Relations industrielles
Industrial Relations

Reinstatement in the Nonunion Sector : An Empirical Analysis

Genevieve Eden

Volume 49, numéro 1, 1994

URI : https://id.erudit.org/iderudit/050919ar
DOI : https://doi.org/10.7202/050919ar

Aller au sommaire du numéro

Éditeur(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (imprimé)
1703-8138 (numérique)

Découvrir la revue

Citer cet article

Eden, G. (1994). Reinstatement in the Nonunion Sector : An Empirical Analysis. *Relations industrielles / Industrial Relations*, *49* (1), 87–103. https://doi.org/10.7202/050919ar

Résumé de l'article

La réintégration au travail est une caractéristique importante de la protection juridique contre le congédiement injuste chez les non-syndiqués. Cet article examine les résultats d'une étude empirique sur l'expérience post-réintégration de travailleurs sous l'égide du *Code canadien du travail.*

Il existe des théories divergentes eu égard à ce recours qu'est la réintégration. Parmi les arguments en faveur de la réintégration, on considère qu'elle procure une plus grande sécurité d'emploi pour les travailleurs, surtout les plus anciens et que la menace que représente ce recours peut obliger les employeurs à revoir et à civiliser leur processus de cessation d'emploi. D'autres suggèrent que la réintégration comporte de graves difficultés en pratique. Les employeurs peuvent décourager les travailleurs congédiés à revenir au travail ou leur rendre la vie misérable à leur retour en utilisant la menace ou du harcèlement. Dans un milieu non syndiqué, la réintégration peut être encore moins efficace vu l'absence de représentants syndicaux pouvant s'assurer d'une part que l'employeur se conforme à l'ordre de réintégration et d'autre part faire de la médiation pour rétablir la relation d'emploi.

Selon les études antérieures, la réintégration a connu du succès dans les milieux syndiqués. On a cependant obtenu un résultat différent dans une étude sur la réintégration en milieu non syndiqué au Québec : la majorité des travailleurs réintégrés suite à une plainte déposée en vertu de la *Loi sur les normes du travail* croit qu'ils ont été injustement traités par leur employeur après leur retour au travail.

Dans la présente étude, un questionnaire a été envoyé à des employeurs assujettis au *Code canadien du travail* et devant réintégrer un salarié suite à une décision arbitrale. Sur les 106 décisions rendues entre le 1" janvier 1983 et le 31 décembre 1991, 37 employeurs ont répondu. Excluant ceux qui n'ont pu être rejoints, le taux de réponse était de 46 %. Un peu plus de la moitié des répondants ont noté que les plaignants ne sont pas retournés au travail ou, s'ils l'ont fait, sont restés moins de trois mois. Pour ceux qui sont retournés, seulement 44 % ont qualifié la réintégration de succès. Dans l'ensemble, la réintégration semble avoir été une mesure corrective efficace dans seulement 30 % des cas. Les effets de plusieurs variables indépendantes sur le résultat de la réintégration ont été mesurés. La première variable dépendante, le retour au travail, était grandement influencée par les causes alléguées du congédiement. Il était plus probable que les personnes congédiées pour des motifs non disciplinaires, tel le rendement, retournent au travail que leurs collègues congédiés pour des raisons disciplinaires. La seconde variable dépendante, le succès de la réintégration, était grandement influencée par la taille de l'unité de travail; plus ces unités étaient grandes, plus le succès était grand. Moins de la moitié des répondants ont changé leurs pratiques de gestion des ressources humaines suite à une décision arbitrale. Ce résultat va à l'encontre de la croyance que la protection juridique prévue au Code a amené un changement radical de la relation d'emploi et a eu un impact majeur sur la gestion des ressources humaines. En somme, les résultats suggèrent que la réintégration n'est pas efficace en tant que première mesure de redressement en cas de congédiement injuste pour les nonsyndiqués. La présence syndicale peut bien être la variable clef de l'efficacité de la réintégration. Il semble que l'octroi d'une indemnité compensatrice pourrait être plus efficace. Cette indemnité devrait être assez élevée pour décourager les congédiements et favoriser les ententes.

Néanmoins, on ne devrait pas abandonner la réintégration. Cette étude démontre que les travailleurs sont plus facilement réintégrés dans les grandes unités. De plus, la prise en considération de facteurs atténuants telle l'ancienneté peut prendre de l'importance dans ces cas où la perte d'emploi est lourde. On pourrait tenter d'améliorer ce recours en confiant à une agence gouvernementale le rôle de s'assurer que les employeurs appliquent les décisions de réintégration et en exigeant des critères plus stricts eu égard aux qualifications des arbitres.

Reinstatement in the Nonunion Sector
An Empirical Analysis

Genevieve Eden

Reinstatement to the workplace is an important feature of statutory protection against unjust dismissal for nonunion employees. This paper discusses the results of an empirical study of post-reinstatement experience of workers under the Canada Labour Code. *Overall, the results stand in contrast to the reinstatement experience in union settings which generally show favorable results. The author concludes that the presence of a union may be a key variable in the effectiveness of the reinstatement remedy.*

Statutory legislation seeking to codify rights of nonunion workers terminated from employment has received considerable attention in both the U.S.A. and Canada. In the U.S., a Model Employment Termination Act (META), adopted in 1991 by the Commissioners on Uniform State Laws, proposes a good cause standard and urges reliance on arbitration as the preferred dispute resolution system. In Canada, three jurisdictions have enacted legislation governing the adjudication of unjust dismissal complaints for nonunionized employees — Nova Scotia (1976), the federal jurisdiction (1978), and Québec (1979).[1] Recently, it has been suggested that consideration be given to extending such legislation to other jurisdictions in Canada (Meltz 1989; Simmons 1991).

---

* EDEN, G., Assistant Professor, School of Public Administration, University of Victoria, B.C.

** Financial assistance for this study was provided by the Social Sciences and Humanities Research Council of Canada and the Institute for Dispute Resolution at the University of Victoria.

1 Prior to 1990 unjust dismissal complaints for nonunionized workers in Québec were heard by an arbitrator. Since then, it is the Labour Commissioner who has jurisdiction to hear such complaints.

An important feature of META, and the Canadian legislation, is the potential of reinstatement to the workplace as a remedy for wrongful discharge. Considerable debate and speculation has surrounded the viability of reinstatement in the nonunion sector. To date, there has been little empirical analysis on the success of reinstatement in nonunion organizations.

This study presents the results of an empirical analysis of reinstatement under the *Canada Labour Code*. Section 240 *et seq.* of the *Code* provides statutory protection against unjust dismissal for nonunion workers under the federal jurisdiction. The federal jurisdiction covers only about ten percent of all employees, but federal legislation often sets precedents for other jurisdictions. Moreover, it covers workers in a number of particularly important areas of the economy. Federally regulated industries include interprovincial air, rail, shipping, ferry, and trucking operations as well as banks, radio broadcasting, grain elevators, uranium mines, atomic energy, and certain Crown corporations.

Prior to the enactment of the legislation, federal workers were governed by the common law and were forced to pursue their claims of wrongful dismissal in the courts, with the remedy restricted to damages. With the enactment of federal legislation, these workers could challenge their dismissal through an adjudication process, similar to arbitration in the unionized sector. Remedial options available to adjudicators for those deemed to be dismissed without just cause include reinstatement as well as monetary compensation.

This study is the first to assess the effectiveness of reinstatement under the federal legislation. The author is aware of only one other study of reinstatement in the nonunion sector; that study dealt with the experience under the Quebec *Labour Standards Act* (Trudeau 1991).

COMPETING PERSPECTIVES ON REINSTATEMENT

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

Several arguments favor reinstatement. One frequently raised is that reinstatement provides workers significantly greater job security. For many employees, the social and psychological support they gain from a well-established employment relationship is irreplaceable. Further, in times of high unemployment, it may be difficult to find another job. Short of an astronomical sum for loss of future income, a monetary award cannot compensate for the hardship (Failes 1986: 6-7). For long service employees, the loss may be even more severe because they suffer an acute and largely irrecoverable loss of the investment of a significant part of their working lives (Weiler 1990).

Another potential advantage of reinstatement is that the threat of this remedy may force a reshaping and civilizing of the process of termination by employers. To avoid having a termination decision reversed by an adjudicator, employers must ensure fair treatment towards employees; this contributes to the enhancement of the quality of their work life (Trudeau 1987: 377). The prevailing view is that statutory protection under the *Canada Labour Code* has brought a radical change to the employment relationship (Simmons 1981: 67) and has had a major impact on the management of human resources (Trudeau 1987: 376).

While regarded by many as a significant advance in job protection, others suggest that reinstatement can encounter grave difficulties in realization. Generally, employers resist policies that infringe on management flexibility. Employers may either discourage dismissed employees from returning to work or make their lives miserable upon return through unjust treatment such as modifications in working conditions, excessive supervision, general harassment and discrimination, and isolating the worker from the rest of the work group (Adams 1983: 46; Trudeau 1991: 310).

In a nonunion setting, reinstatement may be even less effective. Most workers are governed by the common law which limits the remedy to damages. With increasing attention being paid to statutory protection against unjust dismissal for nonunionized workers, there has been considerable controversy and speculation regarding the most appropriate remedy for these regimes. While some analyses have suggested that compensation might be the only viable remedial option (Blade 1967: 1404-1435), others have expressed the belief that reinstatement is realistic even in nonunionized environments (Summers 1976: 531; Dickens *et al.* 1981: 167-168; Mennemeier 1982: 67-68; St. Antoine 1982: 59-60; Trudeau 1985: 324-330; Youngblood and Bierman 1985: 212; Failes 1986: 6-7; Sherman 1989: 228). Still others have pointed out the need for research on the effectiveness of reinstatement in nonunionized environments (Estreicher 1985).

The lack of union representation could be a key variable in the effectiveness of reinstatement. In the organized sector, the union will generally make the employer comply with the arbitrator's order to reinstate the complainant. Further, the worker returns to work under the umbrella of a well-defined set of contract rights that limit management's authority and possible reprisals. Union officers at the work place can mediate the reestablishment of the employment relationship and can aid the reinstated employee faced with employer harassment and discrimination (Trudeau 1985: 79-80).

Another issue to be considered with respect to the remedy of reinstatement is what has been described as "the potential nuisance value of a possible reinstatement" (Heenan 1985: 160). According to this view, dismissed

workers may rely on the threat of potential reinstatement to extract large monetary settlements from employers. Employers may willingly pay substantial amounts to sever the relationship rather than risk having a dismissed worker proceed to adjudication and having to deal with the potential disruption of a disgruntled, reinstated employee (Heenan 1985: 160-161). From another perspective, some employers may elect to risk an adverse decision at adjudication, and negotiate a monetary settlement with the worker only if it becomes necessary as a result of a reinstatement order. However, legal costs of adjudication, time spent by managers preparing the case and attending hearings, and the possible deleterious effect on worker morale may weigh against this option.

While these views are speculative given the lack of empirical evidence, they cannot be discounted as possible factors influencing employer decision making during the termination process. In either case, the underlying premise is that reinstatement may force larger monetary settlements than might otherwise be the case if this remedy was not available.

PREVIOUS STUDIES

The Unionized Sector

The predominant view is that reinstatement has proved successful in unionized workplaces. Employer surveys[2] report a high "success rate" for reinstatement — defined as actual return to work as well as positive evaluations of employee performance subsequent to reinstatement (Ross 1957; McDermott and Newhams 1971; Adams 1978; Malinowski 1981; Shantz and Rogow 1985; Brody 1987; Barnacle 1991). These studies report between 81 to 91 percent of grievors return to work, and 51 to 80 percent are evaluated favorably by employers. However, a different result is obtained in one study where only two-thirds of grievors returned to work (Ponak and Sahney 1986).

Descriptive statistics were utilized in these studies to suggest trends or patterns that influenced the outcomes. Factors affecting the success of reinstatement showed mixed results. One study found an inverse relationship between reinstatement success and age (Adams 1978) while another found a positive association with increased age (Barnacle 1991). Seniority was found to be positively associated with reinstatement success in some cases (Ross

2 Most studies in the union sector have surveyed employers only (McDermott and Newhams 1971; Malinowski 1981; Ponak 1986; Shantz and Rogow 1985; Brody 1987). Ross (1957) surveyed both employers and unions while Adams (1978) and Barnacle (1991) surveyed employers, unions, and employees. However worker and union surveys elicited response rates ranging between 8 to 26 percent, therefore the authors limited their analysis primarily to employer respondents.

1957; McDermott and Newhams 1971; Barnacle 1991) but not in others (Adams 1978; Ponak and Sahney 1986). In one study, reinstatement was more successful the smaller the bargaining unit (Shantz and Rogow 1985). Other factors examined included the length of time between dismissal and award date, and whether assistance was provided to reintegrate reinstatees to the workplace; however, no association was found with these variables and reinstatement success.

While the studies in the union sector were very useful in suggesting trends that influenced outcomes, only one study (Ponak and Sahney 1986) utilized statistical tests to determine the significance of the relationships between the independent variables and the dependent variables.

The Nonunion Sector

The suggestion that reinstatement is less effective in a nonunion setting is supported by Trudeau's (1991) analysis of the reinstatement experience of nonunionized employees covered under the Québec *Labour Standards Act.*[3] A survey of workers reinstated by arbitrators acting under this legislation revealed that only 54 percent of complainants returned to work and 67 per cent of respondents believed they were unjustly treated by their employer after having returned to work. Trudeau attributes this treatment to the lack of union presence to monitor the employer's behavior and protect the reinstated employee from harassment and discrimination. The study suggests that legal efforts to transplant the reinstatement remedy from the union to the nonunion sector have not met with much success.

Trudeau examined the effect of independent variables on the rate of return to work. A negative relationship was found between employee's salary and return, while a positive relationship was found with organization size. These results were statistically significant.

RESEARCH DESIGN

The main objective of this study is to assess the effectiveness of reinstatement under the *Canada Labour Code* from the perspective of the employer. A written questionnaire was sent to employers whose cases had been decided by an adjudicator under the *Code* and reinstatement ordered.[4]

---

3 Trudeau's study was conducted in collaboration with the Québec Labour Standards Board; questionnaires were administered at the behest of the Board which enabled surveys of workers to be conducted.

4 Workers were not surveyed since officials of Labour Canada would not release necessary information due to the confidential nature of the material.

Out of 106 awards rendered between January 1, 1983 and December 31, 1991, 37 employers responded. Exhaustive attempts were made to increase the response rate. The obtained response rate of 35 percent is quite good given 1) the information requested required respondents to review files up to 10 years old, 2) the sensitive nature of the information requested, 3) many organizations do not give priority to questionnaires in these difficult economic times, and 4) some organizations were of a small size and could have gone out of business over the last decade. With respect to the latter point, 25 questionnaires were returned with address unknown and could not be contacted. Accordingly, out of those employers who could be contacted for the survey, the response rate is 46 percent.

The Variables

The variables were derived from the previous studies in the union and nonunion sectors. The dependent variables include: 1) whether or not dismissed employees had returned to work; and 2) employers' evaluation of reinstatement success. The study also measured the effects of the following independent variables on the outcome of reinstatement: 1) employee's age; 2) service; 3) length of time between dismissal and award date; 4) grounds for dismissal; 5) whether the employee was exonerated by adjudicator; 6) size of workunit; and 7) whether employer offered assistance to the employee after reinstatement.

The study also sought information on whether employers deemed reinstatement to be the appropriate remedy or were of the view that compensation would have been more appropriate in the circumstances. Information on changes to human resources management practices as a result of adjudicator decision making was also sought.

RESULTS

Return to Work

Whether or not complainants returned to work constitutes a good indication of the effectiveness of reinstatement as a remedy for unjust dismissal. Out of 37 respondents, almost one third (12 respondents) indicated complainants did not return to work as illustrated in Table 1. Of these, eight complainants agreed to financial compensation rather than returning to work; in one case there was no work for the returning employee; no reason for non return was given by the remaining three respondents. These results stand in sharp contrast

to most studies in the union sector which report 81 to 91 percent of reinstatees actually return to work. However, the rate of return is higher than that of Trudeau's study in the nonunion sector where only 54 percent of workers returned to work.

TABLE 1

Rate of Return Following a Reinstatement Order

	N	%
Total responses	37	100.0
Number returned to work	25	67.6
Number not returned to work	12	32.4

Table 2 provides a summary of the strength of the relationship between the rate of return to work and the independent variables.

TABLE 2

Strength of the Relationship Between Independent Variables and Rate of Return (N=37)

Independent Variables	*Phi/Cramer's V*[a]
Employee's age	.17
Size of workunit	.20
Length of time — dismissal to award date	.22
Employee's service	.26
Whether employee exonerated by adjudicator	.29
Grounds for dismissal	.36*

[a] Phi/Cramer's V measure the strength of the relationship between two variables. Their value increases with the strength of the relationship.

Note: Significance is denoted by * at the .10 level.

No significant relationship emerged between the rate of return and the employee's age, service, size of workunit, length of time between dismissal and adjudication, nor whether employee was exonerated by adjudicator. It is surprising that age and service are not associated with rate of return. Given the greater investment of longer service employees in their jobs, one would expect a positive relationship with rate of return. Similarly, one might think older workers may have more difficulty securing alternative employment. The

results also contradict the intuition that a dismissed employee would seem more likely to return to work in large workunits than small ones; the worker would be more easily integrated in a large-scale operation.

The rate of return is, however, significantly affected by the grounds for dismissal. Workers initially dismissed for nondisciplinary reasons such as performance were more likely to return to work than those dismissed for disciplinary reasons. Of those dismissed for nondisciplinary reasons (12 respondents), almost all (11) returned to work. Of workers dismissed for disciplinary reasons, only 56 percent (14) returned to work, while 44 percent (11) did not. Performance related behavior does not generally imply either a conflict between workers and employers nor a lack of trust. In contrast, dismissal for disciplinary grounds may involve a conflict of personalities or breach of trust which makes reinstatement less acceptable to the employer (Trudeau 1985). (The categories were too small to perform meaningful statistical analysis for every stated reason for dismissal.)

Post-reinstatement Experience

Post-reinstatement experience, measured by duration of employment after return, as well as employers' evaluation of performance and reinstatement success, is another indication of reinstatement's effectiveness.

Duration of Service

Of those who returned to work, 28 percent (7) left within three months. Of these, two complainants were discharged; two agreed to a lump sum severance payment; one position was deleted; and two other employers indicated the complainants resigned without elaborating upon the reasons. Table 3 presents service length after return to work in more detail.

TABLE 3

Service Length After Return to Work (N=25)

	N	%
3 months or less	7	28
3 months to 2 years	3	12
2 to 5 years	10	40
5 to 10 years	5	20

Overall, of the 25 complainants who returned to work, two were subsequently discharged, one retired early, one position was deleted, and seven resigned. Of those who "resigned", four agreed to a lump sum severance payment. Fourteen were still employed at the time of the survey, but only 10 of these were performing satisfactorily with a clean record. This result differs from the experience under the Québec *Labour Standards Act* where 80 percent of reinstatees who had quit their jobs by the time of the survey had done so within four months following their reinstatement (Trudeau 1991).

Employer Evaluation of Reinstatement

Employers' opinions of reinstatement success as well as their evaluation of the performance of reinstatees are also important in the assessment of the effectiveness of reinstatement. Table 4 indicates that 56 percent of employers did not consider reinstatement to be a success in the particular circumstances.

TABLE 4

Reinstatement Success After Return (N=25)

	N	%
Yes	11	44
No	14	56

These figures are consistent with employers' assessment of reinstatees. Fifty-six percent of reinstatees (14) were rated as unsatisfactory — eight were rated below average in performance; nine were subsequently disciplined; and seven had high absenteeism. (Some complainants were unsatisfactory on two or three of these dimensions.) Two of these reinstatees were subsequently discharged.

These results are in contrast with most studies of reinstatement in the unionized sector where the majority of employees were evaluated favorably by employers. However, reinstatement success is higher than that of Trudeau's study which found that reinstatement was deemed not successful by 67 percent of respondents, albeit the respondents were reinstatees.

Table 5 provides a summary of the strength of the relationship between employers' opinions of success of reinstatement and the independent variables.

TABLE 5

Strength of Relationship Between Independent Variables and Success of Reinstatement (N=25)

Independent Variables	Cramer's V/Phi*
Employee's service	.27
Grounds for dismissal	.30
Exonerated	.03
Assistance after reinstatement	.15
Size of workunit	.58*

* Phi/Cramer's V measure the strength of the relationship between two variables. Their value increases with the strength of the relationship.

Note: Significance is denoted by * at the .10 level.

No significant relationship emerged between success of reinstatement and the employee's service, grounds for dismissal, nor whether the employee was exonerated by the adjudicator. It is interesting that there is no relationship between reinstatement success and whether the dismissed worker was exonerated by the adjudicator. One might expect if individuals were "not guilty" of the alleged behavior, that reinstatement would be successful. Does this mean adjudicators erred in their decision to exonerate individuals? Or does it mean that employers were influenced by some resentment over the adjudicator's decision?

Also, no significant relationship was found between the dependent variable and assistance provided to the employee after return to work in the form of reinstatement interviews, counselling, rehabilitation programs, or training. This runs counter to the view that post-reinstatement assistance by employers may enhance the probability of successful reinstatement (Adams 1978; Ponak and Sahney 1986). Employer support of reinstatees on return to work may be unrealistic given employer attitudes towards such a remedy. Interestingly only 22 percent of respondents provided any assistance in integrating reinstatees back to the workplace.

Reinstatement success is significantly affected by the size of workunit. If the workunit is large (21 or over), reinstatement was more successful. This is consistent with the premise that workers would be more easily reintegrated in a large-scale operation.

Summary

In summary, out of 37 employer respondents, just over one-half indicated that complainants either did not return to work (12 respondents) or were reemployed for less than three months (7).

Of those who returned to work (25), 14 respondents rated reinstatement unsuccessful. Only eleven evaluated the reinstatement as successful. Thus, overall, the remedy of reinstatement appears to have been effective in only 30 percent of cases.

It must be highlighted that reinstatement experience has been evaluated from the perspective of the employer only. However, it would be difficult to imagine workers evaluating their reinstatement as successful if employers did not. If anything, reinstatement success may be overestimated by employers.

Monetary Compensation as the Alternative Remedy

Given that, under the *Code*, adjudicators have the option of awarding reinstatement or monetary compensation, the questionnaire sought to elicit whether employers considered compensation to be a more appropriate remedy in the particular instance. Almost one-half (18) favored compensation over reinstatement. Some of these respondents referred to the negative impact of reinstatement on the work unit (5) and failure of adjudicators to grasp the effects of their reinstatement decisions (4). Others referred to characteristics of the employee which made reinstatement difficult such as exercising unacceptable judgement, threats of violence against supervisors, and unacceptable attitude.

Another four respondents did not agree that any remedy was appropriate in the circumstances. These respondents expressed objection to the adjudication process and lack of understanding of the realities of the workplace on the part of the adjudicator.

It is interesting to observe some trend toward a lump sum severance payment after adjudicators awarded reinstatement; eight workers accepted monetary compensation rather than returning to work and four more were provided with a severance payment within three years of reinstatement.

Human Resource Management Practices

The questionnaire also sought information on whether employers had changed human resource management practices as a result of adjudicator decisions given the perception that statutory protection under the *Code* has civilized employment practices. Only 43 percent of respondents changed human resource management practices. Of these, five instituted systems of written documentation to track employees' behavior and four instituted systems of progressive discipline. Only two reported setting up fair systems to deal with staff including the training of managers and supervisors.

DISCUSSION

Overall, the results on post-reinstatement experience stand in contrast to the experience in union settings which generally show favorable results. While more positive results emerged from this study than the experience of nonunion workers under the Québec *Labour Standards Act*, the study supports Trudeau's conclusion that the remedy of reinstatement has not fulfilled its promise in the nonunion sector.

Caution must be exercised in interpreting the results given that voluntary responses may not be representative of the population of all reinstated workers. However, it is possible that reinstatement success is overestimated in this study given that employers may be reluctant to report a subsequent discharge or anything negative regarding an employee.

The survey results do not show any justification for a higher rate of reinstatement; monetary compensation may more effectively redress the wronged employee. Almost one-third of complainants that were ordered reinstated to the workplace subsequently accepted monetary compensation and almost one-half of employers favored compensation over reinstatement in the particular circumstances.

It is difficult to ascertain whether complainants not returning to work were able to extract a higher monetary settlement than the employer may have agreed to prior to the reinstatement order, or, whether employers discouraged workers from returning. In response to possible discouragement from returning to work, complainants who may have been unemployed, without money, tired of and unable to afford further litigation, may simply have accepted whatever compensation was offered by the employer.

The study also reveals some perception on the part of employers of adjudicator insensitivity to the realities of the workplace. Of course, this may simply reflect employers' resistance to decisions that infringe on their flexibility. On the other hand, officials from Labour Canada advised that there exists no formal selection procedure for adjudicators. While they prefer to appoint experienced arbitrators, they do select inexperienced persons. It is possible that stricter guidelines regarding adjudicators' qualifications could result in higher quality decisions. Also, adjudicators may need to increase their sensitivity to the realities of the nonunion environment.

There is little support in this study for the notion that the threat of reinstatement has forced a reshaping and civilizing of the process of termination by employers. Early observations that statutory protection under the *Code* has brought a radical change to the employment relationship and has had a major impact on the administration of human resources are open to question. The empirical evidence in this study does not tend to support this view. This is not

surprising given research which identified a lack of rationale in adjudicator decision making under the *Code* (Eden 1990). Given a fair degree of uncertainty of factors affecting the outcome, employers may not feel compelled to make major changes in their industrial relations practices. Further, it is not known what percentage of discharged workers actually pursue unjust dismissal complaints under this legislation. Another factor to be considered is that a fairly high percentage of unjust dismissal complaints are settled by Labour Canada inspectors prior to adjudication (Eden 1990). Employers may well weigh what could be a low risk of adjudication against any major change in practice.

CONCLUSION

The results of the study suggest that reinstatement is not effective as the primary remedy for unjust dismissal of nonunion workers. The presence of a union may be a key variable in the effectiveness of reinstatement as a remedy.

It is difficult to ascertain whether, and to what extent, the effectiveness of reinstatement could be improved over what was observed under the *Code*. In the absence of a union, workers ordered reinstated to the workplace would have to be provided with greater support. To some degree, this may be achieved through a follow-up mechanism directed by the governmental agency that administers the statute. For example, the same inspector who tried to resolve the dispute between the parties prior to adjudication could contact the complainant after issuance of the adjudicator's order to ensure employer compliance with the reinstatement order. Failure to comply on the part of the employer would result in this agency, not the complainant, initiating the procedure for enforcing the remedy (Trudeau 1991).

Although this supporting mechanism may enforce initial compliance with a reinstatement order, sustained bureaucratic support in terms of ongoing monitoring of employees' return to work is likely not feasible. Since any government agency acts from outside the enterprise, it has no direct and immediate control over the people who must put its decision into play (Weiler 1990). Legal regulation is inherently limited in terms of the rights which can be created. Even if such control were possible, costs (in both time and money) may turn rights which looked meritorious in principle into burdensome albatrosses in practice.

It is the author's conclusion that monetary compensation may more effectively redress the wronged employee in the nonunion sector. This should be set at a level high enough to deter unjust dismissal and promote settlements (Trudeau 1991).

Nevertheless, reinstatement should not be discarded. The study suggests that workers are more easily reintegrated in large-scale workunits. Further, in consideration of the appropriate remedy, mitigating factors such as very long service may weigh heavily where the job loss would be so severe that the worker suffers an acute and irrecoverable loss of the investment of a significant part of their working lives. In addition, reinstatement may also serve employee interests by placing them in a better position to obtain another job than would be the case if they were dismissed. Removing the stigma associated with dismissal may well increase their future job prospects (Dickens *et al.* 1981: 167).

Finally, stricter guidelines regarding adjudicators' qualifications could result in higher quality decisions reflecting sensitivity to the realities of the nonunion environment and a reasoned outcome. In many situations, there may be no practical alternative to a monetary remedy. Further, adjudication awards should be monitored by Labour Canada to ensure that written reasons for the decision are provided as required by the legislation. Greater certainty of potential factors affecting the outcome could assist both employers and workers in making a decision to proceed to adjudication or agree to a monetary settlement.

REFERENCES

ADAMS, George W. 1978. *Grievance Arbitration of Discharge Cases.* Kingston: Queen's University, Industrial Relations Centre.

ADAMS, Roy J. 1983. "The Unorganized: A Rising Force?" *Proceedings McGill University Annual Conference.* Montréal: McGill University, 40-58.

BARNACLE, Peter J. 1991. *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experiences.* Kingston: Queen's University, Industrial Relations Centre.

BLADE, Lawrence. 1967. "Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power." *Columbia Law Review*, Vol. 67, 1404-1435.

BRODY, Bernard. 1987. "Reinstatement of Unjust Dismissals: New Evidence from Québec." *Proceedings of the 24th Annual Meeting of the Canadian Industrial Relations Association.* Hamilton: McMaster University, 1-25.

DICKENS, Linda, Moira HART, Michael JONES, and Brian WEEKES. 1981. "Re-employment of Unfairly Dismissed Workers: The Lost Remedy." *Industrial Law Journal*, Vol. 10, 160-175.

EDEN, Genevieve. 1990. "Unjust Dismissal in the Canadian Federal Jurisdiction." Ph.D. dissertation, University of Toronto, Centre for Industrial Relations.

ESTREICHER, Samuel. 1985. "Unjust Dismissal Laws: Some Cautionary Notes." *The American Journal of Comparative Law*, Vol. XXXIII, No. 2, 310-323.

FAILES, Michael D. 1986. "Statutory Protection from Unjust Dismissal for Unorganized Workers in Canada." LL.M. thesis, Queen's University.

HEENAN, Roy L. 1985. "Unjust Dismissal — Trends in Canada." *Proceedings of the 33rd Annual Conference.* Montreal: McGill University, Industrial Relations Centre, 144-162.

MALINOWSKI, Arthur A. 1981. "Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labour Arbitrators." *Arbitration Journal,* Vol. 36, No. 1, 31-46.

MCDERMOTT, T. J., and T. H. NEWHAMS. 1971. "Discharge-Reinstatement: What Happens Thereafter." *Industrial and Labor Relations Review,* Vol. 24, No. 4, 526-540.

MELTZ, Noah M. 1989. "Flexibility and Employment Security in Canada." Brief prepared for International Labour Organization, University of Toronto.

MENNEMEIER, Kenneth C. 1982. "Protection from Unjust Discharges: An Arbitration Scheme." *Harvard Journal on Legislation,* Vol. 19, 49-96.

PONAK, Allen, and Charu SAHNEY. 1986. "Discharge and Reinstatement in Grievance Arbitration." *Proceedings of the 23rd Annual Meeting of the Canadian Industrial Relations Association.* Winnipeg: University of Manitoba, 158-166.

ROSS, Arthur M. 1957. "The Arbitration of Discharge Cases: What Happens After Reinstatement." *Critical Issues in Arbitration Proceedings of the Tenth Annual Meeting National Academy of Arbitrators.* Washington, D.C.: Bureau of National Affairs, 21-56.

SHANTZ, Edward M., and Robert ROGOW. 1985. "Post-Reinstatement Experience: A British Columbia Study." *Proceedings of the 21st Annual Meeting of the Canadian Industrial Relations Association.* Québec: Laval University, Department of Industrial Relations.

SHERMAN, Mark. 1989. "Unfair Dismissal and the Remedy of Re-employment." *The Journal of Industrial Relations,* Vol. 31, No. 2, 212-228.

SIMMONS, C. Gordon. 1981. "The Experience of the Unjust Dismissal Section 61.5 in the Canada Labour Code, 1978-1981." *Symposium Proceedings.* Kingston: Queen's University, Industrial Relations Centre and Faculty of Law, 59-67.

SIMMONS, C. Gordon. 1991. "Unjust Dismissal under Federal Jurisdiction." *Labour Arbitration Yearbook.* W. Kaplan, J. Sack, Q.C. and M. Gunderson, eds. Toronto: Butterworths Lancaster House, Vol. II, 41-54.

ST. ANTOINE, Theodore J. 1982. "Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come." *Arbitrations Issues for the 1980s,* 43-67.

SUMMERS, Clyde W. 1976. "Individual Protection against Unjust Dismissal: Time for a Statute." *Virginia Law Review,* Vol. 62, 481.

TRUDEAU, Gilles. 1985. "Statutory Protection Against Unjust Dismissal for Unorganized Workers." SJD. dissertation, Harvard Law School.

TRUDEAU, Gilles. 1987. "Employee Rights versus Management Rights: Some Reflections Regarding Dismissal." *Canadian Readings in Personnel and Human Resource Management.* S.L. Dolan and R.S. Schuler, eds. St. Paul: West Publishing Co., 367-377.

TRUDEAU, Gilles. 1991. "Is Reinstatement a Remedy Suitable to At-Will Employees?" *Industrial Relations,* Vol. 30, No. 2, 302-315.

WEILER, Paul C. 1990. *Governing the Workplace: The Future of Labor and Employment Law.* Cambridge, Massachusetts: Harvard University Press.

YOUNGBLOOD, Stuart A., and Leonard BIERMAN. 1985. "Due Process and Employment-at-Will: A Legal and Behavioral Analysis." *Research in Personnel and Human Resources Management*, Vol. 3, 212.

La réintégration chez les non-syndiqués

La réintégration au travail est une caractéristique importante de la protection juridique contre le congédiement injuste chez les non-syndiqués. Cet article examine les résultats d'une étude empirique sur l'expérience post-réintégration de travailleurs sous l'égide du *Code canadien du travail.*

Il existe des théories divergentes eu égard à ce recours qu'est la réintégration. Parmi les arguments en faveur de la réintégration, on considère qu'elle procure une plus grande sécurité d'emploi pour les travailleurs, surtout les plus anciens et que la menace que représente ce recours peut obliger les employeurs à revoir et à civiliser leur processus de cessation d'emploi. D'autres suggèrent que la réintégration comporte de graves difficultés en pratique. Les employeurs peuvent décourager les travailleurs congédiés à revenir au travail ou leur rendre la vie misérable à leur retour en utilisant la menace ou du harcèlement. Dans un milieu non syndiqué, la réintégration peut être encore moins efficace vu l'absence de représentants syndicaux pouvant s'assurer d'une part que l'employeur se conforme à l'ordre de réintégration et d'autre part faire de la médiation pour rétablir la relation d'emploi.

Selon les études antérieures, la réintégration a connu du succès dans les milieux syndiqués. On a cependant obtenu un résultat différent dans une étude sur la réintégration en milieu non syndiqué au Québec : la majorité des travailleurs réintégrés suite à une plainte déposée en vertu de la *Loi sur les normes du travail* croit qu'ils ont été injustement traités par leur employeur après leur retour au travail.

Dans la présente étude, un questionnaire a été envoyé à des employeurs assujettis au *Code canadien du travail* et devant réintégrer un salarié suite à une décision arbitrale. Sur les 106 décisions rendues entre le 1er janvier 1983 et le 31 décembre 1991, 37 employeurs ont répondu. Excluant ceux qui n'ont pu être rejoints, le taux de réponse était de 46 %.

Un peu plus de la moitié des répondants ont noté que les plaignants ne sont pas retournés au travail ou, s'ils l'ont fait, sont restés moins de trois mois. Pour ceux qui sont retournés, seulement 44 % ont qualifié la réintégration de succès. Dans l'ensemble, la réintégration semble avoir été une mesure corrective efficace dans seulement 30 % des cas.

Les effets de plusieurs variables indépendantes sur le résultat de la réintégration ont été mesurés. La première variable dépendante, le retour au travail, était grandement influencée par les causes alléguées du congédiement. Il était plus probable que les

personnes congédiées pour des motifs non disciplinaires, tel le rendement, retournent au travail que leurs collègues congédiés pour des raisons disciplinaires. La seconde variable dépendante, le succès de la réintégration, était grandement influencée par la taille de l'unité de travail; plus ces unités étaient grandes, plus le succès était grand.

Moins de la moitié des répondants ont changé leurs pratiques de gestion des ressources humaines suite à une décision arbitrale. Ce résultat va à l'encontre de la croyance que la protection juridique prévue au Code a amené un changement radical de la relation d'emploi et a eu un impact majeur sur la gestion des ressources humaines.

En somme, les résultats suggèrent que la réintégration n'est pas efficace en tant que première mesure de redressement en cas de congédiement injuste pour les non-syndiqués. La présence syndicale peut bien être la variable clef de l'efficacité de la réintégration. Il semble que l'octroi d'une indemnité compensatrice pourrait être plus efficace. Cette indemnité devrait être assez élevée pour décourager les congédiements et favoriser les ententes.

Néanmoins, on ne devrait pas abandonner la réintégration. Cette étude démontre que les travailleurs sont plus facilement réintégrés dans les grandes unités. De plus, la prise en considération de facteurs atténuants telle l'ancienneté peut prendre de l'importance dans ces cas où la perte d'emploi est lourde. On pourrait tenter d'améliorer ce recours en confiant à une agence gouvernementale le rôle de s'assurer que les employeurs appliquent les décisions de réintégration et en exigeant des critères plus stricts eu égard aux qualifications des arbitres.