98(g).

77. *Trade Union Act* s. 41(1)(e).

avoid this by enabling collective agreement arbitrators to "apply" the remedy in the statute as well as any remedies under the collective agreement. In this case, the arbitrator's interpretation and application of the statute are reviewable on the merits by the courts.⁷⁸ It is recommended that section 61.5 adjudicators be given similar jurisdiction.

The Minister's discretion to remit to adjudication

The nature of this discretion and the dangers which it creates were averted to earlier. The only safeguards for the complainant are the traditional administrative law remedies for abuse of discretionary powers.⁷⁹ As yet the Minister has not been challenged in the courts on this ground. A possible solution may be to grant the employee the right to adjudication and weed out the frivolous cases in conciliation, as in Britain.⁸⁰

Mandatory conciliation

Sub-section (5) requires that an inspector investigate and attempt to settle complaints before a request for adjudication can be made. In the first two years of the section's operation, 46% of the total number of 383 complaints in respect to which conciliation was undertaken were settled voluntarily. No aggregate data on the terms of such settlements is available. The experience in Alberta between September 1978 and March 1980 is that of the 27 cases settled in conciliation, two were withdrawn by the employee, five were found to be ineligible, four involved breaches of other sections of the *Code*, and 15 involved a remedy for breach of section 61.5. Of the latter, one employee was reinstated, two settled for letters of reference, and the remainder accepted cash settlements falling within the range of \$300 to \$1200 (with two exceptions, one above and one below). Conciliation clearly serves a useful function in minimising bureaucratic stress and the "souring" effect of litigation on the parties future relationships (if any). However, inspectors should seek to ensure that the primary remedy of reinstatement is not lightly "traded off" in the haggling over money. After all, the employee is often not represented by counsel at the conciliation stage so that, in a sense, the inspector is the "expert" guardian of his interests. Given that reinstatement is ordered in the majority of adjudications in which it is requested, there does appear to be a danger of this occurring on the basis of the Alberta data. The English experience suggests that the danger can be a real one.⁸¹

Lastly, it appears that Labour Canada has refused to initiate conciliation attempts by inspectors in roughly 25% of cases, principally due to lack of any *prima facie* case being made out by the employee in his application. However justifiable this practice may be in terms of bureaucratic exigencies, it does not tally with the language of section 65.1(5) which provides,

On receipt of a complaint made under sub-section (1), an inspector *shall* endeavour to assist the parties to the complaint to settle the complaint ... (Emphasis added).

78. This is the effect of *McLeod v. Egan*, [1975] 1 S.C.R. 517. In jurisdictions other than British Columbia and Nova Scotia, the effect of *McLeod* is to permit arbitrators to interpret but not apply the statute.

79. See J.M. Evans, "deSmith's Judicial Review of Administrative Action" (Stevens, 1980, 4th ed.) pp. 285-356.

80. The success rate of conciliation in Britain was averred to in footnote 26, *supra*, and accompanying text.

81. The British experience suggests that the danger is a real one. See *Weekes et al* at pp. 16-17, *supra* n. 26.

If “shall” is mandatory, the practice is of questionable legality, although it has not as yet been challenged in court.

The standard of unjust dismissal

The meaning of “unjust” is not defined in the *Code*. Initial doubt whether “unjust” incorporates the arbitral or common law standard has been resolved by adjudicators in favour of the former, but with modifications.⁸² In *Duhamel v. Bank of Montreal*⁸³ the adjudicator, having reviewed extensively the previous adjudications on point, concluded that the test is “... generally accepted standards of good industrial relations practice”⁸⁴ in which the arbitral jurisprudence is relevant as “... a good indication of what those standards should be”.⁸⁵ However, he cautioned that adjudicators should not “blindly follow”⁸⁶ the arbitral jurisprudence. Significantly, the *Labour Canada Unjust Dismissal Manual*⁸⁷, which inspectors utilise as a guide in conciliation and reporting to the Minister, is replete with references to the arbitral authorities on the appropriate standard to be applied. Space precludes full analysis of the facts of all adjudication awards. This section will, therefore, focus on the major points where the arbitral jurisprudence converges with and diverges from section 61.5.

The first point of convergence is that adjudicators have adopted the arbitral practice of placing the burden of proof on the employer⁸⁸ that dismissal is not “unjust” and have, therefore, required the employer to proceed first at the hearing. It is submitted that placing the legal burden of proof on the employer is of questionable legality under the section. The general legal presumption is *ei qui affirmat non ei qui negat incumbit probatio*. Courts have held that the principle should not be departed from “without strong reason”.⁸⁹ Section 61.5 does not expressly place the legal onus of proof on the employer. It provides in sub-section (1) that the employee must file his complaint with an inspector and sub-section (5) requires the employee to initiate a request to the Minister for adjudication via the inspector. It is true that sub-section (4) requires the employer to provide written reasons for dismissal upon request of the claimant or an inspector, but this is pre-hearing and is arguably not strong enough to reverse the legal onus. The courts have required explicit statutory language in order to have that effect. For instance, in *Central Broadcasting Co. Ltd. v. Canada Labour Relations Board et al.*,⁹⁰ the Supreme Court of Canada held, *per incuriam*, that the language of section 188(3) of the *Canada Labour Code*

82. See especially *Roberts v. Bank of Nova Scotia*, Dec. 1979 (Adams); *Freeborn v. Canadian Imperial Bank of Commerce*, esp. pp. 19-20, June, 1981 (Baum); *Childs v. Royal Bank of Canada*, Feb. 1981 (Borowicz); *Cruikshank v. Royal Bank of Canada*, esp. p. 16, Feb. 1981 (Saltman); *Westbury v. Kingsway Transport Ltd.*, Dec. 1979 (Palmer); *Dickinson v. Canadian Pacific Airlines Ltd.*, esp. p. 3, Oct., 1981 (Brock).

83. Oct. 26, 1981 (Hickling).

84. At p. 30, *ibid.*

85. *Ibid.*

86. *Ibid.*

87. *Supra* n. 25.

88. The reasoning is enunciated in *Fink v. International Carriers Ltd.*, at pp. 2-3 *supra* n. 46. In *Sartin*, the adjudicator rationalised the reversal as reflecting implied statutory intent, *supra* n. 47(a). The arbitral jurisprudence is described in Brown and Beatty, at pp. 286-289, *supra* n. 43. Adjudicators place the onus on the employee of proving his eligibility (except for the “manager” bar) and any mitigating factors, as in arbitration.

89. *Constantine Line v. Imperial Smelting Corporation*, [1942] A.C. 154, at p. 174 per Lord Maughan (H.L.).

90. (1976), 76 C.L.L.C. 14,029.

did not have the effect of placing the legal onus on the employer to disprove that he had committed an unfair labour practice in dismissing employees for union activities.⁹¹ Section 188(3) was subsequently amended in order to achieve a reversal of the legal onus.⁹² Nor, it is suggested, does section 61.5(7)(b) have that effect by merely empowering the adjudicator to “determine his own procedure”. The latter would surely empower an adjudicator to apply a *de facto* reversal of the evidentiary onus and compel the employer to lead off with evidence and argument, but “procedure” and legal onus are not the same thing. As yet no adjudication award has been challenged on this ground. The difference in arbitration is that the reversed legal onus has been applied for so long that it has become part of the “climate of bargaining” which the parties are deemed to know when they negotiate “just cause” provisions. It follows that the reversed onus is presumed to reflect the parties’ intentions (in the absence of express provision, or reliable local custom and practice, to the opposite), so that an arbitrator has jurisdiction to apply it under the general “just cause” provision.

The foregoing will not overly prejudice the section 61.5 complainant in most cases. The adjudicator has jurisdiction pursuant to sub-section (7)(b) to apply a *de facto* reversed evidentiary onus, thereby accommodating the “peculiar knowledge” doctrine⁹³ which recognises that the employer is in the best position to disclose his own reasons. The employee would, therefore, only stand to lose where the evidentiary balance is relatively even; the opposite being the case in arbitration under the reversed *legal* onus.⁹⁴ In order to bring section 61.5 into line with arbitration in respect to the *legal* onus, it is probable that the legislation will have to be amended.

The second noteworthy point of congruence is the application of the doctrine of “progressive discipline” to both incompetence and misconduct dismissals. Under this doctrine, the imposition of dismissal in order to protect the work process is balanced against the aim of “correcting” the employee’s default in order to induce him to become a useful and responsible member of the work force.⁹⁵ Following the lead of arbitrators, section 61.5 adjudicators

91. That section read,

“(3) A complaint in writing made pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with paragraph 184 (3)(a) is evidence that the employer or person has failed to comply with that paragraph.”

92. The section now provides,

“Where a complaint is made in writing pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with sub-section 184(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.”

93. This doctrine was utilised to reverse both legal and evidentiary burdens in *Fink*, at pp. 2-3, *supra* n. 46. A good analysis of the *de facto* reversal in the context of unfair labour practices can be found in *National Automatic Vending Co. Ltd.* [1963], 63 C.L.L.C. para 16.278 (O.L.R.B.), a case preceeding the current statutory reversal of the legal onus in Ontario.

94. A good example of the advantage to the employee of a reversed legal onus is the borderline case of *Adams Laboratories et al v. McCannet et al.* [1980] 2 C.L.R.B.R. 86 (B.C.L.R.B.) in which the reversal under section 8(b) of the B.C. Labour Code tipped the decision in favour of the employee in an unfair labour practice application alleging discharge for participation in union activities.

95. In *Nichols v. Rogers Cable T.V.*, Toronto, May 1979, adjudicator Beatty described the doctrine as follows (at p. 4):

“One presumes that employees can be induced to desist from many types of offensive or unacceptable behaviour if the employer progressively increases the penalty for the repetition of such conduct. To refer to one of the more widely accepted passages in the arbitral jurisprudence:

One of the advantages to adopting a corrective disciplinary approach is that it enables the parties to know where they stand with each other. An employee who is subjected to corrective discipline knows that after receiving a warning he may receive a suspension and that after a suspension he may be discharged if he repeats an offence. *Re North York General Hospital* (1973), 5 L.A.C. (2d) 45,” 46-7 (Shime).

See also Roberts; esp. at p. 14, *supra* n. 82.

have held that where dismissal is by reason of incompetence the worker must have been notified of the requisite performance standards by means of instructive job descriptions, structured "on the job" orientation, training and counselling, and on-going formalised performance review procedures through which he must be warned unequivocally that discharge will ensue unless he improves.⁹⁶ In particular, employers who give salary increases, laudatory performance reviews and promotions cannot "spring" discharge on the employee without some intervening notification of unsatisfactory performance.⁹⁷ Lesser penalties such as formal warnings or suspension must normally precede discharge in order to put the employee on notice.⁹⁸ Such measures may only be dispensed with in cases of "... involuntary behaviour which conventional personnel management techniques could not be expected to change", and the employer carries a "heavy onus"⁹⁹ of so proving. In this respect, it is notable that some adjudicators have ordered that employees who, "corrective" measures notwithstanding, cannot perform the job adequately for reasons beyond their control must be transferred or demoted into jobs commensurate with their capabilities rather than be dismissed.¹⁰⁰ The authority to make such orders derives from the words "any other like thing" in sub-section (9)(c). Although no cases have arisen on point, it would presumably be possible for adjudicators to place such employees on lay-off until a position for which they are suitable becomes available. This would parallel the arbitral practice.¹⁰¹

Similarly, "progressive discipline" is normally required where discharge is by reason of misconduct.¹⁰² Work rules must be clearly brought to the attention of the employee through the orientation process or company handbooks if they are to be relied upon, except where plain common sense makes it obvious what the required standards of conduct are.¹⁰³ Lesser penalties such as formal warnings or suspension should be applied before discharge, especially if the worker has a long period of prior satisfactory performance. Only where the misconduct is "gross", in the sense of damaging seriously business operations, can such measures be dispensed with.¹⁰⁴ It follows from the "corrective" thrust of the doctrine that an individual cannot be singled out for discharge in order to deter others.¹⁰⁵

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96. See eg. *Rundle-Goodsell*, *supra* n. 49(a); *Roberts*, *supra* n. 82; *Campbell*, *supra* n. 30; *Cassar v. Canadian Imperial Bank of Commerce*, Jan. 1980 (O'Shea), in which progressive steps had been taken; *Crockford v. Kingcome Navigation*, *supra* n. 49(a); *Walker*, *supra* n. 49(a); *Wint v. Canadian Imperial Bank of Commerce*, Dec. 1980 (Weatherhill); *Harar v. Air Gava Ltd.*, Jan. 1981 (Francoeur); *Freeborn v. Canadian Imperial Bank of Commerce*, June 1981 (Baum); *Gangi v. Fundy Cablevision Ltd.*, June 1981 (Collier); *Peckford v. Beothuk Transport Ltd.*, Feb. 1981 (Hattenhauer); *Chartier v. Purolator Courier Ltd.*, July 1980 (Rousseau); *Sartin*, *supra* n. 47(a); *Rotenberg v. Willowdowns Cable Vision Ltd.*, Nov. 1981 (Hushion); *Canadian Imperial Bank of Commerce v. Beaucage*, October 1981 (Sylvestre), in which progressive steps had been taken.
97. This occurred, for instance, in *Freeborn v. Canadian Imperial Bank of Commerce*, *supra* n. 96.
98. At p. 41. *Rundle-Goodsell*, *supra* n. 49(a).
99. At p. 53. *Rundle-Goodsell*, *supra* n. 49(a). To the same effect see *Freeborn* at p. 22, *supra* n. 96.
100. Eg. *Wint v. Canadian Imperial Bank of Commerce*, *supra* n. 96; *Morow v. Bank of Montreal*, October 1979 (Rubinstein); *Shott v. C.F.C.W. Radio*, December 1980 (Sychuk); *Auden v. Atomic Energy of Canada Ltd.*, *supra* n. 37, at p. 20 wherein the adjudicator said she would have done this had the employee requested reinstatement.
101. See eg. *Aro Canada Ltd.*, (1975), 10 L.A.C. (2d.) 81 (Beatty) and other authorities cited in footnote 230, at p. 329 of Brown and Beatty, *supra* n. 43.
102. Eg. *White v. Freeport Transport Inc.*, April 1981 (Roberts); *Jackson v. Moffat Moving Limited*, February 1979 (Woolridge); *Donaghue v. South West Air*, May 1980 (Brent); *Martin v. Lufthansa Airlines*, May 1989 (Beausoleil); *Harar v. Air Gava Limited*, *supra* n. 96; *Nicholls v. Rogers Cable T.V.*, *supra* n. 95; *Cyr. v. Sept-Iles Aero Club Inc.*, Nov. 1979 (Longlois); *Auden*, at p. 13, *supra* n. 37.
103. See eg. *Freeborn v. Canadian Imperial Bank of Commerce*, *supra* n. 96.
104. As in *Hamaide v. Canadian Imperial Bank of Commerce*, June 1981 (Hinnegan). Contrast *Noel v. Trentway Bus Lines*, August 1980 (Peterborough).
105. As in *Freeborn v. Canadian Imperial Bank of Commerce*, *supra* n. 96.

Third, the arbitral doctrine of “culminating incident” has also been adopted.¹⁰⁶ This means that prior offences can only be taken into account in assessing “cause” if they are similar in kind to the “culminating” incident and if they have been formally recorded against the employee. Adjudicators permit the employee to challenge the justness of prior offences, an important safeguard in view of the unavailability of adjudication for challenging warnings and suspensions at their date of imposition.¹⁰⁷ If a satisfactory explanation is offered, the prior offence will be ignored.

Fourth, the arbitral principle that employers cannot rely *ex post facto* on offences committed *after* the date of discharge has been adopted.¹⁰⁸ Nor can they rely on offences which were committed *before* discharge but which become known afterwards, at least unless the new offence is “part and parcel” of the original ground for discharge.¹⁰⁹ This diverges from the common law position. Management must, therefore, conduct careful investigations before discharge is imposed. It should be noted that sub-section (4) obliges employers to furnish, upon written request of the employee or an inspector, a written statement of the reasons for dismissal within 15 days of receipt of the request. Failure to comply may give rise to the possibility of criminal sanctions pursuant to section 91(1)(a), namely a maximum fine of \$5000 and/or imprisonment for up to one year. Further, one adjudicator has held that breach of sub-section renders dismissal *per se* “wrongful, if not ‘unlawful’ ”¹¹⁰, which may be the more potent sanction.

As regards the points of divergence, adjudicators have cautioned against a reflex-like application of arbitral standards to the non-organised context of section 61.5.¹¹¹ Many features of collective agreement arbitration, and particularly those relating to seniority, are absent in the non-organised sector. Many workers falling within section 61.5 are white-collar “professionals”, in banking for example, for whom the so-called “industrial model” of “cause” developed largely in the context of blue-collar workers is inappropriate. Thus adjudicators have adjusted to the different context, just as arbitrators have done in the case of “professionals” who bargain collectively¹¹², such as nurses and university faculty. The standard of “unjust” is therefore flexible in adjudication, as it is in arbitration.

One significant point of divergence is that adjudicators have held that disciplinary procedures and penalties contained in the employment contract do not bind the adjudicator in determining “cause”, although they are relevant in determining whether the employee knows the standards required of him in

106. The arbitral jurisprudence is described in Brown and Beatty, at pp. 371-375, *supra* n. 43. The following adjudications have approved the doctrine: *Aldham v. Greg-May Broadcasting Ltd.*, at p. 10, August 1980 (Draper); *Mattatal v. D.M.L. Industrial Express Ltd.*, at p. 14, July 1981 (Roach); *Rundle-Goodsell*, at p. 39, *supra* n. 49(a); *Janelle v. Cast North America Ltd.*, at p. 11, May 1989 (Brunner); *Duhamel v. Bank of Montreal*, at pp. 31-32, *supra* n. 83; *Wesbury v. Kingsway Transport Limited*, December 1979 (Palmer); *White v. Freeport Transport Inc.* *supra* n. 102; *Cruickshank v. Royal Bank*, February 1981 (Saltman).

107. As in *White*, *supra* n. 102.

108. The arbitral jurisprudence is described in Brown and Beatty, at pp. 282-286, *supra* n. 43. Adjudicators generally confine the employer to the written reasons given pursuant to section 61.5(4) eg. *Desgagne*, at p. 12, *supra* n. 37; *Mattatal*, at p. 10 and 13, *supra* n. 106.

109. This would reflect the arbitral approach described in Brown and Beatty, at pp. 284-285, *supra* n. 43.

110. *Desgagne*, at p. 8, *supra* n. 37.

111. See eg. the notes of caution in *Duhamel*, at p. 30, *supra* n. 83 and in *Roberts*, at p. 15, *supra* n. 82.

112. See eg. *Owen Sound Hospital* (1977), 16 L.A.C. (2d) 11, at p. 19 (Abbott).

advance.¹¹³ In contrast “mandatory” collective agreement provisions which establish penalties for specified offences or otherwise regulate the imposition of discipline must be adhered to strictly by arbitrators.¹¹⁴ Adjudicators have based this conclusion on the principle that the parties to an employment contract cannot contract out of the statutory standard of “unjust”. So far the issue has arisen where the contractual procedure is less favourable to the employee than the statute. Were the former more favourable to the employee, it is arguable that section 28 of the *Code* would preclude the adjudicator from applying the section 61.5 standard. That section provides that,

... nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract, or arrangement that are more favourable to him than his rights or benefits under this Act.

It is submitted that section 28 probably does not bind the adjudicator to applying the higher contractual standard of “cause”. Section 28 should be construed in the mischief sense. It reflects the “floor of rights” philosophy of Part III, whereby the legislation is aimed at providing an irreducible minimum of protection, but permits the parties to bargain *above* that level if they so choose. More favourable bargains are deemed to be enforceable through the relevant legal forums, not through the *Code*. This philosophy is reinforced by section 61.5(14) which provides that no civil remedy of an employee is “... suspended or affected by this section”. This is not to say that contractual arrangements more favourable to the employee are irrelevant under section 61.5. For example, if a contract provides that only theft shall be cause for discharge, or that an employee shall have a right to appeal to a joint management - employee disciplinary committee within the firm, then discharge for fighting or discharge without the case being remitted to the internal committee may well be held as “unjust” under the section 61.5 standard. In the fighting example, the employee may have been lulled into a false sense of security by the contractual rule. In the internal committee example, the dismissal may be ruled to be procedurally “unjust”. The point is that whereas contractual provisions of whatever type cannot oust the legislative standard of “unjust”, they form part of the context in which that standard must be fleshed out.

Remedies

The remedial powers of the adjudicator are broad. Section 61.5(9) provides,

Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him 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

113. *Eg. Gangi v. Fundy Cablevision Limited*, June 1981 (Collier); *Freeborn v. Canada Imperial Bank of Commerce*, June 1981 (Baum); *Roberts v. Bank of Nova Scotia*, *supra* n. 82; *Walker*, *supra* n. 49(a).

114. See *eg. Calgary Public Library* (1978), 19 L.A.C. (2d) 230 (Mason) where non-compliance with a mandatory disciplinary procedure rendered the discipline null and void. Similarly, the arbitrator has no jurisdiction to substitute a lesser penalty than discharge if the agreement contains “a specific penalty for the infraction” (section 37(8) of the *Ontario Labour Relations Act* R.S.O. 1970, c. 232 as am.), which is a common provision in labour relations legislation.

- (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.

The sub-section has been interpreted as empowering adjudicators to apply the three remedies either alone or in any combination by emphasising the word “may” and reading each sub-paragraph disjunctively.¹¹⁵

Reinstatement, though discretionary, is intended to be the primary remedy for “unjust” dismissal. It has been granted in the majority of cases where the employee has requested it. In one case it was denied because the employee’s duties were taken over by a manager so that his position had become nonexistent.¹¹⁶ The adjudicator ordered the employee to be given the right of first refusal if a vacancy arose in his old position within two years, presumably pursuant to sub-section (9)(c). A similar response might be appropriate where the claimant is unable to resume work immediately due to ill health. It has been refused where severe personality conflicts between the claimant and management personnel or other members of the workforce would make it impractical¹¹⁷, even if those conflicts were aggravated by deficient managerial techniques.¹¹⁸ It seems unfair to penalise the worker where the fault rests largely with management’s control mechanisms over its own personnel. Adjudicators should be particularly wary of spurious conflicts raised by employers to avoid reinstatement. In another case¹¹⁹, discharge was technically “unjust” because the employer failed to apply “progressive discipline” and had promised the employee that she could revert to her former job if she was unable to perform satisfactorily in the higher position. However, reinstatement was denied because the employee was partially at fault in contributing to the impasse and did not impress the adjudicator at the hearing as being susceptible to correction. It, therefore, seems that the remedy may be refused where the *manner* of discharge is procedurally “unjust” but the employee’s *substantive* “contributory fault” is high.

Unlike reinstatement, re-engagement connotes re-hiring the worker in a different position, often subject to different terms and conditions of employment. It has been ordered in three cases, two¹²⁰ of which involved recently promoted employees who were unable to perform their new jobs but whose discharges were procedurally “unjust”. The employees were re-engaged in the lower graded positions in which they had previously proved themselves. In the third case¹²¹, a mail clerk was ordered back into his old position conditional upon successful completion of a four month probationary period. The adjudicator felt that the employee’s prior standard of performance was insufficiently meritorious to warrant full reinstatement, and that probation would give him a last chance to self-correct. Adjudicators derive jurisdiction to order re-engagement from sub-section (9)(c).

115. *Duhamel*, at p. 33, *supra* n. 83.

116. *Peckford v. Beothuk Transport Limited*, *supra* n. 96.

117. *Crockford v. Kingscome Navigation Ltd.*, *supra* n. 49(a); *Janelle v. Cast North American*, May 1979 (Brunner); *Westbury v. Kingsway Transport Limited*, *supra* n. 106; *Childs v. Royal Bank*, February 1981 (Borowicz), *Rotenberg*, at p. 13, *supra* n. 96.

118. This occurred in *Childs v. Royal Bank*, *supra* n. 117.

119. *Roberts v. Bank of Nova Scotia*, *supra* n. 82. See also *Rotenberg*, at p. 20 *supra*, note 96.

120. *Morrow v. Bank of Montreal*, *supra* n. 100; *Wint v. Bank of Montreal*, *supra* n. 96.

121. *Huneault v. Central Mortgage and Housing Corporation*, August 1979 (Cohen).

In addition, adjudicators may reinstate but substitute a lesser penalty such as an unpaid suspension or a written warning. This flexibility is necessary to ensure that account can be taken of "contributory blameworthiness" by the employee. Adjudicators have followed the practice of collective agreement arbitrators. Some¹²² have based their jurisdiction on sub-section (9)(c) whereas others¹²³ have held that the power is inherent in the statutory scheme of adjudication.

The power to award monetary compensation derives from paragraphs (a) and (c) of sub-section (9). The clear intent is to permit "make-whole" awards which compensate the employee fully for the real losses he sustains as a result of dismissal, in contrast to the common law rule that damages are restricted to the contractual notice period and contractually binding fringe benefits. Such awards have been given by certain Labour Relations Boards under similar "make whole" powers.¹²⁴ Although adjudicators have generally not elaborated in detail the rationale of their compensatory awards, unlike the Labour Relations Boards, the underlying "make whole" thrust has on occasion been acknowledged. For instance, in *Aldham v. Gray - May Broadcasting Ltd.*¹²⁵, the adjudicator said:

Adjudicators, as do arbitrators in an industrial relations setting, have discretionary authority to devise equitable remedies to redress unjust dismissals. The remedy must be suited to the wrong done. As has so often been said, it should endeavour to place the employee in the position he would have been in if he had not been unjustly dismissed, so far as that can be reasonably done. That well-established criterion is given added dimension by the authority granted to adjudicators under section 61.5 to "remedy or counteract any consequence of the dismissal". It should be noted that the monetary element (if any) of the remedy is not in the nature of payment in lieu of notice. A dismissal is not just and a remedy will not be denied simply because notice was given or payment in lieu of notice was made. Finally, the appropriate remedy will be that which is appropriate from the standpoint of the injured party - the person who has been unjustly dismissed. It is his interests that are to be served.

As regards wages, some adjudicators have held that sub-section (9) (a) applies only to lost wages up to the date of the hearing.¹²⁶ However, nothing turns on it since paragraph (c) is sufficiently broad to compensate for foreseeable lost wages beyond the date of the hearing. Further, nothing turns on whether given benefits such as pensions, seniority, profit-sharing schemes and the like constitute "remuneration" within paragraph (a) since they can be compensated under paragraph (c). It follows that paragraph (c) could be utilised to order the employer to pay compensation due to the employee under other provisions of the *Code*, such as termination¹²⁷ and severance pay¹²⁸, annual vacations¹²⁹ and general holiday pay¹³⁰, notwithstanding that the latter

122. Eg. *Walker v. Canadian Imperial Bank of Commerce*, *supra* n. 49(a); *Duhamel*, at pp. 38-39, *supra* n. 83; *Rotenberg*, at p. 19, *supra* n. 96.

123. *Poulin v. Puralator Courier Limited*, October 1980 (Carriere); *Rotenberg* at p. 19, *supra* n. 96.

124. See eg. *Ontario Labour Relations Act* s. 79(4); *Alberta Labour Relations Act*, S.A. 1980, c. 72 s. 142(5); *Canada Labour Code* s. 189; *British Columbia Labour Code* s. 8(4)(c). Excellent recent enunciations of the "make whole" philosophy can be found in *United Steelworkers of America v. Radio Shack* (1980), 80 C.L.L.C. 16,003 (O.L.R.B.); *Hallowell House*, (1980) P.L.R.B. Rep. January 35; *Canadian Imperial Bank of Commerce* (1980), 80 C.L.L.C. 16,001 (Can. L.R.B.); *K-Mart Canada Limited*, (1981) 2 C.L.R.B.R. 5 (O.L.R.B.).

125. At p. 11, *supra* n. 106.

126. Eg. *Rundle-Goodsell*, *supra* n. 49(a).

127. Section 60.4. These were compensated in *Rotenberg*, at pp. 19-20, *supra* n. 96.

128. Section 61. These were compensated in *Rotenberg*, at pp. 19-20, *supra* n. 96.

129. Section 39 *ff.*

130. Section 27 *ff.*

may not constitute "remuneration". In assessing compensation for lost wages adjudicators have not bound themselves to the contractual notice period but have sought to determine over what period the worker is reasonably likely to be out of work, having regard to the labour market and his attractiveness therein.¹³¹ So far no adjudicator has had to address the problem of whether an employee should be compensated for the difference between his old wage rate and a lesser wage rate which he is receiving from a second job, or which he could be expected to receive from a second job if he has not already got one.^{131a} It is submitted that if the worker has a lower paid second job, the difference should be compensable for the period until he can reasonably be expected to catch up. If he has not got a job, adjudicators should project his likely period of unemployment and compensate for it, although compensation should be "cut off" by supervening events such as the possibility of the old job becoming redundant. Further, if a second job already taken (or likely to be taken) is less secure than the old job, the difference in security should be compensable. Such projections would be difficult to make, but there is no alternative if the "make whole" goal is to be attained successfully. In most cases adjudicators have applied the duty to mitigate, thereby docking off wages earned elsewhere.¹³² In one case no such deduction was made.¹³³ The objective was seemingly punitive, although no elaboration was given in the award.

So far adjudicators have not compensated for loss of fringe benefits, except in one case where vacation and holiday pay was compensated.¹³⁴ If the worker can reasonably expect to derive certain benefits from his employment they should be compensable *ex post facto* and *de futuro*, provided always that they are capable of quantification. The English law of unfair dismissal is relatively well developed in this regard and section 61.5 adjudicators should follow that lead.¹³⁵

Lastly, adjudicators have utilised their broad sub-section (9)(c) powers to remedy other consequences of unjust discharge. Employers have been ordered to remove discharge from work records¹³⁶, pay legal fees¹³⁷, write a letter of recommendation¹³⁸, continue employment related benefits through the hiatus between discharge and reinstatement¹³⁹, maintain seniority¹⁴⁰, and pay the employee's expenses of attending the hearing.¹⁴¹ One award has been made compensating for loss of reputation and personal anguish caused by

131. Eg. *Aldham*, *supra* n. 106; *Thompson v. Innotech Aviation*, November 1980 (Linden).

131(a). The adjudicator did compensate for the difference in *Rotenberg*, *supra* n. 96, but did not elaborate fully his reasoning.

132. Eg. *Wesley v. Worlway Airlines*, October 1980 (Teplitsky).

133. *St. Pierre v. Purolator Courier Limited*, January 1981 (Morin).

134. *Thompson v. Innotech Aviation Ltd.*, December 1979 (Thompson).

135. See England, at pp. 518-519, *supra* n. 8. In *Rotenberg*, *supra* n. 96, the adjudicator compensated for an anticipated wage increase that would have fallen due after the date of dismissal, in contradiction to the common law rule in *Lavarack v. Woods of Colchester Ltd.*, [1966] 3 All E.R. 683 (C.A.).

136. Eg. *Roberts v. Bank of Nova Scotia*, *supra* n. 82.

137. *Shott v. C.F.C.W. Radio*, December 1980 (Sychuk). There were denied in *Husky v. Purolator Courier Limited*, April 1980 (Norman).

138. *Roberts v. Bank of Nova Scotia*, *supra* n. 82; *Auden*, *supra* n. 37.

139. Eg. *Dmytriw v. Canadian Imperial Bank of Commerce*, October 1979 (Bellan).

140. *Walker v. Bank of Montreal*, *supra* n. 49(a).

141. *Wesley v. Worldways Airlines*, *supra* n. 132.

discharge.^{141a} So far no award has been made compensating for loss of seniority under section 61.5, reflecting the fact that the non-reinstated worker will have to re-qualify by further twelve months work during which time he will be unprotected. There is no reason why that loss should not be compensable given the "make whole" philosophy of the section. Sub-section (9)(c) has also been utilised to reduce the employee's compensation by reason of his "contributory blameworthiness" in the dismissal¹⁴², and to compel an employee to promise not to sue the employer for common law wrongful dismissal.¹⁴³ The latter is arguably unenforceable as conflicting with sub-section (14) which provides that no civil remedy of the employee is "suspended or affected by this section." Further, one adjudicator has held pursuant to paragraph (c) that where the employee is "at fault" in not filing a timely complaint, but a ministerial extension is granted, his compensation for lost wages will be cut off as of the probable date on which an adjudicative hearing would have occurred had the complaint been timely, rather than the actual date of adjudication, in order not to penalise unfairly the employer.¹⁴⁴

Conclusion

The experience of section 61.5 has been largely successful. The non-organised worker has been afforded a similar standard of "cause" as the unionised worker; reinstatement is frequently ordered at adjudication; and the potential for realistic "make whole" compensatory awards to be made is being realised. It is not known whether the experience has encouraged employers to implement voluntarily private disciplinary practices and procedures reflecting the standards of the *Code*, although one might expect that tendency. It is especially pleasing to those familiar with the Courts' exercise of their review powers over arbitrators in the 1960's and early 1970's to see that the Federal Court has not reacted pursuant to its powers under section 28 of the *Federal Court Act* so as to thwart the adjudicative process. Noteable in this regard is the upholding by the Court of the narrow meaning given by adjudicators to the "manager" bar.¹⁴⁵

On the debit side, the section could be improved in several ways. The definition of "dismissal" should at the least include the non-renewal of fixed term contracts and so called "constructive dismissal", if not be defined simply as "loss of the job". The meaning of "continuous employment" should be clarified by regulation if the seniority qualification is to remain, and it is strongly arguable that it should not. The section should be made available to non-"employees" who are economically dependent on their employer and to "managers". The current "lay-off" and alternative statutory redress bars should be clarified by legislative amendment. The collective agreement bar should be clarified in respect to situations when no agreement is in force and

141(a). *Rotenberg*, at p. 19, *supra* n. 96.

142. This is done where an unpaid suspension is substituted for discharge, eg. *Mattatall v. D.H.L. International Express Limited*, July 1981 (Roach).

143. *Wilkins v. Reihart Transport Ltd.*, March 1979 (Anton).

144. *Duhamel*, *supra* n. 83.

145. *A-G Canada v. Gauthier* (Fed. C.A.), *supra* n. 23. The privative clause in section 61.5(10) and (11) has been held not to preclude the courts' review powers under section 28 of the F.C.A. for so-called "jurisdictional error". See the cases cited in footnote 23, *supra*.

the unionised employee should be given a choice of forums, as outlined earlier. The legal burden of proof should be expressly placed on the employer so as to reflect current arbitral and adjudicative practice. In the interests of convenience, adjudicators should have jurisdiction to interpret and apply other statutes as they may arise in a section 61.5 complaint. The current split jurisdiction between Labour Canada and adjudication creates a potential danger that contentious questions of fact and law will not be resolved with the benefit of full argument and evidence in adjudication. Given the competing interests of securing justice for the employee and avoiding a flood gate of frivolous adjudications, it is difficult to formulate any other method for defining the balance. It can only be hoped that Labour Canada officials will have the sense to recognise the danger and ensure that the borderline cases are remitted to adjudication. The alternative would be to adopt the British model under which adjudication is "as of right" for the employee, and to trust to pre-adjudication conciliation for weeding out the obviously non-meritorious cases.

All in all, the experiment has been a success and other jurisdictions which plan to introduce comparable schemes can learn much from the experiment.