

## Industrial Discipline in the Canadian Federal Jurisdiction

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Résumé de l'article

La présente étude analyse les sentences arbitrales qui portent sur des plaintes de congédiement injuste venant de travailleurs non syndiqués assujettis au *Code canadien du travail* dans le but de connaître l'approche que les arbitres ont adoptée en ce qui concerne les mesures disciplinaires. L'objectif principal est de déterminer si les arbitres ont appliqué le principe de la progression des mesures disciplinaires que l'on retrouve dans le secteur syndiqué.

L'auteure passe d'abord en revue le concept de la progressivité des mesures disciplinaires décrit dans la jurisprudence arbitrale provenant du secteur syndiqué. Selon ce concept, on vise à pénaliser l'employé de façon telle que la sévérité de la sanction va en augmentant. Il peut donc s'agir d'avis oraux, écrits, ou de suspensions sans solde de plus en plus longues. Bien que le but de ces mesures disciplinaires soit perçu de plusieurs façons par les arbitres, en général, ils les considèrent en termes de correction et de réhabilitation. De plus, ils écartent ou minimisent l'importance de l'aspect punitif des mesures disciplinaires.

L'examen de la documentation portant sur le comportement organisationnel présente une perspective très différente des mesures disciplinaires sur les lieux de travail de celle adoptée par les arbitres. Les behavioristes les considèrent en effet comme une forme de punition ayant des effets néfastes. L'auteure résume ensuite les critiques sur l'emploi des mesures disciplinaires dans cette documentation ; en général, on les considère inefficaces et improductives.

Étant donné que les paradigmes se font concurrence en ce qui concerne le concept de progression des mesures disciplinaires, l'auteure tente de déterminer quelle approche a été adoptée par les arbitres qui ont eu à juger des plaintes pour congédiement injuste portées en vertu du Code dans le secteur non syndiqué.

Les données pour l'analyse ont été recueillies parmi toutes les décisions à caractère disciplinaire rendues depuis l'entrée en vigueur de la loi, en 1978, jusqu'au mois de mars 1989 (279 décisions). La variable dépendante est la décision de l'arbitre dans chaque cas, i.e. s'il a fait droit à la plainte ou non. La principale variable indépendante est la reconnaissance ou non par l'arbitre du fait que l'employeur n'ait pas mis en pratique le principe de la progression des mesures disciplinaires. Plusieurs variables de contrôle susceptibles d'influencer les décisions des arbitres ont aussi été mesurées. Celles-ci ont été regroupées selon le genre de faute et les caractéristiques des employés.

L'analyse « logit » a été utilisée pour identifier les prédicteurs importants de la probabilité que la plainte soit accueillie ou rejetée. Les résultats confirment que le fait de ne pas appliquer le principe de la progressivité des mesures disciplinaires est un facteur important associé au maintien de la plainte. Par exemple, évalués à la probabilité moyenne de .61, les plaignants ont 39 % plus de chance d'avoir gain de cause si l'arbitre réfère à ce facteur. Autrement dit, pour les plaignants ayant déjà une probabilité de 61 % de voir leur plainte accueillie, le fait que le principe de la progression des mesures disciplinaires n'ait pas été mis en pratique augmente de 39 % la probabilité que l'arbitre fasse droit à la plainte, ce qui assure pratiquement un gain de cause.

L'auteure examine ensuite la jurisprudence dans le but de déterminer de quelle façon les arbitres ont appliqué le concept de la progression des mesures disciplinaires. La définition de « mesures disciplinaires » adoptée par les arbitres est compatible avec celle que l'on retrouve dans la jurisprudence du secteur syndiqué. Dans plusieurs cas, ils ont adopté l'approche de sanctions progressives et imposé des suspensions sans traitement avant le congédiement. Certains arbitres ont permis des exceptions à la stricte mise en pratique du principe selon la nature de l'offense, le genre d'organisation, ou la nature du travail de l'employé. Toutefois, il y a eu une divergence d'opinion à l'intérieur de la jurisprudence. Tandis que certains arbitres ont adapté et modifié ce principe dans certaines circonstances, d'autres ont insisté sur la stricte mise en pratique de la règle. De plus, pour la plupart, les arbitres n'ont pas articulé l'objectif visé par l'emploi de mesures disciplinaires progressives. Dans les cas où l'objectif est énoncé, les thèmes de correction et de réhabilitation sont évidents.

En conclusion, l'auteure met en question l'adoption du principe de la progression des mesures disciplinaires étant donné ses potentiels effets néfastes, tels qu'illustrés dans la documentation portant sur le comportement organisationnel. Elle propose que l'emploi de ce principe dans un contexte de non-syndicalisation puisse être perçu comme une mesure rétrograde. Il faut toutefois signaler l'insuffisance de recherches empiriques venant appuyer l'un ou l'autre des paradigmes concernant la discipline progressive et la nécessité d'avoir de telles recherches.

# *Industrial Discipline in the Canadian Federal Jurisdiction*

**Genevieve Eden**

*This study involves an analysis of adjudicator decisions dealing with complaints of unjust dismissal from nonunionized workers in the Canadian federal jurisdiction to determine the approach adopted with respect to industrial discipline. The analysis includes all disciplinary decisions rendered between the enactment of the legislation in 1978 to March 1989 (279 cases). The results, based on logit analysis, reveal that adjudicators have adopted the approach to discipline by arbitrators in the unionized sector. The definition, application, and purpose of discipline espoused by adjudicators are also discussed. The author questions the adoption of this principle given the potential negative effects of discipline as illustrated in the organizational behavior literature.*

With the enactment of statutory laws governing dismissal for nonunionized workers in Canada, a key issue for inquiry is what approach adjudicators acting under this legislation have adopted with respect to industrial discipline. Most nonunionized workers in Canada are governed by the common law legal regime where, generally, the concept of progressive discipline in the workplace has been held not to apply. Conversely, in the unionized sector, progressive discipline has been described as one of the central principles of just cause in dismissal decisions rendered by arbitrators.

The perpetuation of the concept of progressive discipline over four and a half decades of jurisprudence is interesting given a perspective regarding this

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concept in the organizational behavior literature that stands in sharp contrast to the notion of discipline espoused by arbitrators. Given competing perspectives regarding the concept of discipline, and that, traditionally, it has not been applied in nonunionized settings, the approach adopted by adjudicators acting under a statutory regime will be informative.

This study involves an analysis of adjudicator decisions dealing with complaints of unjust dismissal under the *Canada Labour Code*. Section 240 *et seq.* of the Code provides statutory protection against unjust dismissal for nonunionized employees in the federal jurisdiction. The federal jurisdiction covers only about ten percent of all employees, but it includes workers in a number of particularly important areas of the economy. Federally regulated industries include interprovincial air, rail, shipping, ferry, and trucking operations as well as banks, radio broadcasting, grain elevators, uranium mines, atomic energy, and certain Crown corporations.

The main objective of the study is to determine whether the concept of progressive discipline has been adopted by adjudicators acting under the Code. In addition, the paper discusses how adjudicators have viewed progressive discipline, that is, its definition, application, and purpose.

This study contributes to the literature on decisions rendered under the Code by employing multivariate statistical procedures. The few past studies of unjust dismissal decisions under statutory regimes for the unorganized sector have been based primarily on the citing of cases. Some studies dealing with arbitral decisions rendered under collective bargaining regimes have used multivariate techniques; however, often with a limited array of explanatory variables (Stieber et al. 1985; Ponak and Sahney 1986; Bemmels 1988a, 1988b, 1988c). This study uses a wider array of determinants of arbitral decisions than used in most studies.

## THE ARBITRAL MODEL

The significance of the concept of progressive discipline has been illustrated by reference to it in the industrial relations literature as one of the central principles of just cause in dismissal cases (Kochan and Barocci 1985: 381) and as "the most significant arbitral development" (Failes 1986: 42).

### Definition

In the arbitral jurisprudence, the concept of progressive discipline is normally referred to as penalties of increasing severity administered to the employee. These penalties include verbal warnings, written warnings, and escalating suspensions without pay (Adams 1978; Palmer 1983; Failes 1986;

Dolan and Schuler 1987; Brown and Beatty 1988). Numerous cases have adopted this approach and have specifically required the imposition of suspension without pay prior to the ultimate penalty of discharge.<sup>1</sup>

### Application

The theory of progressive discipline has evolved from the recognition by arbitrators of the importance of warning employees regarding the unacceptability of their behavior prior to the final act of discharge. Thus, employees are given an opportunity to correct their behavior. "Warnings are seen as being part of an underlying concept of fairness." (Failes 1986: 40).

Progressive discipline may not be required where the particular misconduct so seriously undermines the employment relationship that dismissal is justified without prior warning. Theft and fighting are sometimes cited as such serious offenses.<sup>2</sup>

However, in many cases, even such serious offenses are no longer deemed to constitute automatic cause for discharge.<sup>3</sup> In addition to a requirement to apply progressive discipline, other mitigating and aggravating circumstances are considered. It is well established that the grievor's previous record and length of service are important factors to be considered (Brown and Beatty 1988). Other principles considered are whether the employee's intent was deliberate or involuntary,<sup>4</sup> whether the employee expressed remorse for the

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<sup>1</sup> *Re North York General Hospital and Canadian Union of General Employees* (1973), 5 L.A.C. (2d) 45 (Shime); *Re Cooney Haulage and Teamsters Union, Local 91* (1987), 28 L.A.C. (3d) 97 (MacDowell); *Re Treasury Board (Employment & Immigration) and Quigley* (1987), 31 L.A.C. (3d) 156 (Cantin); *Re George Lanthier et Fils Ltée and Milk & Bread Drivers* (1987), 31 L.A.C. (3d) 320 (Bendel); *Re K Line Maintenance & Construction Ltd. and I.B.E.W.* (1988), 35 L.A.C. (3d) 358 (Cromwell); *Re Oshawa Group Ltd. and Teamsters Union, Loc. 419* (1988), 33 L.A.C. (3d) 97 (Knopf); *Re Boart Inc. and C.A.W., Loc. 1256* (1988), 35 L.A.C. (3d) 253 (Palmer); *Re Famz Foods Ltd. (Swiss Chalet) and Canadian Union of Restaurant Employees, Local 88* (1988), 33 L.A.C. (3d) 435 (Roberts); *Re Nat'l Auto Radiator Mfg. Co. and C.A.W., Loc. 195* (1988), 2 L.A.C. (4th) 346 (Walters); *Re Emergency Health Services Com'n and C.U.P.E., Loc. 873* (1988), 35 L.A.C. (3d) 400 (Black); *Re Canada Post Corp. and C.U.P.W. (Leewes)* (1988), 3 L.A.C. (4th) 162 (Bird) and other cases too numerous to mention.

<sup>2</sup> *Canada Safeway and United Food & Commercial Workers* (1987), 29 L.A.C. (3d) 176 (Hope); *Re Kensington Private Hospital and Employees Union* (1987), 29 L.A.C. (3d) 390 (McPhillips).

<sup>3</sup> *Re Goodyear Tire and United Rubber Workers* (1985), 18 L.A.C. (3d) 65 (Burkett); *Re Mun. of Ottawa-Carleton and C.U.P.E., Local 503* (1985), 18 L.A.C. (3d) 292 (Burkett); *Re Digby & Municipal Housing and Service Employees* (1985), 20 L.A.C. (3d) 374 (MacLellan).

<sup>4</sup> *Re Canada Post Corp. and CUPW Leewes* (1988), 3 L.A.C. (4th) 162 (Bird). *Re Oshawa Group Ltd. and Teamsters Union, Loc. 419* (1988), 33 L.A.C. (3d) 97 (Knopf).

wrongdoing,<sup>5</sup> and whether the wrongdoing was an isolated act of misconduct.<sup>6</sup>

While the failure to apply progressive discipline is only one of the factors considered by adjudicators in the determination of whether just cause for discharge exists, this concept has received so much attention in the arbitral jurisprudence that it constitutes the central focus of this study.

### Purpose

While the concept of progressive discipline is well established in the jurisprudence, its purpose has been described in various ways.

*Themes of Correction and Rehabilitation.* A general trend is to view discipline as corrective and rehabilitative.<sup>7</sup> Basic to the corrective approach espoused by arbitrators is the notion that progressively increasing the severity of the discipline will give employees incentives to reform their conduct. These themes of correction and rehabilitation appear, in some cases, to have been imported from theories in criminal law which presuppose that the purpose of punishment is to correct wrongdoing (Alexander 1956; Adams 1978; England 1978; Heenan 1985).

*Deterrence.* Another purpose of discipline that has been referred to in the jurisprudence is that of deterrence, both with respect to the offending employee's future conduct, as well as the conduct of other employees.<sup>8</sup>

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<sup>5</sup> *Re Langley Memorial Hospital and Employees' Union* (1985), 18 L.A.C. (3d) 123 (Thompson); *Re Digby & Municipal Housing and Service Employees* (1985), 20 L.A.C. (3d) 374 (MacLellan); *Re Marystown Shipyard and Marine & Shipbuilding Workers* (1985), 21 L.A.C. (3d) 304 (Easton); *Re Standard-Modern Technologies and United Steelworkers of America, Local 3252* (1986), 26 L.A.C. (3d) 150 (Schiff); *Re Town of Riverview and C.U.P.E., Local 2162* (1987), 26 L.A.C. (3d) 193 (Stanley); *Re Kensington Private Hospital and Employees' Union* (1987), 29 L.A.C. (3d) 390 (McPhillips); *Re Canada Safeway and United Food & Commercial Workers* (1987), 29 L.A.C. (3d) 176 (Hope); *Re Prince George Regional Hospital and Employees' Union* (1987), 29 L.A.C. (3d) 38 (Greyell); *Re Alberta and A.U.P.E. (Harding Grievance)* (1988), 34 L.A.C. (3d) 204 (McFetridge); *Re Canada Post Corp. and C.U.P.W.* (1988), 3 L.A.C. (4th) 162 (Bird).

<sup>6</sup> *Re Emergency Health Services Com'n and C.U.P.E., Loc. 873* (1988), 35 L.A.C. (3d) 400 (Black).

<sup>7</sup> *Re Toronto East General Hospital Inc. and S.E.I.U.* (1975), 9 L.A.C. (2d) 311 (Beatty); *Re Canada Tungsten Mining Corp. and U.S.W.* (1984), 14 L.A.C. (3d) 346 (Hope); *Re Marystown Shipyard and Marine & Shipbuilding Workers* (1985), 21 L.A.C. (3d) 304 (Easton); *Re Cooney Haulage and Teamsters Union, Local 91* (1987), 28 L.A.C. (3d) 97 (MacDowell); *Re Emergency Health Services Com'n and C.U.P.E., Loc. 873* (1988), 35 L.A.C. (3d) 400 (Black); *Re Canada Post Corp. and C.U.P.W. (Leewes)* (1988), 3 L.A.C. (4th) 162 (Bird).

<sup>8</sup> *Re Canada Post Corp. and C.U.P.W. (Leewes)* (1986), 3 L.A.C. (4th) 162 (Bird); *Re Bell Canada and Communications Workers* (November 14, 1983), unreported (Burkett); *Re*

*Other purposes.* Other purposes of discipline referred to in the jurisprudence include "bringing home" clearly the employer's dissatisfaction with the employee,<sup>9</sup> "the development and maintenance of an efficient and profitable operation" (Adams 1978: 6), and conformity to workplace norms.<sup>10</sup>

While one writer characterized progressive discipline as "...an arsenal of calibrated punishments made available to facilitate whipping the work force into shape" (Glasbeek 1982: 75), the more pronounced trend in the jurisprudence is to downplay, dismiss, or ignore the punishment aspect of discipline.

## THE ORGANIZATIONAL BEHAVIOR MODEL

A review of the organizational behavior literature illustrates a very different perspective regarding the notion of discipline than that espoused by arbitrators. It's clear that behavioralists regard discipline in the workplace as a form of punishment. Several writers have expressly equated the use of reprimands and suspensions without pay with the concept of punishment (Wheeler 1976: 240; Dessler 1979: 86; Gibson et al. 1979: 82-83; Arvey and Ivancevich 1980: 131; Kerr and Slocum 1981: 123; Luthans 1981: 391; Arvey and Jones 1985: 370; Arnold and Feldman 1986: 69; Dolan and Schuler 1987: 278, 483; Ivancevich and Mattison 1987: 168). Indeed the terms discipline and punishment are used interchangeably.

### Reinforcement Theory

The concept of discipline in the organizational literature has its roots in reinforcement theory developed initially by the well-known psychologist B. F. Skinner. Initially, punishment was studied under experimental conditions with nonhuman subjects. Skinner (1953) maintained that punishment was ineffective or temporary, and produced undesirable side effects. Such beliefs that punishment is ineffective and counterproductive have persisted and have carried over to the use of discipline in organizational settings. Organizational behavioralists generally have not favored the use of discipline.

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*Canada Safeway and United Food & Commercial Workers* (1987), 29 L.A.C. (3d) 176 (Hope); *Reg. Mun. of Ottawa-Carleton and C.U.P.E. Local 503* (1985), 18 L.A.C. (3d) 292 (Burkett).

<sup>9</sup> *Re Standard-Modern Technologies and United Steelworkers of America, Local 3252* (1986), 26 L.A.C. (3d) 150 (Schiff); *Re Cooney Haulage and Teamsters Union, Local 91* (1987), 28 L.A.C. (3d) 97 (MacDowell); *Re Oshawa Group Ltd. and Teamsters Union, Loc. 419* (1988), 33 L.A.C. (3d) 97 (Knopf); *Re Emergency Health Services Com'n and C.U.P.E., Loc. 873* (1988), 35 L.A.C. (4th) 400 (Black).

<sup>10</sup> *Re Cooney Haulage and Teamsters Union, Local 91* (1987), 28 L.A.C. (3d) 97 (MacDowell).

### Criticisms of Discipline

Many authors have reviewed criticisms of the use of discipline in organizations (Wheeler 1976: 235-236; Dessler 1979: 89-90; Gibson et al. 1979: 82; Arvey and Ivancevich 1980: 125-131; Kerr and Slocum 1981: 123; Luthans 1981: 261, 286; Arvey and Jones 1985: 368, 383; Luthans 1985: 296; Dolan and Schuler 1987: 278; Ivancevich and Mattison 1987: 181). The following is a summary of these criticisms:

- It serves to suppress behavior temporarily rather than change it permanently.
- It may result in escape or avoidance by the employee (e.g., absenteeism, turnover).
- It may result in sabotage against the person who administers the punishment.
- It can turn the person doing the punishing into an “aversive stimulus” with the result that the person cannot take any action that will be perceived as positive.
- It may have a disastrous effect on employee satisfaction.
- It’s difficult for supervisors to administer. It’s stressful for them to handle, and difficult to switch roles from punisher to positive reinforcer.
- It may be used as a mechanical process to justify termination.
- Supervisors may be viewed negatively by upper management if there is an overreliance on aversive control systems.
- It can lead to an increase in expensive, time consuming grievances.
- It’s often thought to be unethical and non-humanitarian.

While the use of punishment has been discredited by many, it has also had some proponents. Some studies have found the use of punishment to be effective in modifying deviant or pathological behaviors (Arvey and Ivancevich 1980). Some have drawn from literature on animal learning, and child development to suggest that punishment can be effective in organizational contexts (Arvey and Ivancevich 1980). However, these propositions do not appear to have been tested in organizational settings.

### THE CONCEPT OF DISCIPLINE IN THE FEDERAL JURISDICTION

It appears that there are competing paradigms regarding the concept of progressive discipline. Generally, the arbitral perspective views discipline as corrective, while the organizational behavior perspective appears to focus on the negative effects of discipline. The central issue to be addressed in this paper is whether the concept of progressive discipline has been adopted by

adjudicators acting under ss. 240 *et seq.* of the *Canada Labour Code*. In addition, the definition, application, and purpose of discipline espoused by adjudicators acting under the Code are discussed.

Traditionally, nonunion workers in the federal jurisdiction were forced to pursue their claims of wrongful dismissal in the courts. With the enactment of ss. 240 *et seq.* (formerly s. 61.5) of the Code, these workers were provided the opportunity to challenge their dismissal through an adjudication process similar to that of arbitration in the unionized sector. The general view appears to be that the objective of the legislation was to afford nonunion workers similar protection against unjust dismissal as enjoyed by most unionized workers under collective agreements (Adell 1981; England 1982; Trudeau 1985).

### Previous Studies

In the existing literature, progressive discipline has been described as the general rule applied under the Code (Muthuchidambaram 1981; Simmons 1981; England 1982; Harris 1984; Levitt 1985; Trudeau 1985; Failes 1986). However, this analysis has been based primarily on the citing of cases.

As reported in this literature, some adjudicators have allowed notable exceptions in the application of the concept of progressive discipline. England (1982) observed that many workers falling under this legislation are white-collar "professionals" for whom the model of cause developed in the context of blue-collar workers in collective bargaining regimes, is inappropriate. He maintained that adjudicators under the Code have adjusted to this different context. Similarly, it's been reported that discipline has not been required by some adjudicators for employees working at a management level or those with a high degree of autonomy and responsibility (Trudeau 1985). Other factors considered in mitigating the strict application of the discipline rule have been the small size of the workplace, and the very specialized skills of the employee that cannot be temporarily replaced (Trudeau 1985; Failes 1986).

These exceptions to the application of progressive discipline, as reported in previous studies, are examined further in the author's own review of cases following the main analysis of this study.

### Data and Methodology

Data for the analysis was collected from decisions rendered under the Code from its beginning in September 1, 1978 to March 31, 1989. There were 503 decisions rendered during this period. Decisions dealing solely with preliminary objections regarding the adjudicator's jurisdiction to hear the case were excluded from the analysis. As well, awards in which adjudicators merely



incorporated the parties agreed settlement were excluded because they do not reflect actual decision making by adjudicators. Finally, cases in which employees were discharged for nondisciplinary reasons such as health or lack of ability to perform the job were excluded which reduced the sample to 279 disciplinary cases.

The dependent variable in this study is the adjudicator's award in each case. The decision was assigned a value of 1 if the complaint was sustained, (i.e., the employee "won") and 0 if the complaint was denied (i.e., the employer "won").

The primary independent variable, NODISP, was coded as 1 when acknowledged by the adjudicator that the employer failed to apply progressive discipline, 0 otherwise. Both the background of the legislation, as well as the previous studies, suggest that adjudicators will consider this as a key element in their decision. Thus it is hypothesized that adjudicators will more likely sustain a discharged employee's complaint where the employer has failed to apply progressive discipline.

The study measured several control variables that may influence adjudicator outcomes which were grouped under type of offense, and characteristics of the employee.

*Type of offense.* The nature of the offense is an important factor in third-party decision making; some offenses may be considered more serious than others. Each of the offense categories is treated as a dummy, coded 1 if the offense was mentioned, 0 otherwise.

*Characteristics of the employee.* Mitigating factors expected to weigh in the employee's favor and thus be positively associated with complaints sustained include long service and a clean work record. These were coded as continuous variables, respectively, as years of service, and as an index from 1 to 5 with respect to the employees' work record with 1 being the most serious blemish on the employee's record (suspension) and 5 indicating a clean record. Other mitigating variables include: lack of intent in committing the offense; willingness to apologize for the wrongdoing; and isolated incident of misconduct. Aggravating factors, expected to be negatively associated with complaints sustained include a deliberate intent to commit the offense and an unwillingness to apologize. Each of these mitigating and aggravating variables were dichotomously coded as 1 when acknowledged by the adjudicator that the condition was present, and 0 otherwise. The omitted reference category for the mitigating and aggravating variables is "no mention".

The complainant's occupation and gender were also included as independent variables, given their inclusion in other studies dealing with arbitral

decisions rendered under collective bargaining regimes (Bemmels 1988a, 1988b, 1988c).

## Procedure

Logit analysis was employed to identify the significant predictors of the dichotomous dependent variable, the probability of the complaint being sustained or denied. The logistic function is appropriate for obtaining probability estimates based on dichotomous dependent variables. As well, it enhances the analysis of adjudicator decisions in that it enables estimation at various probability levels which enhances our understanding of the effect of an increase or decrease in an explanatory variable when the probability of winning is already high or already low.

## Results

*Logit estimates.* Table 1 presents estimates of the effect of the independent variables on the probability of the complaint being sustained for all 279 cases. Changes in the probability of the complaint being sustained are evaluated at three probabilities, .25, .61, and .80, the .61 figure being the mean of the dependent variable (i.e., 61 percent of the complaints were sustained).

The results confirmed the expectation that the variable NODISP is a strong mitigating factor associated with the complaint being sustained. Evaluated at the mean probability of .61 ( $P=.61$ ), complainants are 39 percent more likely to win their case if the adjudicator made reference to this factor. In other words, for complainants already 61 percent likely to win their case, the failure to apply progressive discipline increases the probability of complaints sustained by 39 percent which would virtually ensure the complaint was sustained.

If complainants are only 25 percent likely to win their case ( $P=.25$ ), the failure to apply progressive discipline increases the probability of complaints sustained by 73.5 percent. Again, the employee is almost virtually ensured of winning. For employees already 80 percent likely to win their case ( $P=.80$ ), failure to discipline would increase their likelihood of winning by 19.9 percent. Thus the failure to apply progressive discipline has an overwhelming effect; this variable is indeed a major ingredient in the adjudication decision.

Having illustrated that the failure to apply progressive discipline is one of the major elements in adjudicators' decision to sustain complaints, it is important to determine how adjudicators have viewed this concept, that is, how has it been defined, how has it been applied, and what is its purpose? Have the

TABLE 1  
 Logit Analysis of Probability of Complaint Sustained  
 (Disciplinary Dismissals N=279)

<i>Independent Variable</i>	<i>Logit Coefficient</i>	<i>t-Statistic</i>	<i>Change in Probability Evaluated at</i>		
			<i>P=.25</i>	<i>P=.61</i>	<i>P=.80</i>
Constant	-1.25	-1.22	-0.163	-0.301	-0.276
NODISP	5.277**	5.45	0.735	0.391	0.199
<i>Offense (Other)</i>					
Dishonest	-2.942**	-3.06	-0.233	-0.531	-0.626
Absent	-3.376	-1.63	-0.239	-0.556	-0.680
Absentwp	-1.569	-1.53	-0.185	-0.363	-0.346
Rules	-1.167	-1.26	-0.156	-0.282	-0.245
Alcohol	-0.732	-0.64	-0.112	-0.181	-0.142
Neglight	-1.427	-1.35	-0.176	-0.336	-0.310
Insubord	-0.448	-0.44	-0.074	-0.110	-0.081
Perform	0.132	0.13	0.026	0.031	0.020
Multiple	0.599	0.56	0.118	0.123	0.075
Attitude	0.484	0.45	0.101	0.108	0.066
Nodismis	-0.907	-0.54	-0.131	-0.223	-0.183
<i>Employee</i>					
Record (1-5)	0.546**	3.21	0.102	0.130	0.087
Service (mos)	0.003	0.85	0.000	0.001	0.000
<i>Intent (No mention)</i>					
Nointent	0.720	0.59	0.156	0.154	0.091
Ysintent	-3.509**	-2.13	-0.240	-0.562	-0.693
<i>Remorse (No mention)</i>					
Ysremorse	2.560**	1.81	0.562	0.346	0.181
Noremorse	-2.614**	-2.38	-0.226	-0.505	-0.573
<i>Incident (No mention)</i>					
Isolated	2.148**	2.45	0.491	0.324	0.172
<i>Gender (Male)</i>					
Female	0.017	0.03	0.003	0.004	0.003
<i>Occupation (Admmngr)</i>					
Unsklsrv	0.264	0.23	0.053	0.061	0.039
Skilled	-0.038	-0.06	-0.007	-0.009	-0.006
Clerical	0.803	1.23	0.177	0.168	0.099
Sales	0.037	0.04	0.007	0.009	0.006
Proftech	-0.011	-0.02	-0.002	-0.003	-0.002

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

early trends continued which indicated that this concept had been adapted and modified to fit individual circumstances?

### Definition, Application and Purpose of Progressive Discipline

*Definition.* The definition of progressive discipline adopted by adjudicators under ss. 240 is consistent with the jurisprudence in the unionized sector; numerous cases have adopted the approach of progressive sanctions and have specifically required the imposition of suspensions without pay prior to the ultimate penalty of discharge.<sup>11</sup>

*Application.* While progressive discipline appears well established in the jurisprudence rendered under the Code, some adjudicators have allowed notable exceptions to the strict application of this principle. These exceptions include consideration of the nature of the offense, the type of organization, and the nature of the job occupied by the worker prior to dismissal.

In cases where the misconduct is of an exceedingly serious nature so as to irreparably damage the employment relationship, adjudicators have held that progressive sanctions can be dispensed with. Dishonesty<sup>12</sup> as well as insubordination and negligence<sup>13</sup> have been held, in some circumstances, to warrant immediate dismissal. However, the prevailing view is that even serious offenses are no longer automatic grounds for discharge and are determined on a review of all the mitigating and aggravating circumstances.<sup>14</sup>

Some adjudicators have held that the strict rule of progressive discipline may be modified depending on the type of organization; however, there is a lack of consensus in this area. Generally, such discussions on the appropriateness of discipline within a specific organizational context have focused on the banking and broadcasting industries.

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<sup>11</sup> *Roberts v. The Bank of Nova Scotia*, 1979; *Poulin v. Purolator Courier Ltd.*, 1980; *Freeborn v. The Canadian Imperial Bank of Commerce*, 1981; *Robblee v. The Toronto Dominion Bank*, 1981; *Willberg v. Jo-Ann Trucking Ltd.*, 1982; *Griffiths v. Gulf Canada Products*, 1983; *Rivers v. CHUM Limited*, 1984; *Jordan v. Paul Band Administration*, 1985; *Collet v. National Bank of Canada*, 1985; *Curran v. Continental Bank of Canada*, 1985; *Procaccini v. The Royal Bank of Canada*, 1986; *Devoto v. Iberia, Spanish Airlines*, 1986; *Ryan v. Weather B. Transport Ltd.*, 1987; *Gaatch v. Rockbrune Brothers Limited*, 1987; *Cote v. Dicom Corporation*, 1987 and other cases too numerous to mention.

<sup>12</sup> *Auden v. Atomic Energy of Canada Ltd.*, 1981; *Pearce v. The Royal Bank of Canada*, 1987; *Jakovljevic v. The Bank of Montréal*, 1988; *Ménard v. Air Canada*, 1987; *Kitler v. Canadian Imperial Bank of Commerce*, 1988; *Ryan v. Fidelity Van & Storage Co. Ltd.*, 1988; *Lavallée v. The Royal Bank of Canada*, 1988.

<sup>13</sup> *Giroux v. Purolator Courier Ltd.*, 1987; *Drysdale v. Transx Ltd.*, 1987; *Mr. T. L. v. The Bank*, 1988.

<sup>14</sup> *Guilbert v. Air Canada*, 1986.

In *Roberts v. The Bank of Nova Scotia*, 1979, the adjudicator asserted "I can see no reason for exempting the banking industry from the concept of progressive discipline including the use of disciplinary suspensions" (p. 16). While this view was supported in some cases,<sup>15</sup> other decisions considered the different nature of the banking industry in holding that traditional progressive sanctions could be dispensed with.<sup>16</sup> Generally, this view was espoused when the dismissal was due to dishonesty.

In *Rivers v. CHUM Ltd.*, 1984, the adjudicator was not prepared to accept the employer's argument that the radio industry should be excluded from the traditional industrial discipline model. A similar view was expressed in *Brady v. CBC*, 1987. However, other adjudicators have held that, in the context of the broadcast industry, where poor performance may have immediate and detrimental effects on the audience and the advertising sponsors, suspensions are not required.<sup>17</sup>

Division in adjudicator opinion regarding the application of progressive discipline has also been exhibited in other employment contexts such as working on ships. In one case, *Griffiths v. Gulf Canada Products*, 1983, the adjudicator did not accept the employer's argument that imposing suspensions proved difficult on ships because they operate 24 hours per day and it was impossible to find replacements. However, a contrary opinion was expressed in *Bagwell v. Bow Valley Offshore Drilling Ltd.*, 1985, where the adjudicator considered "the extreme conditions of life afloat in a confined and hazardous space where trust, reliability, team spirit and support for authority may make the difference between life and death" (p. 37) and held that suspension was not required prior to dismissal.

Similar divergence of opinion is illustrated in the application of progressive discipline in small organizations. In *Lamarre v. Air Charters (1982) Inc.*, 1988, the adjudicator held that progressive discipline was required notwithstanding the small size of the organization. In *Robichaud v. Georges Ed Choquette*, 1982, however, the small size of the company was considered in modifying the strict application of progressive discipline.

In some cases, a formalized system of progressive discipline has not been required for supervisory or management employees or those working with a

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<sup>15</sup> *Freeborn v. The Canadian Imperial Bank of Commerce*, 1981; *Robblee v. The Toronto Dominion Bank*, 1981; *Brodeur v. Royal Bank of Canada*, 1985.

<sup>16</sup> *Lemieux v. The Royal Bank of Canada*, 1981; *Ivanore v. Canadian Imperial Bank of Commerce*, 1983; *Kitler v. Canadian Imperial Bank of Commerce*, 1988; *Shumka v. The Bank of Nova Scotia*, 1988.

<sup>17</sup> *St. Clair v. Moffat Communications Ltd.*, 1984; *Maclachlan v. Pineridge Broadcasting*, 1985.

high degree of autonomy and responsibility.<sup>18</sup> However, in many other cases where workers had been employed in administrative, supervisory, or managerial categories, the failure to apply progressive discipline, including suspensions, has been cited as a relevant factor.<sup>19</sup> Similarly, progressive discipline has been required for workers employed in technical, or professional categories.<sup>20</sup>

In summary, while some adjudicators have adapted and modified the principle of progressive discipline to fit individual circumstances, others have insisted on the strict application of the rule.

*Purpose.* While progressive discipline appears to be well established under ss. 240, in the vast majority of cases, adjudicators have not articulated the purpose it is designed to serve. Of those cases that do enunciate the purpose, the themes of correction and rehabilitation are evident. Several cases support the trend to view progressive sanctions as corrective.<sup>21</sup> Relatively few cases support the somewhat more controversial rehabilitation theme.<sup>22</sup>

The view that deterrence is a legitimate purpose to be served by industrial sanctions has not received unanimous approval. Some cases have supported this perspective.<sup>23</sup> However, others have disagreed with the notion that progressive discipline should serve as a deterrent to other employees.<sup>24</sup>

Consistent with the jurisprudence in the unionized sector, several cases adopted the arbitral view that progressive sanctions are important to "bring

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<sup>18</sup> *Lemieux v. The Royal Bank of Canada*, 1981; *Robblee v. The Toronto Dominion Bank*, 1981; *Tanner v. CFMI Radio Ltd.*, 1983; *Wiebe v. Westcan Bulk Transport*, 1986; *Choma v. Canadian National*, 1987.

<sup>19</sup> *Shott v. CFCW Radio Ltd.*, 1980; *Perry v. Vancouver Island Helicopters Ltd.*, 1983; *Brady v. CBC*, 1987; *Jordan v. Paul Band Administration*, 1985; *Guilbert v. Air Canada*, 1986; *Mah v. Canada Post Corporation*, 1988.

<sup>20</sup> *Cliche v. The Royal Bank of Canada*, 1984; *Desjarlais v. Muskowekwan Education Centre*, 1986; *Jaycock v. Burlington Broadcasting Inc.*, 1987; *Sappier v. Tobique Band Council*, 1987; *Compagnon v. Newfoundland and Labrador Air Transport Ltd.*, 1988.

<sup>21</sup> *Nichols v. Rogers Cable T.V.*, 1979; *Jordan v. Paul Band Administration*, 1985; *Côté v. Transport André Tessier Inc.*, 1985; *Procaccini v. The Royal Bank of Canada*, 1986; *Gaatch v. Rockbrune Brothers Ltd.*, 1987; *Therien v. Bank of Montréal*, 1987; *Barbeau v. Awood Air Ltd.*, 1988 and others.

<sup>22</sup> *Walker v. The Canadian Imperial Bank of Commerce*, 1979; *Nichols v. Rogers Cable T.V.*, 1979; *Huneault v. Central Mortgage & Housing Corporation*, 1979; *Ivanore v. Canadian Imperial Bank of Commerce*, 1983; *Rivers v. CHUM Ltd.*, 1984; *Barbeau v. Awood Air Ltd.*, 1988.

<sup>23</sup> *Huneault v. Central Mortgage & Housing Corporation*, 1979; *Poulin v. Purolator Courier Ltd.*, 1980; *Cruickshank v. The Royal Bank of Canada*, 1981; *Robblee v. The Toronto Dominion Bank*, 1981; *Procaccini v. The Royal Bank of Canada*, 1986.

<sup>24</sup> *Freeborn v. The Canadian Imperial Bank of Commerce*, 1981; *Jordan v. Paul Band Administration*, 1985.

home'' the seriousness of the misconduct to the offending employee.<sup>25</sup>

Also in keeping with the trend in the unionized sector, few cases could be found that refer to progressive discipline as a form of punishment.<sup>26</sup>

A notable difference between the jurisprudence rendered under this regime and that of the unionized sector is that, under ss. 240, adjudicators have rarely elaborated upon the purpose of progressive discipline. Where corrective and other themes have been espoused, generally, they are only alluded to with no express rationale for such a view.

## CONCLUSION

Despite some exceptions in its application, progressive discipline appears to be a major ingredient in the outcome of decisions rendered under ss. 240. The general trend under the Code is to view progressive discipline as corrective. While some adjudicators have acknowledged that progressive discipline is a form of punishment, this perspective is usually downplayed, deemphasized, or dismissed.

This result is significant given that nonunionized organizations traditionally have not applied progressive discipline, in the sense of administering suspensions without pay, as a means of dealing with employee problems in the workplace. Third party decision-making can have significant strategic implications for human resource management in that it can shape the ways employers respond to employee problems in the workplace. It would seem to be a matter of enlightened self-interest for employers to adopt adjudicator views of industrial discipline in order to enhance the likelihood of winning future cases.

On the other hand, the perspective regarding the notion of discipline adopted by both arbitrators in the unionized sector, and adjudicators under the Code, stands in sharp contrast to the notion of discipline advanced in the organizational behavior literature which equates the concepts of punishment and discipline and appears to focus on the negative effects of discipline. Thus, it is questionable whether the adoption of this principle by adjudicators enhances treatment of employees, rather it could be viewed as a retrograde step given the potential negative effects of discipline.

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<sup>25</sup> *Jordan v. Paul Band Administration*, 1985; *Brodeur v. Royal Bank of Canada*, 1985; *Procaccini v. The Royal Bank of Canada*, 1986; *Gaatch v. Rockbrune Brothers Ltd.*, 1987; *Turko v. British Columbia Television Broadcasting System Ltd.*, 1987; *Barbeau v. Awood Air Ltd.*, 1988 and others.

<sup>26</sup> *Freeborn v. The Canadian Imperial Bank of Commerce*, 1981; *Jordan v. Paul Band Administration*, 1985; *Ryan v. Weather B. Transport Ltd.*, 1987.

Interestingly, there is a lack of empirical research supporting either of the competing paradigms regarding progressive discipline. Clearly, empirical research is needed on what disciplinary or remedial response strategies exist in organizations and their effectiveness in relation to job performance.

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## *Mesures disciplinaires dans les entreprises fédérales canadiennes*

La présente étude analyse les sentences arbitrales qui portent sur des plaintes de congédiement injuste venant de travailleurs non syndiqués assujettis au *Code canadien du travail* dans le but de connaître l'approche que les arbitres ont adoptée en ce qui concerne les mesures disciplinaires. L'objectif principal est de déterminer si les arbitres ont appliqué le principe de la progression des mesures disciplinaires que l'on retrouve dans le secteur syndiqué.

L'auteure passe d'abord en revue le concept de la progressivité des mesures disciplinaires décrit dans la jurisprudence arbitrale provenant du secteur syndiqué. Selon ce concept, on vise à pénaliser l'employé de façon telle que la sévérité de la sanction va en augmentant. Il peut donc s'agir d'avis oraux, écrits, ou de suspensions sans solde de plus en plus longues. Bien que le but de ces mesures disciplinaires soit perçu de plusieurs façons par les arbitres, en général, ils les considèrent en termes de correction et de réhabilitation. De plus, ils écartent ou minimisent l'importance de l'aspect punitif des mesures disciplinaires.

L'examen de la documentation portant sur le comportement organisationnel présente une perspective très différente des mesures disciplinaires sur les lieux de travail de celle adoptée par les arbitres. Les behavioristes les considèrent en effet comme une forme de punition ayant des effets néfastes. L'auteure résume ensuite les critiques sur l'emploi des mesures disciplinaires dans cette documentation ; en général, on les considère inefficaces et improductives.

Étant donné que les paradigmes se font concurrence en ce qui concerne le concept de progression des mesures disciplinaires, l'auteure tente de déterminer quelle approche a été adoptée par les arbitres qui ont eu à juger des plaintes pour congédiement injuste portées en vertu du Code dans le secteur non syndiqué.

Les données pour l'analyse ont été recueillies parmi toutes les décisions à caractère disciplinaire rendues depuis l'entrée en vigueur de la loi, en 1978, jusqu'au mois de mars 1989 (279 décisions). La variable dépendante est la décision de l'arbitre dans chaque cas, i.e. s'il a fait droit à la plainte ou non. La principale variable indépendante est la reconnaissance ou non par l'arbitre du fait que l'employeur n'ait pas mis en pratique le principe de la progression des mesures disciplinaires. Plusieurs variables de contrôle susceptibles d'influencer les décisions des arbitres ont aussi été mesurées. Celles-ci ont été regroupées selon le genre de faute et les caractéristiques des employés.

L'analyse « logit » a été utilisée pour identifier les prédicteurs importants de la probabilité que la plainte soit accueillie ou rejetée. Les résultats confirment que le fait de ne pas appliquer le principe de la progressivité des mesures disciplinaires est un facteur important associé au maintien de la plainte. Par exemple, évalués à la probabilité moyenne de .61, les plaignants ont 39 % plus de chance d'avoir gain de cause si l'arbitre réfère à ce facteur. Autrement dit, pour les plaignants ayant déjà une probabilité de 61 % de voir leur plainte accueillie, le fait que le principe de la progression des mesures disciplinaires n'ait pas été mis en pratique augmente de 39 % la probabilité que l'arbitre fasse droit à la plainte, ce qui assure pratiquement un gain de cause.

L'auteure examine ensuite la jurisprudence dans le but de déterminer de quelle façon les arbitres ont appliqué le concept de la progression des mesures disciplinaires. La définition de « mesures disciplinaires » adoptée par les arbitres est compatible avec celle que l'on retrouve dans la jurisprudence du secteur syndiqué. Dans plusieurs cas, ils ont adopté l'approche de sanctions progressives et imposé des suspensions sans traitement avant le congédiement. Certains arbitres ont permis des exceptions à la stricte mise en pratique du principe selon la nature de l'offense, le genre d'organisation, ou la nature du travail de l'employé. Toutefois, il y a eu une divergence d'opinion à l'intérieur de la jurisprudence. Tandis que certains arbitres ont adapté et modifié ce principe dans certaines circonstances, d'autres ont insisté sur la stricte mise en pratique de la règle. De plus, pour la plupart, les arbitres n'ont pas articulé l'objectif visé par l'emploi de mesures disciplinaires progressives. Dans les cas où l'objectif est énoncé, les thèmes de correction et de réhabilitation sont évidents.

En conclusion, l'auteure met en question l'adoption du principe de la progression des mesures disciplinaires étant donné ses potentiels effets néfastes, tels qu'illustrés dans la documentation portant sur le comportement organisationnel. Elle propose que l'emploi de ce principe dans un contexte de non-syndicalisation puisse être perçu comme une mesure rétrograde. Il faut toutefois signaler l'insuffisance de recherches empiriques venant appuyer l'un ou l'autre des paradigmes concernant la discipline progressive et la nécessité d'avoir de telles recherches.

### **Association canadienne des relations industrielles (ACRI) Canadian Industrial Relations Association (CIRA)**

L'ACRI est une organisation volontaire à but non lucratif. Fondée en 1963, elle a pour objectif la promotion de la recherche, les discussions et l'éducation dans le domaine des relations industrielles au Canada. Les membres se recrutent dans les milieux syndicaux, patronaux, gouvernementaux, chez les arbitres, les enseignants, les chercheurs, les conseillers et autres spécialistes de relations industrielles. L'ACRI organise son congrès annuel dans le cadre des conférences des sociétés savantes du Canada. La cotisation annuelle à l'ACRI inclut l'abonnement à la revue *Relations industrielles* (Laval), organe officiel de l'ACRI.

*CIRA is a non-profit voluntary organization founded in 1963 and devoted to the promotion of research, discussion and education in the field of industrial relations in Canada. CIRA's membership includes people from unions, management and government interested in industrial relations as well as arbitrators, researchers, teachers, consultants and other specialists in the field. Its annual conference is jointly organized with the Canada Learned Societies, CIRA's annual dues include a yearly subscription to *Relations industrielles/Industrial Relations*, its official organ.*

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