

Section 240 of the *Canada Labour Code*: Some Current Pitfalls

G E O F F R E Y E N G L A N D *

I. INTRODUCTION

THIS PAPER EXAMINES WHAT ARE, potentially, the main pitfalls in the current operation of s. 240 of the *Canada Labour Code*¹ which gives non unionised employees the right not to be unjustly dismissed. The labour standards acts in Nova Scotia and Quebec contain similar provisions, making the federal experience relevant in those provinces.² Many of my observations are necessarily conjectural for there is a dearth of empirical evidence on important facets of the operation of s. 240. My purpose is to stimulate further research into the scope of, and possible solutions to, the following main problems:

- (i) Determining financial compensation for unjustly discharged employees;
- (ii) Determining the appropriateness of the reinstatement remedy;
- (iii) Handling economic dismissals and the "lay off" exception;
- (iv) The fixed term contract exclusion;
- (v) The impact of delay in processing complaints on the financially pressed worker;
- (vi) Determining the economic impact of the section on employers, especially the possible disemployment effect, the possible cost of legal uncertainty and the possible enhancement of productive efficiency;

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¹ R.S.C. 1985, c. C-2.

² *Quebec Act Respecting Labour Standards*, S.Q. 1979, c.45, s. 124; *Nova Scotia Labour Department Act* R.S.N.S. 1989, c.246, s. 71.

- (vii) Determining the effect of the section on employees, especially the success of rehabilitation, the efficacy of mediation in providing fair settlements and the effect on the propensity of employees to unionise; and
- (viii) The need for adjudicator training and certification.

Due to space constraints, case citations have been kept to a minimum. The reader is referred to one of the available employment law textbooks for a comprehensive citation of authorities supporting the various legal principles stated herein.³

II. DETERMINING FINANCIAL COMPENSATION FOR UNJUSTLY DISCHARGED EMPLOYEES

THIS IS CURRENTLY THE MOST PROBLEMATIC issue arising in the case-law under s. 240. S. 242(4) delineates an adjudicator's remedial authority as follows:

Where an adjudicator decides ... that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

...

- (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.

Adjudicators have taken a minimum of five different approaches when applying this section. The first approach is that of the strict "make whole" approach that aims to restore the employee to the same financial position he or she would have occupied had s/he not been unjustly dismissed.⁴ The second is a modified "make whole" approach that also seeks to restore the employee to the same financial position s/he would have occupied had the unjust dismissal not

³ See e.g. G. England, I. Christie & M. Christie, *Employment Law in Canada*, 3rd ed. looseleaf (Toronto: Butterworths, 1998) at c. 17, 21, V1; S.R. Ball, "Canadian Employment Law" looseleaf (Aurora: Canada Law Book, 1998).

⁴ For good examples see: *Page v. Peigan Nation Board of Education* (May 1998), (Hepburn) [hereinafter *Page*]; *Willberg v. Jo-Anne Trucking Ltd.* (November 1982), (England); *Gagnon v. Royal Bank of Canada* (February 1991), (Cote); *Lightbody v. Dicom Express Ltd* (October 1997), (Dissanayake) at 3-4 [hereinafter *Lightbody*]; *Watson v. Canadian Egg Marketing Board* (December 1988), (McCaughy); *Big Canoe v. Chippewas of Mnjikaning (Rama) First Nation* (September 1998), (Mole).

occurred, but only to an extent that is “reasonable.”⁵ The third is the common law approach that provides the employee with *reasonable* notice of termination according to the well-known factors enunciated in *Bardal v. The Globe and Mail*.⁶ Fourthly, the “blended” approach, recently favoured by adjudicator Morley Gorsky, determines the appropriate amount of compensation according to a combination of “make whole” and “common law” elements.⁷ The “lip service” approach is taken where the adjudicator professes to be applying the “make whole” method but arbitrarily assigns a dollar amount without specifying how the remedy is being implemented. Finally, the “rabbit out of the hat” method occurs where absolutely no analysis is provided as to how the compensation award has been determined.

This divergence of practice among adjudicators might appear astonishing given that the courts have frequently endorsed the “make whole” method with regard to compensating unjustly dismissed employees.⁸ However, those adjudicators who have either rejected or ignored the “make whole” approach can perhaps find some excuse in the fact that these judicial pronouncements have largely taken the form of generalised endorsements of the “make whole” philosophy rather than detailed elaborations of how to implement it in particular cases.

The essence of the “make whole” method is to ascertain the financial position the employee would have occupied had s/he not been unlawfully dismissed. The remedy then compensates the employee for the difference between the projected position and the actual financial position occupied as a result of the dismissal.⁹ Often adjudicators must engage in considerable reasoned speculation

⁵ See e.g. *Andrew v. Mosquito Grizzly Bears Head First Nation* (September 1997), (Wallace) at 21; *Reid v. Kenn Borak Air Ltd.* (March 1998), (Wallace) at 21.

⁶ (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). See e.g. *Jack v. Thunderchild First Nation Education Administration* (April 1998), (Ball) at 8; *Thomas v. Esquimalt Nation* (November 1997), (Edgar) at 5; *Smith v. Trans City Express Inc.* (January 1998), (Bruce) at 5; *Levi et al v. Big Cove Indian Band* (February 1997), (Couturier) at 5 [hereinafter *Levi*]; *Chalifoux v. Driftpile First Nation-Driftpile River Band #450* (August 1998), (Wakeling) at 9–10; *Reid v. W.A. Pacific Rim Co. Ltd.* (January 1999), (Newman) at 8–9; *Dempsey v. Jo-Ann Trucking Ltd.* (February 1999), (Huber) at 4.

⁷ *Favilla v. Mayne Nickless Transport Inc.* (December 1997), (Gorsky) at 16–27.

⁸ A non-exhaustive list includes: *Murphy v. Purolator Courier Ltd* (1994), 94 C.L.L.C. 14009 (F.C.A.) at para. 12046; *Slaight Communications Inc v. Davidson*, [1985] 1 F.C. 253 (C.A.) per Urie J., aff'd (1985) 89 C.L.L.C. 14031 (S.C.C.) at para. 12260; *Banca Nazionale del Lavoro of Canada Ltd v. Lee-Shanok* (1988), 22 C.C.E.L. (F.C.A.) 59 at 74 [hereinafter *Lee-Shanok*]; *Atomic Energy of Canada Ltd. v. Shiekoslamie* (1998), 98 C.L.L.C. 210013 (F.C.A.) at para. 141077, n. 6.

⁹ The relevant authorities for what follows are cited in G. England, I. Christie & M. Christie, *Employment Law in Canada*, 3rd ed. (Toronto: Butterworths, 1998) at paras 17.141–17.160.

in order to assess both positions adequately. For example, suppose that a school teacher employed by an Native band under an indefinite term employment contract is unlawfully dismissed at age 55 and by the date of the adjudication hearing has been unable to find replacement work. The first step is to ascertain the employee's career progress had s/he remained with the employer. Would the employee have received wage increases, improvements in fringe benefits, performance bonuses or other perquisites such as paid sabbatical leaves had s/he not been dismissed? If so, such losses are compensable. Conversely, account must be taken of the chance that the employer would have reduced the employee's wages and benefits at some future date due to adverse economic conditions.

Would the employee likely have applied for a promotion to a different position—perhaps in school administration—and what would his/her chances of obtaining the promotion have been? If the employee would likely have been promoted, financial losses derived from being denied the opportunity to occupy the higher position are compensable.

Would the employee likely have lawfully quit at some future date to work in a different school or to pursue other career paths? It is not unusual for employees to change employers within the same industry, or even to do something entirely different. If so, the employee's compensation must be discounted by the probability of such a move.

What degree of security of tenure would the employee have enjoyed had s/he remained with the employer? If the chances are that the employee would have been laid off in the future for economic reasons, for example, if local school enrolments are decreasing or if the employer otherwise plans to restructure its operations, his or her compensation must be discounted by the probability that his /her job would have disappeared anyway.¹⁰ If the employee is experiencing serious performance difficulties or health problems, it is necessary to factor in to the "make whole" equation the chance the employee being lawfully fired for "cause" or having the employment contract frustrated by reason of illness.

The second step in the "make whole" process is to ascertain the chance of the employee obtaining a replacement job. In this stead regard must be had to the current and future state of the labour market relating to the employee's expertise and the personal marketability of the employee (ie. age, prior performance record, etc.). The employee's compensation would be adjusted according to when, and if, re-employment would be likely to occur. In the hypothetical of the 55 year old teacher, it is conceivable that s/he may never find alternate work in education. If so, the compensable period would run to the normal retirement age of 65. Clearly, this goes well beyond the current common law "rea-

¹⁰ *Butler v. Beausoleil First Nation Christian Island Ontario* (July 1999), (Mole) at 14.

sonable" notice period that rarely exceeds two years. Furthermore, account must be taken of the nature of the replacement job. If the wages and benefits provided are less favourable than those received under the previous position, the employee should be compensated for the difference up to the date when "catch-up" will likely occur.¹¹ If the new job is less secure than the old one—for example, it may be in a cyclical or declining industry—the employee should be compensated for the risk of such diminished security. If the new job is less psychologically satisfying than the old one in terms of status, responsibility, career development and personal pleasure, this too should presumably be reflected in greater compensation. Conversely, if the new job is more satisfying than the old one, compensation should be reduced to avoid unjustly enriching the employee.¹²

The third step of the "make whole" process is to compensate the employee for other incidental monetary losses that were sustained as a result of the dismissal. Examples include: Christmas bonuses potentially received from the employer; use of a company car; the opportunity to earn overtime or merit bonuses; the opportunity to take training courses; housing allowances; loss of equity in a home that has to be sold due to an inability to make mortgage payments;¹³ costs associated with finding alternate employment; solicitor-client costs arising from the unjust discharge proceedings;¹⁴ the humiliation and indignity of having the right not to be unjustly dismissed violated;¹⁵ and, the loss of the statutory protection against unjust discharge. This is especially so since the employee would have to re-qualify for the protection by working a further 12 months of continuous employment with an employer in the federal jurisdiction. So far adjudicators have not awarded compensation for loss of accrued seniority in its own right. This is wise, it is submitted, for the notion that an

¹¹ See e.g. *Reid v. Kenn Borak Air Ltd.* (March 1998), (Wallace) at 23, where the projected "catch-up" period was four years; *Fry v. Chatham Coach J.I.DeNure (Chatham Ltd.* (October 1998), (Samuels).

¹² See e.g. *Mann v. Vickard Bros.Ltd.* (November 1994), (Samuels) at 5–6.

¹³ *Page*, *supra* note 4 at 14, but on the facts no compensation was awarded under this head as the claimant had failed to quantify her exact losses.

¹⁴ The courts have ruled that such costs should only be awarded in exceptional cases where the employer has acted egregiously. See e.g. *Banca Nazionale del Lavoro of Canada Ltd v. Lee-Shanok*, *supra* note 8 at 79. However, some adjudicators have awarded part of the employee's solicitor-client despite the absence of employer bad faith. See e.g. *Page*, *supra* note 4 at 15. The practical implications of the *Lee-Shanok* holding on settlement negotiations are reviewed below, *infra* note 15 at 18.

¹⁵ Compensation is commonly awarded for this factor under human rights legislation: see e.g. *Wardair Canada Inc. v. Cremona (No. 3)* (1993), 20 C.H.R.R. D/398 (Can. H.R.T.), where \$1000 was awarded under this head of damage.

employee somehow acquires a “proprietary” interest in his /her job is too uncertain to warrant a compensation award.

The fourth step in the “make whole” process is to attempt to compensate the employee for any non-financial harm—such as mental suffering or impaired professional reputation—suffered as a result of being unlawfully dismissed.¹⁶

Last but not least, the “make whole” method clearly countenances the issuance of non-monetary remedies designed to remove the sting of the unlawful dismissal such as ordering the employer to provide a fair reference letter, to rectify the employee’s personnel record and to provide employment counselling, retraining and job search services.¹⁷

The scope of the employer’s liability under the “make whole” method is limited by the employee’s duty to mitigate. This requires that reasonable efforts be made to minimise the extent of any losses suffered according to common law principles. Therefore, if the employee has not found replacement work by the date of the hearing, the adjudicator must make reasoned speculation as to the likely outcome of the employee’s mitigation efforts in the future and adjust the compensation award accordingly.¹⁸

There are several possible reasons why the “make whole” approach as described above has stymied some adjudicators. The word “possible” is emphasised as adjudicators, regrettably, have rarely articulated their objections in a frank and comprehensive manner. First, adjudicators may feel uncomfortable with the novelty and complexity of making reasoned speculation as to an employee’s future career progress with his/her former employer and with prospective employers. In contrast, the common law method fixes a limit on future projections, namely the expiry of the notice period, and only compensates for the loss of benefits and expectancies that have contractual force during that period. Unquestionably, it is not always straightforward to make long-term “make whole” projections, but neither is it fair to discard the process as being arbitrary, let

¹⁶ See e.g. *Smith v. Rumble Trans Ltd.* (June 1989), (Kilgour) at 5, regarding injured reputation; *Lewis v. C.I.B.C.* (August 1995), (Gibson) at 24; *Charles et al v. Lac La Ronge Indian Band* (November 1998), (Wallace) at 58–60, regarding mental distress.

¹⁷ See e.g. *Wong v. Royal Bank of Canada* (February 1999), (Armstrong) at 48–49; *Page*, *supra* note 4 at 16.

¹⁸ Thus, in the analagous context of awarding “make whole” compensation under the human rights legislation to an employee who was unlawfully dismissed from a manual position in a lumber yard, compensation was cut-off one year after her dismissal. Notwithstanding the fact that she had not found replacement work in the lumber industry, and that she ought to have realised that the chance of finding replacement work in that industry was remote. Thus, she was required to broaden her job search into other sectors: *Frechette v. Warman and Namraw Lumber Ltd.* (1998), 98 C.L.L.C. 230038 (Ont. B.I.) at para. 145429.

alone impossible to implement.¹⁹ Hopefully, adjudicators are selected because of their expertise in local labour market matters as well as in the intricacies of employment law and personnel administration. Moreover, if the federal government were to adopt a comprehensive accreditation scheme for training and certifying qualified adjudicators, such as currently exists for collective agreement arbitrators in some provinces,²⁰ section 240 adjudicators could be properly equipped for the task. Furthermore, adjudicators could seek guidance from the decisions of human rights tribunals where the “make whole” approach has been used with good effect.²¹ Yet, oddly, no section 240 adjudication awards can be recollected that have tapped this useful resource.

Secondly, the “make whole” approach brings to the fore the perennial problem of determining what limitations should be placed on a wrongdoer’s financial liability. Put simply, the fundamental question is how much of the employee’s economic harm flowing from the unjust dismissal is it fair to attribute to the employer?

In the law of torts, the usual control device for limiting liability is the “reasonable foresight” test enunciated in the *Wagon Mound*²² decision. However, the “two limbs” test enunciated in *Hadley v. Baxendale*²³ serves the same purpose in the law of contract. These tests were thought by the courts of the day to be superior to a straight “causation”²⁴ approach. This is due to the potential of the latter to impose overly extensive liability on the wrongdoer while inviting esoteric and hair-splitting distinctions about those events that may serve to break the causal chain. In his seminal article on the tort of negligence written in 1953, Professor Fleming indicated that the “reasonable foresight” tests for determining remoteness are frequently nothing more than mantras recited by judges in order to disguise their unspoken policy choices of where the line ought

¹⁹ The courts in civil actions for breach of the employment contract have often engaged in dramatic degrees of reasoned speculation: see e.g. *Chaplin v. Hicks*, [1911] 2 K.B. 786, where the Court assessed the chance of the plaintiff winning a job competition in an action for breach of a promise by her employer in order to give her leave to enter the competition.

¹⁹ See e.g. Ontario and Nova Scotia. This issue is explored in greater detail below, *infra* note 21 at 25.

²¹ The authorities are reviewed in England et al., *supra* note 3 at paras. 5.168–5.179.

²² *The Wagon Mound*, [1961] A.C. 388 (H.L.).

²³ (1854), 9 Exch. 341.

²⁴ See *Re Polemis*, [1921] 3 K.B. 560. First year torts students are commonly posed the question which is best, *Polemis* or *Wagon Mound*!

to be drawn on a wrongdoer's financial liability.²⁵ Fleming's advice is worth recalling:

The crucial problem is at what point to insulate responsibility. This vital task can be successfully discharged only be a clear and conscious aversion to the policy factors involved in the different fact situations, not be resort to the traditionalism verbalism of "causation" or "remoteness of damage."²⁶

The reluctance of many section 240 adjudicators to apply the "make whole" method is almost certainly derived from their unspoken fear of imposing what, to them, appear to be overly onerous costs on an employer. Instead, several adjudicators have applied the familiar control device in common law wrongful dismissals—the *Bardal* test. Yet, this is somewhat ironic as the *Bardal* test has itself been given a greater "make whole" orientation in recent years. This was accomplished as courts began awarding "reasonable" notice periods of 24 months, or more, for employees whose chances of finding alternate work are slim. The courts use the test to compensate employees for a wide swath of residual "unfair" conduct undertaken by the employer. Furthermore, the *Bardal* test itself appears to be the mantra followed by judges who fashion awards they either believe represent sound policy or, perhaps, barely think about at all. Indeed, the *Bardal* test has recently been criticised for: (1) producing excessive notice periods having adverse economic effects on employers and society at large; and (2) for infusing too much unpredictability in the law.²⁷ Nevertheless, the *Bardal* test clearly encapsulates the notion that there should be some limit on the employer's financial responsibility to a wrongfully dismissed employee. Currently, opinions look to an approximate range of two years wages and benefits, even though this often results in the employee not being compensated for the full extent of the losses flowing from the wrongful dismissal. Moreover, several courts have reduced the employer's liability even more by reducing an otherwise "reasonable" notice period due to extreme financial hardship affecting the employer.²⁸

²⁵ J.G. Fleming, "Remoteness and Duty: the Control Devices in Liability for Negligence" (1953), 31 Can. Bar Rev. 471. The learned Professor restates these views in his textbook, *The Law of Torts*, 7th ed. (Sydney, Australia: The Law Book Company Ltd., 1987) at 186–194.

²⁶ Fleming, *ibid.* at 479.

²⁷ For further elaboration of these, and other aspects of the *Bardal* test, see England et al., *supra* note 3 at c. 14, B.4.

²⁸ One example is *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.), varied 44 O.R. (2d) 361 (C.A.), leave to appeal to the S.C.C. denied 3 C.C.E.L. 79. For further elaboration on the fate of this decision and other techniques for reducing compensation in the employer's interests see England et al., *supra* note 3 at paras. 14.108–14.116.

Other section 240 adjudicators have sought to limit the employer's liability by modifying the "make whole" test. This is achieved, for example, by adding the proviso that the employee will only be "made whole" for "reasonable" losses flowing from the dismissal²⁹ or by somehow blending the *Bardal* test into the "make whole" method.³⁰ The precise implications of the latter re-formulations remain to be fleshed out. In particular, it remains to be seen whether an employee's compensation will be reduced on account of financial exigency affecting the employer. As yet, no adjudicator has qualified the "make whole" approach by adding the "reasonable foresight" proviso used in the law of tort, but several courts have taken this approach under the "make whole" provision in human rights legislation.³¹ It may only be a matter of time before a section 240 adjudicator adopts the "reasonable foresight" proviso on the authority of the latter decisions.

Be that as it may, Professor Fleming's gauntlet must be taken up: what are the policies under section 240 regarding the appropriate limits on an employer's financial liability for losses sustained as a result of unjustly dismissing its employees? The starting point is to recall that section 240 is supposed to reflect the federal government's ratification of I.L.O.³² Termination of Employment Recommendation No. 119. This document is aimed at safeguarding the "personal dignity and autonomy"³³ of employees in dismissal situations by rectifying the limitations of common law wrongful dismissal suits. Such issues addressed are: (1) the excessive costs and delay of litigation; (2) the unavailability of reinstatement; and, (3) the limitation of financial compensation to contractually binding benefits that would vest during the contractual notice period but not thereafter.

²⁹ *Andrew v. Mosquito Grizzly Bears Head First Nation* (September 1997), (Wallace) at 21; *Reid v. Kenn Borak Air Ltd.* (March 1998), (Wallace) at 21.

³⁰ *Favilla v. Mayne Nickless Transport Inc.* (December 1997), (Gorsky) at 16–27.

³¹ See e.g. *Canada (Attorney General) v. Morgan* (1992), 21 C.H.R.R. D/87 (F.C.A.) at D/90; *Canada (Attorney General) v. Thwaites* (1994), 3 C.C.E.L. (2d) 290 (Fed. T.D.) at 316–317; *Canada (Attorney General) v. Levac (No. 2)* (1995), 22 C.H.R.R. D/277 (Can. H.R.T.) at D/283–284; *Leclair v. Roberge (No. 2)* (1994), 23 C.H.R.R. D/81 (Ont. B.I.) at D/82; *Jodoin v. Ciro's Jewellers Inc.* (1996), 96 C.L.L.C. 230028 (Ont. B.I.) at para. 145293; *Canada (Attorney General) v. McAlpine* (1989), 12 C.H.R.R. D/253 (F.C.A.) at D/258–259.

³² International Labour Organisation.

³³ I use this phrase not as mere rhetoric but, rather, in the technical sense enunciated by H. Collins, *Justice in Dismissal* (Oxford: Clarendon Press, 1992) at c. 1. See also c. 3, 4, where Collins fleshes out exactly what is required in order to protect an employee's "personal dignity and autonomy" in dismissal situations.

It is erroneous to view the purpose of Recommendation 119 as being simply to duplicate for non-unionised worker the protections available to unionised employees under collective agreements. Often, unions are unable to win protections as favourable as those contained in the Recommendation. Indeed, in countries such as England unions are the largest users of statutory unjust dismissal machinery. Thus, collective agreements rarely enter into consideration. Collective agreement standards of "just cause," therefore, are useful guideposts as to what the Recommendation envisages as the appropriate level of protection. However, such standards are not the "be all and end all."

The "make whole" approach to awarding compensation would appear to be fully harmonious with the Recommendation's goal of protecting the worker's "personal dignity and autonomy" in wrongful dismissals. The very purpose of Recommendation 119, and consequently section 240, is to escape the confines of the common law rules governing damages. Indeed, the current disinclination of many adjudicators to order reinstatement appears to strengthen the case for compensating an employee on a "make whole" basis as damages are all that will be available following the unlawful dismissal.³⁴ In the unionised sector where reinstatement is commonplace, the necessity for ordering long-term "make whole" compensation projections rarely arises. Collective agreement arbitration, therefore, has little relevance under section 240 as far as the question of compensation is concerned. Once adjudicators strip section 240 of the "make whole" remedy and reinstatement, all that remains is a relatively cheap and expeditious procedure for enforcing common law rights. Yet it is wrong to believe that section 240 was passed merely to fast-track common law rights: the more so since section 246 expressly preserves the claimant's right to pursue his or her common law remedies in court. Furthermore, Recommendation 119 does not stipulate that the financial burden to the employer of providing a "make whole" to an employee who has been unlawfully dismissed justifies curtailing the employee's compensation. Rather, the assumption is that the employee's pecuniary losses will be fully restored. Indeed, in other countries, such as England,³⁵ the concern with excessive costs to the employer has been met by legislating express ceilings on compensation levels, not by adjudicative gerrymandering of the "make whole" principle. Accordingly, it is submitted that section 240 adjudicators who apply the *Bardal* test, or who otherwise qualify their

³⁴ In *Atomic Energy of Canada Ltd. v. Shiekoslamie* (1998), 98 C.L.L.C. 210013 (F.C.A.) at para. 141077, n. 6, Marceau J.A. stated that a reinstatement order may not be necessary to "make whole" a claimant where a compensation award could serve that purpose.

³⁵ See Lord Wedderburn, *The Worker and the Law*, 3rd ed. (London: Penguin Books, 1986) at 253-254. The most comprehensive legal and empirical analysis of the English unfair dismissal statute is L. Dickens, M. Jones, B. Weekes & M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (Oxford: Blackwell, 1986).

“make whole” mandate so as to reduce compensation on account of the employer’s costs, are acting contrary to the legislative intent.

At this juncture, it is not being suggested that the burden to employers of paying out “make whole” compensation, and of otherwise complying with section 240, does not have negative economic consequences for the firm or for society as a whole. Indeed, there is considerable controversy as to whether unjust discharge schemes such as section 240 impair or enhance economic efficiency.³⁶ Regrettably, a comprehensive cost-benefit analysis of section 240 has yet to be undertaken. The point is that adjudicators should not second guess Parliament on this matter and reduce compensation awards by using the *Bardal* test or other means.

Further, the fact that adjudicators regularly reduce compensation to take account of contributory blame on the employee’s part should be taken as signifying that reductions are also permissible to relieve the financial burden on employers.³⁷ The former reductions are directly connected with the question of the degree of employee culpability and are designed, in part, to prevent a blameworthy employee from being unjustly enriched. Plainly, reductions aimed at lowering the employer’s termination costs are different in kind.

As noted earlier, the courts have not yet comprehensively examined the minutiae of the “make whole” remedy of compensating victims of unjust dismissal, although they have endorsed the method in principle.³⁸ As a non-practising lawyer it is likely foolhardy to make predictions as to what the courts will do. However, based on the recent tenor of Supreme Court of Canada *obiter dicta* emphasising the vulnerability of, and the consequent need to protect employees as a class,³⁹ the result will likely be a judicial endorsement of the “make whole” approach under section 240 and the consignment of the *Bardal* test to the rubbish bin of history.

³⁶ This point is examined further below: *infra* note 37 at 31–32.

³⁷ Eg. *Reek v. Messenger Delivery Service of St. Thomas Ltd.* (June 1998), (Watters) at 16, where reinstatement was denied and the reduction was made; *Mousseau v. Dakota Ojibway Tribal Council Inc.* (December 1997), (Soronow), where the reduction was coupled with reinstatement.

³⁸ *Supra* note 8.

³⁹ See e.g. *Wallace v. United Grain Growers* (1997), 97 C.L.L.C. 141202 (S.C.C.) at para. 141215; *Re Rizzo Shoes Ltd.* (1998), 33 C.C.E.L. (2d) 173 (S.C.C.) at 190; *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.) at 507; *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) at 425–426.

III. REINSTATEMENT ORDERS: THE LOST REMEDY?

PROFESSOR KAHN-FREUND HAS CORRECTLY OBSERVED that “law, like politics, is the art of the possible.” Nowhere is this more manifest than in the fate of the reinstatement remedy under section 240.⁴⁰ Ideally, reinstatement should be the primary remedy for unjust discharge, as it is under collective agreements, for it is clearly the most effective manner of making an employee whole. Indeed, many adjudicators have recognised this and have ruled that the remedy should only be denied in “truly exceptional circumstances.”⁴¹ For instance, such circumstances may include: if an employee’s position has been eliminated for legitimate business reasons; if the employee has shown no rehabilitative potential; if the employee occupies a highly sensitive position in which the maintenance of a high level of mutual trust is critical for effective job performance;⁴² or if there is an irretrievable clash of personalities between the employee and fellow workers in establishments where close personal contacts are unavoidable.⁴³ Nevertheless, a significant number of adjudicators—but certainly not all⁴⁴—have taken a more cursory approach towards examining the suitability of reinstatement. Most appear to have denied the remedy whenever an employer voices its objections and without requiring concrete proof that reinstatement would be impractical in the circumstances. Oddly, this means that an employer who consistently maintains an attitude of intense hostility towards an employee up to, and including, the adjudication hearing could recoup the benefit of its own misbe-

⁴⁰ According to data supplied by Human Resources Development Canada, between 1995–1996, reinstatement was ordered in 19 out of 54 adjudications where dismissal was ruled unjust; between 1996–1997, there were 17 reinstatements out of 55 unjust dismissals; and between 1997–1998, 16 reinstatements occurred out of 53 unjust dismissals.

⁴¹ *Lamb v. Bank of Nova Scotia* (June 1994), (Kydd) at 20.

⁴² See e.g. *Legault v. DHL International Express Ltd.* (November 1998), (Dissanayake) at 31–32 [hereinafter *Legault*], regarding a lead hand supervisory position (Note: the employee was re-engaged in the lower position of driver); *Farrell v. Royal Bank of Canada* (December 1998), (Rose) at 67–68, senior bank employee; *Big Canoe v. Chippewas of Mnjikaning (Rama) First Nation* (September 1998), (Mole) at 16, police officer employed in a small workplace.

⁴³ These, and other grounds for denying reinstatement, are enunciated in *Graham v. Bison Diversified* (October 1991), (Steele) at 15.

⁴⁴ Compare the approach that requires employers to adduce concrete evidence, not “bald assertions,” of an irretrievable breakdown in the work relationship as enunciated in *Rae v. Browning-Ferris Industries Ltd.* (November 1998), (Barrett) at 18; *Charles v. Lac La Ronge Indian Band* (November 1998), (Wallace) at 56. In a similar vein, an unjustly dismissed supervisor was ordered reinstated to the lower position of driver in *Legault*, *supra* note 42 at 31–32.

haviour by blocking a reinstatement order.⁴⁵ Moreover, Mr. Justice Marceau of the Federal Court of Appeal recently commented by way of *obiter dicta* that reinstatement should not be regarded as “automatic” if compensation can “make whole” an employee’s losses.⁴⁶

This approach to reinstatement contrasts sharply with the judicial admonition of human rights tribunals that reinstatement on the sole ground of a hostile working environment should not be denied as this would enfeeble the rights conferred by human rights legislation.⁴⁷ Instead, the employer is expected to use its authority to restore any breakdown in relationships and make reinstatement succeed. It is difficult to see why adjudicators should not likewise prevent the enfeeblement of the right not to be unjustly discharged under section 240 of the *Canada Labour Code* by placing the onus on employers to make the workplace conducive to reinstatement.

Nevertheless, the practical difficulties of making reinstatement succeed in the face of employer opposition are almost insurmountable. Although flagrantly disobeying a reinstatement order may ultimately result in the employer being found in contempt of court,⁴⁸ the employer may take the worker back but make life so miserable that the employee is eventually driven to resign.⁴⁹ Indeed, a worker who resigns shortly after being reinstated may be worse off financially than if he or she had been initially awarded compensation on a “make whole” basis. The employer, therefore, may ultimately succeed in being rid of the employee. An important empirical study of the post-reinstatement experience of non-unionised federal workers in Quebec conducted by Professor Trudeau reported that approximately two-thirds of reinstated workers perceived that they had been “unjustly” treated by their employer. Approximately 38 percent of

⁴⁵ See *e.g. Scarfe v. Saskatchewan Cultural Centre* (November 1996), (Ball) at 25–26.

⁴⁶ *Atomic Energy of Canada Ltd. v. Shiekoslamie* (1998), 98 C.L.L.C. 210013 (F.C.A.) at para. 141077, n. 6. However, in the same case, Letourneau J.A., in a concurring judgment, strongly affirmed the primacy of reinstatement (at para. 141,080). Subsequently, Adjudicator Savage supported the latter sentiment in *Brown v. West Coast Air Ltd.* (May 1999) at 12–13.

⁴⁷ *Pittiwanakwat v. Canada (Attorney General)* (1994), 21 C.H.R.R. D/355 (Fed. T.D.) at D/369. See also *Naraine v. Ford Motor Co. (No. 5)* (1996), 28 C.H.R.R. D/267 (Ont. B.I.).

⁴⁸ As in *Miller v. Kahnawake Community Services* (1997), 27 C.C.E.L. (2d) 25 (Fed. T.D.). The adjudicator does not have the jurisdiction to supervise a reinstatement order. Rather, enforcement must be pursued under ss. 244(1) and (2) of the *Canada Labour Code* [see *e.g. Lightbody, supra* note 4]. In England, breach of a reinstatement order increases the amount of compensation to which the employee is entitled.

⁴⁹ Such harassment may ground a constructive dismissal claim entitling the employee to sue for damages at common law or bring another complaint of unjust discharge under s. 240.

those employees had resigned by the time the study was carried out.⁵⁰ In comparison, reinstatement is very successful in the unionised sector due to the presence of the union to police the order.⁵¹ Not surprisingly, anecdotal evidence suggests that many unjustly dismissed employees request reinstatement in their initial complaint purely as a trade-off to secure a more generous negotiated settlement from their employer. It is difficult to determine how to surmount the obstacle of employer opposition to reinstatement orders. Of course, securing the enforcement of all protective employment legislation has been a longstanding problem. Perhaps the supervision of such orders could be remitted to the statutory health and safety committee, or the health and safety representative in smaller workplaces. However, the success rate of such bodies in enforcing their "home" statute is not particularly impressive. Alternative solutions include such options as authorising to issue interim reinstatement orders prior to the hearing, similar to the Ontario Labour Relations Board's power to issue such orders where employees are dismissed for exercising their statutory right to join a trade union and participate in its lawful activities.⁵²

Secondly, adjudicators could award reinstatement for a specified "trial" period after which either side, the employer or the employee, would be entitled to terminate the employment relationship and recover compensation. This might get the employer used to having the worker back and improve the chance of successful reinstatement.

Thirdly, in order to create a culture favourable to reinstatement, adjudicators could be expressly required to award reinstatement in all cases where unjust dismissal is found, save where the employee is ruled to be partially at fault, in which case reinstatement could be discretionary. As unpalatable as it may be, society may simply have to live with the fact that reinstatement cannot be the primary remedy for unjust discharge but must remain the lost remedy. If so, it is submitted that the case is strengthened for ensuring that a non-reinstated claimant receives a full "make whole" compensation award.

⁵⁰ G. Trudeau, "Is Reinstatement a Suitable Remedy to At-Will Employees?" (1991) 30 *Ind. Rev.* 302 at 311.

⁵¹ P.J. Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experiences* (Kingston: Queen's University Industrial Relations Centre, 1990) at 197-206, 208, 294-295.

⁵² Labour Relations Board Rules of Procedure sections 86-98 made under *The (Ontario) Labour Relations Act 1995* S.O. 1995, c. 1, Schedule A. See generally, M. Cornish, H. Simand & S. Turkington, "Ontario's Interim Order Power: How Procedural Reform Brought Substantive Change" (1996), 4 *C.L.E.L.J.* 37.

IV. ECONOMIC DISMISSALS AND THE LAY OFF EXCEPTION

SECTION 242(3.1)(A) OF THE CANADA LABOUR CODE states that no complaint can be brought if the employee has been “laid off because of lack of work or the discontinuance of a function.” Lawyers have had a field day interpreting this provision, especially the meaning of the phrase “discontinuance of a function.” The Supreme Court of Canada has authoritatively defined a “function” as meaning “the office, that is to say the bundle of responsibilities, duties and activities that are carried out by a particular employee or group of employees.”⁵³ It has been held that a “function” will be “discontinued” when “the set of activities that forms an office is no longer carried out as a result of a decision of an employer acting in good faith.”⁵⁴ It is submitted that most of the difficulties have arisen because some adjudicators have looked through the wrong end of the telescope. Instead of starting with the policy goals of the section and interpreting the words to achieve those goals, adjudicators have read the words in isolation and consequently been propelled by linguistic niceties rather than sound industrial relations policy.

The main problem area is where the employer strips the employee’s job duties from him or her and re-assigns those duties either to other existing employees or to external subcontractors. Adjudicators are divided over whether there is a “discontinuance of a function” when the employer re-assigns the claimant’s duties to other employees who are effectively made to work harder.⁵⁵ Adjudicators remain divided over whether there is a “discontinuance of a function”

⁵³ *Flieger v. New Brunswick* (1993), 48 C.C.E.L. 1 at 19 [hereinafter *Flieger*], interpreting the equivalent phrase in the *Civil Service Act*, S.N.B. 1984, c.C-5.1, s. 26(1).

⁵⁴ *Flieger*, *ibid.*

⁵⁵ On one side of the coin, there was held to be no “discontinuance of a function”: *Piccininno v. Trans Western Express* (May 1997), (Kirkwood) at 10, where the employer re-assigned all of the claimant’s maintenance duties to another maintenance worker; *Shoemaker v. Royal Bank of Canada* (September 1997), (Wallace), where the employer consolidated three supervisory functions into two and selected the claimant for termination; *Davis v. Air Canada* (November 1992), (Greyell), where a supervisor was assigned the claimant’s job duties and had to work extra time in order to complete them. On the other side of the coin, there was held to be a “discontinuance of a function”: *Nadjiwan v. Weendahmagen Alcohol and Drug Abuse Treatment Centre* (April 1997), (Aggarwal) at 31–33, where the employer re-assigned the employee’s duties to 4 existing employees; *Levi*, *supra* note 3 at 19, where the duties of one of the claimant’s were re-assigned to other existing employees; *Burton v. Access Cable Television Ltd.* (December 1994), (Collier) at 13; *Vescio and Bearskin Airline* (March 1999), (Yost) at 9; *Peters v. C.I.B.C.* (October 1998), (Edgar) at 13, where the employer created a new position that combined the claimant’s job duties with other duties.

when the employee's job duties are contracted out to an external person.⁵⁰ However, recent judicial pronouncements appear to have clarified the confusion by supporting the view that there is a valid "discontinuance of a function" in both of these situations.⁵⁷ Nevertheless, the confusion could have been minimised, once the fundamental policy goal of the "layoff" bar is understood. This seems to be insulated from adjudicative review under the "just cause" standard of an employer's business judgments about how operations are best structured in order to maximise economic efficiency.⁵⁸ Sensitive business decisions should be made by the employer who, after all, has the requisite expertise and who bears the ultimate responsibility for success or failure. The decision should not be made by an adjudicator whose expertise lies in the area of determining whether an employee's performance deficiencies warrant dismissal. According to Collins in his seminal work on wrongful dismissal, it does not impinge upon an employee's "personal dignity and autonomy" to be dismissed for legitimate economic reasons.⁵⁹ It follows, Collins argues, that the employee has no moral claim to have the "justness" of the employer's business judgment submitted to an external review by an adjudicator.⁶⁰ Collins argues that being terminated for legitimate business reasons is simply part of the price the worker pays for the benefit of living in a predominantly capitalistic society. Consequently, an adjudicator's jurisdiction should not depend of the precise mechanics of the re-structuring of work operations. Rather, it should be limited to determining whether the employer's decision is really based on efficiency factors or is being implemented as a smokescreen to purge the firm of an unwanted em-

⁵⁰ Subcontracting was held to be a "discontinuance of a function." See *e.g. Martins v. Tap-Air Portugal* (May 1991), (Franks). However, the opposite conclusion was reached in other cases. See *e.g. Leta v. Pine Creek First Nation*, [1995] C.L.A.D. No. 256 (Gray).

⁵⁷ See *e.g. Canada Airlines Int'l. Ltd v. Husain* (1998), 161 D.L.R. (4th) 381 (F.C.A.); *Jindal v. Atomic Energy of Canada Ltd.* (1998), No. A-336-96 (F.C.A.). See also *Guilbert Inc. v. Scott* (21 May 1986), No. A-618-85 (F.C.A.) at 2, leave to appeal denied [1987] 1 S.C.R. xiii.

⁵⁸ See the important remarks of adjudicator Dorsey to this effect in *Bellamy v. C.N. North America*, [1996] C.L.A.D. No. 128 at 6-7 of the award and of Adjudicator Deeley in *Jackson v. Washagamis Bar First Nation* (July 1999) at 25 [hereinafter *Jackson*]. In a similar vein in the context of the equivalent Nova Scotia provision see Freeman JA in *Halifax Development Ltd. v. Sutton* (1995), 13 CCEL (2d.) 112, at p.120 (N.S.C.A.).

⁵⁹ Collins, *supra* note 33.

⁶⁰ *Ibid.* at c. 5. Of course, as Collins correctly states, this does not mean that fair re-adjustment protections should not be established for redundant workers. For instance, such measures as: reasonable severance payments, unemployment insurance, government re-training programs and re-location grants are all feasible options.

ployee.⁶¹ This is not to deny that the form of the restructuring is relevant as evidence of bad faith—plainly, it is. For example, if the employer hires a replacement to perform the claimant's duties shortly after an alleged layoff, this smacks strongly of an illicit motive on the employer's part.⁶² However, the correctness/reasonableness of an employer's business judgment should not be subjected to adjudicative review on its substantive merits. It is submitted that if this fundamental policy goal is borne in mind, the difficulties of applying the phrase "discontinuance of a function" would be lessened.

Historically, adjudicators have not implied a duty on the employer to handle layoffs in a procedurally fair manner, perhaps to avoid treading on the slippery slope of second guessing an employer's substantive business judgments. Nevertheless, this risk can be avoided if such a duty is applied cautiously. For example, the duty could be limited to requiring the employer to give the affected employee reasonable early warning of an impending layoff and to provide reasonable time off work to conduct a job search or to try to find an alternate position for the employee in the organisation. In 1999, Adjudicator Germaine held that a duty of procedural fairness is implied in s. 245(3.1)(1).⁶³ The employer in question had misrepresented to the employee the true grounds for his dismissal, thereby precluding the employee from making a fully informed decision whether or not it was worthwhile pursuing his unjust dismissal complaint in adjudication. The Adjudicator ruled that an employer must "at least"⁶⁴ give its employees comprehensive and honest reasons for a layoff. Clearly, this falls well short of second guessing the employer's business judgments. Fashioning the appropriate "make whole" remedy for breach of a duty of procedural fairness unquestionably presents difficulties, but they are not unsurmountable.⁶⁵ For example, Adjudicator Germaine awarded the employee his full costs of proceeding to ad-

⁶¹ Adjudicators have scrutinised in great depth employer claims of layoff conditions in order to ensure that such claims are genuine and not a pretense to be rid of the claimant. See *e.g.* the important remarks to this effect of Adjudicator Swan in *Godfrey v. Brucelandair International* (October 1989). Thus, recent examples of cases have arisen where the alleged economic reasons were ruled to be unfounded: *Haitikka v. Town of Dryden* (April 1998), (Coke) at 41–44; *Doherty v. Nazko Indian Band* (October 1998), (Chertkow); *Jackson*, *supra* note 58 at 25–32; *Howard v. Maritime Telephone and Telegraph Co.* (July 1999), (Darby) at 20.

⁶² As in *Fitzpatrick v. Gitwangak Education Society* (July 1998), (Korbin) at 8; *Doherty v. Nazko Indian Band* (October 1998), (Chertkow).

⁶³ *Roe v. Rogers Cable Systems Ltd.* (August 1999), (Germaine) at 25.

⁶⁴ *Ibid.*

⁶⁵ See G. England, "Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm" (1995) 20 *Queen's L.J.* 557 at 574–76, 590–591.

judication, including 75 percent of his solicitor-client costs, on the ground that the employee would not have proceeded to adjudication had he known the real reasons for his layoff. It remains to be seen how adjudicators will develop this embryonic duty of procedural fairness.

V. THE POTENTIAL RISK WITH FIXED TERM CONTRACTS

AN EMPLOYEE CANNOT BRING A COMPLAINT unless he or she has been “dismissed” within the meaning of section 240(1) of the *Canada Labour Code*. The courts have held that there is no “dismissal” if the employer refuses to renew a fixed term contract as such contracts end automatically by their terms rather than by an act of the employer.⁶⁵ Accordingly, an employer could escape a “just cause” review under section 240 by hiring its employees under a series of fixed term contracts.⁶⁷ While the extent to which employers are utilising this strategy is not known, the widespread hue and cry among business people in recent years regarding the excessive costs of terminating employees might well have resulted in such contracts becoming more popular. Clearly, this is an area where empirical study would be useful. Article 2.3 of the I.L.O.’s Recommendation No. 119 requires signatory states to ensure that unjust dismissal legislation protects fixed term contracts from being abused in such a manner. In England, for example, the expiry of a fixed term contract is deemed to constitute a “dismissal,” although the parties can agree to waive the statutory right to bring a claim for unfair dismissal in a contract of one year or more.⁶⁸ In a similar vein, in 1999, in the European Economic Community, the European Commission adopted a proposal for a new Council Directive that obliges member states, *inter alia*, to legislate the following safeguards for fixed term employees: non-renewal of such contracts when the term expires must be justified by the employer on objective grounds; a maximum total duration of successive fixed term contracts must be established; and, a maximum number of renewals of fixed term contracts must be specified.⁶⁹ As yet, the *Canada Labour Code* has not been amended to guard against this risk. However, in 1999, Decary, JA., intimated that the courts might take the lead and interpret the statutory concept of “dismissal” pur-

⁶⁵ See e.g. *Eskasoni School Board v. MacIsaac* (1986), 86 C.L.L.C. 14042 (F.C.A.).

⁶⁷ See e.g. the warning remarks of Adjudicator Abbott in *Tebbutt v. Town of Chapeau* (March 1985) at 12.

⁶⁸ *Employment Protection Consolidation Act* s. 55 and 142.

⁶⁹ *The Framework Agreement*, clause 5(1). A copy of the *Agreement* can be found at http://europa.eu.int/comm/dg05/soc.-dial/social/fixedpress-_en.htm. The *Agreement* also prohibits discrimination with regard to terms and conditions of employment and career development against fixed term workers by reason of their legal status.

positively so as to prevent employers from abusing fixed term contacts.⁷⁰ So far, no other members of the judiciary have taken up this gauntlet.

VI. DELAY AND THE FINANCIALLY PRESSED WORKER

ANECDOTAL EVIDENCE SUGGESTS that excessive delays in completing mediation, in remitting the complaint to adjudication, and in scheduling and completing adjudication hearings may prejudice the impecunious employee in settlement negotiations with his or her employer.⁷¹ Assuming that the employee has not found replacement work following his or her dismissal, a difficult employer could attempt to deliberately prolong proceedings by requesting postponements or by raising legal technicalities in order to compound the employee's legal costs. Faced with increasing financial pressure, the employee may have to agree upon a negotiated settlement that is considerably less favourable than would have been received from the adjudicator. Indeed, a ruthless employer may even attempt to "bleed white" targeted claimants as an example to deter other employees from filing unjust dismissal complaints. Again, empirical research is needed to determine the extent of this problem.

There are at least three potential safeguards. The first is to amend the *Code* to require that adjudication occurs expeditiously. For example, under the fast-track single arbitration procedure in the unionised sector of Ontario, the arbitrator must commence the hearing within 21 days of his or her appointment by the Minister of Labour.⁷² It is possible that model would work under section 240 of the *Canada Labour Code*. Alternatively, section 240 adjudicators could be empowered to issue interim reinstatement orders similar to those of the Ontario Labour Relations Board's when an employee is fired for supporting a union organising drive.⁷³

The second safeguard would be to award the claimant's solicitor-client costs as a matter of course. After all, the claimant would not have incurred such costs but for the unjust dismissal and he or she can fairly expect to be "made whole." In the early years, many adjudicators adopted this practice. Yet today the courts have ruled that such costs can only be awarded in exceptional circumstances

⁷⁰ *Lemiux v. Canada (Labour Affairs Officer)* (1999), 39 C.C.E.L. (2d) 68 (F.C.A.) at 87.

⁷¹ According to H.R.D.C. date supplied to me, the average time between filing a complaint and referral to adjudication is approximately six to seven months. Whereas the average time between the appointment of an adjudicator and the rendering of a decision is often eight to nine months. Therefore, the average time between filing the complaint and the adjudicative decision is sixteen to seventeen months.

⁷² *Ontario Labour Relations Act* S.O. 1995, c. 1, Schedule A, s. 49(7).

⁷³ *Supra* note 53.

where the employer has acted egregiously.⁷⁴ It is submitted that this position clashes with the remedial thrust of section 240 and should be reversed. Recently Adjudicator Bruce Hephurn relied on the general "make whole" philosophy to award an employee a fair share of his solicitor-client costs, totalling approximately \$5,000.00, notwithstanding the apparent lack of bad faith on the employer's part.⁷⁵ The learned Adjudicator distinguished the *Lee-Shanok*⁷⁶ ruling, holding that it only applies in situations where the employee seeks to recover full solicitor-client costs. Of course, a common argument against awarding an employee's full solicitor-client costs as a matter of course is that the employer should likewise be awarded its costs if the employee loses. It is submitted that this argument is unsound as it fails to consider the crucial distinguishing fact that the remedial goal of section 240 is to facilitate the processing of unjust dismissal complaints, not to discourage them. Furthermore, the employer should be adequately protected against frivolous complaints by the requirement for Ministerial consent to adjudication.⁷⁷

The third possible safeguard is to amend the *Code* to compel the employer to continue paying the dismissed wages until the adjudication award is released—effectively a *status quo* enactment. This position has been championed on the basis that it is unfair to automatically presume that the employee is in the wrong in dismissal situations and to impose a financial loss pending the adjudication award, rather than make the employer, as the wealthier party, carry this burden.⁷⁸ This response is somewhat revolutionary, not the least because the employer, if it does win in adjudication, would likely encounter great difficulty recouping the wages it paid, short of driving the employee into personal bankruptcy.

Again, empirical studies as to the effects of delay and legal fees on the strategies of claimants in settlement negotiations would be useful.

⁷⁴ *Lee-Shanok*, *supra* note 8 at 79, was recently applied in *Fraser v. Bank of Nova Scotia* (September 1998), (Hunter) at 77, and *Levi*, *supra* note 4 at 23.

⁷⁵ *Page*, *supra* note 4 at 15.

⁷⁶ *Supra*, note 52.

⁷⁷ *Canada Labour Code* s. 241(3).

⁷⁸ See H. Glasbeek, "Voluntarism, Liberalism and Grievance Arbitration: Holy Grail, Romance and Real Life" in G. England, ed., *Essays in Labour Relations Law* (Toronto: CCH Canadian Ltd., 1986) at 77.

VII. WHAT HAS BEEN THE IMPACT OF SECTION 240 ON EMPLOYERS?

EMPIRICAL STUDIES ARE LONG OVERDUE to assess the economic impact of the unjust dismissal scheme on employers. In particular, the following questions require answering.

A. Has the section had a disemployment effect?

If employers find the costs of complying with section 240 to be excessive—such costs include not only making damages payments but also administering performance appraisal systems and paying legal fees—one would expect them to substitute “independent contractor” labour for “employees” and introduce labour saving technology. In addition, employers might be discouraged from hiring new employees in market upswings if it will be too costly to dismiss them later on.⁷⁹ If there is a disemployment effect resulting from section 240, this means that “justice” for those lucky enough to be employed is being paid for off the backs of the unemployed. Some might find this to be morally unpalatable. Other ways in which employers may respond to excessive costs might be to depress the wages and benefits of their employees or to hire workers on a series of successive fixed term contracts.⁸⁰

I suspect that the problem of costs may be exacerbated by the injection on the part of some adjudicators of undue formalism into the concept of “just cause.” In particular, it is suspected that some adjudicators may have distorted the requirements of the doctrine of progressive discipline into a formalistic minefield more concerned with setting procedural traps to snare the unwary employer than with striking a sensible balance between safeguarding the production process and giving the employee a fair chance to rehabilitate. Thus, the requirements that the employee be notified of the specific areas of his or her deficiencies and that his or her job is on the line unless specified improvements

⁷⁹ Useful economic analyses of the effects of unjust dismissal and other job security protections include E.P. Lazear, “Job Security Provisions and Employment” (1990) 105 *Quarterly J. of Econ.* 699; N. Leckie, *An International Review of Labour Adjustment Policies and Practices Working Paper Series No. 1993-15* (Kingston: Queen's University Industrial Relations Centre, 1993); M. Emerson, “Regulation or Deregulation of the Labour Market” (1988) *Euro. Econ. Rev.* 755; J. Friesen, “The Response of Wages to Protective Labour Legislation: Evidence from Canada” (1996) 49 *Ind. & Lab. Rels. Rev.* 243; E. Kazamaki, *Firm Search, Sector Shifts and Unemployment* (Stockholm: Swedish Institute for Social Research, 1991); Collins, *supra* note 33 at c. 5.

⁸⁰ As noted above, the expiry and non-renewal of a fixed term contract does not constitute a “dismissal” under s. 240(1) of the *Canada Labour Code*.

are made within a designated period of time sometimes—but not always⁸¹—seem to be applied with the rigour of a criminal law “reading of the rights.” As a result, the employee is expected to shoulder little, if any, personal responsibility for exercising plain common-sense in comprehending that he or she is performing below par. Unquestionably, the employee is entitled to have his or her “personal dignity and autonomy” respected in dismissals by due observance of procedural fairness and rehabilitative measures. This does not mean that the real world understandings and expectations of the workplace should be sacrificed on the alter of legal proceduralism. Two organisational behaviour specialists, R.J.Bies and T.M. Tripp, have cautioned that legalisation becomes counterproductive where there is an

... increasing formalisation of managerial communication—the emphasis ... [is] ... on putting everything in writing, documenting everything in great detail, greater centralisation of information flow and more legal expertise in decision making.⁸²

This is, however, pure conjecture on my part: it would be useful to know, through empirical study, whether or not employers find that these procedural safeguards unduly impede them from discarding inadequate performers. In British Columbia, the Thompson Commission recently recommended against legislating unjust dismissal protection partially due to the excessive costs to employers, especially in the small business sector.⁸³

B. Do employers understand their obligations under section 240?

I suspect that the uncertainty and unpredictability of the employer’s legal obligations under section 240 represents a significant cost item. Again, empirical studies would cast valuable light on the extent to which employers, and employees, understand the precise requirements of section 240. It is true that the concept of “just cause” must necessarily remain flexible in order to account for the unique circumstances of each case. Nonetheless relatively specific

⁸¹ Compare *Farrell v. Royal Bank of Canada* (December 1998), (Rose) at 53, where the adjudicator refused to rule the dismissal unjust on the ground only that the employer had failed to warn the employee of his deficiencies as required under the companies’ personnel manual since the employee suffered no resulting “undue prejudice”—the employee had ample opportunity subsequently to voice his views to the employer and the employer did not prejudge the employee’s guilt. The adjudicator commented that it “... would be unduly fastidious and would work an injustice” to the employer to find no cause on this basis (at 53). See also *Laronde v. Temogami First Nation* (August 1999), (Mole) at 13.

⁸² “Employee Initiated Defamation Lawsuits: Organisational Responses and Dilemmas” (1993) 6 E.R.R.J. 313 at 320–321. See also R. Bies and S. Sitkin, “Law Without Justice: the Dilemmas of Formalisation and Fairness in the Legalistic Organisation” (1993) 6 E.R.R.J. 271.

⁸³ *Thompson Commission Report* (Victoria: Ministry of Skills, Training and Labour, 1994) at 145. The other reason for this recommendation was the ineffectiveness of reinstatement in the non-unionised sector.

guidelines can and should be produced by those responsible for the Code's administration. It may be that Human Resource Development Canada (HRDC) should intensify its educative efforts, possibly by doing spot-checks of disciplinary systems; conducting follow-up audits of disciplinary procedures in firms against which complaints of unjust dismissal have been filed; delivering regular training seminars; and otherwise generally propagating information about section 240. The English model of publishing a *Code of Practice* on discipline and dismissal procedures holds much promise. The *Code of Practice*, which contains relatively detailed "best practice" on all facets of implementing discipline and dismissal, is not legally enforceable in and of itself, but is taken into account by industrial tribunals in applying the unfair dismissal statute. In Canada, a useful model is the *Guidelines to the Ontario Pay Equity Act* which, like the English *Code of Practice*, provides detailed advice on all aspects of the pay equity process to be taken into account by the Pay Equity.⁸⁴ Of course, such educative measures cost money and in this era of declining public expenditures the federal government might be unwilling to pay up. It should be noted that this problem is not unique to section 240. Rather, educating employers and employees as to their rights and duties under all protective employment legislation is a perennial problem.⁸⁵

My impression from reading the adjudication cases is that small firms appear to have the least understanding of what section 240 entails.⁸⁶ In particular, Native employers appear to have a dreadful record of non-compliance with the statute, losing far more adjudications than they win. The small firm sector is clearly where the HRDC's educative *schwerpunkt* should be delivered. Again, empirical studies could cast valuable light of the experience of small employers with section 240. Indeed, it may be arguable that the costs of complying with the section are so harmful to small firms that they should either be exempted from the section, or be bound by the section only in respect to long-service em-

⁸⁴ *Pay Equity Commission Implementation Series, Guidelines # 1-16 (Revised)* (Toronto: Ontario Pay Equity Commission, 1994).

⁸⁵ For example, in its recent examination of the operation of the British Columbia *Employment Standards Act*, the Thompson Commission spotlighted the high degree of ignorance the law on the part of employers and employees as a major problem and recommended the adoption of vigorous education initiatives, including teaching employment law as part of the high school curriculum: *Thompson Commission Report* (Victoria: Ministry of Skills, Training and Labour, 1993) at 116-119.

⁸⁶ For example, according to the to-date information supplied to me by H.R.D.C., of the total of 1195 complaints of unjust dismissal that were filed between 1997-1998, 542 (45.4%) occurred in the road transport industry compared with 151 (12.6%) in banking. Even though substantially more employees work in banking than in road transport, the latter sector is characterised by small firms. As well, 211 complaints (17.7%) involve Native employers which are also predominantly small operations.

ployees.⁸⁷ It would be unfortunate, if the latter path has to be taken out of economic necessity.

C. Has the section increased employers' productive efficiency?

According to Professor Hepple, the enactment of the English unfair dismissal legislation enhanced productive efficiency by strengthening managerial control over discipline. This was accomplished by providing the employer with an incentive to take greater care in recruiting, training and appraising employee performance; by enhancing the status of personnel administrators within the managerial hierarchy; and by defusing resentment and conflict within the workforce when dismissals occur.⁸⁸ In England, employers clearly reacted to the statute by taking pains to improve their discipline and dismissal procedures. Furthermore, studies of the Montana unjust discharge scheme show that stock prices of firms covered by the scheme increased "significantly" when the statute was promulgated, implying that investors anticipated that the efficiency of the firms would increase as a result of the Act.⁸⁹ Clearly, studies are needed in Canada to examine: (1) the extent to which section 240 has resulted in employers improving their discipline and dismissal procedures; and, (2) whether or not section 240 has enhanced the productive efficiency of employers. The chance of other Canadian jurisdictions enacting unjust dismissal schemes will obviously increase if the federal scheme is found to promote economic efficiency.⁹⁰

VIII. WHAT HAS BEEN THE EFFECT OF SECTION 240 ON EMPLOYEES?

EMPIRICAL STUDIES ARE NEEDED to illuminate the following potential problems.

⁸⁷ At one time the English unfair dismissal statute provided a greater qualifying period (two years) for employees hired by small businesses with less than 20 employees than for larger firms (one year). In British Columbia, the Thompson Commission emphasised the financial vulnerability of small businesses in recommending against the enactment of unjust dismissal protection: *supra* note 67 and accompanying text.

⁸⁸ B. Hepple, "The Fall and Rise of Unfair Dismissal" in W.E.J. McCarthy, ed., *Legal Intervention in Industrial Relations: Gains and Losses* (Oxford: Blackwell, 1993) at 94. Compare *supra* note 64.

⁸⁹ S. Abraham, "Can a Wrongful Discharge Statute Really Benefit Employers?" (1998) 37 *Ind. Rel.* 499.

⁹⁰ Currently the only other jurisdictions having such schemes are Quebec and Nova Scotia.

A. Has rehabilitation of the employee succeeded where reinstatement is ordered?

First, empirical studies are needed to show the extent to which the doctrine of progressive discipline, which is at the core of “just cause,” has succeeded in rehabilitating unjustly dismissed workers into useful and productive members of the workforce.⁹¹ It was noted earlier that reinstatement orders are not widely granted as a remedy for unjust dismissal and, even when they are, they have not been particularly successful.⁹² It is important to know the degree to which this relative lack of success is due either to the failure of employees to rehabilitate or to employer opposition and hostility to the employee’s return.

B. Has the statutory mediation process short-changed the employee?

Mediation of the unjust dismissal complaint with the assistance of a HRDC investigator, or Labour Affairs Officer, is a condition precedent to adjudication.⁹³ One of the goals of compulsory mediation is to educate the parties, especially the employer, as to their legal rights and obligations. Studies are required to ascertain the extent to which mediation has succeeded in educating the parties and improving future behaviour. Other goals of mediation are to minimise costs by avoiding adjudication proceedings and to produce a “fair” settlement for the employee. Studies are needed to ascertain whether mediated settlements are producing reasonable settlements for employees. It is suspected that many employees do not retain legal counsel until after mediation has ended and the reference to adjudication is finalised. Even then, some employees, and employers, elect to go it alone. The employee, who likely will not fully comprehend his or her legal rights, may have to rely heavily on the HRDC investigator to act as the unofficial “guardian” of his or her interests. Alternatively, if the employee does have a lawyer, the full extent of the adjudicator’s “make whole” remedial authority may be so unfamiliar to lawyers who do not specialise in employment law that the employee is poorly advised. There is a risk that the HRDC investigator may trade an employee’s rights for the “quiet life,” especially if he or she is pressured by increasing workloads and diminishing resources in today’s climate of government cost-cutting. Moreover, the HRDC inspector may not be ade-

⁹¹ One empirical study of the progressive discipline theory was undertaken by G. Eden, *Unjust Dismissal in the Canadian Federal Jurisdiction* [unpublished Ph.D. Thesis] (Toronto: University of Toronto, 1990) at Part 111. This material forms the basis of her subsequent piece “Progressive Discipline: An Oxymoron?” (1992) 47 *Ind. Rel.* 511, where she expostulates that much of the rehabilitative value of this doctrine has been lost due to an overemphasis on deterrence.

⁹² *Ibid.* at 16–17.

⁹³ *Canada Labour Code* s. 241(2).

quately trained in the intricacies of section 240. Of course, employers, too, may get short-changed in mediation, but it is submitted that employers are more likely than employees to retain specialised legal counsel at the early stages of the complaints process.

C. Has section 240 suppressed employees' incentive to unionise?

One might expect that employees would be less inclined to join a trade union if section 240 provides them with "just cause" protection "free of charge." It is difficult to imagine a stronger incentive to unionise than to obtain the "just cause" safeguard found in most collective agreements. Professor J-P. Bergeron of Montreal University has found empirical support for a correlation between the diminished desire of employees to unionise and the enactment of enhanced employment rights.⁹⁴ Empirical investigation of the effect of section 240 on employees' propensity to unionise would be useful. If a negative effect on the propensity to unionise does exist, this may strengthen the claim of trade unions that the federal government should subsidise arbitration hearings involving "just cause" dismissals since non-unionised workers enjoy roughly equivalent protections at the State's expense. Under section 240(1)(b) of the *Canada Labour Code*, an employee who is subject to a collective agreement is precluded from pursuing a complaint for unjust dismissal, unlike in other countries where unions can, and frequently do, utilise statutory machinery. Of course, statutory protections such as section 240 always place trade unions on the horns of a dilemma: their social justice "voice" wants to welcome any expansion in employee rights, but their "organisational" voice desires to aggrandise the membership base and their dues.

IX. THE NEED FOR ADJUDICATOR TRAINING AND CERTIFICATION

THIS IS A SENSITIVE SUBJECT TO RAISE, but nonetheless the nettle must be grasped. It is submitted that the federal government should introduce a scheme for training and certifying adjudicators as a prerequisite to placing them on the adjudicator list. Too often, the quality of adjudication awards appears to be mediocre. In particular, the facts of cases are not *analysed*. Rather, the testimony of each witness and the relevant documentation is simply *reproduced*, frequently at exhausting length. Plainly, the process of *analysis* is completely different from the mere amenuensical function of *duplication* as it involves *reasoning* why conclusion X should follow from position Y.

⁹⁴ J-P. Bergeron, *Unionisation in the Private Sector* [Ph.D. Thesis] (Toronto: Centre for Industrial Relations—University of Toronto, 1993).

Closely related is the practice of simply *reciting* quotations of legal principles from previous decisions to justify reaching a conclusion without *analysing* precisely how and why those principles lead to that conclusion. The educative value of adjudication is almost certainly diminished as a result of these failures.

Last but not least, adjudicators too often appear not to know the intricacies of the unique and specialised jurisprudence that has developed under section 240, especially with regard to the “make whole” remedial mandate. Consequently, the adjudication process too often resembles a “cut-price” common law wrongful dismissal suit.

Anecdotal evidence suggests that the variable quality of adjudicators may stimulate negotiated settlements between the parties who prefer the predictability of a settlement to the uncertainty of being assigned an incompetent adjudicator.

Space constraints preclude a detailed analysis of how a training and certification scheme could be structured. However, key features would include courses and examinations in the substantive case law arising under section 240 and the completion of “mock” adjudications under the supervision of an experienced adjudicator. Currently, schemes for training and certifying collective agreement arbitrators exist in several provinces, including Ontario and Nova Scotia, so there is no shortage of experience to draw from.

X. CONCLUSION

I DO NOT WANT TO LEAVE THE IMPRESSION from the foregoing criticisms of section 240 that the unjust discharge scheme has become a dog's breakfast. On the contrary, pride should be taken in having protected the most vulnerable sector of the federal workforce against arbitrary dismissal within the limits of the economic resources available. The challenge is to make the system work better than it already does. In order to achieve this goal, further empirical study and policy brainstorming is needed with regard to the problems previously identified.

